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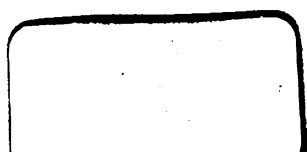
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**TO BE CITED L.R.A. 1917B**

**THE  
LAWYERS REPORTS  
ANNOTATED**

**1917B**

**BURDETT A. RICH, HENRY P. FARNHAM, AND  
GEORGE H. PARMELE, EDITORS,**

**ASSISTED BY  
THE PUBLISHERS' EDITORIAL STAFF.**

---

**THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY  
ROCHESTER, N. Y.**

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# LAWYERS REPORTS

## ANNOTATED

### NEW SERIES.

#### **SOUTH DAKOTA SUPREME COURT.**

STATE OF SOUTH DAKOTA EX REL. R.  
O. RICHARDS et al., Appts.,  
v.

M. D. WHISMAN, as County Auditor of  
Beadle County, Resp't.

(36 S. D. 260, 154 N. W. 707.)

#### **Statute — failure to petition for referendum — effect.**

1. Voters who fail to file the proper referendum petition for the submission to the electors of a proposed statute with an emergency clause cannot attack the validity of the statute on account of such clause in the courts, although they proceed before the time when the statute would take effect in the absence of the emergency clause.

*For other cases, see Statutes, I. c, in Dig. 1-52 N. S.*

#### **Same — taking effect — attack in court.**

2. The mere institution of a suit to determine the validity of a statute will not prevent its going into effect at the prescribed time.

*For other cases, see Statutes, I. b, in Dig. 1-52 N. S.*

#### **Initiative and referendum — power of legislature to repeal initiated statute.**

3. The reservation by the people in the constitutional provision vesting the legislative power in the legislature, of the right to propose measures which the legislature must pass and submit to the people for ratification, does not deprive the legislature of power to repeal a law enacted upon the people's initiative, where the right to require any law enacted by the legislature to be referred to the people for ratification is also reserved.

*For other cases, see Statutes, III. in Dig. 1-52 N. S.*

#### **Statutes — emergency clause — right to referendum.**

4. Statutes which are the subject of refer-

endum cannot, by means of an emergency clause, be put into effect as soon as signed by the executive.

*For other cases, see Statutes, I. b, in Dig. 1-52 N. S.*

(November 4, 1915.)

**A**PPEAL by relators from a judgment of the Circuit Court for Beadle County in defendant's favor, and from an order denying a new trial, in a proceeding to restrain defendant, as county auditor, from complying with the requirements of the Primary Election Law of 1915, which was alleged to be unconstitutional and void. Affirmed.

The facts are stated in the opinion.

Messrs. Gardner & Churchill and Null & Royhl, for appellants:

The law is unconstitutional in that, by its terms and provisions, it was to take immediate effect, and thereby deprived the people of the expressly reserved right of having the law submitted to the voters.

Ex parte Pfahler, 150 Cal. 71, 11 L.R.A. (N.S.) 1092, 88 Pac. 270, 11 Ann. Cas. 911; Ex parte Anderson, 134 Cal. 69, 86 Am. St. Rep. 236, 66 Pac. 194; Stetson v. Seattle, 74 Wash. 606, 134 Pac. 494.

The power to govern rests primarily in the people, and not in the legislature.

Vanhome v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Atty. Gen. ex rel. Barbour v. Lindsay, 178 Mich. 524, 145 N. W. 98.

By amendment of their Constitution, the people reserved the power of direct legislation and of direct veto.

Chisholm v. Georgia, 2 Dall. 455, 1 L. ed. 455.

A law enacted by the people of the state cannot be repealed by the legislature of the state.

State ex rel. Reedsburg Bank v. Hastings, 12 Wis. 47; Van Steenwyck v. Sackett, 17 Wis. 646; Brewer v. Haight, 18 Wis. 102; Rusk Bank v. Van Norstrand, 21 Wis. 160;

**Note.** — As to initiative and referendum, see annotation following HOCKETT v. STATE LIQUOR LICENSING BOARD, post, 15. L.R.A.1917B.

Porter v. State, 46 Wis. 375, 1 N. W. 78; State ex rel. Wagner v. Summers, 33 S. D. 40, 50 L.R.A.(N.S.) 206, 144 N. W. 730, Ann. Cas. 1916B, 860; Stetson v. Seattle, 74 Wash. 606, 134 Pac. 494; Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536.

Mr. W. A. Lynch, amicus curiæ:

Any measure proposed or any law referred will take effect only when ratified by a majority of the electors of the state; otherwise it cannot become a law.

Williamson v. Aldrich, 21 S. D. 13, 108 N. W. 1063; State ex rel. Clark v. Stakke, 22 S. D. 228, 117 N. W. 129; Southerland v. Goldsboro, 96 N. O. 49, 1 S. E. 760; People ex rel. Chicago & I. R. Co. v. Chapman, 66 Ill. 137; State ex rel. Quincy, M. & P. R. Co. v. Harris, 96 Mo. 29, 8 S. W. 794; Re Denny, 156 Ind. 104, 51 L.R.A. 722, 59 N. E. 359.

Messrs. Clarence C. Caldwell, Attorney General, and T. F. Auldridge, for respondent:

The question relative to the authority of the legislature to declare an emergency and place the 1915 Act into immediate operation is not within the issues of this case nor material thereto.

McIntosh v. State, 56 Tex. Crim. Rep. 134, 120 S. W. 455.

The emergency clause is contained in § 97 of said chapter 258, and a holding that this section is void would certainly not entitle the appellants to a decree that the entire act is void, and that its execution should be forever enjoined.

Riley v. Carico, 27 Okla. 33, 110 Pac. 738.

The legislature, in its wisdom, has declared an emergency in the 1915 Act, and there is no appeal to the courts therefrom.

State ex rel. Lavin v. Bacon, 14 S. D. 394, 85 N. W. 605; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

Chapter 258 of the 1915 Primary Election Law is constitutional.

Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; State v. Summers, 33 S. D. 40, 50 L.R.A.(N.S.) 206, 144 N. W. 730, Ann. Cas. 1916B, 860; State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; Re Senate Resolution, 54 Colo. 262, 130 Pac. 333; People ex rel. Tate v. Prevost, 55 Colo. 199, 134 Pac. 129; Hall v. Dunn, 52 Or. 475, 25 L.R.A.(N.S.) 193, 97 Pac. 811; Waugh v. Glos, 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974; State v. Schluer, 59 Or. 18, 115 Pac. 1057.

The legislative power is vested in the legislature.

Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Straw v. Harris, 54 Or. 424, 103 Pac. 780; People ex rel. Tate v. L.R.A.1917B.

Prevost, 55 Colo. 199, 134 Pac. 130; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 18; People ex rel. Mattison v. Nye, 9 Cal. App. 148, 98 Pac. 241.

Messrs. Byron S. Payne, Assistant Attorney General, and A. A. Chamberlain also for respondent.

McCoy, P. J., delivered the opinion of the court:

This suit was instituted by plaintiffs, R. O. Richards and others, to restrain defendant, as county auditor of Beadle county, from complying with the requirements of chapter 258, Laws of 1915, upon the ground that said legislative enactment is unconstitutional and void: (1) In that it contains an emergency clause making it take immediate effect, thereby, as it is alleged, "depriving the people of the expressly reserved right of having the law submitted to the voters;" (2) in that the legislature was without the power to repeal chapter 201, Laws of 1911, commonly known as the "Richards Primary Law," the same, as it is alleged, "being a law enacted by a direct vote of the people under the initiative and referendum." Findings and judgment were in favor of defendant, and plaintiffs' appeal.

At the 1915 session of the legislature there was passed and enacted, with an emergency clause, chapter 258; the same being a general primary election law. In many material particulars, although not in all, this chapter 258 inherently conflicts with certain provisions of chapter 201, Laws of 1911. By the express provision of chapter 258, chapter 201 and all acts and parts of acts in conflict with chapter 258 were repealed. We will first consider the question of the emergency clause contained in chapter 258, as we view it in connection with the record in this case. Every law which the legislature has power to enact, where there is no emergency clause embodied therein, goes into effect on the next succeeding 1st day of July, unless vetoed by the governor, or unless a referendum petition referring the same to a vote is filed as required by law. If, as contended by appellants, the emergency clause to chapter 258 was void and of no effect (a question not necessary to be decided in this case under the record herein), then the said chapter 258 is, in legal effect, the same as if no emergency was therein contained. Chapter 258 was not vetoed by the governor, and it stands as one of the conceded facts in this case that no referendum petition of any kind was ever filed requiring chapter 258 to be submitted to a vote of the people for approval. There is no provision in the Constitution that will permit or au-

thorize the exercise of the referendum vote in the absence of the filing of a proper petition therefor. Not having filed a proper referendum petition requiring a vote on said chapter 258, the plaintiffs are not in a position to complain of the invalidity of chapter 258 on account of the emergency clause therein contained. The mere fact that this suit was commenced before July 1st will not change the situation. The only thing that will prevent such an enactment, if otherwise valid, from going into effect on the 1st day of July, is the exercise of the veto or the referendum.

The mere commencement of a suit to determine the constitutionality of an enactment, either with or without the emergency clause, will not prevent such an enactment from going into effect at the legally specified time; otherwise many salutary laws might be in this manner indefinitely postponed from going into effect at the times specified by the Constitution, and thereby placing in the hands of litigants and courts the power of regulating or varying the time fixed by the Constitution in which legislative acts shall go into effect. The attachment of an unwarranted and void emergency clause to an enactment could in no manner prevent the filing of a proper referendum petition. In order to have kept alive the question of the validity of the emergency clause contained in chapter 258, as a question for determination in this court, or the court below, a proper referendum petition should have been filed prior to the 1st day of July last. Therefore, if the legislature had the power to repeal chapter 201, and enact in place thereof chapter 258, then, on and after the 1st day of July, 1915, chapter 258 was a valid and existing law of this state, whether the same became such with or without an emergency clause. In *Riley v. Carico*, 27 Okla. 33, 110 Pac. 738, and in *McIntosh v. State*, 56 Tex. Crim. Rep. 134, 120 S. W. 455, it is held that the fact that the action of the legislature in declaring an emergency to exist was void did not invalidate the act or relieve the necessity of filing a referendum petition, but resulted in the act taking effect ninety days after the adjournment of the legislature. It is therefore clear that the first ground of unconstitutionality of chapter 258, urged by appellants, is now merely a moot question. 3 C. J. pp. 358-360.

As we view the record in this case, there is but one question before this court for determination, and that is: Had the legislature power to repeal chapter 201, Laws of 1911, and enact in place thereof the general primary law embodied in chapter 258, Laws of 1915? No rule of law is better settled throughout the United States than that a

state legislature has absolute power to enact, that is, pass, amend, or repeal, any law whatsoever it pleases, unless it is prohibited from so doing by either the state or Federal Constitutions; that the courts can only restrain the execution of a statute when it conflicts with either one or the other of said Constitutions. In determining the constitutionality of a statute as is well said in one of the cited cases, we peruse the statute, then examine the Constitution, and ascertain if this instrument says, "Thou shalt not;" and, if we find no inhibition, then the statute is the law. The inhibition of a Constitution may be either express or implied; that is, the Constitution may expressly prohibit any specified act of the legislature, or the Constitution by its inherent terms may of necessity prohibit certain acts of a legislature by reason of the inherent conflict that would arise between the terms of the Constitution and the power claimed in favor of the legislature. *Cooley*, Const. Lim. pp. 126, 236, 245, 252, 255; 36 Cyc. 944; *Chamberlain v. Wood*, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674, 88 N. W. 109; *Bon Homme County v. Berndt*, 15 S. D. 494, 90 N. W. 147; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Com. ex rel. McCormick v. Reeder*, 171 Pa. 505, 33 L.R.A. 141, 33 Atl. 67.

With these rules in view we will examine the question presented. Section 1, art. 3, state Constitution, as it originally existed, read as follows: "The legislative power shall be vested in the legislature which shall consist of a senate and house of representatives."

That was a grant of general plenary power conferred upon the legislature by the people to enact, amend, or repeal any statute law, excepting only in those instances where prohibited by such Constitution itself, or by the Federal Constitution. In 1898 said § 1, art. 3, was amended to read as follows:

"The legislative power [of the state] shall be vested in a legislature which shall consist of a senate and house of representatives except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.) Provided, that not more than 5 per centum of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

"This section shall not be construed so as to deprive the legislature or any member thereof of the right to propose any measure. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by a vote of the electors of the state shall be: 'Be it enacted by the people of South Dakota.' The legislature shall make suitable provisions for carrying into effect the provisions of this section."

As we view this constitutional amendment, there is nothing therein contained which, either expressly or impliedly, in any degree, conflicts with, inhibits, limits, abridges, or prohibits any part of the legislative power originally granted to it to enact, amend, or repeal any law which it might have enacted before the adoption of this amendment. The fact that the people themselves may propose or enact laws in connection with the legislature in no manner conflicts with or prohibits the legislature from itself also enacting the same law that might be desired by the people. If the legislature of its own volition should enact the same law desired by the people, the initiative would then become unnecessary and useless as to such law. The evident purpose of this constitutional amendment was not to curtail or limit the powers of the legislature to enact laws, but the purpose was to compel enactment by the legislature of measures desired by the people, and, if the legislature neglected to act as so desired by the people, that then the people, by means of the initiative, might enact such measures into laws themselves. And, recognizing the right of the legislature to enact laws as it pleased, within all its constitutional powers, the referendum was designed as a check upon all legislative enactments not favored by the people. The only prohibition or inhibition or limitation in relation to legislative power appearing in the initiative portion of the amendment is that which relates to the veto power, and which reads: "The veto power of the executive shall not be exercised as to measures referred to a vote of the people."

If the framers of this constitutional amendment had placed therein language something like the following: "No legislature shall have power to repeal any initiative measure referred to a vote of the people,"—then the Constitution would have expressly prohibited the legislature from amending or repealing initiated laws; or, if they had placed something like this in the constitutional amendment: "Initiated laws can be amended or repealed only by a vote of the people,"—then this constitutional amendment would, by necessary implication, L.R.A.1917B.

have prohibited the legislature from repealing initiated laws. But no such limitation of the legislative power appears in such amendment or elsewhere in the Constitution. Appellants are, in effect, now asking this court to read into the Constitution something that is not, either expressly or by implication, therein. In some of our sister states the initiative and referendum constitutional amendment prohibits the repeal by the legislature of initiated laws. Section 1, art. 2, Wash. Const. as amended in 1912, provides that "the veto power of the governor shall not extend to measures initiated by or referred to the people."

And that "no act, law or bill approved by" the people can "be amended or repealed by the legislature within a period of two years following such enactment."

Section 1, art. 4, of the California initiative and referendum constitutional amendment, provides that measures initiated or adopted by the people are not subject to the veto power of the governor; and no measure adopted by the people under the initiative can be amended or repealed except by a vote of the electors. By the Washington Constitution the legislature is for a time expressly prohibited from amending or repealing any initiated law. While in the California Constitution the legislature is not expressly mentioned, still the power of the legislature to amend or repeal an initiated law submitted to the people is effectually prohibited by the inherent terms of such Constitution by necessary implication. In the states of Arkansas, Colorado, Missouri, Montana, Nebraska, Oklahoma, Oregon, Ohio and some others, the initiative and referendum constitutional provisions are similar to that in this state, and contain a prohibition against the veto power of the state executive, but make no mention of any prohibition as against the power of the legislature to amend or repeal initiated laws. Why the Constitution builders of Washington and California put such a prohibition as to legislative repeal of initiated laws in their state Constitutions, or why the Constitution builders of this state, and all these others, left such prohibition out of their Constitutions, is not for us to inquire. It is enough for us to know that it was left out of our Constitution. It is a matter of common knowledge that an ill-advised and burdensome law might be placed upon our statute books by means of the initiative, as well as by an enactment of the legislature. Such a law so placed upon the statute books by the initiative would almost invariably remain a law at least four years, if the only method of repeal or amendment was by means of the initiative and vote of the people. It may have been that a majority

of those drafting and proposing the initiative and referendum amendment to the Constitutions such as exists in this state were of the view that four years was too long a time to leave such an unwise law in force, and therefore purposely and intentionally left the repealing power as to all initiated laws in the hands of the legislature. It is not to be presumed that the Constitution builders of California and Washington possessed all the wisdom upon this subject, and that all the Constitution makers in all these ten or a dozen other states blundered by leaving the repealing power as to initiated laws in the hands of the legislature. Even in the state of Washington, after the lapse of two years, the legislature is permitted to repeal an initiated law, thus recognizing that for some reason the legislature should have repealing power, and also recognizing that the legislature would have such repealing power unless so taken away. There are many suggestive reasons which might have influenced the Constitution makers of this and other states in leaving with the legislature the power to repeal or amend an initiated law. If, in the course of time, we should have placed upon our statutes various initiated laws upon various general subjects, such as elections, banking, corporations, court procedure, assessment and taxation, schools, public officers; and if the legislature possessed no power to repeal or amend such initiated laws, then the legislature would be powerless to pass any law in conflict with any part of such initiated laws. A Constitution is to be tested not by what has been or is being done thereunder, but by what may be done under its authority. *Sterritt v. Young*, 14 Wyo. 146, 4 L.R.A.(N.S.) 160, 116 Am. St. Rep. 994, 82 Pac. 946. Under such conditions the constitutional functions of the legislature would thereby become so handicapped, curtailed, and limited as to be of but little value. We are of the view that the Constitution of the state cannot be so amended or nullified by means of initiated legislative enactments. We are of the view that the initiative and referendum amendment was never intended as a means of so curtailing and limiting the constitutional power of the state legislature, but was intended to preserve to the people a greater share of, and control over, the legislative power, but without taking away from any other constitutional department any of its powers, excepting the veto power of the state executive. *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Kiernan v. Portland*, 57 Or. 454, 37 L.R.A.(N.S.) 339, 111 Pac. 379, 112 Pac. 402; *People ex rel. Tate v. Prevost*, 55 Colo. 199, 134 Pac. L.R.A.1917B.

129; *State ex rel. Smith v. District Ct. 50 Mont.* 134, 145 Pac. 721. The supreme court of every state having an initiative and referendum constitutional provision similar to that of this state, which has been called upon to determine the question, has held that the legislature has the power to repeal or amend an initiated law. The supreme court of the state of Oregon, in *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, among other things, said: "Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will."

To the same effect are the decisions of the supreme courts of Missouri and Colorado. *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; *Re Senate Resolution*, 54 Colo. 262, 130 Pac. 333; *People ex rel. Tate v. Prevost*, 55 Colo. 199, 134 Pac. 129. Also see note on initiative and referendum, 50 L.R.A.(N.S.) p. 195.

It is urged by appellants that if the legislature has the power to amend or repeal initiated laws, and that if the legislature also has the power to prevent the operation of the referendum as to such an amending or repealing statute by passing the same by a two-thirds majority vote, with an emergency clause embodied therein, then the initiative and referendum amendment to the Constitution becomes a farce and of no practical utility. We are of the view that the premise from which this conclusion is drawn is untrue. This contention with relation to such use by the legislature of the emergency clause requires us to further consider the emergency proposition in connection with appellants' second ground of alleged invalidity of said

chapter 258. We are of the view that, where the legislature enacts a law amending or repealing an initiated law, such law may be submitted to referendum vote under the same conditions as may be submitted to vote any and all laws which are the subject of constitutional referendum, and this wholly regardless of whether or not such amending or repealing act contains an emergency clause; in other words, all those enactments by the legislature which are the subject of referendum are not subject to the emergency clause, and, vice versa, all those enactments which are subject to the emergency clause are not subject to the referendum. The only lawful function of the emergency clause is to cause an enactment to go into effect as soon as signed by the executive, instead of waiting until the first day of the next July. It must be observed that the initiative and referendum amendment to the Constitution provides that any laws, which the legislature may have enacted shall, upon a proper referendum petition being filed, be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the state government and its existing public institutions. Such laws comprehended within this exception, as their names and nature imply, are emergency measures. As to such emergency measures there can be no exercise of the referendum power, under any circumstances, with or without an emergency clause, and this regardless of the size of the majority vote by which they were passed. Section 22, art. 3, provides that "no act shall take effect until ninety days after the adjournment of the session at which it passed, unless in case of emergency (to be expressed in the preamble or body of the act), the legislature shall by a vote of two thirds of all the members elected of each house otherwise direct."

Sections 1 and 22 of article 3 should be construed and read together as if forming different parts of but one section. *State ex rel. Lavin v. Bacon*, 14 S. D. 304, 85 N. W. 605. The emergency measures mentioned in § 22 must and can only refer to the same emergency measures mentioned in the referendum clause exception contained in § 1. It therefore follows that the legislature, by necessary implication, is only authorized to declare emergencies in that class of measures specified in the said exception to the referendum clause. As to all emergency measures and acts within the purview of this exception, the legislature may declare an emergency to exist, for the purpose and to the end that such enactment

may at once go into effect, and such declaration and finding as to the existence of such emergency is final, and not within the power or province of the courts to question. But as to any measure, law, or enactment clearly not within the class of emergency measures specified within said exception, the legislature has no power or authority to declare an emergency to exist in relation thereto, by any vote, however large the same may be; and the action of the legislature in embodying emergency clauses in measures clearly not comprehended within the said exception is wholly unwarranted and void, and should be so held by the courts. Not that the act itself would be void, but the emergency clause would be void, with the result that the act would not go into effect until the 1st day of the next July, and also with the result that, in the event of a proper referendum petition being filed, as required by law, such enactment would not go into effect until approved by a majority vote of the electors of the state. *Riley v. Carico*, 27 Okla. 33, 110 Pac. 738; *McIntosh v. State*, 56 Tex. Crim. Rep. 134, 120 S. W. 455; *Sears v. Multnomah County*, 49 Or. 42, 88 Pac. 522; *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, 297. In *State ex rel. Brislawn v. Meath* the court held that, as, under the Constitution of 1889, the courts had decided they were without authority to review the legislative discretion in declaring an emergency, they should, after the adoption of the initiative and referendum amendment, scrutinize a legislative declaration of an emergency and declare the declaration void in case it is obviously false; for the spirit of a law and the mischief intended to be remedied must be considered. In *Mugler v. Kansas* it is held that "the courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Under this view the initiative and referendum is a workable and efficient law; that whenever the legislature shall have passed

an act repealing an initiated law, not comprehended within the emergency exception to the referendum clause, the same may be referred to a referendum vote the same as may any other law which is subject to the referendum. We are of the view that this was the clear intention of the framers of the initiative and referendum amendment to our Constitution as expressed by the plain terms thereof.

We therefore hold that the legislature had the power to repeal chapter 201, Laws of 1911, and to enact in lieu thereof chapter 258; that the only relief the courts might have granted under any circumstances growing out of the enactment of chapter 258, for reasons hereinbefore stated, was to have ordered and required that the enactment or law known as chapter 258 be submitted to a referendum vote of the people, notwithstanding the emergency clause thereto annexed; but that cannot be granted, for the reason that the people have not invoked the referendum or put the same in operation as to said enactment by the filing of a referendum petition signed by

at least 5 per cent of the electors of the state.

This being a cause involving a matter of public concern, by written stipulation of counsel for both appellants and respondent, W. A. Lynch, Esq., attorney, as *amicus curiæ*, has filed a brief contending that chapter 201, Laws of 1911, never became a valid initiated law of this state, in that the same was not approved by a majority vote of all the electors of this state; but we are of the view that this contention is not well grounded, for the reason that neither under the Constitution nor the statute (Pol. Code § 22) under which initiated laws may be voted upon is it required that the same shall receive more than a majority of all the votes cast upon the measure submitted.

The judgment and order appealed from are affirmed.

Petition for rehearing denied.

Dismissed by the Supreme Court of the United States, March 6, 1916 (241 U. S. 643, 60 L. ed. 1218, 36 Sup. Ct. Rep. 449).

#### OHIO SUPREME COURT.

CHARLES S. HOCKETT, Plff. in Err.,  
v.  
STATE LIQUOR LICENSING BOARD  
et al.

(91 Ohio St. 176, 110 N. E. 485.)

**Constitutional law — amendment — referendum.**

1. The Constitution and the statutes of Ohio provide ample and adequate legal machinery for the initiation, submission, and adoption or rejection of any proposed amendment to the Constitution of Ohio by what is known as a referendum vote.

*For other cases, see Constitutional Law, I. a, 2, in Dig. 1-52 N. S.*

**Same — intoxicating liquors — adoption.**

2. Article 15, § 9a, relating to home rule on the subject of intoxicating liquors, was regularly and legally initiated, submitted, and carried by a majority of the voters of Ohio voting thereon at the regular election held in November, 1914, and thereby became a part of the Constitution of Ohio.

*For other cases, see Constitutional Law, I. a, 2, in Dig. 1-52 N. S.*

**Same — constitutionality.**

3. Said amendment is not in conflict with any provision of the Federal Constitution. *For other cases, see Intoxicating Liquors, I. c, in Dig. 1-52 N. S.*

(January 26, 1915.)

Headnotes by the COURT.

**Note.** — As to initiative and referendum, see annotation following this case, post, 15. L.R.A.1917B.

**E**RROR to the Court of Appeals for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas in defendants' favor in an action brought to enjoin them from appointing a licensing board in certain counties. Affirmed.

The facts are stated in the opinion.

Messrs. A. Jay Miller, H. B. Emerson, J. A. White, W. B. Wheeler, Howenstine & Huston, John E. West, Miller, Miller, Brady, & Seeley, for plaintiff in error:

No method or means of election machinery was provided for proposed constitutional amendments.

Mason v. State, 58 Ohio St. 30, 41 L.R.A. 291, 50 N. E. 6; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3; Cass v. Dillon, 2 Ohio St. 607; Exchange Bank v. Hines, 3 Ohio St. 1; Stevens v. Benson, 50 Or. 269, 91 Pac. 577; Palmer v. Benson, 50 Or. 280, 91 Pac. 579; State ex rel. McClurg v. Powell, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927; State ex rel. Woods v. Tooker, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 6 L.R.A. 422, 23 N. E. 491; People ex rel. Tate v. Prevost, 55 Colo. 199, 134 Pac. 129; State ex rel. Little Rock v. Donaghey, 106 Ark. 56, 152 S. W. 746; State ex rel. Bailey v. Brookhart, 113 Iowa, 250, 84 N. W. 1064; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N.



W. 609; *State ex rel. Stevenson v. Tuffy*, 19 Nev. 391, 3 Am. St. Rep. 895, 12 Pac. 835; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

The Home Rule Amendment violates the Federal compact by an unwarranted limitation on the police power.

*Rippey v. Texas*, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; *License Cases*, 5 How. 504, 577, 12 L. ed. 255, 289; *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828; *Beebe v. State*, 6 Ind. 542, 63 Am. Dec. 391; *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 Am. Rep. 186; *Schwuchow v. Chicago*, 68 Ill. 444; *State v. Durein*, 70 Kan. 13, 15 L.R.A. (N.S.) 908, 78 Pac. 152, 80 Pac. 987; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 626, 11 Sup. Ct. Rep. 13; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Vance v. W. A. Vandercook Co.* 170 U. S. 444, 42 L. ed. 1103, 18 Sup. Ct. Rep. 674; *Cronin v. Adams*, 192 U. S. 108, 48 L. ed. 365, 24 Sup. Ct. Rep. 219; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; *Doering v. Cincinnati*, 76 Ohio St. 636, 81 N. E. 1184.

The Home Rule Amendment, if valid, must be construed prospectively.

*Shreveport v. Cole*, 129 U. S. 36-41, 32 L. ed. 589-591, 9 Sup. Ct. Rep. 210; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Schuyler County v. Thomas*, 98 U. S. 169-171, 25 L. ed. 88, 89; *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *New York C. & H. R. R. Co. v. United States*, 212 U. S. 500, 53 L. ed. 624, 29 Sup. Ct. Rep. 309; *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324; *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613; *Re Davis*, 4 Ohio N. P. N. S. 417, 52 Ohio L. J. 46; *Swift & Co. v. Newport News*, 105 Va. 108, 8 L.R.A. (N.S.) 404, 52 S. E. 821; *State ex rel. Evans v. Dudley*, 1 Ohio St. L.R.A.1917B.

437; *Cooley*, Const. Lim. 7th ed. p. 97; *Allhyer v. State*, 10 Ohio St. 588; *Platt v. Craig*, 66 Ohio St. 75, 63 N. E. 594.

Messrs. Timothy S. Hogan, Attorney General, P. E. Dempsey, James I. Boulger, and Frank Davis, for defendants in error:

Adequate and proper machinery for the holding of an election on constitutional amendments has been provided.

*People ex rel. Elder v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167; *Constitutional Prohibitory Amendment*, 24 Kan. 700; *Lovett v. Ferguson*, 10 S. D. 44, 71 N. W. 765; *Allen v. State*, 14 Ariz. 458, 44 L.R.A. (N.S.) 468, 130 Pac. 1114; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Worman v. Hagan*, 78 Md. 152, 21 L.R.A. 716, 27 Atl. 616; *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 10 L.R.A. (N.S.) 149, 110 N. W. 1113, 15 Ann. Cas. 781; *West v. State*, 50 Fla. 154, 39 So. 412; *Green v. Weller*, 32 Miss. 664.

The Home Rule Amendment needs no additional legislation.

*Hodges v. Dawdy*, 104 Ark. 583, 149 S. W. 656; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *Cass v. Dillon*, 2 Ohio St. 608; *Re Sweeley*, 12 Misc. 174, 33 N. Y. Supp. 369; *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 611-616, 47 L. ed. 328-333, 23 Sup. Ct. Rep. 206.

The Home Rule Amendment does not violate article 4, § 4, of the United States Constitution.

*Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

It is not a violation of other constitutional amendments.

*Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 434, 12 L. ed. 223; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Barrington v. Missouri*, 205 U. S. 483-486, 51 L. ed. 890-894, 27 Sup. Ct. Rep. 582; *Otis v. Parker*, 187 U. S. 606-608, 47 L. ed. 323-327, 23 Sup. Ct. Rep. 168; *Noble State Bank v. Haskell*, 219 U. S. 104-112, 55 L. ed. 112-117, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186; *Laderburg v. Miller*, 127 C. C. A. 250, 210 Fed. 614; *State ex rel. Gongwer v. Graves*, 90 Ohio St. 311, 107 N. E. 1018.

Mr. A. J. Freiberg also for defendants in error.

Mr. Judson Harmon, for Home-Rule Association:

The Home Rule Amendment was lawfully submitted and adopted.

*Re Assignment of Judges*, 34 Ohio St. 431; *Hupp v. Hock-Hocking Oil & Natural Gas Co.* 88 Ohio St. 61, 101 N. E. 1053, Ann.

Cas. 1914D, 1004; *Cass v. Dillon*, 2 Ohio St. 607; *State ex rel. Sheets v. Laylin*, 69 Ohio St. 1, 68 N. E. 574; *Constitutional Prohibitory Amendment*, 24 Kan. 700; *Third Nat. Bank v. Laidlaw*, 86 Ohio St. 91, 98 N. E. 1016; *Citizens' Bank v. Parker*, 192 U. S. 73, 85, 86, 48 L. ed. 346, 356, 24 Sup. Ct. Rep. 181; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; *State ex rel. Cleveland, C. C. & St. L. R. Co. v. Creamer*, 83 Ohio St. 412, 94 N. E. 831.

When the Home Rule Amendment took effect the Rose County Option Law and everything arising from or depending on it ceased to exist for all purposes.

*State ex rel. Evans v. Dudley*, 1 Ohio St. 437; *Norton v. Taxing Dist.* 129 U. S. 490, 32 L. ed. 774, 9 Sup. Ct. Rep. 322; *Wadsworth v. Eau Claire County*, 102 U. S. 537, 26 L. ed. 221.

Wanamaker, J., delivered the opinion of the court:

This case is based on what has become politically known as "the Home Rule Amendment," pertaining to intoxicating liquors. The question is not "Should it have passed? That was addressed to the voters of Ohio at the November election. The question is not "What is the meaning and scope of the amendment? That is a moot question here and must be reserved for concrete cases arising under the amendment if it should be a valid amendment. The questions here are (1) Did it carry? Did it become a part of our Ohio Constitution? (2) Is it in conflict with the Federal Constitution?

Plaintiff in error contends that, notwithstanding the official returns made to the secretary of state show a majority prima facie of 12,618 for the amendment, still said amendment did not carry because there was no valid legal machinery provided, either by the Constitution or the statutes, for the submission of such amendment and for the casting, counting, and returning of the votes thereon.

Article 8, § 1, Bill of Rights of the Ohio Constitution of 1802, contained the following provision: ". . . Every free republican government being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence; to effect these ends, they [the people] have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary."

The Constitution of 1851 contains the following provision: "All political power is inherent in the people. Government is instituted for their equal protection and L.R.A.1917B.

benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary. . . ." Const. 1851 Bill of Rights, Art. 1, § 2.

This provision remains in the Constitution of 1912. Under the amendments proposed and passed in the Constitution of 1912 for the submission of amendments the following provisions are pertinent. Article 2, § 1, of the Constitution of 1912, reads as follows: ". . . But the people reserve to themselves the power to propose to the general assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power . . . and independent of the general assembly to propose amendments to the Constitution and to adopt or reject the same at the polls."

Pursuant to this sovereign political power, which is inherent in the people, and their reserved right "to propose amendments to the Constitution and to adopt or reject the same at the polls," a petition was initiated and filed with the secretary of state, calling for the submission of such "Home Rule Amendment" at the next regular or general election.

No complaint is now made, or ever has been, that the petition was not in due form, duly signed and verified, all in accordance with the provisions of law; but the complaint is that there was no legal machinery, constitutional or statutory, for the submission of such amendment to the people for counting, canvassing, and returning the votes thereon and the final determination and proclamation as to the official vote of the people of the state on such amendment. It may also be observed in passing that no claim or contention whatsoever was made prior to the election that such amendment had not been regularly and legally submitted. It is now claimed by the plaintiff in error that the vote on the amendment, therefore, was a mere nullity because the Constitution failed to provide the necessary legal machinery agreeable to the words "as hereinafter provided," as found in said article 2, § 1.

We must remember that we are here construing the Constitution of the state of Ohio, affecting 5,000,000 people scattered over more than 40,000 square miles. We are not to use any millimeter measure of interpretation nor employ that strict construction peculiar to criminal law and procedure, but we are to employ that broad-gauged liberal construction that the general terms of constitutional provisions necessarily require in order to make them effective and carry out the real intention of the people in making the Constitution, through their

representatives, and by adopting the Constitution by their own votes. The polestar in the construction of Constitutions, as well as other written instruments, is the intention of the makers and adopters.

Now what was to be "hereinafter provided?" Manifestly the manner and means of proposing amendments to the Constitution and adopting or rejecting the same by a referendum vote. An examination of § 1a, article 2, clearly and conclusively shows that the Constitution makers proceeded forthwith to "hereinafter provide" for the submission of amendments to the Constitution and for a referendum vote thereon. Notice the language of the very next section: "Sec. 1a. The first aforesaid power reserved by the people is designated the initiative, and the signatures of 10 per centum of the electors shall be required upon a petition to propose an amendment to the Constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the Constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: 'Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors.'"

In addition to these numerous provisions specifically providing for the submission of constitutional amendments for a referendum vote in § 1a, § 1g includes the further provisions: "A true copy of all . . . proposed amendments to the Constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same shall be prepared. . . . The secretary of state shall cause to be printed . . . proposed amendment to the Constitution, together with the arguments and explanations, . . . and shall mail, or otherwise distribute, a copy of such . . . proposed amendment to the Constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such . . . proposed amendment to the Constitution, to be submitted. He shall also cause the ballots so to be printed as

to permit an affirmative or negative vote upon each . . . proposed amendment to the Constitution. The style of all laws . . . shall be . . . and of all constitutional amendments: 'Be it resolved by the people of the state of Ohio.' . . ."

Section 1b provides for the ballots on such proposed amendment; also, if the amendment shall carry by a majority of the electors voting thereon, when such amendment shall go into effect and the publication by the secretary of state: "Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the Constitution submitted to the electors as provided in § 1a and § 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state."

Again, in § 1g we have the following language: "Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the Constitution."

This same section goes on to provide who may sign such petitions and how, and then further provides: "No law or amendment to the Constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions," etc.

The astonishing thing about these provisions is not their brevity, but the minutia and detail with which the Constitution makers provided for safeguarding the initiative and referendum as to constitutional amendments. But after all this was done, in order to make assurance doubly sure, fearing that they might have omitted some clerical step, the Constitution, at the close of § 1g, provides as follows: "The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provision or the powers herein reserved."

Agreeable to the last three lines of § 1g above quoted, the legislature of Ohio had formerly passed the following section (§ 4785, General Code), which reads: "Except when otherwise provided by law, all public elections in this state shall be conducted according to the provisions of this title."

And § 5019, General Code, provides how constitutional amendments shall be submitted, as follows: " . . . The provisions of this title, so far as practicable, shall apply to the marking of ballots and the counting of votes upon any constitutional amendment so submitted."

This section and other kindred sections are found in part first of the General Code, under the head of "Title XIV. Public Elections," which title provides for the entire election machinery of the state. Again, §§ 5088 and 5089, General Code, under the same title, provide for the tally-sheet entries and the compiling and preparing of the count on the day following the election, and the certification of the result thereof to the secretary of state. But it may be claimed that some of these sections were enacted by the legislature prior to the constitutional amendment on the initiative and referendum, and therefore have no application. This is fully answered by the express provision of the Constitution saving certain statutes, as found in a schedule adopted with the regularly proposed amendments to the Constitution on September 3, 1912. Such schedule reads as follows: "The several amendments passed and submitted by this convention when adopted at the election shall take effect on the 1st day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith shall continue in force until amended or repealed."

So that by express provision of the schedule all old statutes not repugnant to or inconsistent with the provisions of the new Constitution are as applicable to the constitutional amendment as those that are passed subsequently to the adoption of the constitutional amendments of 1912. So that throughout the Constitution and the amendments we have abundance of provision for the submission of the amendment at a public election, for the preparation of the ballots, for the casting and counting of them, the certification of the result, and the publication finally by the secretary of state. Indeed, it is difficult to imagine any additional provision that could have been made under this right and power of the people for the amendment of their Constitution by a referendum vote.

Judge Brewer, in the famous Kansas case, goes even further, and holds that "if there were no legal machinery provision the court nevertheless must take judicial notice of the result."

The language of the court on the prohibitory amendment is found in Constitutional Prohibitory Amendment, 24 Kan. 700, and L.R.A.1917B.

is as follows: "Suppose a majority did adopt, but no machinery is provided for ascertaining that fact, no one is authorized to canvass and proclaim the result, and no one in fact does so canvass and proclaim. Must not the court nevertheless take judicial notice of the result? When the Constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? It is the election, and not the canvass, that works the change; and if we are bound to take notice of everything that is allowed to affect the validity of any law, must we not of everything affecting the fundamental as well as the statute law?"

We hold that this objection to the amendment is not well taken. As a reinforcement of our position on this question we quote liberally from the pertinent parts of the Kansas case, supra, by Judge Brewer:

"And, first, the election itself was authorized by law. It was not a mere voluntary proceeding. The proposition was put by legislative sanction before the people, who were invited to consider and act upon it. 'The following proposition . . . shall be submitted to the electors of the state for adoption or rejection.' Both Constitution and statute name the time and the persons at which and to whom this proposition is submitted. And the statute further provides that the proposition shall be submitted 'at the general election.' This implies something more than the mere matter of time. The Constitution says 'at which time.' But the statute goes further. It does not read, at the time, or on the day of the general election, but at that election itself. For the purpose of voting upon and determining the question submitted, it thus refers to and appropriates the statutory machinery of the general election. Concede that this may technically be limited to the mere proceedings of election day, and that the Constitution and the statute together, prescribing the form of ballots, the parties entitled to vote, the time of election, and the election machinery, have exhausted their force at the close of the polls, and what then? Must not the court take judicial notice of the result? We are bound to know what the Constitution is—what the statutes are. We take judicial notice of them. No proof is required—none is proper. . . . 'Of course, we take judicial notice, without proof, of all the laws of our own state. . . . And in doing this, we take judicial notice of what our books of published law contain, of what the enrolled bills contain, of what the journals of the legislature contain, and, indeed, of everything that is allowed to affect

the validity of any law, or that is allowed to affect or modify its meaning in any respect whatever.'

"Now, the Constitution provides that, 'if a majority of the electors voting on said amendments at said election shall adopt the amendments, the same shall become a part of the Constitution.' Suppose a majority did adopt, but no machinery is provided for ascertaining that fact, no one is authorized to canvass and proclaim the result, and no one in fact does so canvass and proclaim; must not the court nevertheless take judicial notice of the result? When the Constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? It is the election, and not the canvass, that works the change; and if we are bound to take notice 'of everything that is allowed to affect the validity of any law,' must we not of everything affecting the fundamental as well as the statute law? And judicial notice does not depend on the actual knowledge of the judge or the extent of the personal labor and inquiry required. The justice of the peace in the most remote county in the northwest portion of the state, who may never have seen a copy of the journal of either house, takes judicial notice of all things appearing in either journal, so far as they affect the validity of any law. When challenge is made, he must investigate and know. So, although it may seem extravagant, yet if the legislature has failed to make provision for the canvass of any vote on a proposed constitutional amendment, and if in fact none be made, must not the courts take judicial notice of the actual vote and its result? It may be said if we take judicial notice of votes on one question, why not on all, and what need of election contests? Let the court determine on its judicial knowledge. But we do not take judicial notice of votes and elections as such, but we can take notice of them so far, and only so far, as they affect the validity of some public law. . . .

"The courts are to know what is and what is not a public law of the state; what is and what is not a part of the Constitution: and to that end, must take judicial notice of everything, near or remote, that determines such fact. This argument, condensed, is this: The courts take judicial notice of what is public law, statutory or constitutional. When a majority of the electors voting on an amendment at an election properly ordered adopts it, then it becomes a part of the Constitution. So the Constitution itself says. The courts must judicially know whether such amendment has been adopted, and is in fact a part of

the Constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election.

"But, second, does not a fair reading, a reasonable construction, of the resolution, make it broad enough to appropriate the entire election machinery, including all relating to canvass as well as to casting votes? It says that the proposition 'shall be submitted to the electors of the state for adoption or rejection, at the general election to be held on the Tuesday succeeding,' etc.; and the second section prescribes the form of the ballot. This, as we have just considered, plainly authorizes the vote. Does it not also appropriate the whole election machinery?

"We have a general election law. It is a single statute, yet it covers all details of ordinary elections, names election boards, prescribes rules of election, provides for returns and canvass of all votes. . . . It is one election law of the state. It is a general election law. Now, when a proposition is submitted to the people at the general election, without further words or designation, does it not mean that the proposition is to be decided in the manner prescribed by that general election law? It is an old and familiar doctrine that that which is within the spirit of the statute, though not within the letter, is a part of it; as well as that which is not within the spirit but within the letter, is not a part of it. . . . If . . . it should be stated that a question had been submitted to the electors at a specific and named election, the universal understanding would be, not only that the votes were to be received, but also that they were to be counted, canvassed, and the result proclaimed; and all this would be implied from the simple statement in reference to the submission. Should not equal extent be given to the language used by the legislature, if, without such extent, its intended action fails? Of course, what the legislature omits, the courts cannot supply. But the largest latitude may, and should, be given to the language used, in order to uphold, rather than defeat, its action. Especially is this true when, otherwise, large interests fully considered, will fail, and more especially is this true, when, upon the faith of such legislative action, the people of the whole state have been stirred up and moved to express their judgment upon a matter understood to be before them for decision. . . . Nearly two years elapsed between the time the proposition passed the legislature and the day of the popular vote. During this time this question was not forgotten. It was discussed in every household and at every meeting. The state was thoroughly canvassed;

its merits and demerits were presented and supported by all possible arguments. Pulpit, press, and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of a submission as would defeat the popular decision. . . . But there was not a suggestion from friend or foe. The contest was warm and active. After the contest was ended and the election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement, and struggle was simply a stupendous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority."

The Ohio Home Rule Amendment in question reads as follows:

"No law shall be passed or be in effect prohibiting the sale, furnishing or giving away of intoxicating liquors operative in a subdivision of the state upon the option of the electors thereof, or upon any other contingency which has force within a territory larger than a municipal corporation or a township outside of municipal corporations therein. All laws in contravention of the foregoing are hereby repealed.

"Nor shall any law hereafter be passed prohibiting the sale, furnishing or giving away of intoxicating liquors throughout the state at large."

Now, as to the second contention of plaintiff in error, that said "Home Rule Amendment" is contrary to the Federal Constitution, or, to use the language of plaintiff in error, a violation of the "Federal compact." Plaintiff in error does not attempt to specify any particular article, section, or provision of the Federal Constitution which he claims nullifies this amendment. He contends, however, that it is a violation of the general welfare clause of the preamble of the Federal Constitution. That preamble reads as follows: "We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The brief of plaintiff in error exhibits un-L.R.A.1917B.

usual research of cases and authorities to sustain his contention, but we are unable to find a single citation or authority which would authorize any court to declare any statute or provision of any state Constitution invalid because the same was held contrary and repugnant to the preamble of the Federal Constitution. The preamble of the Federal Constitution merely states the great cardinal purposes of government. It has been held again and again that it is not a grant or delegation of power, but merely a generic statement of the great aims and ends of our national government.

Chief Justice Fuller in *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 188, 33 L. ed. 302, 308, 10 Sup. Ct. Rep. 68, 73, says: "The preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous."

Judge Story, in his work on the Constitution, 5th ed. vol. 1, § 462, uses this language: "The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. . . . Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them."

Watson, in his excellent work on the Constitution (vol. 1, page 92, and following), exhaustively discusses this phase of the subject, and the authorities are collected to sustain this doctrine. We quote one more (*Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. ed. 643, 648, 25 Sup. Ct. Rep. 358, 359, 3 Ann. Cas. 765): "Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from these so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the preamble, it be found in some express delegation of power or in some power to be properly implied therefrom."

Therefore, inasmuch as we have no delegation or denial of power in the preamble, how can it be said that any exercise of governmental power by the state by virtue of its state Constitution can be violative

of any grant of power or denial of power in the preamble of the Federal Constitution? But it may be claimed that if a state constitutional provision cannot be held invalid or contrary to the Federal Constitution because of the provisions of the preamble to that Federal Constitution, yet the spirit of that preamble pervades all the provisions of the Federal Constitution, and therefore the proposed Home Rule Amendment" is violative of that spirit, and therefore unconstitutional.

The Federal Constitution is a delegation or denial of powers. This is clear from various provisions, but especially article 10 of the Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In substance the same is true of our state Constitution. It is a statement of delegated or denied powers to each branch of the government and to the various departments and subdivisions thereof. This appears in various parts of the Constitution and the various amendments thereto, but is directly specified in § 20 of art. 1, which reads: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people."

Cooley discusses the doctrine of violating the spirit of the Constitution as follows: "We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit which it is thought prevades or lies concealed in the Constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the Constitution confers. Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice, or a mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in republican government. . . . The remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other." Cooley, Const. Lim. 7th ed. p. 108.

To same effect is the following: "Nor are the courts at liberty to declare an act void, L.R.A.1917B.

because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words. 'When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.'" Cooley, Const. Lim. 7th ed. pp. 239, 240, and a large number of cases there cited.

If it be true that all political power is inherent in the people, and the powers specified in the Constitution are a delegation or denial of power to the legislative branch, judicial branch or executive branch of the government, or any subdivision thereof, then it must follow that such delegation or denial with all their limitations are absolutely obligatory upon the people of the state, no less than upon the officers of the state, so long as such provisions remain a part of the Constitution of the state. The remedy is not to amend or to nullify by legislative act or judicial decree, but by further amendment to the Constitution in the way provided by law.

Numerous cases can be found in which the state has undertaken, through its Constitution and by its legislative acts, to arbitrarily, radically, and drastically exercise its police power, which courts have held again and again to be a violation of the personal rights and property rights guaranteed by the Federal Constitution. But we have been cited to no authority in which the state undertook not to enlarge, but to diminish, the exercise of its police power, in which such action has been held contrary to the provisions of the Federal Constitution. If the state had adopted the prohibition or "dry" amendment, which was submitted on the same day, that would clearly be an enlargement of the police power of the state. Cases in large number are available to show that that enlargement of the police power has been contended as a violation of the Federal Constitution, but both state and Federal courts have uniformly held that it was not such. If that be true as to a dry amendment, which enlarges the police power, it is difficult to comprehend why it is not also true when the state seeks to diminish that police power, as is claimed under the "Home Rule" Amendment. The people are the masters of their legislature and of every other branch of the government. In a matter involving exclusively state functions they may say in their organic law what the legislature may enact and what they may not enact; and a denial

to a legislature of such a right, or what otherwise might be such a right, to pass certain laws, cannot be made the basis of a valid claim that such denial is a violation of any right which the people of the state may have under the Federal Constitution. As the Constitution is above the legislature, so the people are above the Constitution, subject to it and all its parts while it is in force, but possessed of the undoubted right to change, alter, or amend

it at their own will in any of the regular ways provided by Constitution or laws.

The judgment of the Court of Appeals is therefore affirmed.

Nichols, Ch. J., and Johnson, Donahue, Newman, Jones, and Matthias, JJ., concur.

Petition for writ of certiorari denied by Justice of Supreme Court of United States.

### Annotation—Initiative and referendum.

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The earlier cases on the initiative and referendum are discussed in the note to *State ex rel. Davies v. White*, 50 L.R.A. (N.S.) 195. Only the subsequent cases are contained in this note. In the discussion of the initiative and referendum<sup>1</sup> the popular interpretation of those

terms has been allowed to define the scope. The initiative is a departure from previously existing forms of government in that the electors may enact or reject legislation independently of the legislative assembly. Previously, while the electors had the right to petition the legislative assembly for desired legislation, in order that it might crystallize into law the legislative assembly must have acted favorably upon it. The referendum, however, is not so novel a theory. It has long been customary for the legislative assembly to provide for a referendum as to some of its acts, so that they do or do not take effect according to the vote of the electors. Local option is a form of referendum. These forms of referendum, however, have been excluded from treatment in the present note. This discussion is confined to the referendum as being the power reserved to the people at their own option to approve or reject at the polls any act of the legislative assembly. As thus defined its exercise is entirely independent of the will of the legislative assembly. As will be afterwards noted, certain acts are excluded from the operation of the referendum, but within the scope of the referendum, the electors may act independently of the legislative assembly.

Although the initiative and referendum serve separate purposes, they are not such separate subjects, looking to the attainment of separate objects, as to require submission as separate amendments to a Constitution under a constitutional provision that if more than one amendment is submitted, they shall be submitted in such manner that the elector may vote for or against each measure separately.<sup>2</sup> Both the initiative and referendum are legislative in character. While the referendum operates as a veto, it is not an invasion of the executive function, but under it the electors proceed towards bills enacted by the legislature in essentially the same manner as the senate upon a bill which has passed the house.<sup>3</sup> It is stated that only one provision of the Constitution is changed; to wit, the provision by which the entire legislative authority of the state is lodged in the legislative assembly, and this, by reserving legislative authority in the people; that such

<sup>1</sup> See note to *State ex rel. Davies v. White*, 50 L.R.A. (N.S.) 195, for definitions and authorities.

And see other L.R.A. notes on various related questions referred to in 50 L.R.A. (N.S.) at page 197.  
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<sup>2</sup> *State ex rel. Hay v. Alderson* (1914) 40 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B. 39; *Gottstein v. Lister* (1915) 88 Wash. 462, 163 Pac. 565.

<sup>3</sup> *State ex rel. Hay v. Alderson* (Mont.) and *Gottstein v. Lister* (Wash.) *supra.*

authority could be used in two ways, designated respectively as a power to propose and enact laws and the power to approve or reject laws enacted by the legislative assembly, does not suggest disconnection, but enumeration of the parts as a whole.<sup>4</sup>

Nor does the fact that the proposed amendment, in addition to reserving the initiative and referendum powers to the people, withholds the veto power of the governor from measures initiated by or referred to the people, require the proposed amendment to be submitted as a separate proposition.<sup>5</sup>

It should be remembered that questions relating to the initiative and referendum are governed almost entirely by constitutional and statutory provisions, and these should be first consulted upon the question under investigation.

## II. Constitutionality of principle.

### a. In general.

It is now well established, so far, at least, as the courts are concerned, that the adoption of the initiative and referendum is not a departure from the republican form of government guaranteed by the Federal Constitution to the several states.<sup>6</sup> The United States Supreme Court has denied writs of error to decisions of the state courts so holding on the theory that whether or not a state has ceased to maintain a republican form of government because of its adoption of the initiative and referendum is a political question, not a judicial

one, and is solely for Congress to determine.<sup>7</sup>

The power of a state to apply the referendum to an act redistricting the state for congressional purposes is, so far as the state Constitution is concerned, a question for the state courts; their decision is not reviewable by the Federal Supreme Court.<sup>8</sup> Since the question whether a state has ceased to maintain a republican form of government is solely for Congress to determine, where Congress has recognized<sup>9</sup> the referendum as a part of the state legislative power for the purpose of creating congressional districts, there is no objection to such legislation from the Federal Constitution. The recognition by Congress of the referendum as a part of the legislative power of the state for the purpose of redistricting the state for congressional purposes does not violate art. 1, § 4, of the Federal Constitution, that the "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulation."<sup>10</sup>

### b. As applied to municipalities.

It has been held that the adoption by a municipality of the initiative and referendum is not inconsistent with a republican form of government,<sup>11</sup> but the usual theory applied in cases involving municipalities is that the guaranty of a republican form of government does not extend to a subdivision of the state.<sup>12</sup>

<sup>4</sup> State ex rel. Hay v. Alderson (Mont.) supra.

<sup>5</sup> Gottstein v. Lister (Wash.) supra.

<sup>6</sup> See authorities in 50 L.R.A.(N.S.) 197 et seq.

<sup>7</sup> Ibid.; Ohio ex rel. Davis v. Hildebrandt (1916) 241 U. S. 565, 60 L. ed. 1173, 36 Sup. Ct. Rep. 708.

<sup>8</sup> Ohio ex rel. Davis v. Hildebrandt (U. S.) supra.

<sup>9</sup> It is held in Ohio ex rel. Davis v. Hildebrandt (U. S.) supra, that Congress, by providing in the Apportionment Act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), that the redistricting of a state for congressional purposes should be made by each state "in the manner provided by the laws thereof," manifestly intended that where, by the state Constitution and laws, the referendum is treated as a part of the legislative power, the power thus constituted should be held and treated as the state legislative power for the purpose of creating congressional districts by law.

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<sup>10</sup> Ohio ex rel. Davis v. Hildebrandt (U. S.) supra.

<sup>11</sup> 50 L.R.A.(N.S.) 198, note.

That the initiative and referendum is not repugnant to the constitutional guaranty of a republican form of government is held in State ex rel. Foote v. Hutchinson (1914) 93 Kan. 405, 144 Pac. 241, involving a municipal ordinance.

The initiative and referendum as applied to municipalities is held not invalid as an attempt to regulate the administration of the affairs of the cities and other municipalities, in Enos v. Hanff (1915) 98 Neb. 245, 152 N. W. 397.

Nor does it violate the provision of the Federal Constitution that guarantees to the people a representative form of government, nor does it violate § 2, art. 3, of the Nebraska Constitution. Ibid.

See State ex rel. Foote v. Hutchinson, infra, subd. IV. b. 1.

<sup>12</sup> Note in 50 L.R.A.(N.S.) 198.

### *III. Necessity of legislation to carry constitutional provisions into effect.*

#### *a. In general.*

Whether a constitutional provision conferring initiative and referendum powers is self-executing depends upon the form of the provision. In general it may be said that a constitutional provision is self-executing if it enacts a sufficient rule by means of which the rights given may be enjoyed and protected or the duty imposed may be enforced. Again, it has been said that a constitutional provision which is intended to declare personal rights of a citizen needs no legislation to give it force, but if it defines a rule for the government of the legislature, it does.<sup>13</sup>

Adhering to these general rules for determining whether a constitutional provision is self-executing, the North Dakota constitutional provision conferring initiative powers with reference to an amendment to the state Constitution was held not self-executing.<sup>14</sup> The constitutional provision in question declared that an amendment to the Constitution might be

proposed by the people by filing, at least six months previous to a general election, an initiative petition containing the signatures of at least 25 per cent of the legal voters; it then provided that when such a petition had been properly filed, the proposed amendment or amendments should be published, as the legislature may provide, for three months previous to the general election, and should be placed upon the ballot, to be voted upon by the people at such election. The court reasons that the reference to publication "as the legislature may provide" refers to future legislative provisions. It is further pointed out that no basis is prescribed for determining the legal voters, whereas in a constitutional amendment conferring initiative and referendum powers as to legislation, the same legislature particularized by inserting a definite basis on which the required percentage of signers should be computed. It is further pointed out that the constitutional provision does not prescribe either the form or substance of the enacting clause for such an amendment, while in the corresponding provi-

<sup>13</sup> The application of these general rules to specific constitutional provisions is discussed in the note to 50 L.R.A.(N.S.) 198 et seq.

In holding the provision of the Michigan Constitution relating to the initiative and referendum self-executing, the court, in *Thompson v. Vaughan* (1916) — Mich. —, 159 N. W. 65, states that the section of the Constitution under consideration is not a mere statement of principles, but, on the contrary, points out in detail the various steps to be taken in referring an act of the legislature to the electors, and undoubtedly intends that the conduct of the election and the canvass and return of votes shall be in accordance with the general laws of the state.

The provision of the Ohio Constitution declares that it is self-executing. *Shryock v. Zanesville* (1915) 92 Ohio St. 375, 110 N. E. 937; *State ex rel. Hunt v. Hildebrand* (1915) 93 Ohio St. 1, 112 N. E. 138. Many other constitutional provisions declare that they are self-executing, in which case no judicial question arises as to this point.

The court in *HOCKETT v. STATE LIQUOR LICENSING BOARD*, ante, 7, after extensively setting forth the provisions of the Ohio Constitution and statutes relating to the initiative and referendum, holds that such provisions authorized the initiating of a home rule amendment as to intoxicating liquors and the submission of the same by referendum to the electors.

A constitutional amendment adopted upon an initiative petition was held self-executing in *Ghera v. State* (1915) 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94, although it contained a section providing that

"the legislature shall, by appropriate legislation, provide for the carrying into effect of this amendment." Another section of the amendment provided that it should take effect and be in force upon a date stated. The general question of what is a self-executing constitutional provision is, of course, merely touched upon in this note, as it relates to the initiative and referendum, and no attempt has been made to discuss any cases passing upon any question relating to this other than those which discuss the question of whether the constitutional provision conferring initiative and referendum powers is self-executing. The case of *Ghera v. State* is, of course, outside of this question, but deals only with a constitutional amendment adopted under the initiative and referendum powers, and is merely incidentally referred to in this connection.

<sup>14</sup> *State ex rel. Linde v. Hall* (1916) — N. D. —, 159 N. W. 281. The constitutional amendment, so far as was material to the inquiry, provided that "any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state at least six months previous to a general election of an initiative petition containing the signatures of at least 25 per cent of the legal voters in each of not less than one half of the counties of the state. When such petition has been properly filed, the proposed amendment or amendments shall be published as the legislature may provide, for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election."

sion relating to the initiation of legislative matters the enacting clause is provided for. The court further points out that the constitutional provision conferring initiative powers as to legislation, as well as a constitutional provision for the recall of officers, each declared expressly that they should be self-executing. Again, it is stated that the constitutional provision merely requires a minimum percentage, leaving it to the legislature to fix the percentage required, which must be "at least 25 per cent." The court also reviews the history of legislation and concludes as above stated, that the constitutional provision in question is not self-executing.

The fact that a constitutional provision which declares that it is self-executing commands a public officer to do a particular thing, without directing the manner in which it shall be done, imposes upon such officer the duty to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded, in the absence of provisions by the legislature defining the methods.<sup>15</sup>

Laws enacted in pursuance of a constitutional provision reserving initiative and referendum powers and making the provision self-executing, but providing that legislation may be enacted especially to facilitate its operation, require liberal construction to the end that the constitutional right of the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof.<sup>16</sup>

<sup>15</sup> State ex rel. Hunt v. Hildebrandt (1915) 93 Ohio St. 1, 112 N. E. 138. In this case the secretary of state was compelled by mandamus to print and distribute an argument against a proposed constitutional amendment, over his objection that neither the Constitution nor the statutory law provided any method by which he might determine who may prepare and file the argument, or, in case more than one argument is prepared and filed, which one of the arguments shall be printed and distributed.

<sup>16</sup> State ex rel. Case v. Superior Ct. (1914) 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838. See infra, note 186.

<sup>17</sup> 60 L.R.A.(N.S.) 200, note. See State ex rel. Fleck v. Dalles City (1914) 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855, infra, subd. XI. d. 1, note 140.

<sup>18</sup> Coleman v. La Grande (1914) 73 Or. 521, 144 Pac. 468 (action for injury to employee in waterworks department). It was claimed by counsel for the city that a state statute providing for the manner of maintaining actions against a public cor-

**b. Statutes limiting and defining scope.**

Notwithstanding a constitutional provision conferring initiative and referendum powers may be self-executing, legislation may be enacted to facilitate the enforcement of the provision, but such legislation cannot limit or restrict the rights conferred by the constitutional provision.<sup>17</sup>

**IV. As applied to municipal matters.**

**a. In general.**

The state does not, by conferring in its Constitution initiative and referendum power upon its municipalities, authorizing them to enact and amend their charters, and adopt local or special laws, surrender its sovereignty to the municipalities; they are still subject to the general laws. Consequently, a municipality which has adopted its charter under the initiative and referendum provisions is not relieved from liability to actions for personal injuries, while in the exercise of its private functions, as provided by general law.<sup>18</sup> Nor does a provision in such a charter that the city shall, in its name, contract and be contracted with, sue and be sued, plead and be impleaded, defend and be defended, show an intention on the part of the people of the city to render the municipality immune from such an action.<sup>19</sup>

**b. Power to exercise.**

**1. In general.**

The right to exercise the initiative and referendum may be conferred upon municipalities by constitutional provi-

sion. It was held in *State ex rel. Hunt v. Hildebrandt* (1915) 93 Ohio St. 1, 112 N. E. 138, that the provision of the Ohio Constitution that the city of Cincinnati should exercise the initiative and referendum powers did not apply to municipalities for the reason that the municipality is not subject to legislative control; in other words, that the city, in so far as it relates to cases of this kind, is an imperium in imperio.

<sup>19</sup> Ibid.

As to the power of a municipal council to question the wisdom of a proposed initiative amendment to its charter, etc., see *State ex rel. Fleck v. Dalles City* (1914) 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855, infra, subd. XI. e. 3.

As to the power to declare when an initiative measure shall take effect, see *Minges v. Merced* (1915) 27 Cal. App. 15, 148 Pac. 816, infra, subd. VIII. b.

As to the duty of the council to submit the valid part of a petition while not submitting the invalid, see *Bennett v. Drullard* (1915) 27 Cal. App. 180, 149 Pac. 368, infra, subd. XI. a.

As to notice of election in a municipal referendum, see *Reed v. Wing*, infra, subd. XI. h.

sion. The interpretation of some such constitutional provisions is discussed in this subdivision, *infra*.

In the absence of a constitutional provision expressly conferring initiative and referendum powers upon municipalities, the right of a municipality to exercise these powers may depend upon a statute enacted by the legislature, or upon a charter granted by the legislature, or it may depend upon the power of the municipality itself to confer such power upon its electors. The power of the legislature in this regard and the power of the municipality itself will be taken up in their order.

Acts of the legislature conferring initiative or referendum powers, or both, upon municipalities, must be tested by existing constitutional provisions. A statute authorizing a referendum of all resolutions of a county board, whether emergency or otherwise, has been held to conflict with a constitutional provision expressly authorizing the legislature to confer upon the board of supervisors of the several counties powers of a local legislative and administrative character, within the rule "expressio unius est exclusio alterius."<sup>20</sup> On the contrary, a constitutional provision authorizing the legislature to confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient, has been held not exclusive, and not to forbid the conferring of initiative and referendum powers upon the electors of a municipality.<sup>21</sup>

A statute which authorized a referendum of emergency ordinances and resolutions, although such orders or resolutions went into effect immediately, while others did not go into effect until twenty days from the time of their passage, and which provided that if an emergency ordinance or resolution is rejected, it shall stand repealed from and after twenty days after being rejected by the electors, was held to conflict with the legislative power of repeal, and to be forbidden by the Constitution.<sup>22</sup>

As to some other resolutions of the county board, the board was held to act

in a judicial capacity, and therefore a referendum upon such resolutions was a delegation of judicial power and likewise forbidden.<sup>23</sup>

The power of a municipality to confer upon the electors thereof the right to legislate by the initiative must likewise be tested by constitutional provisions. It has been held that if it is not prohibited by the language of the Constitution, the power exists, in a state in which there is a constitutional policy that the people of the state at large shall enjoy the right of the initiative and referendum.<sup>24</sup>

It has been urged that a constitutional provision relating to municipalities that there shall be at least one house of legislation, or a legislative body of either one or two houses, prevents the municipality from conferring initiative and referendum powers upon the electors. But this has been denied, and it has been held that a provision in the Constitution relating to the municipal charter, that it "shall provide among other things . . . at least one house of legislation," does not prevent the municipality from conferring upon its electors the right to legislate by ballot if its legislative body fails to act upon the certification to it of a petition showing measures which the people request them to adopt.<sup>25</sup> The court points out in this case that the provision in question does not go to the full extent of legislative powers which were reserved to the people of the state in the Constitution; that it is only in case the legislative body of the municipality fails to act upon proper petition that the right to initiate a law is reserved to the people. It is further stated that the constitutional provision above referred to is complied with by a charter providing for one house of legislation; that it does not prevent further means of legislation, but, after providing for the one house, the municipality is left free to provide without restriction or prohibition any mode of legislation in harmony with the Constitution and laws of the state. Cities having home rule charters are not prohibited from conferring the power to initiate and adopt ordi-

<sup>20</sup> *Mead v. Dane County* (1914) 155 Wis. 632, 145 N. W. 239. The resolution which was sought to be referred in this case was one of the county board to purchase a farm adjoining the county poor farm, for an addition thereto.

See *State ex rel. Walker v. Superior Ct.* (1915) 87 Wash. 582, 152 Pac. 11, *infra*, subd. IV, c, 1, as to power to make franchises subject to referendum.  
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<sup>21</sup> *State ex rel. Foote v. Hutchinson* (1914) 93 Kan. 405, 144 Pac. 241.

<sup>22</sup> *Mead v. Dane County* (Wis.) *supra*.

<sup>23</sup> *Ibid*.

See *Enos v. Hanff*, *supra*, subd. II. b.

<sup>24</sup> *Pitman v. Drabelle* (1916) 267 Mo. 78, 183 S. W. 1055.

nances upon the electors of the city by a constitutional provision that "it shall be a feature of all such charters that there shall be provided among other things for a mayor or chief magistrate and a legislative body of either one or two houses; if of two houses at least one of them shall be elected by general vote of the electors." Requiring a legislative body to be a feature of all home rule charters does not necessarily mean that no legislative functions can be exercised by any other body.<sup>25</sup>

Where the Constitution expressly confers initiative and referendum powers upon a municipality, questions as to the extent of such power frequently arise. Under constitutional provisions granting the legal voters of every city and town power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state, and providing further that the manner of exercising the powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation, municipalities have the power to provide the manner of exercising the initiative power in effecting an amendment of their charter.<sup>26</sup> Under these constitutional provisions a municipality has power also to provide the manner of enacting a new charter.<sup>27</sup> Whether the city has provided the manner of enacting a new

charter depends upon the construction of the ordinance designed for that effect.<sup>28</sup>

The people of a municipality to whom initiative and referendum powers are reserved, who have power to enact and amend their municipal charter, cannot enact ordinances regardless of whether the charter contains any provision authorizing such legislation. Municipal corporations have no powers except such as are granted in express words by their charters, or such as are necessarily implied from those granted, or such as are essential to the declared object and purposes of the corporation.<sup>29</sup> But where, by the express terms of a commission charter adopted by the people, certain provisions of the old charter are declared to remain in full force and effect as ordinances only, such ordinances furnish authority for the council to act with reference to the subject matter therein contained.<sup>30</sup>

Even if one part of a municipal ordinance providing for the manner of exercising the initiative and referendum powers is void, the remaining sections of the municipal legislation are not vitiated thereby.<sup>31</sup>

A constitutional provision reserving to municipalities initiative and referendum powers as to "all" municipal legislation does not prevent the exercise by the municipality of the right to except emergency ordinances from the operation of

<sup>25</sup> State ex rel. Zien v. Duluth (1916) — Minn. —, 159 N. W. 792.

<sup>26</sup> Note in 50 L.R.A.(N.S.) 202.

<sup>27</sup> Duncan v. Dryer (1914) 71 Or. 548, 143 Pac. 644.

Where a new charter for a municipality is petitioned for by initiative petition, and the same is approved by the commissioners of the municipality, which is acting under a commission form of government, it does not become the charter of the city without a vote of the electors, where the power of enactment of a city charter was only extended to the legal voters of the municipality. Birnie v. La Grande (1915) 78 Or. 531, 153 Pac. 415.

<sup>28</sup> Where an ordinance indicated clearly in its title and in the emergency declaration that it was the intention of the council to provide for the exercise by the city of the initiative and referendum powers, including the power to enact and amend charters, and the reason for having the ordinance take effect at once was declared to be to enable the city, at as early a date as possible, to enact a new charter, it was held to provide the manner for exercising the initiative and referendum, although in the various sections of the ordinance the L.R.A.1917B.

power to enact a new charter was omitted, the ordinance referring simply to an amendment of the charter. The court here states that the ordinance will be construed as if the words, "a charter or" had been written in the section before the words "an amendment and amendments," wherever they occur in the section, as, by so doing, the letter of the ordinance will be made to express the manifest intention of the council as shown by the ordinance itself. Duncan v. Dryer (Or.) supra.

<sup>29</sup> Robertson v. Portland (1915) 77 Or. 121, 149 Pac. 545. Although the matter is discussed as one of the power of the people to enact legislation without charter authority, as a matter of fact in this case the act was one by the council of a municipality, acting under a commission charter.

<sup>30</sup> Ibid. The ordinances in question, relating to street improvements and special assessments therefor, were held to authorize the action of the council in providing for a street improvement and special assessments.

<sup>31</sup> State ex rel. Fleck v. Dalles City (1914) 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855.

the referendum.<sup>33</sup> In the Oregon<sup>33</sup> case the legislature, in passing an act providing for carrying into effect the referendum powers, provided for the enactment of emergency ordinances by the municipal council, and this was carried into a charter provision. The supreme court points out that for nine years it was understood that municipal councils had power to pass ordinances with emergency clauses appended thereto in like manner as was done by the state legislature. In view of this long acquiescence the court concludes that the power cannot be denied. The constitutional provision involved in the Ohio case,<sup>34</sup> in addition to conferring initiative and referendum powers on the municipalities on all questions of municipal legislation, provided that such powers shall be exercised in the manner now or hereafter provided by law. An act of the legislature provided for the exception from the referendum of emergency measures. It was urged that the language of the constitutional provision could not be interpreted to invest the legislative body of a municipality with the power of declaring any act to be an emergency; further, that the general assembly had no power to invest the municipal legislative body with any such authority. The supreme court points out that, in the general provisions reserving initiative and referendum powers to the electors of the state, the referendum is reserved except as to emergency laws, and that the constitutional provision conferring the initiative and referendum powers upon the people of a municipality must be interpreted in the light of the definition of the referendum as defined in the Constitution generally. As thus defined, emergency measures are expressly reserved. The court therefore concludes that, under the statute in question, the council of the municipality might exercise the power of declaring an emergency.

<sup>33</sup> *Shryock v. Zanesville* (1915) 92 Ohio St. 375, 110 N. E. 937; *Thielke v. Albee* (1915) 79 Or. 48, 153 Pac. 793.

<sup>34</sup> *Thielke v. Albee* (Or.) supra.

<sup>35</sup> *Shryock v. Zanesville* (Ohio) supra.

<sup>36</sup> *State ex rel. Walker v. Superior Ct.* (1915) 87 Wash. 582, 152 Pac. 11. The power to make such an ordinance subject to the referendum depends upon whether the power to grant franchises is conferred upon the city in its corporate capacity or upon the city council. If the former, as was held in this case to be the fact, it may be made subject to referendum. L.R.A.1917B.

## 2. Under particular constitutional and statutory provisions.

See note in 50 L.R.A.(N.S.) 202 et seq., for earlier cases on this question.

### c. What acts are subject.

#### 1. In general.

An ordinance granting a telephone franchise is subject to the referendum under a charter provision making all franchise ordinances subject to the referendum except as otherwise provided by law.<sup>35</sup>

While, as is shown below, the initiative and referendum applies only to legislative matters as distinguished from administrative or executive, not all legislative matters are within its scope. Thus, although a resolution of the board of trustees of a municipality, establishing the grades of certain streets and avenues thereof, is legislative in character, it has been held not subject to a referendum,<sup>36</sup> on the theory that the inevitable effect of applying the referendum to such a matter would be greatly to impair or wholly destroy the efficacy of the statutes providing for the establishment and improvement of streets, and also upon the theory that such an improvement is of a special and local nature, in which only those interested were intended to have a voice.<sup>37</sup> It is on the latter theory, that is, of special or local matters, that the right to a referendum in case of a resolution to construct a sewer and septic tank, to be paid by special assessment upon the property benefited, was denied.<sup>38</sup> Legislation in regard to special assessments was examined and held to indicate the policy of leaving to those, and those only, who bear the burdens, the right in the first instance to say whether the obligation shall be assumed by the municipality, and of denying, as clearly as it is possible, the right of the general elector to participate in an election involving such a question.

The referendum power applies only to legislative matters, as distinguished from

<sup>36</sup> *Chase v. Kalber* (1915) 28 Cal. App. 561, 153 Pac. 397.

<sup>37</sup> *Chase v. Kalber* (Cal.) supra. The court here is of the opinion that the right of the property owners to be heard in the matter of a proposed improvement would be cut off if such matters were subject to the referendum, and further, that a statutory provision that, upon protest, such a proceeding should be suspended for a certain period, would be precluded of operation in case of the referendum.

<sup>38</sup> *Glove v. Willis* (1915) 16 Ariz. 378, 146 Pac. 544.

administrative or executive.<sup>38</sup> Consequently it becomes important to determine what are legislative matters. The resolution of a city council accepting the proposition of a land company offering to donate a certain sum to the city towards the erection of a new city hall on a block of ground given by the company to the city for that purpose, on condition that the city appropriate at least an equal amount, and that the construction of a new city hall be commenced without delay, and conditioned further that when the building is completed, it shall be occupied and used as a city hall, is legislative in character and subject to the referendum, since the resolution involves and requires a determination by the council that the public interest of the city requires that it have a city hall, that the same be located on the land offered for that purpose, that said offer be accepted, that a suitable building be erected thereon, that the money of the city be appropriated and used in the construction thereof, and that, when completed, the building be occupied and used by the city officers as a city hall and for municipal purposes.<sup>39</sup> Further resolutions considered and held legislative accepted the deed which was tendered by the land company and an agreement between the land company and the city, whereby the company was immediately to erect a building on the land, upon the completion of which the city was to occupy the same as a city hall and for municipal offices, thereafter paying a stated sum as monthly rental until the total rental should amount to a stated sum, whereupon the building should be conveyed by the land company to the city.<sup>40</sup>

Likewise a proposed initiative ordinance accepting another but similar offer as to the erection of a city hall was

held a valid exercise of legislative power, and within the initiative power.<sup>40</sup>

### *3. Administrative matters.*

The referendum is confined to legislative matters as distinguished from administrative or executive,<sup>41</sup> even though it is exercised by ordinance or resolution, in the absence of a very clear declaration to the contrary.<sup>42</sup> The order of the legislative board of a municipality, granting a license, is not an ordinance which is suspended for thirty days after the passing of same under the initiative and referendum provisions, since it does not have the force and effect of law.<sup>43</sup>

### *d. To what bodies applies.*

See earlier cases in 50 L.R.A.(N.S.) 204, note.

### *V. Application of existing constitutional provisions to initiative and referendum enactments.*

#### *a. In general.*

In operation the initiative and referendum powers are governed by existing constitutional provisions<sup>44</sup> which are appropriate. As to what constitutional provisions are appropriate gives rise to some diversity of holding.<sup>45</sup>

#### *b. Constitutional amendments.*

The statement above made as to the general applicability of constitutional restrictions upon the exercise of the initiative and referendum is true in the case of constitutional amendments proposed by the method; that is, existing constitutional amendments govern in so far as they are applicable. The diversity of holding arises in the determination of what constitutional restrictions are applicable.<sup>46</sup>

<sup>38</sup> Hopping v. Richmond (1915) 170 Cal. 605, 150 Pac. 977.

<sup>40</sup> Ibid.

See Reed v. Wing (1914) 168 Cal. 706, 144 Pac. 964, *infra*, subd. X. g.

See Enos v. Hanff, *infra*, subd. IV. c, 2, as to an ordinance held not legislative.

<sup>41</sup> See note in 50 L.R.A.(N.S.) 204, for earlier cases on this question.

<sup>42</sup> Hopping v. Richmond (Cal.) *supra*. See case *supra* as to matters determined to be legislative.

<sup>43</sup> Enos v. Hanff (1915) 98 Neb. 245, 152 N. W. 397. But an ordinance regulating the licensing of the sale of intoxicating liquors is stated to be subject to the initiative and referendum act.

<sup>44</sup> In determining the intent of an act L.R.A.1917B.

initiated by the electors, the court in State ex rel. Taylor v. Duncan (1916) — Mont. —, 155 Pac. 1111, states that "while we are not required to hold that a law passed by the people upon the initiative is subject in all respects to the constitutional provisions and restrictions touching the title to acts passed by the legislative assembly, yet the title may be fairly accepted as a notice to the people of the general contents of a bill presented for their acceptance or rejection, and as some indication of their intent in passing it."

<sup>45</sup> See note in 50 L.R.A.(N.S.) 204, for earlier cases on this question.

<sup>46</sup> 50 L.R.A.(N.S.) 205, note. See State ex rel. Linde v. Hall (1916) — N. D. —, 159 N. W. 281.



**c. Legislation.****1. In general.**

Legislation enacted by means of the initiative and referendum is subject to existing constitutional restrictions.<sup>47</sup>

**2. Carrying into effect initiative and referendum powers.**

In the case of legislation designed to carry into effect initiative and referendum provisions authorized by Constitution, existing constitutional provisions yield where the constitutional amendment reserving initiative and referendum powers in effect provides that the manner of executing the reserve powers shall be prescribed by general laws. In such a case, however, the legislation itself does not alter the existing constitutional provisions, but the constitutional amendment reserving the powers as above stated effects the change, subject only to such provisions of law as shall make it available.<sup>48</sup>

**VI. Power of governor to veto.**

The power of the governor to veto a measure initiated by the people and passed by the requisite number of electors has been denied.<sup>49</sup> This power is usually the subject of express constitutional provision, in which case the matter is not one for construction by the courts.

**VII. Power of legislature to repeal or amend.**

The power of the legislature to repeal initiative and referendum legislation has been sustained generally under the various constitutional or statutory provisions that have governed.<sup>50</sup>

As to the power of the legislative body to repeal an act on which a referendum has been asked, and legislate on the subject matter contained in the act, see *infra*, subd. IX. a, 3.

**VIII. Matters peculiar to initiative.****a. In general.**

The initiator of a measure is not a legislator. He must proceed in conformity with the rules prescribed for the exercise of the initiative.<sup>51</sup> Accordingly, where a statute enacted in pursuance of constitutional authority, prescribing the method for exercising the initiative, provides that arguments limited in number shall be published with the measure, but the expense of such arguments shall be borne by their proponents, the proponents of a measure cannot insert an argument in a proposed measure under the guise of a preamble.<sup>52</sup> But where the proposed measure extends the policy of the state, more latitude is allowable in the preamble, although even in such a case argumentative matter cannot be inserted.<sup>53</sup>

It is sometimes required that an initiative measure must first be submitted to the lawmaking body for its action thereon, and only in case the lawmaking body rejects the proposed measure is it necessary to submit it to a vote of the electors; under such a provision relating to municipalities the initiative cannot be used for the purpose of petitioning the council to repeal an ordinance annexing land to the municipality, instead of a referendum upon the ordinance, as provided by statute.<sup>54</sup>

See note in 50 L.R.A.(N.S.) 209, for earlier cases on this question.

<sup>47</sup> 50 L.R.A.(N.S.) 206, note.

The writer of the opinion in *Pitman v. Drabelle* (1916) 267 Mo. 78, 183 S. W. 1055, intimates that initiative legislation is subject to constitutional limitation in the same way that any other legislation is.

The statute enacted by the initiative was tested in the ordinary way as to constitutionality in *Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595.

As to the necessity of complying with constitutional and statutory provisions in the proposal of initiative measures, see *State ex rel. Berry v. Superior Ct.* (1916) — Wash. —, 159 Pac. 92, *infra*, notes 51, 52.

<sup>48</sup> 50 L.R.A.(N.S.) 207, note.

<sup>49</sup> 50 L.R.A.(N.S.) 208, note.

<sup>50</sup> *STATE EX REL. RICHARDS V. WHISMAN*, ante, 1, writ of error dismissed by U. S. Supreme Court for want of jurisdiction, 241 U. S. 643, 60 L. ed. 1218, 36 Sup. Ct. Rep. 449. See note in 50 L.R.A.(N.S.) 208, for earlier cases on this question. L.R.A.1917B.

<sup>51</sup> *State ex rel. Berry v. Superior Ct.* (Wash.) *supra*.

<sup>52</sup> *Ibid.* The measure here proposed was a fisheries code for the state; it was purely an amendatory bill or law upon a subject of legislation long recognized and acted upon in the state, and made no radical change therein. The preamble contained a somewhat extended argument in favor of enacting the bill.

<sup>53</sup> *State ex rel. Griffiths v. Superior Ct.* (1916) — Wash. —, 159 Pac. 101. The statute here involved related to the Workmen's Compensation Act, and it appeared from an examination of the preamble that there was a declared purpose to extend the policy of the state with reference to workmen's compensation for injuries; some argumentative matter, however, was stricken out of the preamble involved in this case.

<sup>54</sup> *Com. ex rel. Heiney v. Marks* (1915) 248 Pa. 518, 94 Atl. 191.

See *State ex rel. Dawson v. Pratt* (1914)

*b. When bill takes effect.*

The time when an initiated measure takes effect is largely a matter of constitutional or statutory provision.<sup>55</sup> An initiated ordinance does not take effect until thirty days after its adoption by the voters, under a statutory provision contained in the act, providing for the initiative and referendum, that no ordinance for the government of any city, except as hereinafter provided, shall go into effect until thirty days after the passage of the same.<sup>56</sup>

But a statutory provision relating to the operation of the initiative and referendum in cities and towns as to matters not conflicting with existing municipal legislation on the subject, that an initiative measure adopted by the electors shall not go into effect until thirty days thereafter, does not apply where the municipality, under constitutional authority, has provided differently.<sup>57</sup>

The people of a municipality have power to provide in an initiative measure when the same shall take effect,<sup>58</sup> under a constitutional provision in which no time is provided as to when initiative measures proposed by the people of a municipality shall take effect, but requiring the officers, in the submission of such measures, to be guided by the general laws of the state, except as otherwise provided. This is true notwithstanding a statutory provision that an ordinance which has been accepted by the voters shall be a valid and binding ordinance and be considered adopted upon the date that the vote is canvassed and declared by the canvassing board, and go into effect ten days thereafter. This statute is construed by the court as intended to accomplish an object similar to that of a statute relating to bills passed by the legislature, providing for the time of going into effect in the absence of any contrary provision fixed by the legislature in the bill itself; and it is stated that the former statutory provision relates to the time when an ordinance proposed by the electors of a municipality shall go into effect in case the ordinance itself fails

to prescribe the time when it is to take effect.<sup>59</sup>

It has been held that a measure initiated by the people becomes a law as provided in the constitutional amendment that such a measure when adopted shall be in operation on and after the thirtieth day after the election at which it is approved, although the act concludes by stating that it shall take effect and be in full force and effect from and after a period beyond the thirty days. As, however, there was no claim in this case that the public officers would seek enforcement of the provisions of the law prior to the time specified in the law for its going into effect, the validity of such a provision is not considered to any extent. It is merely stated that whether the concluding section be unconstitutional or not would not change the date of the coming into existence of the law,<sup>60</sup> although it might be unenforceable until a later date.

*IX. Matters peculiar to referendum.*

*a. Effect upon legislative enactments.*

*1. When takes effect.*

As shown in the earlier note, a legislative act which is subject to the referendum cannot take effect until the time for the filing of referendum petitions has expired, nor thereafter if the referendum is invoked, until approved by the electors.<sup>60</sup> The legislature, however, may provide that the act shall take effect at a date beyond the period for the filing of referendum petitions, under an act which does not fix the date at which the legislation shall become effective, but merely provides that no act shall go into effect until after the expiration of the time limited for filing referendum petitions.<sup>61</sup>

*2. Suspension by filing of referendum petition.*

Upon the filing of a valid referendum petition to any act of the legislative body subject to the referendum, the going into effect of the same is suspended until the referendum is determined; and if determined adversely, the act, of course, does

<sup>52</sup> Kan. 247, 139 Pac. 1191, *infra*, subd. XI. j.

<sup>55</sup> 50 L.R.A. (N.S.) 209, note.

<sup>56</sup> *Eyre v. Doerr* (1915) 97 Neb. 562, 150 N. W. 625. It was contended that this provision of the statute applied only to the passage of an ordinance by the mayor and council. The facts, however, that the section was a part of the original act providing for the initiative and referendum, and that, prior to that act, there was no such provision in regard to ordinances enacted L.R.A.1917B.

by the mayor and council, were regarded by the court as making it apply to ordinances initiated by the electors.

<sup>57</sup> *State ex rel. Hedges v. Anderson* (1915)

75 Or. 509, 147 Pac. 526.

<sup>58</sup> *Minges v. Merced* (1915) 27 Cal. App. 15, 148 Pac. 816.

<sup>59</sup> *Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595.

<sup>60</sup> 50 L.R.A. (N.S.) 210.

<sup>61</sup> *Leatherock v. Lawter* (1915) 45 Okla. 715, 147 Pac. 324.

not go into effect at all.<sup>63</sup> In case of a defective petition, however, the going into effect of the act is not suspended.<sup>63</sup>

It has been held that an act on which a referendum is sought is suspended by the filing of the referendum petition, and remains so although an election is held thereon which proves to be invalid. It is apparently the theory of this case that it remains suspended until a valid election is held thereon.<sup>64</sup>

**3. Power to repeal act on which a referendum has been filed and again legislate on subject matter.**

An ordinance which has been suspended by a referendum may be repealed by the municipal council.<sup>65</sup> Having repealed the ordinance under such circumstances, the council cannot pass another ordinance in all essential features like the repealed ordinance, but the council may deal with the subject matter of the repealed ordinance, and if, acting in good faith and with no intent to evade the effect of the referendum petition, the council passes an ordinance covering the same subject matter that is essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance, the second ordinance cannot be held invalid for this cause.<sup>66</sup>

**b. Laws excepted from operation of referendum.**

**1. Laws carrying into effect initiative and referendum provisions.**

Certain laws are excepted from the operation of the referendum by the constitutional provisions conferring initiative and referendum powers. One such constitutional provision had to do with laws carrying into effect initiative and referendum provisions.<sup>67</sup> Under such a

constitutional exception a law carrying into effect initiative and referendum provisions is not suspended for filing referendum petitions unless the law has to do with additional matters.<sup>67</sup>

**2. Laws necessary for preservation of public peace, health, or safety.**

**(a) Who determines what laws are within exception.**

Some confusion in the use of terms exists in the cases with reference to laws necessary for the immediate preservation of the public peace, health, or safety, which, by most constitutional provisions, are excepted from the operation of the referendum. In some states the legislature, and in municipalities, the legislative body, is given power to declare an emergency in certain cases for the purpose of having an act passed by it take effect at once. This is not confined to the initiative and referendum, but the cases in which the legislative body is given power to declare an emergency usually include and are sometimes limited to laws necessary for the immediate preservation of the public peace, health, and safety. In the initiative and referendum amendments laws necessary for the immediate preservation of the public peace, health, and safety, are usually excepted from the operation of the referendum. This is found in some, but not all, jurisdictions in connection with another provision that no act subject to referendum shall take effect until a stated number of days after adjournment of the legislature. These provisions are considered in some jurisdictions and treated as though requiring an emergency in order to except a law from the operation of the referendum. It is recognized, however, that the emergency

<sup>63</sup> *Rigdon v. San Diego* (1916) 30 Cal. App. 107, 157 Pac. 513, holding a municipal ordinance repealing another ordinance suspended by a referendum petition, although the repealing ordinance carried a clause making it immediately effective as an urgency measure.

<sup>50</sup> L.R.A.(N.S.) 210, note.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ex parte Smith* (1916) — Okla. —, 154 Pac. 521.

<sup>65</sup> *Re Megnella* (1916) — Minn. —, 157 N. W. 991.

<sup>66</sup> *Re Megnella* (Minn.) *supra*. The ordinance in question dealt with the "jitney" situation in the municipality. The first ordinance required as a condition precedent to the issuance of a permit a liability insurance bond issued by a reliable insurance company which was to cover injuries to persons; the second ordinance permitted a

bond of an insurance company or "association" holding a license to do an indemnity insurance business in the state, and provided that it should cover injuries to property as well as to persons. It appeared that there was an association licensed to do business that issued indemnity policies or bonds at premiums much less than the regular company, and further, that the cost of obtaining these bonds under the first ordinance was one of the principal objections to the ordinance, so that the new ordinance was satisfactory in this respect to those who had protested against the old one. There were various other points of difference of varying importance, but the court did not mention them, it being held that the new ordinance, being different from the first one, was valid.

<sup>67</sup> 50 L.R.A.(N.S.) 211, note.

clause is not the general emergency clause mentioned above. The only meaning given to the term "emergency" in these cases seems to be that a situation is presented in which the law should be excepted from the referendum. In at least one jurisdiction<sup>68</sup> the court separates the questions and considers the right to declare an emergency a right separate from that to except a law from the operation of the referendum. It is true that the Constitution in this jurisdiction does not, so far as appears from the reported cases, contain a provision that no act subject to the referendum shall take effect until a stated number of days after adjournment of the legislature, but it does except from the operation of the referendum only laws necessary for the "immediate" preservation of the public peace, health, or safety. The emergency provision referred to by this court is the general emergency provision referred to above. In other words, the confusion exists in the use of the term "emergency," some using this to mean a situation calling for the immediate operation of the law; others to mean a situation requiring that the law be excepted from the operation of the referendum. It must also be kept in mind that even the cases that use the

term "emergency" in the latter sense may also use it to designate a situation calling for the immediate operation of the law.<sup>69</sup> Perhaps in most instances the law is put into immediate operation.

This difference in the use of terms is not of vital importance in considering the question who determines what laws come within the exception, for whether the court considers that an emergency is necessary to except a law from the operation of the referendum, or considers this right to except a law to be independent of an emergency, the right to except a law from the operation of the referendum is limited to laws necessary for the immediate preservation of the public peace, health, or safety; and it thus becomes a question, when the legislature has declared a law to be of this character, whether the legislative declaration is conclusive. On this question there is a difference of opinions. It is held by one line of authorities that the legislative declaration is conclusive,<sup>70</sup> notwithstanding the legislature may intentionally or through mistake erroneously declare the law to be necessary for the purpose stated.<sup>71</sup>

According to the other line of authorities the legislative determination is not conclusive.<sup>72</sup> The latter conclusion, that

<sup>68</sup> *Van Kleeck v. Ramer* (1916) — Colo., 156 Pac. 1108; *People ex rel. Kiefer v. Ramer* (1916) — Colo., 158 Pac. 146.

<sup>69</sup> This note is, of course, not exhaustive of the cases on this question apart from the initiative and referendum.

<sup>70</sup> *Van Kleeck v. Ramer* (Colo.) *supra*, followed in *People ex rel. Kiefer v. Ramer* (Colo.) *supra*; *Thielke v. Albee* (1915) 79 Or. 48, 153 Pac. 793, citing *Kaddery v. Portland* (1903) 44 Or. 118, 74 Pac. 710, 75 Pac. 222, discussed in the earlier note; 50 L.R.A. (N.S.) 212.

<sup>71</sup> 50 L.R.A. (N.S.) 212, note; *Thielke v. Albee* (Or.) *supra*.

<sup>72</sup> *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11; *State ex rel. Case v. Howell* (1915) 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1016A, 1231. See also *STATE EX REL. RICHARDS v. WHISMAN*, ante, 1, as to right to object to an emergency so declared by the legislature where no referendum petition has been filed. And see also discussion in this case on power of legislature to declare an emergency.

In *Rigdon v. San Diego* (1916) 30 Cal. App. 107, 157 Pac. 513, an action involving a municipal ordinance which carried a clause making it immediately effective as an urgency measure, it was not argued that the mere statement of the council expressed in the ordinance, to the effect that the public health and safety demanded that the ordinance should take immediate effect, was of any force or virtue whatever, and the court states that it has been held other-  
L.R.A.1917B.

wise, citing *Re Hoffman* (1909) 155 Cal. 114, 132 Am. St. Rep. 75, 99 Pac. 517, in which the court expressed an opinion with reference to a municipal ordinance that the mere declaration of the council that the ordinance was passed for the immediate preservation of the public health was neither conclusive nor was it sufficient. This was obiter in the *Hoffman* Case.

Under a constitutional provision that no act shall take effect until a stated time from the end of the session in which it shall be passed, excepting that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health, or safety by a two-thirds vote of the members elected to each house, the legislative determination to give effect to a certain act is not final and conclusive upon the courts. *Atty. Gen. ex rel. Barbour v. Lindsay* (1914) 178 Mich. 524, 145 N. W. 98. It does not appear, however, that this was connected with a referendum provision.

An act, which states in its title that it declares an emergency, and which in a section of the act contains the language: "It is hereby adjudged and declared that existing conditions are such that this is necessary for the immediate preservation of the public peace, health, and safety; therefore an emergency is hereby declared to exist and this act shall take effect and be in full force and effect from and after its ap-

the legislative determination to declare an emergency is not final, seems to be the correct one. The limitation upon the power of the legislature to declare an emergency that only laws of a certain class shall be so subject, or that all laws except the class shall be subject to the referendum, without expressly vesting in the legislature power to determine what laws come within that class, leaves to the courts the power to determine the question. In other words, a law must be a law belonging to the excepted class before it can be declared free from the referendum. Where the law is of the prescribed character the legislative determination that it shall be free from the referendum is final; but its determination that the law belongs to the excepted class is not. In support of this theory it has been pointed out<sup>73</sup> that the clause excepting the named laws from the referendum is not the usual general emergency provision, but an exception to the otherwise universal application of the reserved power of referendum; that the clear purpose of the exception is to preserve unimpaired the right of the legislature to exercise the police power so far as it may be emergent; that the exception from the referendum includes only those certain, definite, and unquestioned phases of the police power which, in their very nature, may be and usually are emergent. It is further stated that, as the court exercises jurisdiction to determine whether an act of the legislature is a valid exercise of the police power, it must be a judicial question whether the exercise by the legislature of certain phases of that power which

are selected and made an exception to the constitutional guaranty of the referendum is a valid exercise of the power.

Under this theory doubt will be resolved in favor of the correctness of the legislative determination.<sup>74</sup> Applying this rule, an act of the legislature prohibiting the transfer or diversion of moneys collected by a municipality by sale of bonds or otherwise for any local improvements to any other fund or use has been held not to be so clearly without the exception as to authorize the court in holding the emergency declared by the legislature void.<sup>75</sup> Likewise, an act of the legislature relating to the jitney situation, and enacting a system of regulation of such common carriers, was sustained as a law necessary for the immediate preservation of the public peace, health, and safety, and therefore as within the exception to the referendum.<sup>76</sup> But a law changing the personnel of the board having charge of the public land was held not to be one for the immediate preservation of the public peace, health, or safety, etc., and therefore it was beyond the power of the legislature to so declare.<sup>77</sup>

*(b) Effect of legislative determination.*

The legislature may declare a law to be for the preservation of the public peace, health, or safety for the sole purpose of excepting it from the operation of the referendum. If such is the purpose, the law takes effect at the time provided for acts to take effect; the only effect of the declaration is to except it from the referendum.<sup>78</sup> Even under the theory that an emergency must exist, the

proval by the governor," is sufficient to declare an emergency. *Bennett Trust Co. v. Sengstacken* (1911) 58 Or. 333, 113 Pac. 863.

<sup>73</sup> *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162.

<sup>74</sup> *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11; *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162; *State ex rel. Case v. Howell* (1915) 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231.

<sup>75</sup> *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162.

<sup>76</sup> *State ex rel. Case v. Howell* (1915) 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231.

<sup>77</sup> *State ex rel. Brislawn v. Meath* (Wash.) supra.

<sup>78</sup> *People ex rel. Kiefer v. Ramer* (1916) — Colo. —, 158 Pac. 146. The general emergency clause required a two-thirds vote, while the safety clause merely required a majority vote. It was apparently urged in this case that the emergency clause might be invoked without the safety clause, in L.R.A.1917B.

which event it would be subject to the referendum, although taking effect at once. The court answered this by stating that "we cannot apprehend for it the illogical results which counsel so earnestly urge. It is impossible to conceive of a case where two thirds of the general assembly can knowingly be secured to pass an emergency clause . . . where a majority could not always be secured to insert the safety clause." Continuing, the court states: "Before the emergency clause is a proper subject for consideration at all the bill must be passed by a majority vote of the house then considering it; and, under our former holding, the safety clause being a part of the bill requiring a majority vote only to pass it, the majority have the right to determine whether it is of the character that should not be referred, the two-thirds vote being required only to put it into effect at once upon its approval, otherwise it becomes effective ninety days after the adjournment of the session passing it."

50 L.R.A.(N.S.) 212, note.

law need not go into effect at once; the only effect of the declaration which appoints some subsequent time for the going into effect of the law is that the law is excepted from the operation of the referendum.<sup>79</sup> It was urged in one such case<sup>80</sup> that the declaration by the legislature of an emergency was a contradiction is deferred for a time to give those the law should not take effect for thirty days after its enactment. The court answered this by stating that the law takes effect immediately, although its operation of terms where it was provided that affected thereby a reasonable period in which to adjust themselves to the changed conditions; and it is stated that the word "immediate," as used in this constitutional amendment, does not necessarily have an arbitrary sense of instantly, forthwith, or without any intervening lapse of time whatever. But if the legislative body declares that the law shall go into effect immediately, that effect is given it.<sup>81</sup>

It seems that a logical treatment of this matter requires a recognition that the legislative declaration that a law is necessary for the immediate preservation of the public peace, health, or safety may be for the purpose of excepting it from the operation of the referendum, or for the purpose of having it take effect at once. If the former is the purpose, the only effect of the declaration is to prevent a referendum; but if the latter, it goes into effect at once. In the latter case, however, it must be enacted as general emergency legislation, which usually requires more than a majority vote of the legislature.<sup>82</sup> As to what would be the effect if an emergency were declared without the safety clause, the Colorado court<sup>83</sup> refuses to consider. The South Dakota court<sup>84</sup> points out that the constitutional provision in that state reserves "the right to require that any law . . . shall be submitted to a vote of the electors of the state before

going into effect;" and adds that "the right to require any law that has taken effect or is in force to be submitted is not reserved." It has been held that the legislature cannot constitutionally confer upon a county the referendum as to acts that have taken effect, since that involves the power of repeal.<sup>85</sup>

(c) *How such laws are passed.*

See note in 50 L.R.A.(N.S.) 213, for earlier cases on this question.

3. *Other laws excepted.*

(a) *Who determines.*

Acts making appropriations are frequently excepted from the operation of the referendum.<sup>86</sup> Following out the decision of the Washington court in *State ex rel. Brislawn v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, this court determined whether an act of the legislature came within the exception of the referendum, although the legislature had so declared. Acts making appropriation for the payment of materials furnished to the highway department, to the fisheries department, and to the agricultural department of the state, were held to come within the exception of laws necessary for the support of the state government and its existing public institutions, and therefore not to be subject to the referendum.<sup>87</sup>

(b) *What laws are excepted.*

Laws providing for tax levies are exempted by the Ohio law. Accordingly the section of a law levying a highway tax was held to go into operation upon its passage, although other sections, which were subject to the referendum, may have been suspended until the time for filing a referendum petition had expired.<sup>88</sup> The provision as to referendum authorized a referendum on any section of a law or any item of a law appropriating money.

<sup>79</sup> *Hanson v. Hodges* (1913) 100 Ark. 479, 160 S. W. 392 (law did not go into effect for over eleven months after approval by governor).

<sup>80</sup> *State ex rel. Case v. Howell* (1915) 81 Wash. 204, 147 Pac. 1159, Ann. Cas. 1916A, 1231.

<sup>81</sup> Note in 50 L.R.A.(N.S.) 212; *Thielke v. Albee* (1915) 79 Or. 48, 153 Pac. 793.

<sup>82</sup> *State ex rel. Lavin v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605.

<sup>83</sup> *People ex rel. Kiefer v. Ramer*, supra, note 78.

<sup>84</sup> *State ex rel. Lavin v. Bacon* (S. D.) supra.

<sup>85</sup> *Meade v. Dane County* (1914) 155 Wis. L.R.A.1917B.

634, 145 N. W. 239. See supra, subd. IV, b, 1.

<sup>86</sup> The Washington constitutional provision excepts from the operation of the referendum laws necessary for the "support of the state government and its existing public institutions." *State ex rel. Case v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162.

<sup>87</sup> *State ex rel. Blakeslee v. Clausen* (1915) 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810.

See note in 50 L.R.A.(N.S.) 213, for earlier cases on this question.

<sup>88</sup> *State ex rel. Donahay v. Roose* (1914) 90 Ohio St. 345, 107 N. E. 760.

A bill providing for the erection of an armory for use and occupation as an armory building by the National Guard does not come within the meaning of an act of the legislature "making appropriations for the expenses of the state government and state institutions existing at the time such act is passed," which is excepted from the operation of the referendum. The word "expenses" as used in this section of the Constitution means the ordinary running expenses of the state government and existing state institutions, and does not include money to be paid for the erection of a new and permanent building.<sup>89</sup>

#### 4. Laws subject to a special referendum.

See note in 50 L.R.A.(N.S.) 214, for earlier cases on this question.

#### 5. Laws which have been excepted by the legislature.

As stated in the earlier note, the character of the law is immaterial under the theory that the legislative determination of what laws fall within the exception is final. In jurisdictions adhering to this theory a civil service bill has been excepted from the operation of the referendum.<sup>90</sup> An act relating to intoxicating liquors has been excepted,<sup>91</sup> as has also a municipal ordinance relating to jitneys.<sup>92</sup> As to the laws excepted under the opposite theory, see *supra*.

See note in 50 L.R.A.(N.S.) 214, for earlier cases on this question.

#### 6. Publication.

See note in 50 L.R.A.(N.S.) 214, for earlier cases on this question.

#### 7. Laws enacted under special statutory provisions.

The referendum provision conferring referendum powers upon the electors of a municipality acting under the commission form of government has been held inapplicable to an ordinance enacted by the council in pursuance of a petition of the electors under a general law with reference to a particular subject.<sup>93</sup>

#### X. Remedies.

##### a. Who may maintain.

A citizen and taxpayer may maintain an action to annul an order of the board of trustees of a municipality, declaring that, by a referendum election, an ordinance previously sought to be passed by the trustees, granting a franchise to a railroad company to construct an open track in the municipality, had been rejected by the requisite number of electors.<sup>94</sup>

In a mandamus proceeding the object being to compel action and to secure the enforcement of a public duty, the state is the real party in interest, and the relator need not show that he has any special interest in the result, except as he has a general interest as a citizen and elector.<sup>95</sup>

But an injunction, being to prevent an official from taking action, is the exer-

<sup>89</sup> *Bartling v. Wait* (1914) 96 Neb. 532, 148 N. W. 507. See *Enos v. Hanff* (1915) 98 Neb. 245, 152 N. W. 397, *supra*, subd. IV. c, 2, and *State ex rel. Blakeslee v. Clausen*, *supra*, subd. IX. b, 3 (a).

See note in 50 L.R.A.(N.S.) 213, for earlier cases on this question.

<sup>90</sup> *Van Kleeck v. Ramer* (1916) — Colo. —, 156 Pac. 1108.

<sup>91</sup> *People ex rel. Kiefer v. Ramer* (1916) — Colo. —, 158 Pac. 146.

<sup>92</sup> *Thielke v. Albee* (1915) 79 Or. 48, 153 Pac. 793.

<sup>93</sup> *Perrault v. Robinson* (1916) — Idaho, —, 158 Pac. 1074. By general law the legislature had made it unlawful to keep open any theater or moving picture show on Sunday, but provided that if a number of qualified electors, equal to a majority of the votes cast at the last general election, should petition the council or board of trustees of a city or village to permit theaters and moving picture shows to keep open on Sunday therein, the council or board of trustees might pass an ordinance granting the desired relief. The procedure provided by this general law had been pursued and such an ordinance enacted in a municipality L.R.A.1917B.

acting under the commission form of government, whereupon a referendum petition was filed according to the initiative and referendum provisions applicable to the commission form of government. The court reviews the legislation in question, and comes to the conclusion, as above stated, that the referendum provisions of the commission form of government law do not apply to such an ordinance.

<sup>94</sup> *Reed v. Wing* (1914) 168 Cal. 706, 144 Pac. 964. It is stated that if the election had ratified the action of the trustees, and had resulted in voting to the railroad company a valuable franchise, no one would doubt the right of a citizen and taxpayer to attack such disposition of something belonging to the citizens; that is to say, a use of the street different from that common to all. Likewise a citizen who may believe that the city of his residence would be injured by refusal to grant certain privileges to a public utility may attack the methods of the refusal.

<sup>95</sup> *Thompson v. Vaughan* (1916) — Mich. —, 159 N. W. 65. The right of relators who were electors of the state, interested in the proper administration of the law, to

cise of a sovereignty vested in the state alone, and cannot be invoked by one who is not affected in any other way than as a citizen or elector.<sup>96</sup>

The right of a taxpayer to enjoin the submission of a proposed constitutional amendment has been sustained although his financial hurt will be very small.<sup>97</sup>

*b. Injunction.*

The courts have not consistently applied any single rule to determine when a court of equity will interfere in initiative and referendum matters by injunction. As shown in the earlier note, the power of a court of equity has been denied on the theory that the court will not interfere in elections nor in cases involving political questions.<sup>98</sup> The right has also been denied on the theory that equity is concerned only with matters of property and the maintenance of civil rights; consequently equity cannot compel the striking out of certain words in the ballot title of an initiated act about to be submitted to the electors.<sup>99</sup> On the contrary, it has been held that a court may interfere and enjoin the preparing or causing to be printed, petitions for a proposed initiative measure, and from circulating or attempting to obtain signatures of legal voters upon such petitions, where the measure evades the plain provisions of a statute regarding the publication of arguments and the payment of the expense thereof, by including an argument for the measure in the preamble thereof, the statute requiring the expense of arguments to be met by the proponents, while the measure itself was published at the expense of the

state.<sup>100</sup> This case is distinguished from the earlier case<sup>101</sup> by stating that in the earlier case no statutory regulations were involved nor in fact provided for by the Constitution. The court concludes that the question is not a mere political one nor an exempt legislative process, but is regulated by the law, and is subject to judicial interposition. A court has also been held to have power to interfere by injunction and determine whether any authority exists for holding an election on a constitutional amendment initiated by the electors.<sup>102</sup> This is held not to amount to judicial interference with legislation, since the enacting of a constitutional amendment is not an exercise of a legislative power. In some parts of the opinion the court seems to base the power of the court not alone upon the theory that no legislative matter was involved, but upon the broad ground of the right to interfere generally in such cases. The latter is not made clear, however. The fact that the proposed amendment may be rejected at the polls does not prevent judicial interference in such a case.<sup>103</sup>

See note in 50 L.R.A.(N.S.) 215, for earlier cases on this question, and see also subd. XI. f, *infra*.

*c. Mandamus.*

Mandamus lies to control the duties of the secretary of state as to filing a referendum petition which are ministerial, and not discretionary. The jurisdiction of the court does not so much depend upon whether the duty is prescribed by the legislature instead of by the Consti-

institute a proceeding in mandamus, was sustained.

50 L.R.A.(N.S.) 214, note.

<sup>96</sup> 50 L.R.A.(N.S.) 215, note.

<sup>97</sup> State ex rel. Linde v. Hall (1916) — N. D. —, 159 N. W. 281.

A taxpayer of a city whose only interest appeared to be that he would be called upon to pay taxes to meet the principal and interest upon the bond provided for by an ordinance submitted to a referendum vote was held entitled to maintain an action to determine the validity of the ordinance; but apparently there was no question raised as to the form of the action, the suit being one to enjoin a municipality from entering into the contract provided by the ordinance. *Pearce v. Roseburg* (1915) 77 Or. 195, 150 Pac. 855.

<sup>98</sup> See note in 50 L.R.A.(N.S.) 215.

State ex rel. Crawford v. Dunbar (1906) 48 Or. 109, 85 Pac. 337, denying a court of equity the power to strike certain words from the ballot title of an initiated act about to be submitted to the electors. L.R.A.1917B.

<sup>99</sup> *Ibid*.

<sup>100</sup> State ex rel. Berry v. Superior Ct. (1916) — Wash. —, 159 Pac. 92.

<sup>101</sup> State ex rel. Crawford v. Dunbar (Or.) *supra*.

It is also a theory of this case that an initiator is not a legislator. See *supra*, subd. VIII. a.

<sup>102</sup> State ex rel. Linde v. Hall (N. D.) *supra*. There was held upon investigation to be no authority for initiating a proposed amendment to the Constitution, since the constitutional provision conferring initiative and referendum powers was not self-executing, and no provision had been made by the legislature for initiating an amendment.

There being no authority for the calling of the referendum election, it was held that a writ of prohibition would lie to prevent it, in *Perrault v. Robinson* (1916) — Idaho, —, 158 Pac. 1074.

<sup>103</sup> State ex rel. Linde v. Hall (N. D.) *supra*.



tution, as it does upon the nature of the duty imposed.<sup>104</sup>

Mandamus will not issue unless the relator shows a clear right to the writ.<sup>105</sup> In this case mandamus to compel the secretary of state to file referendum petitions was denied where the action therefor was not brought until so short a period before the election as would render it impossible for the court to decide the matter and have the referendum vote at the election should it be decided that the petitions were valid.<sup>106</sup>

See further, subd. XI. f, *infra*, as to the power of courts.

#### *d. Jurisdiction of supreme court.*

See note in 50 L.R.A.(N.S.) 217, for earlier cases on this question.

#### *e. Time for bringing action.*

See note in 50 L.R.A.(N.S.) 218, for earlier cases on this question.

Where the decision of the secretary of state is in favor of an initiative petition, and the opponent thereof takes an appeal therefrom to the court within the five days limited by law for such appeal, the advocates of the measure, who are permitted to intervene in the court proceeding, may set up as erroneous the rejection by the secretary of state of certain names on the petition, although this claim is not set up within the five days limited for taking the appeal.<sup>107</sup>

#### *f. Right to appeal.*

Appeals being governed by statutes, in the absence of a statute authorizing an appeal the court has no appellate jurisdiction over the judgment of a clerk authorized to pass on the sufficiency of an initiative petition. A municipality cannot, by incorporating in its charter a repealed provision of the state law authorizing appeal, vest a district court with appellate power.<sup>108</sup>

<sup>104</sup> Thompson v. Vaughan (Mich.) *supra*.

<sup>105</sup> State ex rel. Gongwer v. Graves (1914) 90 Ohio St. 311, 107 N. E. 1018. See State ex rel. Foote v. Hutchinson, *infra*, subd. XI. e, 3.

See note in 50 L.R.A.(N.S.) 216, for earlier cases on this question.

<sup>106</sup> State ex rel. Gongwer v. Graves (Ohio) *supra*.

<sup>107</sup> State ex rel. Case v. Superior Ct. (1914) 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838. The rights of the advocates of such measure are in substance those of defendants, and are such as to entitle them to have offset, against any errors which may have been committed by the secretary of state in favor of submitting the measure, any errors which he may have committed tending to defeat the sub-L.R.A.1917B.

In discussing the right to review the action of the secretary of state with reference to an initiative measure, it has been stated that, speaking generally, "it may be said that the legislature might have committed wholly to administrative officers all questions arising under the law incidental to the submission of an initiative measure to the people without any right of review in the court whatever, except, possibly, pure questions of law."<sup>109</sup>

#### *g. Parties.*

In an action to annul an order of the board of trustees of a municipality declaring that, by a certain referendum election, an ordinance previously sought to be passed by the trustees granting a railroad company a franchise to build a spur track over a designated route in the municipality had been rejected by the requisite number of voters of the municipality, the railroad company is not a necessary party, especially when the referendum election is held illegal, and therefore results in restoring the rights of the railroad company under the first ordinance.<sup>110</sup>

#### *h. Competency of members of court.*

The judges of a court who are residents of a city are incompetent to sit in a case involving the validity of an election held under the initiative and referendum provisions of the city charter, involving the issuance of bonds which can only be paid by taxation of the residents of the city.<sup>111</sup>

### *XI. Matters relating to practical exercise of the power.*

#### *a. In general.*

Certain statutory provisions with reference to the manner of exercising the initiative and referendum have been

mission of the measure; the fact that the objection on behalf of the advocates of the measure is put forward merely by way of defense renders the five-day limitation prescribed in the statute wholly inapplicable.

<sup>108</sup> Ruth v. Merrill (1914) 43 Okla. 764, 144 Pac. 371.

See note in 50 L.R.A.(N.S.) 218, for earlier cases on this question.

<sup>109</sup> State ex rel. Case v. Superior Ct. (Wash.) *supra*.

<sup>110</sup> Reed v. Wing (1914) 168 Cal. 706, 144 Pac. 964.

<sup>111</sup> Holland v. Cranfill (1914) — Tex. Civ. App. —, 167 S. W. 308.

As to the competency of the attorney general, see Cress v. Estes (1914) 43 Okla. 213, 142 Pac. 411, *infra*, subd. XI. b, 1.

held directory merely. It has been so held as to the requirement of initialing in ink;<sup>112</sup> the number of names on each sheet of the petition;<sup>113</sup> and the manner of designating charter amendments.<sup>114</sup>

The purpose of the initiative is to submit legislation proposed by the people to the people for ratification or rejection without interference from any official or set of officials as to the form such legislation is to take. The officers having charge of the machinery for bringing the petition to a vote of the electors cannot alter the petition. Consequently if the petition is void in fact, the officers cannot be compelled to eliminate the void part and submit the balance.<sup>115</sup>

In the absence of testimony it will be presumed in a contest involving the regularity and validity of the adoption of an amendment to a city charter that the recorder, whose duty it is under the law to provide a ballot title for an initiative measure properly filed, regularly performed such duty.<sup>116</sup>

## b. Petition.

### 1. Form and contents.

The forms for initiative and referendum petitions are largely statutory.<sup>117</sup> It is frequently provided in the statute that a substantial compliance is sufficient. Under such statutes a liberal construction is given. Thus, a slight difference between the wording of the ballot title in a petition initiating a proposed constitutional amendment required to be filed in the office of the secretary of state and the original petition signed by the electors, which in no way substantially affects the proposed measure, does not invalidate the petition under a statute making the prescribed procedure not mandatory, but sufficient if substantially followed.<sup>118</sup>

Even in the absence of a constitutional or statutory requirement to such effect, it seems that an initiative petition must set forth the desired legislation, so that the signers may know the contents.<sup>119</sup>

<sup>112</sup> Thus, a statutory provision relating to the certifying of the signers of an initiative or referendum petition by local officials, that the local official shall place his initial "in ink" opposite the signature of those persons who are legal voters, but which contains no provision declaring that the initialing by means other than ink renders a signature upon the petition so initialed invalid, is directory merely; consequently initialing by lead pencil is sufficient. *State ex rel. Case v. Superior Ct. (Wash.) supra.*

<sup>113</sup> And a provision of the law that a petition shall consist of sheets "with numbered lines of not more than twenty signatures on each sheet" is directory merely, in so far as it may be considered as thus describing the number of signatures that must be upon the petition, so that a petition is not invalidated because a number of sheets in the petition contain more than twenty names on them, resulting in names not being upon the numbered lines. *Ibid.*

<sup>114</sup> The failure to comply with a provision in an ordinance providing for the manner of exercising initiative and referendum powers, that charter amendments submitted by the city council without initiative petition shall be designated on the ballot as "charter amendments submitted to the voters by the city council," does not invalidate the election where the ballot title furnished the information that the electors were to vote upon an amendment to the city charter, and embodied the main provisions of the act, the purpose and the amount of the issue of the bond authorized by the amendment, and the names of the members of the commission created thereby, and only one measure appears upon the ballot. The theory of this case is that a strict compliance

with provisions other than notice of the election is not required. *State ex rel. Hedges v. Andresen (1915) 75 Or. 509, 147 Pac. 526.*

<sup>115</sup> *Bennett v. Drullard (1915) 27 Cal. App. 180, 149 Pac. 369*, holding that, under a municipal charter which, in dealing with the initiative, uses the singular "ordinance," and contains nothing to indicate that an initiative petition may contain more than one ordinance, "no duty rests upon a municipal council to submit to an election the valid part of an initiative petition containing a proposed ordinance and two alternative propositions for certain sections of the ordinance, it being admitted that the alternative propositions are void."

See *Buohl v. Beverly (1916) — N. J. L. —, 98 Atl. 270.*

<sup>116</sup> *State ex rel. Fleck v. Dalles City (1914) 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855.*

<sup>117</sup> See note in 50 L.R.A.(N.S.) 218, for earlier cases on this question.

<sup>118</sup> *Cress v. Estes (Okla.) supra.*

<sup>119</sup> *Buohl v. Beverly (N. J.) supra.*

In an obiter statement the court observes that a statutory requirement relating to a municipal ordinance that the ordinance petitioned for should either be passed without alteration or submitted to the people without alteration seems to require that the ordinance, without alteration, be recommended by the petitioners, and this can only be done by showing that each petitioner knew the contents of the proposed ordinance, and petitioned for that very ordinance without alteration. It is then stated that a prima facie case would perhaps be made by attaching a copy of the proposed ordinance to each paper.

A statutory provision requiring an initiative petition to set forth a full and correct copy of the title and text of the law or amendment to the Constitution so proposed does not apply in case of a referendum, where the statute with reference to a petition for referendum merely requires setting forth the title of the act sought to be referred, if the petition is against the whole act, and it is only when the petition is against less than the whole act that the part or parts on which referendum is sought are required to be set forth. Consequently the omission of a word in setting forth the act in a referendum petition does not render it defective, the referendum being sought on the entire act.<sup>120</sup>

The enacting clause of the amendment to a city charter in form, "people of . . . city do ordain as follows," is sufficient to effect the amendment of the charter. The term "ordain" is equivalent in potency to "be it enacted" or any like expression. A provision of the state Constitution that the style of all bills shall be, "be it enacted by the people of the state of Oregon," refers only to measures treated by the legislative assembly or the people of the whole state, and not to municipal legislation.<sup>121</sup>

The fact that the attorney general, who is required to prepare a proper ballot title for an initiated measure, is a candidate for re-election does not disqualify him to perform the prescribed duties.<sup>122</sup>

As to the verification of the petition, see subd. XI. d, *infra*.

## 2. Conflict between petition and pamphlet.

See note in 50 L.R.A.(N.S.) 219, for earlier cases on this question.

<sup>120</sup> *Bartling v. Wait* (1914) 96 Neb. 532, 148 N. W. 507. The act sought to be referred provided for the building of an armory "upon the ground originally occupied by old Fort Kearney," while the purported copy omitted the word "originally" from the above clause.

<sup>121</sup> *State ex rel. Fleck v. Dalles City (Or.) supra.*

<sup>122</sup> *Cress v. Estes* (1914) 43 Okla. 213, 142 Pac. 411.

As to the competency of members of a court, see *Holland v. Cranfill* (1914) — Tex. Civ. App. —, 167 S. W. 308, *supra*, subd. X. h.

<sup>123</sup> *State ex rel. Baker v. Hanna* (1915) 31 N. D. 570, 154 N. W. 704. It was urged in this case that because a referendum of the entire act necessarily referred the included part, the petition therefore must be held as equivalent to one for the repeal of L.R.A.1917B.

## 3. Failure to submit to city attorney.

See note in 50 L.R.A.(N.S.) 219, for earlier cases on this question.

## 4. How petition adopted.

See note in 50 L.R.A.(N.S.) 219, for earlier cases on this question.

## 5. Right to amend.

See note in 50 L.R.A.(N.S.) 219, for earlier cases on this question.

And see *Thompson v. Vaughan*, *infra*, subd. XI. c, 6.

## 6. Separate sheets.

The signers of a petition for the referendum of an entire act cannot be aggregated with the signers of a petition for only one of the several provisions of such act to make up the required percentage of voters where the result of repealing or adopting the act in question would be entirely different from the repealing or adoption of the provision called for in the other referendum petition.<sup>123</sup>

## c. Filing.

### 1. With whom to file.

See note in 50 L.R.A.(N.S.) 220, for earlier cases on the question.

### 2. When petitioner's duty ends.

See note in 50 L.R.A.(N.S.) 220, for earlier cases on the question.

### 3. What is a filing.

See note in 50 L.R.A.(N.S.) 221, for earlier cases on the question.

### 4. Time of filing.

A referendum petition must be filed within the time prescribed by statute.<sup>124</sup> The time fixed by statute is mandatory and not merely directory.<sup>125</sup> However,

the part. and therefore the names should be aggregated. This contention, however, was denied.

And see note in 50 L.R.A.(N.S.) 220, for earlier cases.

And see the general question of signing, *infra*, subd. XI. d. 1, for verification of separate parts of a petition.

<sup>124</sup> *Re Opinion of Justices* (1915) — Me. —, 95 Atl. 869.

<sup>125</sup> *Kelty v. Flynn* (1916) 223 Mass. 369, 111 N. E. 857. Under the statute involved in this case a petition must be filed within thirty days in case of the granting, renewal, or extension of a general franchise or general right to occupy or use the streets of the city; in all other matters the petition must be filed within ten days. The order sought to be referred in this case was one to extend a street and borrow money for the construction and extension thereof.

where a resolution of a city council for a charter amendment is read, adopted, filed, and published a sufficient length of time before the election at which it was submitted, the filing is sufficient, although it came up for second reading and final passage at a special meeting of the city council held thereafter, and not the required number of days before the special election. The provision made when the resolution was adopted for the same to come up for second reading and final passage was treated as simply providing for reconsideration of the matter in case there should be influential objection made after the same was published. It was not absolutely essential that the resolution should be adopted more than once.<sup>126</sup>

#### 5. Filing in sections.

Under a constitutional provision that each section of the petition shall be filed with the clerk or registrar of voters of the county or city and county in which it was circulated, but all said sections circulated in any county or city and county shall be filed "at the same time," a referendum petition is sufficiently filed where, after having filed one section of the same, thereafter, and on the same day, another section of the petition was presented for filing. The court states that such a constitutional provision is to be liberally construed, and adds that "it is certainly a permissible construction to hold that 'at the same time,' as used in the Constitution, does not regard fractions of a day, and that filings of these petitions are good if made upon the

same day."<sup>127</sup> But the various sections cannot be filed on different days under such a constitutional provision.<sup>128</sup> It is the duty of the secretary of state, when sections are forwarded him which have been filed on different days, to reject those which appear on their face to have been filed on days subsequent to that on which the first filing took place.<sup>129</sup>

The sections filed upon a subsequent day cannot be treated as supplemental petitions provided for by a constitutional provision that, within a stated time from the transmission of the petition to the secretary of state, a supplemental petition, containing supplemental names, may be filed with the county clerk, the court stating that the evident purpose of the supplemental petition is to supply any deficiency that may have been found in the original petition after it has been transmitted to the secretary of state.<sup>130</sup>

#### 6. Right of officer to return petition for corrections.

After a petition has been filed with the proper officer, it has been held that it cannot be removed from the office and changed.<sup>131</sup> Consequently the sections of a petition for a referendum which have been returned by the officer to its proponents and afterwards brought back, so that the officer does not know what, if any, changes have been made, must be rejected.<sup>132</sup> But sections which have not been filed by a state officer, though received by him from the county clerk, are not subject to this rule; such sections are as if they had not been transmitted.<sup>133</sup> It is possible that con-

This was held not to be the granting, renewal, or extension of a general franchise or general right to occupy or use the streets of the city, and therefore a petition therefor must be filed within ten days.

<sup>126</sup> *State ex rel. Hedges v. Andresen* (1915) 75 Or. 509, 147 Pac. 528. For earlier cases as to the time of filing, see note in 50 L.R.A.(N.S.) 221.

<sup>127</sup> *Perry v. Gross* (1916) — Cal. —, 156 Pac. 1031. In an obiter statement the court adds that "it may be said that this construction would not avail in case some ignorant or designing person should file such a petition bearing but a few names some days in advance of the filing of a principal petition. With that question we are not here concerned."

<sup>128</sup> *Thompson v. Vaughan* (1916) — Mich. —, 159 N. W. 65. In a case in which various sections of a referendum petition coming to the secretary from the various county clerks showed upon their face that some were filed at one time and some at another, it was held the duty of the secretary to reject all subsequent to the first filing. L.R.A.1917B.

It was argued that the secretary of state had nothing to do with the time or manner of filing the sections with the various county clerks, and that his only duty was to count the signatures upon the petition. This is answered by stating that the sections of the petition upon which he is to count the signatures must be valid sections, and must have been first filed with the various county clerks. Sections which show upon their face that they were filed in violation of the Constitution are as ineffectual as if they had never been filed at all.

<sup>129</sup> *Thompson v. Vaughan* (Mich.) supra. In this case the various sections were filed as a part of the original petition, and before any portion of them had been transmitted to the secretary of state.

<sup>130</sup> *Thompson v. Vaughan* (Mich.) supra. The sections from a certain county, after being filed, were returned to the clerk of the county; later, these sections were brought back, with a letter from the county clerk, notifying the secretary of the number of changes and corrections that had been made while absent from the office. The secretary

stitutional or statutory provisions may govern this, and these should be consulted.

#### *d. Signing.*

##### *1. In general.*

It is usually required that the signatures of petitioners be verified. Names on one section of a petition to which no proper affidavit has been attached cannot be counted, when the constitutional requirement declares that each section shall have such an affidavit attached.<sup>131</sup>

Under a constitutional provision that, upon written petition of a certain number of electors, a referendum may be had on bills enacted by the legislature, and defining a "written petition" as one or more petitions with the original signatures of the petitioners attached, verified as to authenticity of the signatures by the oath of one of the petitioners certified thereon, and accompanied by the certificate of the clerk of the city, town, or plantation in which the petitioners reside, that their names appear on the voting list of his city, town, or plantation as qualified to vote for governors, both the verification of the authenticity of the signatures and the certificate of the clerk are necessary.<sup>132</sup> Names attached to the petitions and certified by the clerk, but not verified as to authenticity by the oath of any petitioner certified thereon, cannot be counted.<sup>133</sup> Nor can the omission be supplied after the time for the filing of petitions has expired.<sup>132</sup>

Nor can names be counted which are upon sheets pasted together or fastened together with pins or eyelets, after the certificate and affidavit, which refer only to the "foregoing petitions." Only those names preceding the certificate and affidavit can be counted.<sup>133</sup>

In case the certificate of the clerk covers all the names on the petitions thus

fastened together, but only the first sheet bears the verification of the petitioner, only those names preceding the verification can be counted.<sup>134</sup>

The succeeding names cannot be properly certified and verified after the time for filing the petition has expired.<sup>134</sup>

If the verifying petitioner signs the verification on each of the several pages of the petition, but executes the jurat only on the first page, only the names on the first page can be counted.<sup>134</sup>

Nor can the omission to fill out the jurat on subsequent sheets be remedied after the expiration of the time for the filing of petitions, nor may the governor receive evidence as to the intention of the verifying petitioner and the magistrate executing the jurat that said jurat was to apply to the several sheets, and that they were to be taken as one petition.<sup>134</sup> The verifying petitioner must be one of the petitioners on that page.

A petition consisting of two or more sheets pasted together or pinned together or fastened together by eyelets is not sufficiently verified where the verification appears on the first sheet only, and is made by a petitioner appearing on a subsequent page. Not even the names upon the first page can be counted under such conditions.<sup>134</sup>

Some constitutional provisions require the petition to be verified by the oath of one of the petitioners. Under such a provision a petition cannot be sufficiently verified by a petitioner who did not sign the petition, but did sign some other petition.<sup>134</sup> And this is true although the petitioner signed a similar petition in the same town or city, which petition is properly certified by the town clerk.<sup>134</sup>

Some statutory provisions are more specific, and require one of the signers to each paper constituting the petition to make oath that each signature to the paper appended is the genuine signature of the person whose name it purports to

of state, in his answer to the mandamus, said in substance that he did not know what changes, if any, were made in the sections. This, the court states, is the same as saying that he cannot make any assured canvass of these sections as they were filed. Under such circumstances the sections cannot be canvassed at all, and must be rejected.

<sup>131</sup> *Thompson v. Vaughan* (Mich.) *supra*. The constitutional requirement involved in this case was to the effect that "each section shall have attached thereto the affidavit of the person soliciting signatures to the same stating his own qualifications and that all the signatures to the attached section were made in his presence, that each signature to the section is the genuine sig-  
L.R.A.1917B.

nature of the person signing the same and no other affidavit thereto shall be required."

<sup>132</sup> *Re Opinion of Justices* (Me.) *supra*.

<sup>133</sup> *Ibid*. On the first sheet of these petitions the forms prepared for the certificate and authentication were filled out; on subsequent sheets they were left blank; and only the names preceding the certificate and affidavit which were filled out were held entitled to be counted. Apparently, though this is not clear, if the verification were on a page other than the first, all names preceding it might be counted, on the theory that the sheets constituted one petition.

<sup>134</sup> *Re Opinion of Justices* (1915) — *Me.* —, 95 Atl. 869.

be. A verification by one who did not sign the paper invalidates it.<sup>135</sup>

Other constitutional provisions merely require each section to be verified by the person soliciting the signatures. This, taken in connection with another constitutional provision that any qualified elector of the state is competent to solicit signatures within the county in which he is an elector, is held to preclude him from soliciting signatures in any county other than that in which he is an elector.<sup>136</sup> This qualification must affirmatively appear in the affidavit.<sup>136</sup> It must be made before the section is filed with the county clerk, and cannot be changed after such filing.<sup>136</sup>

A petition composed of four sheets pasted together, the fourth sheet having the certificate of the clerk filled out, but left unsigned, cannot be verified by a petitioner whose name appears on the fourth sheet, since the persons whose names appear on the fourth sheet are not constitutional petitioners.<sup>137</sup>

Nor can this defect be cured by permitting the clerk to sign the certificate on the fourth page thereto after the filing thereof and the expiration of the time limited for the filing of a referendum petition, although the omission to sign on the fourth page was through inadvertence.<sup>137</sup>

A petition cannot be verified by one whose name appears upon the petition, but who is specifically excepted as not being upon the voting list in the clerk's certificate to the petition.<sup>137</sup>

Nor can such a person verify the petition although he gives his voting residence in the petition as from a different town, and is certified to as a qualified voter by the clerk of the town where he resided, after the time for the filing of the petition has expired.<sup>137</sup>

Where the names of the petitioners appear in two columns in the petition, and the clerk certifies only the names in the first column, the other names remain uncertified and cannot be counted.<sup>137</sup>

Nor can such a petition be verified by a petitioner whose name appears only in the second column of the petition; consequently none of the names upon a petition so verified can be counted.<sup>137</sup>

Nor can this omission be corrected af-

ter the time for filing the petition has expired.<sup>137</sup>

The names on a petition cannot be counted where the name of the verifying petitioner does not appear on any petition.<sup>137</sup>

Nor can such a petition be verified by a competent petitioner after the time for filing the petition has expired.<sup>137</sup>

This is true although the verifying petitioner failed to sign the petition by inadvertence, but did sign as a verifying petitioner, and his verification was duly taken by the magistrate.<sup>137</sup>

Names cannot be counted as petitioners that are certified as being upon the voting list by a clerk or stenographer of the clerk, who is not a deputy, signing the city clerk's name, with her initials under the same.<sup>137</sup>

Nor can this error be corrected after the expiration of the time for filing referendum petitions.<sup>137</sup>

It is not necessary that the verifying petitioner sign the certificate under the constitutional provision above set out. The authenticity of the signature may be verified in either of two ways: The petitioner may make and sign a certificate, and swear to the truth of his statements, or he may make oath before a magistrate as to the authenticity of the signatures, and the magistrate's jurat or certificate thereof is sufficient evidence of the facts stated in it. The signature of the verifying petitioner is not essential: if it appears that the authenticity of the names is sworn to by one of the petitioners on the petition, the names should be counted.<sup>137</sup>

A verifying petitioner who has properly appeared before the magistrate and certified to the petition, and whose name is entered in the jurat by the magistrate, but who inadvertently failed to sign his name as a verifying petitioner, cannot, after the expiration of the time limited for filing petitions, correct the error and thus enable the names to be counted.<sup>137</sup>

The names upon a petition are entitled to be counted where the blank in the jurat, left for the insertion of the name of the verifying petitioner, is not properly filled, but is filled with the words "town clerk," provided it appears that the verification was actually signed and sworn to by a petitioner.<sup>137</sup> Likewise,

<sup>135</sup> *Buohl v. Beverly* (1916) — N. J. L. —, 98 Atl. 270. It apparently was urged in this case that the signature of the party verifying the petition, to the verification, was sufficient, but the court states that the language of the statutory requirement can only mean that the affidavit to which oath L.R.A.1917B.

is required to be made shall be distinct from the paper forming part of the petition, otherwise the words "paper appended" are without force.

<sup>136</sup> *Thompson v. Vaughan* (Mich.) supra.

<sup>137</sup> *Re Opinion of Justices* (Me.) supra.

the names on a petition can be counted where the name of the verifying petitioner is not inserted in the jurat, although the verifying petitioner has signed the certificate, and appeared before the magistrate when the jurat was executed.<sup>137</sup>

Neither certificates nor jurats can be corrected after the expiration of the time limited for the filing of a petition.<sup>137</sup>

Under some Constitutions it is required that the name of the county or city in which each section of the petition has been circulated shall appear upon the section, and also that each signer thereto shall add to his signature his place of residence, street, and number in cities having street numbers, and his election precinct. It is held that these requirements must be strictly observed. It cannot be inferred that a section was circulated in a certain county or city from the fact that a majority or all of the signers gave their residences as in that county or city, nor can it be inferred that the signers resided in a certain county or city from the fact that the section was circulated in such county or city. The place of circulation and the place of residence must each be shown by itself on every section. The signatures cannot be counted on a section which does not thus show where it was thus circulated, nor can a signature be counted on any section unless it is followed by the signer's residence and voting precinct.<sup>138</sup> A signer to a referendum petition, in giving his residence, may use common and well-known abbreviations if there are such, designating his county or city, but his residence must not be left to guesswork or mere inference. Ditto marks may be used.<sup>139</sup>

The fact that there are many names, places of residence, and voting precincts, all apparently in the same handwriting, upon petitions for referendums, is not sufficient to justify the conclusion by the secretary of state that the names

were written thereon fraudulently, and that they should therefore be rejected from the canvass.<sup>138</sup>

It has been held that the failure of certain signers of a petition to state the county and state in which they live, in addition to the city or village, is not such a defect as requires the rejection of such names, where, on the opposite side of the petition, the county and state do appear. Even without the proof upon the back of the petition, it is a fact of which the court takes judicial notice that there are in the state cities and villages of the names appended.<sup>139</sup>

A municipality cannot restrict the signers of initiative petitions to registered voters under constitutional provisions awarding that privilege to legal voters, consequently an ordinance attempting to do so is invalid.<sup>140</sup>

When it appears that the person making the affidavit to a petition knew that a person signing the petition did not sign it with knowledge of its contents, yet, notwithstanding such knowledge, wilfully, corruptly, and intentionally made the false, perjured affidavit to the contrary, such affidavit is worthless, and the petition or part of a petition to which it is attached does not fill the requirement of the Constitution, and the genuine signatures thereon cannot be counted, for the reason that the petition lacks the affidavit.<sup>141</sup>

The number of signers required to initiate a measure or bring about a referendum on an act of the lawmaking body is sometimes fixed at a certain percentage of the electors voting "at the last general election." In case of a referendum sought upon a municipal ordinance the meaning of the "last general election" was claimed to be the last general state election, rather than the last general municipal election. But this contention was denied and the number of signers required was fixed upon the basis of the electors voting at the last municipal election.<sup>142</sup>

<sup>138</sup> *Thompson v. Vaughan* (1916) — Mich. —, 159 N. W. 65.

<sup>139</sup> *Bartling v. Wait* (1914) 96 Neb. 532, 148 N. W. 507.

<sup>140</sup> *State ex rel. Fleck v. Dalles City* (1914) 72 Or. 337, 143 Pac. 1127, Ann. Cas. 1916B, 855.

<sup>141</sup> *State ex rel. Gongwer v. Graves* (1914) 90 Ohio St. 311, 107 N. E. 1018.

See *State ex rel. Case v. Superior Ct.* infra, subd. XI. e. 1. as to power of secretary of state to determine genuineness of signatures.

See *State ex rel. Baker v. Hanna*, supra, subd. XI. b. 6.  
L.R.A.1917B.

<sup>142</sup> *Bakersfield & K. Electric R. Co. v. Hay* (1915) 29 Cal. App. 289, 155 Pac. 132. The last election that had been held in the municipality prior to the filing of the referendum petition was a municipal election. It seems that it was the only municipal election held since the adoption by the municipality of the charter containing the initiative and referendum powers. Some objection was made that this had not been a general election; the court states, however, that even if this were conceded, it would not aid the case of the petitioner, since if no general municipal election had been held by the city since the adoption

Under some statutes, the signers of a petition are deemed and held to be qualified electors unless a protest is filed; in which event a hearing is required. Such a protest is required by some statutes to be "in writing, under oath." If the protest is not under oath, it is ineffective.<sup>143</sup>

## 2. Withdrawal of names.

A petitioner for an initiative ordinance may withdraw his name from such petition before any action has been taken thereon by the clerk whose duty it is to examine the petition, and from the registration books ascertain whether or not the petition is signed by the requisite number of registered electors, and certify the result of his examination to the council.<sup>144</sup>

A sufficient number of names having been withdrawn to reduce the number of signers below the required per cent, the council is not required to submit the ordinance to an election in case of its failure to pass same. It is not sufficient that the petition, at the time it was filed, contained a sufficient number of electors as signers, especially where no time is fixed for the special elections at which the ordinance shall be submitted.<sup>145</sup>

of the charter, the test would relate back to the last general municipal election preceding the adoption of the charter. Whether this had occurred since the last general state election or prior thereto is not stated, but, from the date given, it would seem that it had occurred either at the same time or prior to the state election. The charter of the municipality involved in this case was adopted by the municipality under a special act. There was also a general law in effect in the state, providing for direct legislation by cities and towns, including initiative and referendum. It was urged that, although this general act did not apply to the city in question, the referendum provisions of the city charter being modeled upon the terms of that statute, the court should apply the rule that one statute founded upon another is deemed, in so far as it follows the terms of the previous statute, to adopt also its meaning. The general statute having made the basis of computing the required signers the vote cast for governor, it was urged that the court should construe the provision in the municipal charter as making the basis the vote cast at the state election; but this argument was denied also.

<sup>143</sup> *Ramer v. Wright* (1916) — Colo. —, 150 Pac. 1145. The verification to the protest recited the state and county, and that the persons "each for himself (or herself), and not one for the other, deposes and says . . . that he (or she) knows the contents of said protest, and the statements L.R.A.1917B.

## e. Who determines sufficiency of petition.

### 1. In general.

Under the general election laws, the secretary of state, acting as state supervisor of elections, has been held to have authority to determine the sufficiency and validity of referendum petitions, and his decision is final in the absence of fraud or an abuse of discretion. The statutes with reference to the filing of referendum petitions were examined and shown to leave only twenty-one days in which to make proofs as to the sufficiency or insufficiency of a petition. This was held insufficient time for process, and unless process should be waived, the courts would be powerless to grant any relief within the time limited; consequently it was concluded that, by these constitutional provisions, the sufficiency or validity of referendum petitions was with the secretary of state, as the election official.<sup>146</sup>

Under the Michigan Constitution the duties charged upon the secretary of state were held to be purely ministerial. It was therefore held that his action must be based upon the face of the petition for a referendum, as received at his

therein contained are true to the best of his (or her) knowledge, information, and belief." It was signed by the persons making the protest, but the officer's certificate recited merely that it was "subscribed to before me this . . . day of . . ." The court states that the certificate nowhere recites that it was sworn to, and it is the certificate of the officer from which it must be determined whether or not an oath was administered. The fact that in the statement the signers "deposed" and "said" is referred to, and it is stated that if it be assumed that "to depose" means "to swear," the certificate does not show that the signers even "deposed" before the officer; it recites only that they subscribed.

As to right to aggregate signers on petitions for an entire act with those for only part, see *supra*, *State ex rel. Barker v. Hanna* (1915) 31 N. D. 570, 154 N. W. 704.

<sup>144</sup> *Dagley v. McIndoe* (1915) 190 Mo. App. 168, 176 S. W. 243. The court here states that there is no bar on a petitioner who voluntarily signs from voluntarily withdrawing, providing he does so before the council has taken action. The withdrawal in this case, however, occurred before the city clerk had taken any action, so that the statement with reference to the council is obiter.

<sup>145</sup> *Ibid.* See note in 50 L.R.A.(N.S.) 223, for earlier cases on this question.

<sup>146</sup> *State ex rel. Gongwer v. Graves* (Ohio) *supra*.



office; that he was not given authority to enter upon an investigation of alleged frauds and irregularities.<sup>147</sup> But the secretary of state must see that the requirements of the Constitution have been met in the petition, as these requirements are mandatory.<sup>147</sup> It is, accordingly, his duty to reject petitions which show on their face that they do not comply with the requirements of the law.<sup>148</sup>

Where the statute requires a local official to examine the petition and certify that the signatures on the petition opposite which he has written his initials are signatures of legal voters of the state or of his precinct, and the secretary of state, by a statute, is required, upon the filing of the petition, to proceed to canvass and count the names of the certified legal voters on such petition, and, if he finds the same name signed to more than one petition, to reject both names from the count, the secretary of state has no authority to reject names for any other reason than that of duplicate signatures. He cannot reject names upon the ground that the names were forged and fraudulent. The special authority given the secretary to reject duplicate signatures upon different petitions is stated to suggest almost conclusively a limitation of power on the part of the secretary to reject names for any other cause when they are determined to be signatures of legal voters by the local certifying officers, and such determination is evident by the proper certificate. Nor does the use of the word "canvass" in the statute prescribing the duties of the secretary of state indicate an intention to broaden his powers to do more than reject the duplicate signatures.<sup>149</sup>

The fact that there is no special provision of the law requiring the local certifying officers to return their certificates to the secretary of state does not change the fact that such local officers' decisions are official, and that their certifi-

cates are the prescribed official evidence of their decisions.<sup>149</sup>

Nor does the fact that, in nonregistration precincts, the certificate required of the local officer is that he "is acquainted with the legal voters thereof (a precinct), and that he believes the signatures opposite which he has written his initials are the signatures of legal voters of such precinct," lessen the force and effect of such determination as an official decision.<sup>150</sup>

The certificate of a clerk upon a petition for a proposed initiative ordinance, that he had examined the same, and, from the records of registration, to wit, the great register of the county, had ascertained that the petition is signed by the requisite number of qualified electors, sufficiently shows that the persons signing the petition were at the time registered, qualified electors, so as to comply with a statute prescribing such qualifications.<sup>151</sup> It will be assumed that the great register examined was the register then in force.<sup>151</sup>

## 2. What is sufficient notice of protest.

See note in 50 L.R.A.(N.S.) 224, for earlier cases on this question.

And see *Ramer v. Wright* (1916) — Colo. —, 159 Pac. 1145, supra, note 143.

## 3. What objections may be raised.

In general it may be stated that the constitutionality of a proposed measure cannot be raised to defeat its submission.<sup>152</sup> Thus, the constitutionality of a proposed initiative measure cannot be raised in an action to restrain the secretary of state from certifying the measure and causing it to be printed on the official ballot.<sup>153</sup>

Nor can the constitutionality of a proposed initiative municipal ordinance be raised in an action to compel the com-

<sup>147</sup> *Thompson v. Vaughan* (1916) — Mich. —, 159 N. W. 65.

<sup>148</sup> *Thompson v. Vaughan* (Mich.) supra. Under the Michigan law the sections of the petition must come to the secretary of state from the various county clerks of the counties in which the sections were circulated. It is stated that the secretary of state has no authority to receive and act upon a petition received from any other source, nor has he authority to receive sections that have not been filed with the county clerk of the counties in which they were circulated, as required. As to the requirement of being filed at the same time, see supra, subd. XI. c. 5.

<sup>149</sup> *State ex rel. Case v. Superior Ct.* L.R.A.1917B.

(1914) 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838.

<sup>150</sup> *In State ex rel. Case v. Superior Ct.* (Wash.) supra. It is stated that all that the decision of any court or tribunal amounts to, in the last analysis, is a belief of the official.

<sup>151</sup> *Minges v. Merced* (1915) 27 Cal. App. 15, 148 Pac. 816.

<sup>152</sup> 50 L.R.A.(N.S.) 224, note.

<sup>153</sup> *State ex rel. Bullard v. Osborn* (1914) 16 Ariz. 247, 143 Pac. 117; *Pfeifer v. Graves* (1913) 88 Ohio St. 473, 104 N. E. 529.

A court has no concern with the validity of proposed legislation initiated by the people. *State ex rel. Griffiths v. Superior Ct.* (1916) — Wash. —, 159 Pac. 101.

missioners to submit it to the electors.<sup>154</sup> Nor in an action to enjoin the holding of an election.<sup>155</sup>

Nor can the validity of a proposed constitutional amendment be determined upon an appeal from the decision of the secretary of state that the petition therefor is sufficient.<sup>156</sup> The courts are without power to say what laws shall or shall not be enacted. Their powers are exercised when questions arise and causes are brought before them in the ordinary course of litigation in passing upon the substantial rights of parties thereto. To question the constitutionality of initiative legislation would be to place a restraint over such legislation that does not exist in acts proposed in the legislative body. Such differentiation of power has been expressly prohibited by a constitutional provision that any law which may be enacted by the legislature may be enacted by the people under the initiative.<sup>157</sup>

It has been stated in an action for mandamus that the court will not compel the doing of a vain thing, hence will not compel the submission of an ordinance, "if, beyond dispute, the ordinance, if passed, would be in contravention" of a state law.<sup>158</sup> But where it does not so clearly appear, submission will be enforced.

A statutory provision that, on a showing that any petition is not legally sufficient, the court may enjoin the secretary of state from certifying and printing the measure on the official ballot, does not authorize an injunction where the proposed measure is claimed to be unconstitutional, since the phrase "legally sufficient" requires conformation with the requirements of the law as to form and signature.<sup>159</sup>

A municipal council cannot question the wisdom of a proposed initiative amendment to the charter, nor refuse to perform their duties in regard thereto,

on the ground that it would be difficult of execution.<sup>160</sup>

### *j. Power of court.*

The court is not concluded by the decision of an officer which is ministerial, and which is not required to be evidenced by a return or certificate of the official passing upon the question. Thus, in such a case the return of the secretary of state that an appropriation act has been referred is not conclusive upon the court in an action for mandamus to compel action by officials under a statute which is rendered ineffective if the appropriation act has been referred.<sup>161</sup>

Nor is the decision of the secretary of state conclusive on a question of law, although it be conceded that his decision upon a question of fact, in the absence of fraud or bad faith on his part, is conclusive upon the court. Whether or not the initialing of blank lines, on which no petitioner's name appears, by a local official to whom was delegated the duty of so initialing the names of legal voters, is such evidence of fraud on the part of the certifying officer as warrants the rejection of all names upon the petition where the initialing of blank lines occurred, is a question of law. As a matter of law it is not of sufficient weight as evidence to warrant the conclusion that the initialed and certified names upon such petitions were fraudulently or illegally initialed by the local official.<sup>162</sup>

The declaration of the speaker of the house of representatives that a proposed amendment to the Constitution, initiated by the people, has received the requisite number of votes, and is therefore a law, has no binding force when the matter of the adoption of the amendment is considered as a judicial question.<sup>163</sup>

But the court has no power to review a matter which is committed to other officials in other than a ministerial capacity. The fact that the legislature had

<sup>154</sup> State ex rel. Foote v. Hutchinson (1914) 93 Kan. 405, 144 Pac. 241.

<sup>155</sup> A court cannot interfere and determine legislation initiated by the electors of a municipality to be unconstitutional, for the purpose of arresting or controlling the action of the electors and preventing its submission. Pitman v. Drabelle (1916) 267 Mo. 78, 183 S. W. 1055.

<sup>156</sup> Creas v. Estes (1914) 43 Okla. 213, 142 Pac. 411.

<sup>157</sup> State ex rel. Bullard v. Osborn (Ariz.) supra.

<sup>158</sup> State ex rel. Foote v. Hutchinson (Kan.) supra.

<sup>159</sup> State ex rel. Bullard v. Osborn (Ariz.) supra.  
L.R.A.1917B.

<sup>160</sup> State ex rel. Fleck v. Dalles City (1914) 72 Or. 337, 143 Pac. 1127.

<sup>161</sup> State ex rel. Baker v. Hanna (N. D.) supra.

<sup>162</sup> State ex rel. Case v. Superior Ct. (Wash.) supra.

<sup>163</sup> Hildreth v. Taylor (1915) 117 Ark. 465, 175 S. W. 40.

In this case the question was whether a majority of the votes cast on the amendment was sufficient to adopt it or whether a majority of the votes cast at the election was necessary, a question that was answered by holding that a majority of votes cast at the election was necessary.

guarded the signing of an initiative or referendum petition by very severe penalty for illegal signing was held to evidence an intention on the part of the legislature that such penalty, so imposed, together with the certification of the local officers, was to be the only safeguard; therefore the court had no power to review the determination of the local certifying officers upon the question of the names upon the petition being the signatures of legal voters.<sup>164</sup>

Upon an appeal from the decision of the secretary of state on an initiative petition under a statute authorizing an appeal to the court for a citation requiring the secretary of state to submit the petition to the court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof, as the case may be, the court is limited to a review of the question which the secretary of state was authorized to decide, and his errors in exceeding his authority.<sup>164</sup> The secretary of state, being bound by the decision of local certifying officers on the question of the names upon the petition being the signatures of legal voters, the court is likewise bound.<sup>165</sup>

#### *g. Publication of proposed measure.*

It is the doctrine of some cases that the manner of giving notice of initiative and referendum measures prescribed on that subject must be strictly followed, and that a failure to comply with the requirements of the municipal law in that respect is fatal to the legislation attempted. The notice is treated as analogous to the manner in which jurisdiction over the subject matter or parties to a proceeding is acquired by a court; unless it is published by authority and in

the manner and at the time required, the proceeding has no more force than the judgment of a court where there was no service of summons and no appearance of the defendant, although he may have read all about the litigation in the newspapers.<sup>166</sup> Consequently a proposed initiative measure which is not published as required by a municipal ordinance providing for the manner of the exercise of the initiative and referendum powers cannot validly be submitted to the electors.<sup>167</sup>

It has been held a strict compliance with a requirement that an ordinance shall be "published . . . in at least ten issues within two weeks prior to said special election," for publication to be made once each day for twelve successive days, the last day of publication being eight days prior to the election, upon the theory that the provisions required the last publication merely to be made within the two weeks prior to the election.<sup>168</sup>

On the contrary, statutes as to publication have been given a liberal construction. Thus, a statutory provision that a proposed law or amendment to the Constitution shall be, by the secretary of state, caused to be published not later than a certain date, in a newspaper in each county, for thirty days, has been held directory, so that a publication of a proposed constitutional amendment, beginning from three to thirteen days after the stated date, is sufficient.<sup>169</sup>

At least, the failure to publish exactly as required will not defeat a submission of the proposed measure, in the absence of a showing that it amounted to such a radical disregard of the legislative requirements as probably affected the result of the election.<sup>169</sup>

Some statutes expressly provide that

<sup>164</sup> State ex rel. Case v. Superior Ct. (Wash.) supra.

<sup>165</sup> Ibid.

See State ex rel. Gongwer v. Graves (1914) 90 Ohio St. 311, 107 N. E. 1018, supra, subd. XI. e, 1, and the discussion of the right to appeal, supra, subd. X. f.

<sup>166</sup> State ex rel. Fleck v. Dalles City (Or.) supra. At the time of starting with the proposed initiative ordinance in this case, the proponents inquired whether the municipality had made any provisions for carrying into effect the initiative and referendum powers, and were informed that none had been made. It was subsequently discovered, however, that such an ordinance had been enacted, whereupon the measure was published, but not in a paper designated by the council, and too late to comply with the provisions of the ordinance as to time. The ordinance, which L.R.A.1917B.

was an amendment to the city charter, was held to be governed by such legislation.

See Reed v. Wing, infra, subd. XI. h.

<sup>167</sup> State ex rel. Fleck v. Dalles City (Or.) supra.

<sup>168</sup> Staples v. Astoria (1916) — Or. —, 158 Pac. 518. A dissenting opinion took the position that the ten publications must all be within a period of two weeks immediately preceding the election.

<sup>169</sup> Hildreth v. Taylor (Ark.) supra. In arriving at this conclusion the courts took into consideration the fact that if the attorney general took the time allowed him for preparing the ballot title after the petition was required to be filed, only seven days would be left before the date of publication, during which time the secretary of state would have to mail out the copy for the printer, and it would have to be set up; the court stating that the fact that a

the provisions regulating the procedure in elections under the initiative and referendum are not mandatory, but that a substantial compliance is sufficient. As to what is a substantial compliance depends to a certain extent upon the facts of the individual case.<sup>170</sup>

The proclamation of the governor calling an election upon a referendum petition, duly issued and deposited in the office of the secretary of state, is sufficient without further publication, where the law makes no provision for further publication.<sup>170</sup>

By some constitutional provisions the secretary of state is required to print and distribute arguments for and against a proposed initiative measure. It is the duty of the designated officer to comply with this requirement.<sup>171</sup>

In the absence of a constitutional provision prohibiting it, the legislature may require the proponent of arguments for or against any proposed measure to bear the expense of the increased cost of paper for, and the printing and binding of, such argument, while at the same time requiring the state to pay the expense of publicity required for the measure itself,

and of distributing the pamphlet to the voters of the state.<sup>172</sup> The proponents of an initiated measure cannot evade such a statute by producing an argument under the guise of a preamble to the proposed measure.<sup>173</sup>

It is the doctrine of some courts that when a statute adopted by the people at a referendum election has been authenticated, promulgated, and published, the court will not consider whether or not it has received the necessary publicity, when the Constitution provides that any measure shall become law when approved by majority vote and proclaimed as such by the governor.<sup>174</sup> The doctrine of this case was held applicable, and the court refused to inquire as to the publicity of an initiative measure where no provision was made by statute for the preservation of any official record of the facts touching the sufficiency of the publication of initiative and referendum measures, and the Constitution provides that any measure initiated by the people or referred to the people, as herein provided, shall take effect and become a law if it is approved by a majority of the votes cast thereon.<sup>175</sup>

condition has been imposed by the legislature, which is, to say the least, difficult of literal performance, affords much reason for holding that it is merely directory, and not mandatory. The further fact is considered that the act of publication would involve not only the conduct of a public official, but that of many others concerned in the publication, who might not always act upon a strict sense of public duty. The further fact is considered that the legislature, in framing this provision, did not impose any requirement for the preservation of the evidences of the notice.

<sup>170</sup> Where barely more than half the required pamphlets containing the text of the measure sought to be referred, ballot title, and argument, are distributed, and it appears from the actual figures that more than 70,000 voters remained away from the polls, and 42,000 participating in the election failed to vote upon the question submitted, and that there were 33,000 less pamphlets distributed than there were voters participating in the election, there is no substantial compliance with a statutory provision that there must be a sufficient number of pamphlets printed and distributed to the various counties to supply each voter of the county, and an additional number equal to 10 per cent of such number of voters. *Ex parte Smith* (1916) — Okla. —, 154 Pac. 521.

It was further held in this case that the distribution of the pamphlets by the state board to the county election boards, commencing ten days before the election and continuing thereafter until the pamphlets

were distributed, and the distribution by the county election board to the various precinct officers at the time of furnishing election supplies, with no general distribution except such as was made on the day of the election, is not a substantial compliance with a statutory requirement that the secretary of the state election board shall, not later than forty days before the election, forward such pamphlets to the county election board, who shall in like manner immediately distribute them to the election inspectors for each election precinct, and that it shall be the duty of such inspectors, not later than five days prior to the election, to convoke a public meeting and distribute or cause to be distributed such pamphlets to the assembled voters, and use all other diligent means of distributing them to the voters of such election precinct. *Ibid.*

<sup>171</sup> *State ex rel. Hunt v. Hildebrand* (1915) 93 Ohio St. 1, 112 N. E. 138.

<sup>172</sup> *State ex rel. Chamberlain v. Howell* (1914) 80 Wash. 692, 142 Pac. 1.

<sup>173</sup> *State ex rel. Berry v. Superior Ct.* (1916) — Wash. —, 159 Pac. 92, *supra*.

<sup>174</sup> *Allen v. State*, 14 Ariz. 458, 44 L.R.A. (N.S.) 468, 130 Pac. 1114, referred to in earlier note.

<sup>175</sup> *Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595. Referring to the case of *Allen v. State* (Ariz.) *supra*, the court says that "unless there is a distinction to be drawn between initiative and referendum measures which we are unable to see, that decision seems directly in point so far as the principle here invoked is concerned"

**b. Elections.**

In the absence of a provision in the amendment reserving initiative and referendum powers, specifying the number of votes necessary to adopt an amendment to the Constitution initiated by the electors, an existing constitutional provision specifying the number with reference to constitutional amendments by the general assembly applies.<sup>176</sup>

A provision in the amendment reserving initiative and referendum powers, contained in the paragraph relating to the referendum, that "any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon, and not otherwise," does not apply to proposed amendments to the Constitution, initiated by the people.<sup>178</sup>

The phrase "votes cast at such election" in a constitutional provision that a measure initiated by the people or referred to them shall take effect and become a law if it is approved by a majority of the votes cast thereon, provided that the votes cast upon such question or measure shall equal one third of the total "votes cast at such election," and not otherwise, will be interpreted to mean the "number of voters voting at such election."<sup>177</sup>

When notice of elections is required to be in accordance with an ordinance, a notice provided in an ordinance which was not introduced at a regular

adjourned meeting is insufficient, since such an ordinance is void.<sup>179</sup>

The lack of money to defray the expense of an election, or provision therefor, is not a valid excuse for refusing to submit an ordinance proposed by initiative petition.<sup>179</sup>

The question whether or not an election upon a municipal ordinance providing for the construction of a railroad and the issuance of bonds to pay for the same is invalidated by an instruction to the judges and clerks of the election to permit resident taxpayers only to vote is not raised where there is nothing to indicate that any vote was refused by reason of the person offering to vote being a nontaxpayer.<sup>180</sup>

It has been held that there was no irregularity in the canvass of the result of a referendum election where the election boards met, as required by law, canvassed the returns of a primary election held upon the same day, and all the members thereof were present upon different dates during the progress of such canvass, and, while canvassing the returns of the primary, the returns upon the referendum were also canvassed as they came in, but, prior to the final result, one member of the board absented himself on private business, and thereafter the two remaining members continued to canvass and certified the result to the governor, no claim being made that the result as canvassed was incorrect.<sup>181</sup>

See note in 50 L.R.A.(N.S.) 225, for earlier cases on publication of proposed measure.

<sup>176</sup> *Hildreth v. Taylor* (1915) 117 Ark. 465, 175 S. W. 40. (The requirement being that a majority of the electors voting at such election adopt the amendment, it is not adopted where those voting for it are less than such majority, although they constitute a majority of the votes cast on the amendment.)

<sup>177</sup> *Gottstein v. Lister* (Wash.) *supra*. It was urged in this case that these words meant votes to be counted separately for or against each separate measure to be submitted and voted upon at the election, —a contention which was denied by the court.

As to what is meant by the "last general election" in a municipal charter requiring the referendum to be submitted at such election, see *Bakersfield & K. Electric R. Co. v. Hay* (1915) 29 Cal. App. 289, 155 Pac. 132, *supra*, XI. d, 1.

<sup>178</sup> *Reed v. Wing* (1914) 168 Cal. 706, 144 Pac. 964.

<sup>179</sup> *State ex rel. Foote v. Hutchinson* (1914) 93 Kan. 405, 144 Pac. 241. It was here urged in defense that the commission-

ers were controlled by the fact that there was no money in the city treasury which could be lawfully appropriated to the payment of the expense of the election; and further, that levies had already been made by the board of commissioners to the full extent and limit allowed by law, and that they were prohibited by law from issuing any warrants to pay any debt or expense for which no provision had been made when there was not sufficient money on hand to meet the payment. The court states that the holding of elections in a city is the exercise of a local governmental function, and the incurring of expense incident thereto is not the contracting of a debt within the meaning of the Constitution and statutes.

<sup>180</sup> *Pearce v. Roseburg* (1915) 77 Or. 195, 150 Pac. 855.

See note in 50 L.R.A.(N.S.) 225, for earlier cases dealing with elections.

See also *State ex rel. Hedges v. Andersen* (1915) 75 Or. 509, 147 Pac. 527, *supra*, subd. XI, a.

See *Eyre v. Doerr* (1915) 97 Neb. 562, 150 N. W. 625, *infra*, subd. XI. j.

<sup>181</sup> *Ex parte Smith* (1916) — Okla. —, 154 Pac. 521.

**4. Insertion of initiative and referendum enacting clause in legislative enactment.**

See note in 50 L.R.A.(N.S.) 226, for earlier cases on this question.

**5. Right of electors to have measure submitted.**

The commissioners of a city must submit to an election an ordinance, initiated by the electors, regular in form and sufficient to comply with the statutes, repealing an ordinance enacted by the commissioners, notwithstanding the failure, because not filed within the required time, of a petition previously filed, seeking to suspend the operation of the same ordinance, under the provisions of a statute that if, during a stated time after the enactment of an ordinance, a petition signed by at least 25 per cent of the votes cast for all candidates at the preceding general municipal election, protesting against the passage of such ordinance, be presented to the commissioners, the ordinance shall be suspended from going into operation, and, if not repealed by the commissioners, shall be submitted to a vote either at a general or special election.<sup>183</sup>

The right to have an ordinance submitted is not defeated by the fact that, at the time the case is heard in the court, should the council refuse to adopt the proposed ordinance, and resort to the alternative of submitting it forthwith to the electors, the result could not be known until after the time fixed in the ordinance for its going into effect. The

provision as to its taking effect would, in such case, be inoperative, and the time of taking effect would be fixed by general law.<sup>183</sup>

A proceeding to compel the submission to an election of an initiated ordinance accepting an offer to a municipality with reference to the construction of a city hall has not become a moot case, so that it will be dismissed upon the expiration of the time limited in the offer, where, prior to the expiration of the time limited, the limitation upon the life of the offer was extended.<sup>184</sup>

A clerk of a municipality cannot submit a proposed ordinance to the electors without submitting it to the mayor and council, in disregard of a statutory provision that, if the mayor and city council be convened before an ordinance proposed by initiative can be legally submitted to a direct vote of the voters, the clerk shall forthwith present such body a certified copy of the proposed ordinance and the demand for the submission of the same, on file in his office, and if the proposed ordinance is not made a law by the mayor and council within thirty days from the filing of the same with the clerk, the clerk shall then submit the same to the voters, according to the provisions of the article.<sup>185</sup>

**XII. Construction.**

See earlier cases in note in 50 L.R.A.(N.S.) 226.

A liberal construction will be given to laws enacted to facilitate the exercise of initiative and referendum powers.<sup>186</sup>

<sup>183</sup> State ex rel. Dawson v. Pratt (1914) 92 Kan. 247, 139 Pac. 1191. See Com. ex rel. Heinly v. Marks (1915) 248 Pa. 518, 94 Atl. 191, supra, subd. VIII. a.

<sup>184</sup> Minges v. Merced (1915) 27 Cal. App. 15, 148 Pac. 816.

<sup>185</sup> Hopping v. Richmond (1915) 170 Cal. 618, 150 Pac. 982.

<sup>186</sup> Eyre v. Doerr (1915) 97 Neb. 562, 150 N. W. 625.

<sup>187</sup> See State ex rel. Case v. Superior Ct. (1914) 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838, supra, note 16.

See State ex rel. Taylor v. Duncan (1916) — Mont. —, 155 Pac. 1111, supra, subd. V. a. W. A. E.

**KENTUCKY COURT OF APPEALS.**

SARAH ANN RICE, Appt.,

v.

JARVIS KLETTE et al.

(140 Ky. 787, 149 S. W. 1019.)

Will — devise to one and his children — interest conferred.

A joint estate in fee is conferred by a

clause of a will devising land to testator's son and his children, where life estates are created in the same will by appropriate words, and the bequest to them follows a life estate, and directs that the property be divided so that they will get the property "willed to them."

For other cases, see Wills, III. g, 2, in Dig. 1-52 N. S.

(October 10, 1912.)

**Note.** — For annotation of the question as to when a devise or bequest to one and his children will give the children an estate jointly or in common with the parent, or a L.R.A.1917B.

remainder upon a life estate in the parent, see annotation following this case, post, 49.

For annotation of the question as to when a conveyance to one and his children,

**A** PPEAL by defendant from a judgment of the Circuit Court for Kenton County in plaintiffs' favor in an action brought to determine their respective interests in a tract of land which was part of a tract owned by Asa G. Klette, deceased, and disposed of in the seventh clause of his will. Reversed.

The facts are stated in the opinion.

Mr. Robert C. Simmons, for appellant:

A devise to one and his children will be construed so that the parent named as devisee shall take a joint estate in fee simple with his children then born or thereafter to be born.

Turner v. Patterson, 5 Dana, 295; Cessna v. Cessna, 4 Bush, 516; Powell v. Powell, 5 Bush, 620, 96 Am. Dec. 372; Bell v. Kinneer, 101 Ky. 271, 72 Am. St. Rep. 410, 40 S. W. 686; Harkness v. Lisle, 132 Ky. 767, 117 S. W. 284.

Messrs. Stephens L. Blakely and John H. Klette for appellees.

Clay, C., filed the following opinion:

This appeal involves the construction of the seventh clause of the will of Asa G. Klette, who died several years ago, a resident of Kenton county, Kentucky. Some time after the death of Asa G. Klette, George D. Klette, his son, died leaving two children, Jarvis Klette and Fred Klette. By his will, which was duly probated in Kenton county, Kentucky, George D. Klette devised all of his estate to his sister, Sarah Ann Rice, giving as a reason therefor that she had cared for him during his last illness. This action was brought by plaintiffs, Jarvis Klette and Fred Klette, against defendant, Sarah Ann Rice, for the purpose of determining their respective interests in a tract of about 25 acres of land, which was formerly a part of the 50-acre tract of land owned by Asa G. Klette, and disposed of by the following provision of his will:

"7th. I also will and bequeath to my said son George D. Klette and to his children, at the death of my wife Sarah Klette, the one half of the 50 acres herein willed to her during her life, and it is my will that the said 50 acres at the death of my wife, be so divided that George D. Klette and his children will get the 25 acres herein willed to them and I further will and give to my said son George D. Klette in his own right one-third part of a lot which I now own in the town of South Covington, Kenton county, Kentucky. Said lot fronts on Bank

will give the children an estate jointly or in common with the parent, and when a remainder upon a life estate in the parent, see annotation to Cullens v. Cullens, post, 74.

L.R.A.1917B.

Lick turnpike road 100 feet and runs back 105 feet, his said third 33½ feet is to front on the pike and joins the lot herein willed to my son Lewis J. Klette. I further will to my said son George D. Klette and to his children fifty shares of my stock in the Independence & Colemansville Turnpike Company."

It is the contention of the plaintiffs that their father took only a life estate in the property in question, and upon his death a fee vested in them. Defendant contends that George D. Klette and his children, the plaintiffs, Jarvis Klette and Fred Klette, took a joint estate in fee simple. The chancellor held that George D. Klette took only a life estate in the property in question, and that defendant, therefore, as a devisee of George D. Klette, acquired no estate therein. Judgment was entered accordingly, and defendant appeals.

In the consideration of the question, we deem it necessary to set out the material parts of Asa G. Klette's will. After providing for the payment of his debts, in the first clause of the will, we have the following:

"2nd. I will and bequeath to my beloved wife, Sarah Klette, for and during her natural life, 16½ acres and 31 poles of land, being that portion of my home farm in Kenton county, Kentucky, and bounded and described as follows: [Here follows description.]

"3rd. I also give and bequeath to my said wife, Sarah Klette, for and during her natural life 50 acres of land in Kenton county, Kentucky, being a portion of my farm lying on the waters of De Coursey creek in said county, said 50 acres is bounded as follows: [Here follows description.]

"4th. I give and bequeath to my son, Lewis J. Klette and to his children the following described real estate lying in Kenton county, Kentucky, being a portion of my home farm and bounded thus: [Here follows description.]

"5th. I also will and bequeath to my said son, Lewis J. Klette, the one-third part of a lot of land which I now own in the town of South Covington, Kenton county, Kentucky. [Here follows description.] This part of my said lot my son can dispose of for his own use and benefit. I also give and devise to my said son, Lewis J. Klette, and his children fifty shares of the stock which I now own in the Independence & Colemansville Turnpike Company.

"6th. I will and devise to my son George D. Klette, and his children the following real estate in Kenton county, Kentucky, viz.: [Here follows description.]

"7th. [Clause in question.] I also will and bequeath to my said son, George D. Klette and to his children at the death of

my wife Sarah Klette, the one half of the 50 acres herein willed to her during her life, and it is my will that the said 50 acres, at the death of my wife, be so divided that George D. Klette and his children will get the 25 acres herein willed to them and I further will and give to my said son, George D. Klette in his own right one-third part of a lot which I now own in the town of South Covington, Kenton county, Kentucky. [Here follows description.] I further will to my said son, George D. Klette and to his children fifty shares of my stock in the Independence & Colemansville Turnpike Company.

"8th. I will and bequeath to my daughter, Sarah A. Rice and to her children the following described real estate: [Here follows description.] I further will and bequeath to my said daughter, Sarah A. Rice and to her children to take at the death of my wife, Sarah Klette, the one half of the 50 acres herein willed to her during her life, and it is my will that at the death of my said wife, said 50 acres be so divided that my said daughter, Sarah A. Rice and her children get the half joining the 28½ acres herein willed to them.

"9th. I will and bequeath to my son, Edward B. Klette 100 acres of the land of my farm of 160 acres in the county of Randolph and state of Indiana. I also will and bequeath to my said son, Edward B. Klette one-third part of a lot which I own in South Covington, Kenton county; and his said third of said lot is to front 33½ feet on the pike and to join the lot herein willed to my son George D. Klette. I further will to my said son, Edward B. Klette fifty shares of my stock in the Independence & Colemansville Turnpike Company, and it is further my will that in the event that my said son, Edward B. Klette should die without issue or without lineal descendants and still owning said estate that all of the estate herein willed or bequeathed to him, shall go to, and be equally divided between, his two brothers and sister, Sarah A. Rice, and should either of his said brothers or sister be dead, then their children of such of them as may be dead shall take their father's or mother's part.

"10th. I will and bequeath to my daughter, Mary E. Durr for her life and after her death to her heirs, a house and lot in California, in Kenton county, Kentucky. [Here follows description.] I also will and devise to my said daughter, Mary E. Durr, for her life and at her death to her children a certain tract of land in Kenton county, Kentucky, containing 37 acres adjoining the said California lot. [Here follows description.] And I further will and bequeath to my said daughter, Mary E.

Durr the \$700 which is due and owing to me from the estate of her former husband Ezra F. Armstrong, deceased.

"11th. I will and bequeath to my daughter, Udora Klette all of a certain tract or parcel of land in Kenton county, Kentucky, for her life, viz.: [Here follows description.] And it is my will that at the death of my said daughter, Udora Klette, said land shall go to and vest in the heirs of her body and if none such, then said lands to be sold and the proceeds divided according to law and it is my further will that at the death of my wife, the 16 acres and ½ and 31 poles of my home farm given to my wife, shall go and vest in my said daughter Udora Klette in the same way and at her death to be disposed of in the same manner as the other tract herein given to her is to go.

"12th. I will and direct that my executor hereinafter named shall sell the tract of about 17 acres which I now own on De Coursey creek and also sell the two lots I own in Independence and also to sell the 64 acres of my land in Randolph county, Indiana, not herein disposed of, and give to my wife, Sarah Klette, one third of the proceeds of said sales and the other two thirds to be equally divided among all of my children. It is my will and I hereby give to my son, Edward B. Klette, the right to designate off of what part of the Indiana land, the said 64 acres shall be sold.

"13th. It is my will that after all of the legacies are taken as herein set out and given, that the surplus of my estate if any shall go one third to my wife and the remainder be equally divided among all of my children living and if any be dead then their part to their children if any."

It will be observed that by the seventh clause of the will in question the property involved in this controversy is bequeathed "to my said son, George D. Klette and to his children." This language brings the case within the rule laid down in one of three lines of cases. One class of cases is to the effect that the parent takes a joint estate in fee simple with his children then born or thereafter to be born. *Turner v. Patterson*, 5 Dana, 295; *Cessna v. Cessna*, 4 Bush, 516; *Powell v. Powell*, 5 Bush, 620, 96 Am. Dec. 372; *Bell v. Kinneer*, 101 Ky. 271, 72 Am. St. Rep. 410, 40 S. W. 686. Another class of cases is to the effect that the parent takes merely a life estate, with remainder to his children. *Fletcher v. Tyler*, 92 Ky. 145, 36 Am. St. Rep. 584, 17 S. W. 282; *Smith v. Upton*, 12 Ky. L. Rep. 28, 18 S. W. 721; *Davis v. Hardin*, 80 Ky. 672. The other class of cases is where the word "children" is used in the sense of heirs. This construction is adopted



only in those cases where, upon a consideration of the whole will, it is evident that the words were used as words of limitation, and not of purchase. *Childers v. Logan*, 23 Ky. L. Rep. 1239, 65 S. W. 124; *Moran v. Dillehay*, 8 Bush, 434; *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75; *Lachland v. Downing*, 11 B. Mon. 32; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330. As there is nothing in the language of the will to indicate that the word "children" is used in the sense of heirs, but, on the contrary, the testator plainly indicates what part of his devised estate is given to George D. Klette absolutely, or in his own right, it follows that the estate devised to George D. Klette and his children comes within the first or second class of cases above referred to.

Under the more recent decisions of this court, where there is nothing in a deed or will to show a contrary purpose, the rule is to hold an estate deeded or devised to a man and his children, or to a woman and her children, as a life estate to the first taker, with remainder to the children. *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129; *Brumley v. Brumley*, 28 Ky. L. Rep. 231, 89 S. W. 182. The reason given for this rule of construction is that, if a joint estate is given, the quantity or interest each takes will remain uncertain, and shift upon the birth of each after-born child; and that a testator's intention can be best carried out by giving to the son or daughter a life estate, with remainder to his or her children, thus keeping the estate intact for the benefit of them all. With these principles in view, let us examine the will in question, and to this end consider the entire will, including the other devises.

By the first clause he devises to his wife certain land "for and during her natural life." By the second clause he devises other land to her "for and during her natural life." By the third clause he devises certain other lands to his wife "for and during her natural life." By the fourth clause he devises certain land to Lewis J. Klette and his children. By the fifth clause he devises a certain lot of land to Lewis J. Klette, with the right to dispose of it for his own use and benefit. By the same clause he gives to Lewis J. Klette and his children 50 shares of stock. By the sixth clause he devises to George D. Klette and his children certain real estate. By the seventh clause, the one in question, he devises to George D. Klette and his children one-half of the 50 acres willed to his wife during her life. He further directs that at the death of his wife the land be so divided that George D. Klette and his children will get the 25 acres therein willed to L.R.A.1917B.

them. He further gives to George D. Klette in his own right one third of a certain lot. He also gives to him and to his children 50 shares of stock. In the eighth clause he devises to Sarah A. Rice and her children certain real estate. By the ninth clause he gives to Edward B. Klette certain property, with the provision that, should he die without issue or lineal descendants while still owning said estate, it shall be divided between his two brothers and his sister, etc. In the tenth clause he devises to Mary E. Durr for her life, and after her death to her heirs, certain real estate. Another tract of land in the same clause is devised to Mary E. Durr for her life, and at her death to her children. By the eleventh clause he devises certain property to Udora Klette, with the further provision that at her death it shall vest in the heirs of her body, and if none such, the land shall be sold and the proceeds divided according to law. By the twelfth clause he gives one third of the proceeds of certain lands to his wife absolutely, and directs that the other two thirds be equally divided among all his children. By the thirteenth clause he directs the residue of his estate to be divided, one third to his wife, the remainder equally among all of his children.

It will be observed that in four different instances the testator devises certain property to his wife and daughters for life. He gives to his son Edward a defeasible fee. He also gives to Edward and George certain property absolutely. By the eleventh and twelfth clauses he gives to his wife and all of his children certain property absolutely. It is rare that you see in one will as many different kinds of estates devised. When the testator wanted to give a life estate, he knew exactly what language to employ for that purpose; when he wanted to create a fee, he had no difficulty in selecting appropriate terms; and when he wanted to create a defeasible fee, the language employed is apt and precise. If the testator had not used in the will the precise terms necessary to create the character of estate which he intended to devise, it might be said that some uncertainty existed in the clause under consideration, and it should therefore be construed as intending to bestow a life estate upon George D. Klette. But when the testator, in at least four different paragraphs in the same will, had used just the precise words necessary to create a life estate, it can hardly be said that he abandoned the words, whose meaning he plainly understood, although intending to give a similar estate. It does not appear that he used the proper terms by mere inadvertence. The property in question is a part of the same property which he devised to his wife

for and during her life, and it is hardly probable that he would have abandoned the words necessary to create a life estate if he intended, upon the expiration of the first life estate, to create a second life estate, with remainder over, in the same property. This conclusion is strengthened by the devise to Udora Klette of 16½ acres, devised by clause 2 to his wife for life. In that instance he used language plainly creating a life estate in his daughter. Naturally, if he had contemplated giving George D. Klette a mere life estate at the termination of the widow's interest, he would have used language as plainly implying his purpose as that used in disposing of the remainder in the other property devised to his wife for life. Furthermore, the clause

in question provides that the 50-acre tract shall be so divided that George D. Klette and his children will get the 25 acres "herein willed to them." This division is to take place at the death of Sarah Klette. The language clearly indicates that the testator intended that George D. Klette and his children should have equal rights in the property in question upon the death of Sarah Klette. We therefore conclude that George D. Klette and his children took a joint estate in fee simple, and Sarah Ann Rice, devisee of George D. Klette, acquired by his will a one-third interest in the property in question.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

**Annotation—Devise or bequest to one and his children as giving the children an estate jointly or in common with the parent, or a remainder upon a life estate in the parent.**

**I. Scope, 49.**

**II. Presumptive meaning of testamentary gift to one and his children, 50.**

**III. Indicia tending to support or vary the presumption that parents and children take concurrently, 60.**

**IV. Indicia which vary the presumption arising where there are no children, that the children take in succession, 73.**

**I. Scope.**

This note is addressed to the inquiry as to when, where there is a devise or bequest to one and his or her children (or in terms construed as an equivalent), either directly, as in the phrase just used, or indirectly, as where the gift is in trust for one and his children, or to one for his own benefit and that of his children, the parent and children take concurrently, i. e., as joint tenants or tenants in common, and when they take in succession, i. e., the parent taking as tenant for life and the children as remaindermen. It includes cases in which, while the word "children" was not used, the term actually used ("heirs," "issue," etc.) was held to denote children. Cases in which the children were named instead of simply being described as "children," and in which the question was whether they took in succession to or concurrently with their parent, have also been included.

Its scope does not extend to the question whether, where the children take concurrently with the parent, the par-

ent takes one moiety and the children the other, or whether they share per capita.<sup>1</sup> Nor does it include the question whether or not, under a devise or bequest to "the children of" a certain person (the parent not being included as a beneficiary of the gift), the gift vests in those in being at the time of testator's death, to the exclusion of those born thereafter.<sup>2</sup>

The question with which this note is concerned does not arise until it has been ascertained that the reference to children in the will is not to be taken as merely indicative of the motive for the gift,<sup>3</sup> and that the word "children" is used as a word of purchase, and not

<sup>1</sup> Among the cases passing upon this question are: *Lord v. Moore* (1849) 20 Conn. 122; *Davis v. Sanders* (1905) 123 Ga. 177, 51 S. E. 298; *Proctor v. Smith* (1871) 8 Bush (Ky.) 81; *Seabury v. Brewer* (1869) 53 Barb. (N. Y.) 662. Ordinarily, they share per capita.

<sup>2</sup> For an instance of this sort, see *Wood v. McGuire* (1854) 15 Ga. 202.

<sup>3</sup> In *McCroan v. Pope* (1850) 17 Ala. 612, where property was devised to a husband in trust to pay over to his wife annually "the net proceeds of the said estate real and personal for the sole and separate use and maintenance of her the said Mary and her children free from the control of her said husband the said George S. Morris during her natural life," it was held that the words "for the sole and separate use and maintenance of her . . . and her children" only showed the reason or motive of the testator in making the bequest, and did not reduce the share or interest of the wife to an equal share or proportion with all her children.

of limitation. As to when it will be construed as a word of limitation rather than of purchase, see note to *Strawbridge v. Strawbridge*, 4 L.R.A.(N.S.) 948, on Conveyance of fee by devise to one and his or her child or children; the note to *Wills v. Foltz*, 12 L.R.A.(N.S.) 283, on "'Children' as a word of purchase or limitation;" and note in 29 L.R.A.(N.S.) 963, on the Rule in *Shelley's Case*, at page 1123.

## II. Presumptive meaning of testamentary gift to one and his children.

As in every question of testamentary construction, the present inquiry resolves itself into two parts: first, what is the *prima facie* or presumptive mean-

ing of the phrase to be construed, and second, what other expressions or circumstances tend to support or vary that meaning.

Usually the courts will be found in agreement as to what may be taken as the *prima facie* meaning of any given phrase; but such is not the case here.

The more generally prevalent view, which is based upon one of the resolutions in *Wild's Case*,<sup>4</sup> is that where there is a bequest or devise to one and his or her children, and there are children in existence, it will be presumed, in the absence of any contrary indication in the context,<sup>5</sup> that the parent and children were intended to take concurrently.<sup>6</sup> This has been said to be the

<sup>4</sup>In *Wild's Case* (1599) 6 Coke, 16. b, 77 Eng. Reprint, 277. "this difference was resolved for good law, that if A devises his lands to B and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore there such words shall be taken as words of limitation, scil. as much as children or issues of his body; for every child or issue ought to be of the body, . . . but if a man devise land to A and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have put but a joint estate for life."

<sup>5</sup>In *Byng v. Byng* (1862) 10 H. L. Cas. 178, 11 Eng. Reprint, 991, it was said by Lord Cranworth: "It must be taken as established by the rule of construction laid down in *Wild's Case* that where there is a devise of land to a man and his children, and he has at the time of the devise no child, then *prima facie* the word 'children' shall be taken to be a word of limitation and the first taker shall have an estate tail; but, on the other hand, if the first taker has children at the time of the devise, then the will shall *prima facie* be construed as giving a joint estate to the first taker and the children as purchasers. I have qualified the rule as stated by Lord Coke by introducing the words '*prima facie*,' because he certainly did not mean to state the rule as one which must take effect where a contrary intention was apparent: and it is clear that in acting on the rule in both its branches the courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator as collected from other passages in the will."

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<sup>6</sup>See *Cook v. Cook* (1706) 2 Vern. 545, 23 Eng. Reprint, 952; *Buffar v. Bradford* (1741) 2 Atk. 220, 26 Eng. Reprint, 537; *Oates ex dem. Hatterly v. Jackson* (1742) 2 Strange. 1172, 93 Eng. Reprint, 1107; *Crone v. Odell* (1811) 1 Ball & B. 449 (obiter); *Paine v. Wagner* (1841) 12 Sim. 184, 59 Eng. Reprint, 1102; *Gordon v. Whieldon* (1898) 11 Beav. 170, 50 Eng. Reprint, 782, 18 L. J. Ch. N. S. 5, 12 Jur. 988; *Mason v. Clarke* (1853) 17 Beav. 126, 51 Eng. Reprint, 980, 22 L. J. Ch. N. S. 956, 17 Jur. 479, 1 Week. Rep. 297; *Webb v. Byng* (1856) 2 Kay & J. 669, 69 Eng. Reprint, 951, 4 Week. Rep. 657; *Byng v. Byng* (1862) 10 H. L. Cas. 171, 177, 11 Eng. Reprint, 991, 31 L. J. Ch. N. S. 470, 7 Jur. N. S. 1135, 7 L. T. N. S. 1, 10 Week. Rep. 633; *Clifford v. Koe* (1880) L. R. 5 App. Cas. (Eng.) 447, 43 L. T. N. S. 322, 28 Week. Rep. 633 (obiter); *Re Wilmot* (1879) 76 L. T. N. S. (Eng.) 415, 45 Week. Rep. 492; *Nimmo v. Stewart* (1852) 21 Ala. 682; *Furlow v. Merrell* (1853) 23 Ala. 716; *Vanzant v. Morris* (1854) 25 Ala. 286; *Dryer v. Crawford* (1890) 90 Ala. 131, 7 So. 445 (obiter); *Moore v. Ennis* (1913) — Del. —, 87 Atl. 1009; *McCord v. Whitehead* (1896) 98 Ga. 381, 25 S. E. 767; *Holt v. Bowman* (1864) 33 Ga. Supp. 129, 133; *Biggs v. McCarty* (1882) 86 Ind. 352, 44 Am. Rep. 320; *Moore v. Gary* (1897) 149 Ind. 51, 48 N. E. 630; *Noble v. Teeple* (1897) 58 Kan. 398, 49 Pac. 598; *Gill v. Logan* (1850) 11 B. Mon. (Ky.) 231; *Allen v. Hoygh* (1842) 5 Met. (Mass.) 324; *Jones v. Jones* (1861) 13 N. J. Eq. 236 (obiter); *Noe v. Miller* (1879) 31 N. J. Eq. 234; *Gordon v. Jackson* (1899) 58 N. J. Eq. 166, 43 Atl. 98; *Kyte v. Kyte* (1907) 73 N. J. Eq. 220, 67 Atl. 933; *Hannan v. Osborn* (1834) 4 Paige (N. Y.) 341; *Armstrong v. Moran* (1850) 1 Bradf. (N. Y.) 314; *Moore v. Leach* (1857) 50 N. C. (5 Jones, L.) 88; *Coakley v. Daniel* (1858) 57 N. C. (4 Jones, Eq.) 89 (obiter); *Prudren v. Paxton* (1878) 79 N. C. 446, 28 Am. Rep. 333; *Hunt v. Satterwhite* (1881) 85 N. C. 73; *Hampton v. Wheeler* (1888) 90 N. C. 222, 6 S. E. 236; *Silliman v. Whitaker* (1896) 119 N. C. 89, 25 S. E. 742; *Nou-*

natural and ordinary meaning of the words;<sup>7</sup> and it has been remarked that where one means to give the whole to any person for life, and after the death of that person the thing to be divided among his children, it is so natural to say so that where it is not so said the argument is strong that it was not so intended.<sup>8</sup>

The rule, of course, has no application where the gift or devise to the children would, without reference to the rule, be a gift in succession to, and not concurrently with, their parents.<sup>9</sup>

The point of time at which it is to be inquired whether children are in existence is the testator's death, although Wild's Case fixes this point of time at

the date of the will.<sup>10</sup> It has, however, been held sufficient to warrant the application of the rule, that there was a known pregnancy at the time the will was made.<sup>11</sup>

Where the devise is to several persons "and their children," and only one of them has children at the time the will takes effect, all will nevertheless take estates jointly with their children, the estates of those then childless opening to vest shares in their children upon birth.<sup>12</sup>

It will also be presumed that existing children are to take, to the exclusion of those born thereafter;<sup>13</sup> but where it appears that after-born children were meant to take, the estate will open to

shand v. Rodetsky (1898) 5 Ohio N. P. 256; Johnson v. Johnson (1842) McMull. Eq. (S. C.) 347 (obiter); Coogler v. Crosby (1911) 89 S. C. 508, 72 S. E. 149; Gannaway v. Tarpley (1860) 1 Coldw. (Tenn.) 572; Bunch v. Hardy (1879) 3 Lea (Tenn.) 543 (obiter); Cannon v. Apperson (1885) 14 Lea (Tenn.) 553; Merryman v. Merryman (1817) 5 Munf. (Va.) 440 (obiter); Vaughan v. Vaughan (1899) 97 Va. 322, 33 S. E. 603 (obiter); Fitzpatrick v. Fitzpatrick (1902) 100 Va. 552, 93 Am. St. Rep. 976, 42 S. E. 306; Martin v. Martin (1903) 52 W. Va. 381, 44 S. E. 198 (obiter); Bentley v. Ash (1906) 59 W. Va. 641, 53 S. E. 636.

The court will give the parent a life interest only where there is something to be found in the will indicating an intention that the parent and children shall not take jointly. Rose v. Edsall (1872) 19 Grant, Ch. (U. C.) 544.

<sup>7</sup> In Sutton v. Torre (1842) 6 Jur. (Eng.) 234, it was said by Wigram, V. C.: "If there be a bequest of personality to a number of persons by name, as to A, B, and C, no doubt they take as joint tenants. So, if there be a bequest to a class, as to children or grandchildren, they take as joint tenants. Or, if, instead of being a simple bequest to a class, a stranger be added, still the legatees take as joint tenants. The question is whether, if one of the class of legatees happens to be a parent, the case is the same? I am of opinion that, upon principle, it is; and the cases seem to warrant the conclusion that it should be the same."

In Moushand v. Rodetsky (1898) 5 Ohio N. P. 256, it is said that when a grant or devise is to A and his or her children, there is no way of torturing the language into meaning that A only takes a life estate, that not being its natural and ordinary signification.

In Moore v. Ennis (1913). — Del. —, 87 Atl. 1009, it is said, with reference to the rule in Wild's Case, that "this is the natural meaning of the words. The gift is to the son as well as to his children; to the children as well as to the son; to all

alike. A gift to several persons is a gift to them jointly, and there is no reason to have a different rule where the gift is to a man and his children. To change this primary meaning one must go outside the words, and, in place of the natural and legal import of the words, grope by surmise for some other meaning. For more than three centuries that has been an established rule of law as to real estate. Should another meaning be given to the words because the subject matter of the gift is personal and not real property? No case so holds, and no reason has ever been suggested why there should be a different rule applicable to the two kinds of property."

<sup>8</sup> Graham v. Flower (1826) 13 Serg. & R. (Pa.) 439.

<sup>9</sup> Re Jones [1910] 1 Ch. (Eng.) 167, 79 L. J. Ch. N. S. 34, 101 L. T. N. S. 549.

<sup>10</sup> Wills v. Foltz (1907) 61 W. Va. 262, 12 L.R.A.(N.S.) 283, 56 S. E. 473; Nimmo v. Stewart (1852) 21 Ala. 682 (obiter).

In 2 Minor, Inst. 3d ed. 84, it is said that what is meant by the time of the devise is not quite settled. "It seems, however, to be the better doctrine that we are to understand by it not the date of the devise, but the period when it is to take effect, whether that be the death of the testator or a time subsequent to that."

<sup>11</sup> In Mason v. Clarke (1853) 17 Beav. 126, 51 Eng. Reprint, 980, 22 L. J. Ch. N. S. 956, 17 Jur. 479, 1 Week. Rep. 297, it was held that, under a bequest to testator's daughter "and her children lawfully begotten," the daughter being then pregnant of a child who was afterwards born alive, but who died in the testator's lifetime, the intention was to give the daughter the property bequeathed jointly with her children, rather than a life interest therein, with remainder over to her children.

<sup>12</sup> Wills v. Foltz (1907) 61 W. Va. 262, 12 L.R.A.(N.S.) 283, 56 S. E. 473 (obiter).

<sup>13</sup> Where the devise is in terms immediate, and so intended by the testator, and the description of the persons to take is general, there none that do not fall within the description at the time of the tes-

admit them,<sup>14</sup> and it is no objection that by this means the several estates may commence at different times.<sup>15</sup>

tator's death can take; therefore the after-born must be excluded. *Crone v. Odell* (1811) 1 Ball & B. Ir. 449.

See also *Alcock v. Ellen* (1692) Freem. Ch. 185, 22 Eng. Reprint, 1150, in footnote 66, *infra*.

<sup>14</sup> Under a devise to one and her children, the gift takes effect immediately, subject to be reopened upon the birth of future children. *Jackson v. Coggin* (1859) 29 Ga. 403.

In *Annable v. Patch* (1825) 3 Pick. (Mass.) 360, it was held that under a devise of "all the remainder of my estate both real and personal to my daughter, Sarah Annable and the children born of her body, including all my wife has the improvement of during her life after her decease," the daughter and her children living at the time of testator's decease took an estate as tenants in common, subject to open to let in after-born children. The court said: "As to the question whether the children born after the will was made can come in for their shares, we think that they may. 'The children of her body' meant all the children she might have. This will not appear to be a strained construction of the words when it is observed that as to part of the property the devise was prospective, it being of a remainder after a life estate to the widow. If the deviser had intended to limit his bounty to the children living when he made his will, he would have named them, or used words to show that he meant so to limit it. We are therefore of opinion that it was the intention of the testator that all the children should take under the will in equal shares with the mother. This intention may be carried into effect according to the rules of law. As to that part of the will in which a life estate was given to the widow, Sarah and the four children living at the decease of the testator took a vested remainder, which remainder may open to let in the after-born children, according to the case of *Dingley v. Dingley* (1809) 5 Mass. 535. As to the residue of the estate, it vested in Sarah and her four children on the death of the testator. But it was a qualified fee, and so limited as to admit the claims of the after-born children, and they may hold by way of executory devise. *Fearne, Contingent Remainders*, 6th ed. 399."

In *Martin v. Martin* (1903) 52 W. Va. 381, 44 S. E. 198, it is said the estate will open and let in after-born children.

In *Bently v. Ash* (1906) 59 W. Va. 641, 53 S. E. 636, where testator devised his real estate share and share alike to his seven children, and, with reference to the share of one of them, provided: "But the share I will and bequeath to my daughter Emmazetta Bently, late Emmazetta Knight, it is my express will and desire, and I hereby give the same to her and her child or

Instances in which the rule has been applied,<sup>16</sup> or in which it has been expressly held that there was nothing in

children to be held by them free from the claim or claims of control of her said husband, and the same shall be held and enjoyed—the said Emmazetta Bently and her child or children as her or their separate estate, and that the said Bently shall not have or exercise any control over the same directly or indirectly in any manner whatever," and the daughter had at the date of the will but one child, some five months of age, it was held that as it was clearly testator's intention in using the phrase "child or children" to benefit after-born children, Emmazetta and all her children should receive equal parts or undivided interests in the land devised.

For a further instance in which after-born children were let in, see *Lynn v. Hall* (1897) 101 Ky. 738, 72 Am. St. Rep. 996, 43 S. W. 402.

<sup>15</sup> *Oates ex dem. Hatterley v. Jackson* (1742) 2 Strange, 1172, 93 Eng. Reprint, 1107.

<sup>16</sup> In *Lenden v. Blackmore* (1840) 10 Sim. 626, 59 Eng. Reprint 759, where testatrix bequeathed the residue of her personal estate to certain persons and the survivor of them for life," after both their deaths to be equally divided between Sybilla Lenden and Mary Seyer, daughters of my sister, Elizabeth Seyer, and Elizabeth Blackmore, daughter of my sister, Susannah May, and her children," it was held that Mrs. Blackmore did not take a life estate with remainder to her children, but that she and her children living at the time of distribution took as tenants in common.

In *Paine v. Wagner* (1841) 12 Sim. 184, 59 Eng. Reprint 1102, where a testator made the following provision: "I recommend the house and premises may be disposed of as soon as possible and after paying all just debts may be equally divided share and share alike . . . Mrs. Mitchell. Mr. and Mrs. Wagner and children likewise Anna Harby," it was held that the natural construction of the words was that all the parties who were either named or described should take as between themselves as tenants in common.

In *Beales v. Crisford* (1843) 13 Sim. 592, 60 Eng. Reprint 230, where a testatrix used the following expression: "Observing that Francis Beales and his family are my residuary legatees for all but cash or monies so called," the vice chancellor said that when the testatrix observed that Francis Beales and his family were her residuary legatees, she evidently spoke of more persons than Francis Beales; that it was plain from the next passage that she was speaking of persons who were living at the date of her will; and as it appeared that Francis Beales had nine children who were living at that time, there was sufficient to authorize the court to hold that by "Francis Beales and his family" the testator

meant Francis Beales and his children who were living at the time when she made her will.

In *Wilson v. Maddison* (1843) 2 Younge & C. Ch. Cas. 372, 63 Eng. Reprint, 164, 12 L. J. Ch. N. S. 420, a bequest of an annuity "to Anne Wilson together with her little girl, Louisa and two little boys Frederick and Octavius, my adopted children, and for their joint maintenance" was held to be a bequest of the annuity to the persons named for their joint lives and the life of the survivor.

In *Re Wilmot* (1897) 76 L. T. N. S. (Eng.) 415, where testator, after creating certain interests in his property, provided that upon their termination the property should go "to my ward, Mademoiselle Ellen Ellendil, now residing with me, and to any lawful issue she may have, such issue taking a vested interest in my said property upon attaining the age of twenty-one years," it was held that there was nothing in the case to take it out of the ordinary rule that under a gift of personalty to A and his children, the parent and children take prima facie concurrently as joint tenants.

In *Shaw v. Thomas* (1872) 19 Grant, Ch. (U. C.) 489, where testator devised his estate upon trust, inter alia, to "manage the said premises so given, granted, demised and conveyed to the said executors in whatever manner they consider most advantageous for my wife and my issue, who I will and declare to be entitled to receive the benefit of any and every portion of the aforesaid lands, goods," etc., it was held that the widow and children were intended to take equally and concurrently.

In *Rose v. Edsall* (1872) 19 Grant, Ch. (U. C.) 544, where testator willed to his wife, "for the benefit of herself and children jointly," two policies of life insurance, "to have and to hold for their joint and mutual benefit and to be by her spent in the most judicious and beneficial manner for all," it was held that the widow and children took concurrently and equally.

In *Donald v. Donald* (1884) 7 Ont. Rep. 669, where testator provided: "I give, devise and bequeath to my said executor and executrix all my real and personal property of every kind whatsoever for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my said children and my wife while she remains my widow," it was held that the widow did not take an immediate estate in the whole, with reversion to her children, but that she and the children took jointly, she during widowhood and they share and share alike absolutely.

A bequest to a married woman and her children born and thereafter to be born gives them a joint interest, which by the statute is turned into a tenancy in com-  
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mon. *Duan v. Bank of Mobile* (1841) 2 Ala. 152.

In *Banks v. Jones* (1874) 50 Ala. 484, where a testator directed his executors to lay aside \$400 annually for ten years, to be managed by them for the sole and special use and benefit of "Sarah A. Sherrod and her children," it was held that the bequest vested on the death of the testator in Mrs. Sherrod and her two children then living.

In *Re Utz* (1872) 43 Cal. 200, a devise to "Margaret Utz and to her children" was held to give the devisees what at common law would have been a joint estate, but which, under the statute (Acts 1855, 171), was an estate in common.

In *Hoyle v. Jones* (1866) 35 Ga. 40, 89 Am. Dec. 273, a devise of a negro to testator's daughter "and to the children of her body" was held to give the daughter and her children a joint estate.

In *Edwards v. Worley* (1883) 70 Ga. 667, where testator bequeathed the whole of his estate to his five children, except his daughter Sarah, as to whom he provided: "My will is that my son John Rich take charge of all the property falling to Sarah A. E. Edwards and manage the same for the benefit of her and her children; and if he should die before she does or before a settlement with the children, that in that case the court of ordinary appoint a successor to settle the same," it was held that the only estate which the children of Mrs. Edwards could take in the property under the will of their grandfather would be as tenants in common with their mother.

In *New England Mortg. Secur. Co. v. Gordon* (1895) 95 Ga. 781, 22 S. E. 706, where by her will a testatrix devised to her daughters, one of whom had children then in life, certain described property, and also declared that "the property willed to my daughters is to be kept for theirs and their children's own use and benefit, free from the debts and control of any husband or person whatever," it was held that the legal effect of these provisions was to vest in the daughter who then had children, and her children, an estate in common, at least as to the use.

In *Whitfield v. Means* (1913) 140 Ga. 430, 78 S. E. 1067, a devise to a daughter of certain property, "to have said lot of land No. — to her and her children, and to the exclusion of all other persons whatever, said lot of land in fee, to her and her child and children all rights thereto appertaining," was held to vest title in the daughter and such of her children as were living at the date of the will and at the death of the testator, as tenants in common.

In *Lynn v. Hall* (1897) 101 Ky. 738, 72 Am. St. Rep. 439, 43 S. W. 402, it was held that under a will by which testator gave "to my daughter-in-law, Polly Jane Lynn and her children," certain property "in consideration of the love and affection and in consideration of her kindness to me here-

the context to preclude its application,<sup>17</sup> may be found in the subjoined footnotes. Just what indications in the context tend to support or vary the *prima facie* meaning of the phrase is considered in subdiv. III. post.

tofore," it was held that the daughter-in-law and her children, as well those born after the death of the testator as those born before, took the land jointly.

In *Allen v. Claybrook* (1874) 58 Mo. 124, where a will directed that the executor should secure the one half of the residuary estate "by trust or otherwise for the benefit of my niece, Mrs. Jane Allen . . . and her children," and the fund was afterward invested by the trustee in certain lands which were conveyed by him to "said Jane Allen and her children to their own proper use, benefit and behoof forever," it was held that Jane Allen and her children took an estate in common in the property.

In *Kyte v. Kyte* (1907) 73 N. J. Eq. 220, 67 Atl. 933, it was held that the plain effect of the words used in a will by which testator devised to his wife "for herself and her children any and all real estate that I may die seised of" was to vest a concurrent interest in the wife and her children.

In *Gordon v. Jackson* (1899) 58 N. J. Eq. 166, 43 Atl. 98, where a testatrix bequeathed the remainder of her estate "to my first husband's stepmother and her children. Her name is Mrs. Rebecca Hand," the court said that if the case had been one of first impression, he should have held that Rebecca Hand took a life interest, with remainder in her children; but that the rule of construction, settled by the overwhelming weight of judicial sentiment, is that a devise or gift in this shape, without more, gives a concurrent estate to the parent and children.

In *Davis v. Cain* (1840) 36 N. C. (1 Ired. Eq.) 304, where testator bequeathed a sum of money "in trust for the separate and sole use of my daughter Ann Davis and her children," and similarly bequeathed to her a share in his residuary estate, it was held that, as none of the legatees were to wait on or for any particular event, but all took their undivided shares of the trust fund immediately on the death of the testator, the children should be deemed to take an immediate equal interest with their mother in the legacy so bequeathed.

The rule was applied in *Hunt v. Satterwhite* (1881) 85 N. C. 73, to a devise of lands "in trust to John W. Kelly for the benefit of my daughter, Martha E. Satterwhite and her children."

The rule was applied in *Hampton v. Wheeler* (1888) 99 N. C. 222, 6 S. E. 236, to a devise of certain realty "to be the property of Alfred Hampton and his wife Jureda Reich and their children."

In *Smith v. Smith* (1901) 108 Tenn. 21, 64 S. W. 483, where testator, who had given his wife a life estate in all his realty, went L.R.A.1917B.

Opposed to the rule of construction above discussed are the cases in which, as in *RICE v. KLETTE*, ante, 45, the broad statement is made that where there is nothing to show a contrary purpose, a devise to a man and his children, or to

on to provide: "After the death of my wife . . . I will and bequeath to my son Samuel F. Smith and his heirs equal shares in my home farm," it was held (the word "his heirs" being construed as meaning "children") that his son and the son's children, born during the continuance of the widow's life estate, were entitled to equal shares in the property.

In *Wills v. Foltz* (1907) 61 W. Va. 262, 12 L.R.A.(N.S.) 283, 56 S. E. 473, a devise to three daughters named "and their children," the daughters having children at the date of testator's death, was held to confer upon the daughters and their children a joint estate in equal portions, and not to vest a fee in the daughters alone.

<sup>17</sup> In *Sutton v. Torre* (1842) 6 Jur. (Eng.) 234, where a testator directed the residue of his personal property to be divided into three parts, one of which he gave to his daughter "and her younger children," it was held that there was nothing in the will to take it out of the operation of the rule that the parent and children shall be deemed to take as joint tenants.

In *Moore v. Leach* (1857) 50 N. C. (5 Jones, L.) 88, it was held that there was nothing in a will by which testator devised to his daughter "and her children the lawful heirs of her body" certain described property "to her the said Eliza Ann Leach and her children forever" to prevent the application of the rule, but that, on the contrary, it was manifest from the will that the testator intended that his daughter and her children should take together the house and lots and other land which he devised to them.

In *Lewis v. Stancil* (1911) 154 N. C. 326, 70 S. E. 621, where testator devised to his grandson certain lands "to him and his children born in wedlock forever," it was held that there was nothing to take the case out of the operation of the rule by which the grandson and his children living at the death of the testator took the land in fee as tenants in common; and, further, that in view of the use of the word "forever," there could be no room to contend that the grandson took a life estate.

In *Graham v. Flower* (1826) 13 Serg. & R. (Pa.) 439, where testator gave and devised his residuary estate unto his nephew, naming him, and his nieces, naming them, "and the children of my said nieces, their heirs and assigns in severalty; in the following proportions, viz.: two sixths thereof, the whole into six equal parts to be divided, unto William Graham his heirs and assigns forever; one sixth unto Eleanor Hoskins and her children, their heirs and assigns forever; one sixth unto Mary Hoskins and her children, their heirs and

a woman and her children, will be held to give the parent an estate for life and the children the remainder. Where this view prevails, it has been held immaterial whether or not there are children in existence at the time the will was made or at testator's decease.<sup>18</sup> This doctrine is based upon cases which embody a much narrower presumption; namely, that where the bequest or devise

is to a son and his children, or to a daughter and her children, or to testator's wife and children, the general rule above stated, which would give the parent and children concurrent interests, is displaced by a counter presumption, arising from the relationship of the parties, that testator's intention was to give the parent an estate for life.<sup>19</sup> The reasons assigned for this counter

assigns forever; one sixth unto Henrietta Flower and her children, their heirs and assigns forever; and the other sixth unto Catharine Robinson and her child, their heirs and assigns forever. And it is my will that their shares be secured by my executor, to my heirs who have husbands," it was held that there was no such intent so plainly expressed in the will as to counteract the immediate devise to each niece and her children, who accordingly took concurrently.

<sup>18</sup> See *Keown's Estate* (1913) 238 Pa. 343, 86 Atl. 270, set out in footnote 19, infra; and *Chambers v. Union Trust Co.* (1912) 235 Pa. 610, 84 Atl. 512, in which the court, after reviewing a number of the earlier Pennsylvania cases, says that it may be taken as established that the second resolution in *Wild's Case* (1599) 6 Coke, 16b, 77 Eng. Reprint, 277, is not the law in Pennsylvania.

<sup>19</sup> In *Wilson v. McMullen* (1883) 4 Ky. L. Rep. 895, where a testator directed that the share of one of his daughters should be placed in the hands of a trustee, who should rent out and manage "her interest" for the benefit of her "and children," it was held that the testator's daughter took a life estate and her children the remainder.

In *Frank v. Unz* (1891) 91 Ky. 621, 16 S. W. 712, a devise to testator's wife "for her own use and the benefit of her children forever" was regarded, in view of the rule existing in the case of devises by a husband to a wife and children, and of the fact that the words used gave the wife only the use, as giving the wife a life estate, with remainder to the children in fee.

In *Brand v. Rhodes* (1895) 17 Ky. L. Rep. 97, 30 S. W. 597, where testator bequeathed to his wife "the house and lot on which I now live together with household and kitchen furniture as a homestead for her and my children by her," it was held that there was nothing in the will to take the case out of the general rule of construction by which, in such cases, the wife is deemed to take a life estate, that she may thus manage and control the property, and thereby raise and educate the children, and the children the remainder.

In *Adams v. Adams* (1898) 20 Ky. L. Rep. 655, 47 S. W. 335, a devise of testator's residuary estate to his daughter "and her children in their exclusive right" was regarded as giving the daughter a life estate, with remainder to the children, the court saying that if such a devise should

be construed as giving a joint estate, the quantity of interest each would take would remain uncertain and would shift on the birth of each after-born child,—a condition of affairs which the testator would hardly be supposed to have intended to create.

In *Kuhn v. Kuhn* (1902) 24 Ky. L. Rep. 112, 68 S. W. 16, where testator devised to his daughter a farm, adding: "I give this farm to her and her children, to be theirs with all its appurtenances," it was held that the daughter took a life estate only, with remainder in fee to her children.

In *Sims v. Skinner* (1904) 118 Ky. 573, 81 S. W. 703, where a testator devised all his property to his daughter "and her children," she having at his death and the probate of his will four living children, it was held that there was nothing in the will to take the case out of the general rule that, in the case of a gift from a father to his daughter and her children, the daughter takes a life estate, with remainder to the children.

In *Smith v. Smith* (1905) 119 Ky. 899, 85 S. W. 169, a will containing the following provisions: "I also give to my wife 100 shares of bank stock in the Farmer's Nat. Bank of Richmond, Ky. at her death this property goes to my son and his children. I also give to my wife during her life 140 acres of land [describing it] at her death to my son and his children," it was held that aside from the general presumption existing in such a case, as the testator had made a distinct difference in the devises to his son, having devised certain other real estate to him absolutely, the son should be deemed to take a life estate only, with remainder to his children.

In *Haydon v. Layton* (1910) — Ky. —, 128 S. W. 90, a will by which testator bequeathed "the whole of my estate not hereby specifically devised, to my executors in trust for Ann, Eliza, Ellen and her children. Ann, Jim, Kate and Agnes and such other children as Ellen may hereafter have," was held, in accordance with the established rule, to give Ellen a life estate, with remainder to her children.

The same rule is applied in *Burns v. Moseley* (1915) 162 Ky. 190, 172 S. W. 521, to a case in which a father devised certain lands to his daughter "and her children if she should have any living, and should she have no bodily heirs living, then it is to go to my legal heirs."

In *Duncan v. King* (1915) 163 Ky. 577, 174 S. W. 84, where a testator having a daughter, who, at the time of his death,



presumption are, in the case of a devise to testator's wife and children, that otherwise, if the wife were to take a

part in fee simple, this part of the estate might pass to some stranger in blood to the husband,—a possibility not

was a young, married woman, about twenty years of age, with one living child, after giving his wife all his property during widowhood directed that, at her death or marriage, his estate should "be equally divided between my three children," naming them, adding, "and it is also my will that my daughter, Mary A. Glenn hold the money and property which may be her portion only in trust for her children which she now has or may hereafter have . . . I having only one daughter I feel desirous to provide and secure to her heirs the small pittance I as their grandparent can give or leave them,"—it was held that it was the intention of the testator, as gathered from the language of the instrument and the situation of the parties and their relation to each other, that, after the death of his wife, one third of his property should go to his daughter for her life, and ultimately to her children in fee.

In *Brock v. Brock* (1916) 168 Ky. 847, 183 S. W. 213, where testator devised certain property "to my daughter Fannie Cromwell Dorsey and children," it was held that as it was clear that the testator intended not only that his daughter should enjoy the estate, but that her children, born and to be born, were to have a beneficial interest therein, such intention should be effectuated by giving a life estate to the daughter and the remainder to her children.

In *Lacey v. Lacey* (1916) 170 Ky. 166, 185 S. W. 495, where a husband, a short time after his marriage, and before the birth of any children, made a will by which he bequeathed to his wife "everything of every kind and description real and personal I may have or acquire, for her sole use and benefit and to any children which may be born to us," it was held that although it was clearly his purpose that, if no children should be born to them, his wife should have his whole estate, it was equally clear that, in the event that should happen, he intended to provide for both, and that, in the light of the subsequent birth of the children, the testator having such a contingency in view at the time the will was written, there was no reason why the will should not be construed as if the children had been in existence at the time it was made; and therefore that there was no reason why the general rule of interpretation that a devise by a husband and father to his wife and children should be construed to be a devise to his wife for life and to the children in remainder, in the absence of anything in the instrument to show a contrary intent, should not be applied.

In *Noe v. Miller* (1879) 31 N. J. Eq. 234, the following testamentary provision: "I do give unto my daughter, Elizabeth M. Noe, wife of John Noe, one share in addition to what she has already had, her said husband not to have any control of said legacy but to be hers and her child's or

children's forever; but in case she should die leaving no child or children the said legacy may be claimed by my other children according to the tenor of my will," it was held that, although there was no doubt that the testator intended the children of his daughter Elizabeth should, by force of his will, take some interest in the share he gave their mother, he had failed to make clear precisely what he intended to give to them, and that it would be more consonant with his probable intention that the daughter should take an estate for life, with remainder to her children, than that they should share equally with their parent at once. But in *Gordon v. Jackson* (1899) 58 N. J. Eq. 166, 43 Atl. 98, it is said that the case of *Noe v. Miller* (N. J.) supra, was taken out of the general rule by the phrase, "her said husband not to have any control of the said legacy." [For discussion of the effect of this phrase, see text and footnotes 60-64, infra.]

In *Forest Oil Co. v. Crawford* (1896) 23 C. C. A. 55, 37 U. S. App. 408, 77 Fed. 106, it was held that under a devise "to my son Matthew and to his children," provided he should pay certain legacies, the son took a life estate, with remainder to his children. And the Pennsylvania supreme court, in *Crawford v. Forest Oil Co.* (1904) 208 Pa. 5, 57 Atl. 47, construing the same will, placed upon it the same construction.

In *Vaughan's Estate* (1911) 230 Pa. 554, 79 Atl. 750, it was held that where the language employed by the testator constitutes the setting aside of a child's share, to be held in trust for him or her and his or her children, the parent takes a life estate, with remainder to the children in fee.

In *Elliott v. Diamond Coal & Coke Co.* (1911) 230 Pa. 423, 79 Atl. 708, a will by which testator devised to his daughter, naming her, a farm, "to have and to hold unto my said daughter and her children forever," it was held that, under the prevailing rules of construction in Pennsylvania, the gift was one of a life estate to the mother, with remainder in fee to the children as a class.

In *Keown's Estate* (1913) 238 Pa. 343, 86 Atl. 270, where testator, who had given his daughters shares in the residue of his estate, went on to provide: "The shares bequeathed to my daughters is for their own separate use and that of their children should they have any, and is in nowise to be subject to transfer by other parties," it was held that a daughter took a life estate, with remainder in the children who might be living at her death, the court saying: "The reason of the rule lies in the fact that the devise to children is to them as a class which cannot be ascertained until the death of the parent, when the possibility of issue is extinct, and the parent can therefore, from necessity, take only a life estate. It is immaterial to the application

to be supposed consonant to his wishes and intentions.<sup>20</sup> In the case of devises to a son or daughter and his or her children, the reasons given are, that it is not to be supposed that the testator meant to give such an estate that the quantity of interest each takes will remain uncertain and shift at the birth of each after-born child,<sup>21</sup> and that the provision made for the son or daughter will be diminished.<sup>22</sup> The reason given in *Keown's Estate* (1913) 238 Pa. 343, 86 Atl. 270, "that the devise to children gives to them as a class which cannot be ascertained until the death of the parent, when the possibility of issue is extinct, and the parent can therefore, from necessity, take only a life estate," is pure nonsense, as it assumes the very point to be decided, i. e., that the gift to the children is not immediate.

Opinions have differed as to whether this counter presumption is a proper one.<sup>23</sup> Its insubstantial character is indicated by the fact that so many differ-

ent reasons have been assigned for it; and it may be urged against it, that if the testator meant the parent to take a life estate, it would be both easy and natural to say so. While the relationship between the testator and the person named as parent may properly be taken into consideration as bearing on the question whether the testator intended such parent to enjoy the whole (from which it follows that the children take, not concurrently, but in succession; see footnote 50, *infra*), it should not be treated as sufficient in itself to establish that intention. So to hold is to come perilously near to making a will for the testator.

This counter presumption has had its chief recognition in the courts of Kentucky and Pennsylvania; but has made little or no headway in other jurisdictions.<sup>24</sup> Out of it has grown the supposed rule stated in *RICE v. KLETTE*, ante, 45, and some other cases. It does not, however, seem to have been ap-

of the rule that there are no children in existence when the will is made."

In *Hall v. Hall* (1911) 84 Vt. 259, 33 L.R.A.(N.S.) 191, 79 Atl. 971, Ann. Cas. 1913A, 490, the court approved of the rule that when a devise is to a wife and her children, and there is nothing in the will to indicate a different intention, it will be inferred that the wife is to take a life estate only, and the children are to take in remainder.

See also, in this connection, cases in footnotes 20-22, *infra*.

<sup>20</sup> *Hood v. Dawson* (1895) 98 Ky. 285, 33 S. W. 75; *Brand v. Rhodes* (1895) 17 Ky. L. Rep. 97, 30 S. W. 597.

<sup>21</sup> In *Adams v. Adams* (1898) 20 Ky. L. Rep. 655, 47 S. W. 335, it is said that if a joint estate is given, the quantity of interest each takes will remain uncertain and shift on the birth of each after-born child; for confessedly in such cases the devise opens up for the benefit of all the children, whether in existence at the time the will speaks or not; and that it is hardly to be supposed that the testator intended to create such an estate.

The same doctrine was adhered to in *Sims v. Skinner* (1904) 118 Ky. 573, 81 S. W. 703, the court saying that while ordinarily gifts and conveyances to a mother and her children, or a father and his children, will create a joint tenancy, a different rule of construction should prevail for gifts from a father to his daughter and her children, or to a son and his children, or from a husband to a wife and children, for the reason stated in *Adams v. Adams* (Ky.) *supra*.

<sup>22</sup> In *Noe v. Miller* (1879) 31 N. J. Eq. 234, it is said that it is much more natural and reasonable to conclude, where a father makes a bequest of a particular sum or fund to a child and also the children of L.R.A.1917B.

such child, jointly, without indicating in any way when their enjoyment shall commence, that he intends the parent shall have simply the income or produce during life, and that the principal shall go to the children on the death of their parents, than that he meant that his grandchildren should share equally with their parents at once, and have a right to demand a division of the fund as soon as it is payable.

<sup>23</sup> In *Re Jones* [1910] 1 Ch. (Eng.) 167, it was said by Joyce, J., that "a priori, it is in the highest degree improbable, if not impossible, that a rational testator should give or devise property to a child and his or her children as a class, or so as to make them take not in succession, but concurrently. In his book on the construction of wills, the late Mr. Vaughan Hawkins says, in Appendix, II., page 316, after discussing the law: 'It is conceded that, notwithstanding these cases, the rule as at present established requires some aid from the context to convert the gift to the children into a gift in remainder, and that without such aid the force of the expressions themselves is to cause the parent and children to take concurrently.' The opposite rule, however, if established, would no doubt be a convenient and probably beneficial rule of construction."

<sup>24</sup> In *Newill v. Newill* (1872) L. R. 7 Ch. Eng. 252, 41 L. J. Ch. N. S. 432, 26 L. T. N. S. 175, 20 Week. Rep. 308, it was said by Lord Hatherly, L. C., that there is no absolute rule of construction by which, in the case of a gift to a wife in trust for herself and her children, the court will, from some presumed intent on the part of the testator, lay hold of every small circumstance to support the conclusion that the testator intended what the court, upon some presumed rule, conceives to be his most

plied in Kentucky outside of cases in which the testator was the husband or father of the person named as parent; though in Pennsylvania it has been applied where the relation of the testator to the parent was that of brother<sup>25</sup> or uncle.<sup>26</sup> It has no application where it appears that the children are not to take as a class.<sup>27</sup>

According to the doctrine in *Wild's Case* (1599) 6 Coke, 16b, 77 Eng. Reprint, 277, if one devises land to another and his children or issue, and such other has not any issue at the time of the devise, the word "children" or "is-

sue" shall be taken as a word of limitation, thereby giving the parent an estate tail.<sup>28</sup> This, however, is not a rule of law, but a rule of construction,<sup>29</sup> and accordingly does not apply where the effect of its application will be to defeat rather than to promote the testator's intention to benefit the children; as where estates tail are by statute converted into a fee in the first taker,<sup>30</sup> or where the subject of the gift is personal property, the effect of the application of the rule to which would be to give the parent an absolute interest,<sup>31</sup> or the

natural intention a priori, and will modify such a bequest into a bequest to the wife for life, with remainder to the children.

<sup>25</sup> In *Fox v. Dunmon* (1861) 4 Phila. (Pa.) 323, it was held that under a devise to the testator's sisters and their children, the sisters took an estate for life, with remainder to their children.

<sup>26</sup> In *Chambers v. Union Trust Co.* (1912) 235 Pa. 610, 84 Atl. 512, where testator devised his farm to his nephew, naming him, "and to his children; but in case he should die without legal issue then it is to go to the heirs of my father as directed by the intestate laws of Pennsylvania," it was held that although the nephew had no children living at the time of testator's decease, the gift was to be construed as one to the nephew for life, with remainder to his children.

<sup>27</sup> In *Hazelett v. Farthing* (1893) 94 Ky. 421, 42 Am. St. Rep. 365, 22 S. W. 646, where testator devised property "to my beloved wife and children," naming them, but purposely omitting to name one of his children, and naming a stepson, it was held to be plain that the testator intended to give to his wife, not a life estate, with remainder to the others named, but a joint and equal interest in the property with them.

<sup>28</sup> See footnote 4, *supra*, for statement of the resolutions in *Wild's Case*.

<sup>29</sup> In *Carr v. Estill* (1855) 16 B. Mon. (Ky.) 309, 63 Am. Dec. 548, it is said that although, where lands are devised to a person and his children, the words abstractly and literally import an immediate gift not only to the devisee in esse, but to his or her children also, yet, if there be no children at the time, it does not necessarily follow, as seems to have been supposed, that it was not the testator's intent that the children should take by way of remainder.

<sup>30</sup> In *Turner v. Ivie* (1871) 5 Heisk. (Tenn.) 222, it is said that, in view of the abolition of estates tail in Tennessee, the rule in *Wild's Case* should no longer be recognized as a rule of testamentary construction.

And see, to like purport, *Carr v. Estill* (Ky.) *supra*.

<sup>31</sup> The question has been raised whether the first branch of the rule in *Wild's Case*, namely, that where there is a gift to a per-

son and his or her children, and no children are in existence, the word "children" will be regarded as a word of limitation, and not of purchase,—applies in a case of a bequest of personality, for the reason that the words which will raise an estate tail in the case of realty will give the first taker an absolute interest in the case of personality, thereby defeating instead of effectuating testator's intention to benefit the children. The question was discussed in the case of *Stokes v. Heron* (1845) 12 Clark & F. 183, 8 Eng. Reprint, 1361, 9 Jur. 563, 3 Eng. Rul. Cas. 160, where, however, the point was not decided by the House of Lords, although Lord Brougham expressed the opinion that the rule applied equally to gifts of personal as well as of real estate. Sir John Romilly, in *Audsley v. Horn* (1858) 26 Beav. 195, 53 Eng. Reprint, 872, affirmed in (1859) 1 De G. F. & J. 226, 45 Eng. Reprint, 345, 20 L. J. Ch. N. S. 201, 6 Jur. N. S. 205, 8 Week. Rep. 150, states that the applicability of the rule to bequests of personality has been disputed in a great variety of cases, such as *Knigh v. Ellis* (1789) 2 Bro. Ch. 570, 29 Eng. Reprint, 312; *Buffar v. Bradford* (1741) 2 Atk. 220, 26 Eng. Reprint, 537; and *Stone v. Maule* (1829) 2 Sim. 490, 57 Eng. Reprint, 871, 29 Revised Rep. 150. In discussing the point he further said: "Upon a review of the whole of the cases upon this subject, I think that, setting aside some contradictory decisions, which it is not very easy to reconcile, the tendency of modern decisions has been, in cases like the present, to hold that, in personality, the bequest gives an interest for life to the mother, with an interest in remainder to the children. Thus, in *Crawford v. Trotter* (1819) 4 Madd. Ch. 361, 20 Revised Rep. 312, 56 Eng. Reprint, 788, a bequest to one and her children was held to give an interest for life to the mother, with remainder to her children; and in *Morse v. Morse* (1829) 2 Sim. 485, 57 Eng. Reprint, 869, 29 Revised Rep. 147, a bequest of a sum of money to the testator's daughter and her children was held to give an interest for life in the daughter, with remainder to all her children. I certainly cannot say that cases are not to be found in the books which it is not easy entirely to reconcile with this view of the subject; but I think that the

context shows that the children are to take as purchasers.<sup>32</sup>

It has been held that the rule in Wild's Case does not apply where the devise is to a trustee for the sole and separate use of a woman, and to her children, and not directly to her and her children, as in such a case there is no necessity for construing the word "children" to be a word of limitation, for

the purpose of effectuating the intention of the testator.<sup>33</sup>

Where the rule is held not to apply, the presumption seems to be that the parent takes an estate for life, with remainder to the children. The decisions in which this presumption has been applied, or in which a like result has been reached with the aid of the context, may be found in the subjoined footnote.<sup>34</sup>

view I have stated is that which is most consistent with the line of modern cases and their tendency, and generally most in accordance with the spirit and intention of the testator in these cases. I also find that I have, upon two former occasions, adopted the same view; viz., in *Dawson v. Bourne* (1852) 16 Beav. 29, 51 Eng. Reprint. 686, and in *Jeffery v. De Vitre* (1857) 24 Beav. 208, 53 Eng. Reprint. 372."

So in *Re Willmot* (1897) 76 L. T. N. S. (Eng.) 415, 45 Week. Rep. 492, it is held that the rule in Wild's Case has no application to personalty; and in *Re Jones* [1910] 1 Ch. (Eng.) 167, 79 L. J. Ch. N. S. 34, 101 L. T. N. S. 549, it is said to be well settled that, as to personalty, the rule in Wild's Case has no application.

<sup>32</sup> In *Buffar v. Bradford* (1741) 2 Atk. 220, 26 Eng. Reprint 537, where there was a gift of a share of a residuary estate "to my niece Buffar and children born of her body," and another gift, in an event mentioned, of a further share, by a direction that "such part shall, when the time of possession comes go to Mrs. Buffar and her children, because they will have then four of the eight parts," and Mrs. Buffar had no children at the date of the will, and predeceased the testator, leaving issue, it was held that the words "when the time of possession comes" indicated that the word "children" was not a word of limitation.

<sup>33</sup> *Turner v. Ivie* (1871) 5 Heisk. (Tenn.) 222.

<sup>34</sup> In *Paine v. Wagner* (1841) 12 Sim. 184, 59 Eng. Reprint, 1102, Vice Chancellor Shadwell said that he understood the law to be that if there is a gift simply to parents and children, and there are children living at the time, the children take with their parents; but that if there are no children, then the parents take for their lives, with remainder to their children.

In *Grieve v. Grieve* (1867) L. R. 4 Eq. (Eng.) 180, it was held that under the following devise: "To my nieces, Louisa and Emily I leave my house at Clifton after my sister's death, and to their children, and if they have not any to their brother William and his children, always burdened with £10 a year to the Clifton school. The furniture to go with the house, but changed as my sister may like,"—the direction that the furniture should go with the house evinced an intention that the nieces should take, not an estate tail, but an estate for life, with remainder to their children.

In *Re Moyles* (1878) Ir. L. R. 1 Eq. L.R.A.1917B.

155, where testatrix devised lands to a woman who, at the date of the devise and at the death of the testatrix, had never been married, "and to any child or children she may have by any husband or husbands with whom she may intermarry, in such shares and proportions and subject to such limitations and conditions as she may by deed or will . . . direct, limit or appoint; and in default of appointment, or so far as the same shall not extend or take effect, in equal shares to and amongst such children if more than one," and if only one, then to that one, "and to their respective heirs and assigns" upon attaining twenty-one years, with a limitation over in default of children to attain such age, it was held that, as there was an express limitation to the children and their heirs for a tenancy in common, vesting thus in them together and by themselves at one time the whole estate, and this with a period fixed for vesting, and a limitation over upon these children dying under twenty-one, the mother took only an estate for life; this construction being further supported by the fact that, by a codicil, trustees were appointed to preserve contingent remainders.

A bequest to a woman and her children will, where the woman was then unmarried, create in her a life estate simply, with remainder over to her children. *Furrow v. Merrell* (1853) 23 Ala. 705.

The refusal of the Kentucky court of appeals to follow the rule in Wild's Case, as not adapted, in view of the statutory conversion of fees tail into fees simple, to promote the intention of the testator, has led to the adoption in that state of the special rule of construction that where there is a devise to one and his children, and such person has at the time no children, the children will be regarded as taking by way of remainder. See *Carr v. Estill* (1855) 16 B. Mon. (Ky.) 309, 63 Am. Dec. 548.

In *Righter v. Forrester* (1867) 1 Bush (Ky.) 278, it was held, construing a devise to testator's daughter, who was then unmarried, "and her bodily heirs," that the phrase quoted was used to denote children, and that the daughter therefore took for life only, with remainder to her children in fee.

In *Chambers v. Union Trust Co.* (1912) 235 Pa. 610, 84 Atl. 512, it is held that the same rule of construction applies where there are no children living at the death of the testator as where there are, and that in both cases the parent takes the life estate, with remainder to his or her children.

**III. *Indicia tending to support or vary the presumption that parents and children take concurrently.***

It has been said that where the construction is doubtful, the courts lean toward giving the parent a life estate,<sup>35</sup> and that a slight indication of an intention that the children shall not take jointly with the parent will give a life estate to the parent, with a remainder to the children.<sup>36</sup> Two reasons are given for this inclination, one being that children born after the death of the tes-

tator may otherwise be cut off,<sup>37</sup> and the other being that the children, if tenants in common with the parent, might, on arriving at age, demand a partition, and thus deprive the parent, who in these cases is frequently, if not usually, the primary object of the testator's bounty, of the means of support in old age.<sup>38</sup> The first of these reasons is a valid one only where the subject of the gift is personalty and there is reason to infer that testator meant after-born as well as existing children to benefit there-

In *Nix v. Ray* (1852) 5 Rich. L. (S. C.) 423, it is held that where a gift of personal property is made to one and his issue, or the heirs of his body, with a limitation over in the event of his dying without leaving issue or heirs of his body living at the time of his death, the first taker has an estate for life only, and his issue or heirs of his body living at the time of his death take in remainder as purchasers.

In *Turner v. Ivie* (1871) 5 Heisk. (Tenn.) 222, where testator gave certain property to his son "in trust for the sole use and benefit of my daughter, Sarah E. and to her children if she should have any, . . . and should my daughter, the said Sarah E., die without any child or children, then the above specified property to return to my children and be equally divided among them," and at the death of the testator Sarah was unmarried and without children, being only eleven years of age, it was held that, giving to each word the proper meaning, it was apparent that the testator intended to give the land to the trustee for the sole use and benefit of his daughter, and if she should marry and have children, he then intended to give the land to them at her death.

The fact that there were no children at the death of the testator is a sufficient circumstance to support the inference of an intention to give the mother a life estate, with a remainder to the children. *Cannon v. Apperson* (1885) 14 Lea (Tenn.) 553.

In *Scruggs v. Mayberry* (1916) — Tenn. —, 188 S. W. 207, where testator devised certain lands to one, "and the heirs of his body and if he should die without heirs then the land I have given him to go to his sister Lucinda and her heirs, that is, the heirs of her body," it was held (the word "heirs" being construed as meaning children) that the devisee named would take an estate for life, with remainder to his children, although they were not yet in being at the time of testator's decease.

In *Sisson v. Seabury* (1832) 1 Sumn. 235, Fed. Cas. No. 12,913, where testator devised to his grandson, who, at the time of testator's death, was a minor without children, not then having been married, a certain farm "to him my said grandson Philip Sisson and to his male children lawfully begotten of his body and their heirs forever to be equally divided amongst them and their L.R.A.1917B.

heirs forever," it was held that, in order to give effect to the provision that all the male children of Philip shall have equal shares in the devised premises in fee simple, the devise ought to be construed as an estate to Philip Sisson for life only, with a contingent remainder in fee to his male children.

<sup>35</sup> *Goss v. Eberhart* (1850) 29 Ga. 545.

<sup>36</sup> In *Crockett v. Crockett* (1848) 2 Phill. Ch. 553, 41 Eng. Reprint 1057, 17 L. J. Ch. N. S. 230, 12 Jur. 234, it is said that even where a gift is simply to a mother and her children, a very slight indication of intention that the children shall not take jointly with the mother has been thought sufficient to enable the court to decree a life estate to the mother, with remainder to her children.

Other provisions of the will, indicating an intention that the parent and children should not take jointly, even though such indications may be very slight, or be founded upon small circumstances, will induce the court to interpret a bequest as a gift of the life estate to the parent, with remainder to the children. *Mill v. Mill* (1875) Ir. Rep. 9 Eq. 104.

Under a gift of personalty to A and his children, the parent and children take prima facie concurrently as joint tenants; but slight circumstances have been laid hold of by the courts as enabling them to come to the conclusion that a gift for life to A, with remainder to his children, was intended. *Re Wilmot* (1897) 76 L. T. N. S. (Eng.) 415, 45 Week. Rep. 492.

See also, to the same effect, *Williams v. McConico* (1860) 36 Ala. 22; *Gordon v. Jackson* (1899) 58 N. J. Eq. 166, 43 Atl. 98; *Cannon v. Apperson* (1875) 14 Lea (Tenn.) 553; *Bunch v. Hardy* (1879) 3 Lea (Tenn.) 543.

<sup>37</sup> *Bunch v. Hardy*, supra; *Williams v. McConico* infra.

<sup>38</sup> In *Williams v. McConico* (1860) 36 Ala. 22, it is said that slight indications in the context of such an intention on the part of the testator have frequently been thought sufficient to justify courts in holding, especially in bequests of personalty, that the parent shall take for life, with remainder to his children, including all the children that may be born before the termination of the parent's life estate. "The chief reason for such an inclination on the part of the courts where the gift is to one

by, and executory gifts of personality are regarded as inadmissible,<sup>39</sup> since, as has hereinbefore been pointed out, where the subject of the gift is real estate, after-born children may take by executory devise, the estate taken by the parent and existing children opening to admit them.<sup>40</sup> The reason does not apply where the bequest is to the widow and children of the testator himself, as in such case there is no presumption of an intention to benefit after-born children.<sup>41</sup> The second reason involves the assumption that the person named as parent is the primary object of the testator's bounty,—an assumption which cannot be universally made without discrediting the presumptive meaning which concededly attaches to a bequest to one and his children.

It is difficult to say just what will

amount to a sufficient indication of a contrary intention to overcome the presumption that the parent and children are to take concurrently; and the want of harmony among the decisions on the question has more than once been the subject of judicial comment.

It has been held that the court will not strain the natural and plain meaning of words to give the parent a life estate, with remainder to the children, rather than a joint estate, where the statute of distributions puts the parent and children upon the same footing.<sup>42</sup>

The presumption that the parent and children are to take concurrently is clearly overcome where it is inferable that the parent was contemplated by the testator as taking an estate for life,<sup>43</sup> as where the parent is spoken of as taking the property "as a loan,"<sup>44</sup> or as

and his children, there being children in case at the time, is that the other construction resulting from the application of the first branch of the rule in *Wild's Case* (1599) 6 Coke, 17, 77 Eng. Reprint, 277, 10 Eng. Rul. Cas. 773, by confining the gift to those children who are living at the testator's death, excludes entirely all those born after that event. Another reason which has been suggested is that the children, if tenants in common with the parent, might, on arriving at age, demand a partition, and thus deprive the parent, who in these cases is frequently, if not usually, the primary object of the testator's bounty, of the means of support in old age."

<sup>39</sup> Where there is a bequest to a man and his children of personal estate, a child born after the death of the testator shall not take, for being vested upon the death of the testator, it shall not be divested. *Cook v. Cook* (1706) 2 Vern. 545, 23 Eng. Reprint, 952.

<sup>40</sup> See footnote 14, supra.

<sup>41</sup> *Newsom's Trusts* (1878) Ir. L. R. 1 Eq. 373.

<sup>42</sup> *Jackson v. Coggin* (1859) 29 Ga. 403.

<sup>43</sup> In *Jones v. Jones* (1849) 7 Ga. 76, where testator devised his residuary property to his son and daughters, adding: "And as respects my said daughters I give the same to them and to them only, personally, individually and exclusively, and to their children, and not to their husbands . . . but as before mentioned is hereby willed and devised bona fide in right and use to the said [names] my daughters and their children respectively and to them only so long as they or either of them shall live," it was held that it was manifestly the intention of the testator that each of his daughters named should take a separate estate for life in a share of the property, with remainder in fee to their children respectively, born and to be born, and that there was nothing in the technical terms of the instrument necessarily to contravene this purpose.

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*Jones v. Jones* (Ga.) supra, was followed in the case of a will containing an identical provision in *Jennings v. Parker* (1858) 24 Ga. 621.

In *Bowers v. Bowers* (1871) 4 Heisk. (Tenn.) 293, where testator bequeathed "to my daughter," naming her, certain described property, "to have and to hold the same to her and her children, to their special use and benefit forever," it was held that the daughter had the legal title to the whole property, and an equal equitable interest therein with each of her children; that the use of the word "forever" indicated that the testator intended that there should be no limitation as to the time during which the beneficiaries were to have the use and benefit of the property, nor any restriction of the devise to the children then living of his daughter, but that he intended that his daughter and all of her children should enjoy the use and benefit of the property until her death, when the legal and equitable title should be vested in the children.

<sup>44</sup> In *Coakley v. Daniel* (1858) 57 N. C. (4 Jones, Eq.) 89, where testator, who, by the context of his will, evinced an intention to give what he called the balance of his property, to be equally divided between his two sons and his daughter and her children, the two sons taking a third part each, and the daughter and her children taking the remaining third, gave the residue of his estate "to be equally divided between the three, to Henderson and Thomas as gifts and to Sarah as a loan," and in another clause, where he provided for a division after the death of his wife, expressed himself thus: "All the property to be divided between Sarah B. Coakley, Henderson L. Daniel and Thomas P. Daniel share and share alike to Henderson and Thomas and their heirs and assigns as gifts, to Sarah B. Coakley as a loan for the benefit of her and her children," it was held that an intention to give the daughter an estate for life was evinced by the

enjoying the property as a whole,<sup>45</sup> or as taking "for herself and her children," indicating that the testator had in mind that there was to be a difference between mother and children in respect to the title or interest which they were respectively to take.<sup>46</sup> So, where the gift is

like of the word "loan," and that her children accordingly took a remainder interest.

<sup>45</sup> In *Parsons v. Coke* (1858) 4 Drew. 290, 62 Eng. Reprint, 114, where testator provided that if any of certain legatees should die without issue, "then the legacy of him or her so dying to go to and be equally divided between the survivors of them and the issue of such survivor; such issue to take the parents' share only and to be paid at the age of twenty-one years," it was held that, as the issue were intended to take something, and were not to take with their parents, but to take their share, the parents took for life, with remainder to their children.

In *Turner v. Patterson* (1837) 5 Dana (Ky.) 295, a devise as follows: "Item, to my daughter, Catharine Patterson, I give her and her children, the 50 acres of land they now live on, to each an equal part," which, had it stood alone, would have been taken to import that the mother and her children should hold the land as tenants in common, was, in view of another clause in the will in which testator said: "Catharine Patterson is to have no more than the 50 acres of land above stated," to give her the whole of the land during her life, with remainder to her children, "each an equal part."

In *Mefford v. Dougherty* (1889) 89 Ky. 58, 25 Am. St. Rep. 251, 11 S. W. 716, it was held that, under a devise to a son "and to his children, the heirs of his body," of a tract of land to which the testator referred in a subsequent part of the will as the land "I have given my son," the son took a life estate, with remainder to his children.

In *Ponton v. McEmore* (1839) 22 N. C. (2 Dev. & B. Eq.) 285, where testator, who had devised and bequeathed certain property in trust for the support and maintenance of his daughter, further declared: "The property I hereby leave in trust for the benefit of my daughter, Mary E. Avent is to be applied at the discretion of the trustee for the support and maintenance of Mary E. Avent and her children and no part or parcel thereof to be subject to the debts of her husband," it was held that—taking into consideration the declaration of the testator that the property should not be subject to the debts of his daughter's husband, that the bequest thereof was made to a trustee, that the trusts are to be collected from intimations as to the object of his bounty in different parts of his will, that in the first part his daughter is solely named as that object, and in the latter part his daughter and her children are all named as such objects—the testator's purpose would be most effectually promoted by hold-

ing that the bequest was made in trust for his daughter, to her sole and exclusive use for life, and after her death, then in trust for her children,—especially as such construction would not limit the benefit of the bequest to children in being at the death of the testator, which evidently was not his intention.

Where the object of the testator, either

ing that the bequest was made in trust for his daughter, to her sole and exclusive use for life, and after her death, then in trust for her children,—especially as such construction would not limit the benefit of the bequest to children in being at the death of the testator, which evidently was not his intention.

<sup>46</sup> In *Desmond v. MacNeill* (1916) 90 Conn. 142, 96 Atl. 924, where testator, after giving the use of certain real estate to his wife and a sister for and during their lives, gave the remainder over upon their decease "to my cousin Mrs. Lizzie MacNeil for herself and children," it was held that as the gift was not made to Mrs. MacNeill and her children, but to Mrs. MacNeill for herself and children, indicating that the testator had in mind that there was to be a difference between mother and children in respect to the title or interest which they were respectively to take, the devise should not be regarded as one to Mrs. MacNeill and her children as tenants in common, but as giving the property to her for her life, with remainder over to her children.

In *Hannan v. Osborn* (1834) 4 Paige (N. Y.) 336, where testator devised and bequeathed to his sister "all the remainder of my estate both real and personal to have and to hold the same to her and her children forever," it was held that as the devise was not to the mother and her children immediately, but to her, to have and to hold the same to her and to her children, it was evident that the intention of the testator was that the children were not to take immediately, but only by way of remainder after the death of the mother; and this construction was strengthened by the circumstance that the testator used the term "children" in the plural when there was but one child in existence at the time of making the will.

<sup>47</sup> In *Re McVicker* (1890) Ir. L. R. 25 Eq. 307, where testator bequeathed all his property "for the absolute use and benefit of my said wife Margaret and my infant daughter Nelly, or any other of my lawful issue living at my decease; and if no child shall be living at my decease, then my said property shall become vested in my said wife Margaret so long as she remains my widow . . . and in case of her death or marriage my wish is that my executors (in case I leave lawful issue surviving) shall use and exercise a discretionary power over my aforesaid property for the absolute use and benefit of my said lawful issue," it was held that the wife took an estate for widowhood only, with remainder to the children, and not jointly with them.

<sup>48</sup> In *Izod v. Izod* (1863) 11 Week. Rep.

er expressed<sup>49</sup> or inferable from the relation of the parties,<sup>50</sup> is to provide a support and maintenance for the parent, the parent will be regarded as taking an estate for life in order to avoid a construction which, by making the children tenants in common with her, would enable them, when they came of age, to demand a partition, and thus leave their mother destitute in her old age. It has been held, however, that the mere fact that the quantity of land devised is

small cannot reasonably be allowed to so affect and change the plain meaning of the words employed as to make them imply that the testator intended to give the parent a life estate and the children the remainder.<sup>51</sup>

The presumption that the parent and children are to take concurrently is equally repelled where there are indications that testator did not contemplate the parent as taking any absolute interest,<sup>52</sup> as where the parent is given a

(Eng.) 452, where money was bequeathed to trustees to invest and pay the annual income, "and also all or any portion of the principal thereof, to or for the benefit of Mrs. Sarah Izod, the widow of my son, Joseph Izod, and of his three children [naming them], in such manner, shares and proportions, at such time or times, under such conditions and for such purposes, as they, . . . shall in their or his absolute or uncontrolled discretion think proper; but if the said Sarah Izod shall marry again, then I direct that her interest under this my will shall cease and determine." the master of the rolls said that though he was puzzled by the direction as to cesser of Mrs. Izod's interest, yet, as the trustees might have appointed the capital to her, she would (the power not being exercisable, in consequence of the refusal of the trustees to accept the trust) take jointly with the children.

<sup>49</sup> *Chestnut v. Meares* (1857) 56 N. C. (3 Jones, Eq.) 416.

<sup>50</sup> Where a testator devised his property for the benefit of his wife and children, the court will anxiously lay hold of any slight circumstance which will enable it to construe the gift as an estate for life to the wife, remainder to the children, and not as creating a joint tenancy. *Re McVicker* (Ir.) *supra*.

In *Salmon v. Tidmarsh* (1859) 5 Jur. N. S. (Eng.) 1380, it is said that under a gift to a wife and her children, if there is nothing to denote the proportions in which the wife and children are respectively to take, then the court is called upon to determine the proportions, and that the most natural disposition is to give the property to the wife for her life and afterwards to her children.

In *Faribault v. Taylor* (1850) 58 N. C. (5 Jones, Eq.) 219, where testator gave the share of his estate to which his oldest daughter might be entitled to trustees in trust "for the benefit of her and her children free and exclusive from any control of her present or any other husband she may have," and at the time of the testator's death the daughter had three children, it was held that the manifest intent of the testator would be much more effectually carried out by giving to the daughter a life estate, with remainder to all the children which she might have, rather than an absolute estate as tenant in common with her children living at the time of the testator's L.R.A.1917B.

death, as the latter construction might, by diminishing the present and immediate interest in the daughter, render it an inadequate support for her during her life, and because it would exclude from the benefit of the fund any after-born children.

<sup>51</sup> *Hampton v. Wheeler* (1888) 99 N. C. 222, 6 S. E. 236; but compare *Bunch v. Hardy* (1879) 3 Lea. (Tenn.) 543, set out in footnote 55, *infra*, where the amount of property devised seems to have been taken into consideration.

<sup>52</sup> In *Hatfield v. Sohler* (1873) 114 Mass. 48, where a testatrix devised real estate to a married daughter "to her sole and separate use free from the interference and control of her said husband or of any other person . . . to have and to hold the said estates, with all the privileges and appurtenances to the same belonging to her the said Ann Louisa Hatfield to her sole and separate use as aforesaid free from the interference or control of her said husband or of any other person whatsoever, and to the children or child of the said Louisa or the issue of any deceased child in equal proportions," it was held that as the devise to the daughter was not in the terms commonly used to create a fee, and as it contained no words extending her interest beyond her life, or indicating an intention to give her the power of disposal during her life, the intention of the testatrix was to give her an estate for life and the remainder to her children or the issue of any deceased child, in equal proportions.

In *Re Jones* [1910] 1 Ch. (Eng.) 167, where testator, upon his wife's decease, devised and bequeathed his estate "to my dear children in the following proportion, namely two fifths of the whole of my estate to my son Mordecai John Morgan Jones and the other three fifths to my daughters Mary Margaret and Ellen Elizabeth in two equal shares, share and share alike, and to the child or children of the three said children. In case any of my children dying and leaving no legal issue, the share or shares of those dying to be given to the surviving child or children of such as will be dead. My daughters' and granddaughters' shares to be independent and free from all husbands,"—it was held that there was sufficient to warrant the assumption that the children of the testatrix' children should not take concurrently with, but in succession to, their parents.



limited power of disposal inconsistent with a taking in fee,<sup>53</sup> or where the gift is in trust for the parent's support and maintenance, evincing no intention to

give a greater interest,<sup>54</sup> or where the children are referred to as taking the whole, showing that the parent is to take no part absolutely.<sup>55</sup>

<sup>53</sup> In *Koenig v. Kraft* (1888) 87 Ky. 95, 12 Am. St. Rep. 463, 7 S. W. 622, where testator gave and bequeathed to his wife all his estate "for her and her child, Emma Kraft's sole use and benefit, and give my beloved wife full power and authority to sell my real estate what I now hold on Walnut near Clay street but no other," it was held, in view of the limitation of the power of the wife as to the disposition of the realty, which was inconsistent with a grant of the fee, that she took a life estate for the use and benefit of herself and child, with remainder in fee to the child at her death.

In *Mitchell v. Simpson* (1889) 88 Ky. 125, 10 S. W. 372, where the testator, after devising certain lands to his daughter, went on to say: "The said land is willed to my daughter and her bodily heirs except the 200 acres in Scott county, Kentucky, which she is to have the right to dispose of as she wishes," it was held that the words "bodily heirs" were used as synonymous with "children," and therefore that the daughter took a life estate and her children a remainder.

<sup>54</sup> In *Belote v. White* (1859) 2 Head (Tenn.) 703, it was held that under a bequest in trust "for the use and annual support of my daughter, Elizabeth B. Belote and her children . . . to be applied to the support and maintenance of my said daughter Elizabeth and her present and future children and to their education," it was held that at the testator's death the daughter and her then children took an equitable estate as tenants in common in the property, in equal shares; her interest being for life only, with remainder, as to that, to them, and their estates in fee; and that the estate was subject to open for after-born children.

<sup>55</sup> In *Garden v. Pulteney* (1765) 1 Amb. 499, 27 Eng. Reprint, 324, 2 Eden, 323, 28 Eng. Reprint, 922, where testator bequeathed certain securities to his nephew in trust for his son William Pulteney "now an infant; and for such younger son and sons as the said William Pulteney now an infant shall or may have to be equally divided between them share and share alike and in case there shall be but one younger son then I give the whole to that younger son," it was held to be very clear that William Pulteney was intended to take only an estate for life, with remainder to his younger sons, as otherwise the latter words, which give the whole to a younger son in case there shall be but one, cannot have effect.

In *Newman v. Nightingale* (1787) 1 Cox. Ch. Cas. 341, 29 Eng. Reprint, 1194, where testator bequeathed a sum of money "to the sole use of Mrs. Eliz. Newman or of her children forever," it was held that Mrs. Newman did not take a share equally with her children, but that the true construction of the words was to give Mrs. Newman an L.R.A.1917B.

interest for life, with remainder to her children after her death.

In *Hill v. Thomas* (1878) 11 S. C. 346, which involved the following provision: "I give and bequeath to my son G. W. Hill . . . the land whereon I now live. . . . Now the condition of the above gift is that the property, including that given off before . . . is to remain the property of the said G. W. Hill and his child or children, and in case the said G. W. Hill should die and not leave any living child or children why then the said property" should go to others, it was held that, as the case was not one of a direct devise to parent and children, but as the gift to G. W. Hill was separate and distinct, and at the same time the gift to the children was of the whole property, just as it had been to G. W. Hill, and as there was no evidence that the "child or children" should take less than the whole, the only mode by which the testator's intention to give both G. W. Hill and his children the whole property was for them to take it successively. The fact that although, at the time of the making of the will, there was but one child of G. W. Hill in esse, the testator used the word "children," thereby indicating an intention to include after-born children, who could not take immediately, was also adverted to as supporting this construction.

The context was held to take the case out of the operation of the rule, in *Bunch v. Hardy* (1879) 3 Lea (Tenn.) 543, where testator had directed his lands to be divided into ten shares "so that all my children or their representatives hereafter named shall share and share alike in value as follows: Mary A. C. Rutledge, wife of Dr. J. B. Rutledge, deceased and her children shall have one share," and similarly disposed of other shares to his sons and daughters and to the children of a deceased son and a deceased daughter, in connection with the gift to the last-named of whom, however, children were not mentioned. The court said: "In the will before us, the testator starts out with saying that 'having been prospered and blessed by a kind Providence with a family of children and worldly means and property of value,' he wishes to secure to 'all my children' an equitable division, and directs a division of his lands into ten shares, as nearly equal in value as possible, 'so that all my children or their representatives hereafter named' shall share and share alike. The children are afterward named, and the two grandchildren, the representatives of their parents, showing definitely to whom this clause refers. So when he comes to speak of the division of the surplus personality, he directs it to be paid equally 'to each legatee or legally authorized representative.' These provisions of the will leave no doubt that the testator's children, and

But a direction for an equal division of the property among the children after the death of the parent does not necessarily exclude the children from participation during the life estate of the parent.<sup>56</sup>

An expression of the desire that the property be kept in the family has been held to indicate that the parent is to take an estate for life, with remainder to the children.<sup>57</sup>

his two grandchildren as representing their parents, were the primary objects of his bounty. The children of the living sons and daughters are not mentioned in these clauses. They are only connected with their parents in the specification of the shares into which the land is to be divided. The exclusion of the marital right in the case of the daughters and their children contemplates a separate estate in the daughters of the entire share devised to each daughter. There is a provision for the wives of the testator's sons, if they survive their husbands, that they shall have a right to remain on the land allotted to the husband until the youngest child comes of age, which seems to contemplate the ownership of the entire lands by the children upon the death of the father,—a result not attainable except by giving to the parent only a life estate. And lastly, the interstitial manner in which the whole will is drafted does not allow us to give the words on which the claim of the children rests for a present division their technical sense. The general scope of the will, with the situation and pecuniary condition of the sons-in-law, and the modest share of land allotted to each child, lead to the conclusion, as strongly as in any of the cases cited, that the intention of the testator was to give his daughter, Nancy E. Hardy, and his son, George A. Wood, the only two shares now in controversy, a life estate in the land devised to each, subject to a trust for the maintenance of their children while members of the family, with remainder to their children respectively living at the death of the testator, or born during the continuance of the life estate."

<sup>56</sup> In *Nimmo v. Stewart* (1852) 21 Ala. 682, where a testator bequeathed certain property to trustees for his daughter and her children during the daughter's natural life, the profits arising therefrom to be applied to the benefit of the said daughter "and her children," and after the decease of said daughter that the property should "be equally divided between the heirs of her body share and share alike," it was held that there was nothing in the will to show that the daughter should take an exclusive life estate, with remainder to her children, rather than a life estate jointly with them.

<sup>57</sup> An intention to give, by devise of a share of testator's property to a son "and his children," an estate to the son for life, with remainder to the children, was held to be deducible from a restriction of the right to sell such interest and an expression of a de-

It has been held that if, in addition to the bequest, there are any superadded words which import a desire that the property shall be settled, the court will lay hold of the words and will infer a gift to the parent for life, with remainder to the children.<sup>58</sup> An intention to settle the property is inferable where an intention to create a trust for the benefit of the parent and children is ex-

sire that such lands be kept for homes for testator's sons and their children after them, in *Fieldon v. Ballenger* (1895) — Tenn. —, 35 S. W. 758.

<sup>58</sup> *Mason v. Clarke* (1853) 17 Beav. 126, 51 Eng. Reprint, 980, 22 L. J. Ch. N. S. 956, 17 Jur. 479, 1 Week. Rep. 297.

In *Vaughan v. Headfort* (1840) 10 Sim. 639, 59 Eng. Reprint, 764, 9 L. J. Ch. N. S. 271, 4 Jur. 649, where testatrix bequeathed a sum of money "to the Marquis of Headfort and his children to be secured for their use," it was held that the words "to be secured for their use" evinced an intention that the father should take for his life, and his children after his decease, since it would be absurd to hold that those words applied to the Marquis, as he might have taken his own share and either secured it for himself or spent it.

In *Combe v. Hughes* (1872) L. R. 14 Eq. (Eng.) 415, 41 L. J. Ch. N. S. 693, 27 L. T. N. S. 366, 20 Week. Rep. 793, where testator directed that the share of his estate given to a daughter should be retained and accumulated in the hands of trustees during the lifetime of her husband, "and upon the death of her said husband, should there be any child or children living, then the property should be secured for their benefit and for that of their mother," but should there be no child or children living, then the testator directed that the said share should be paid to her for her own use and benefit, it was held that the share should be settled upon trust for the daughter for her life, with remainder to her children.

In *Holt v. Bowman* (1864) 33 Ga. Supp. 129, where testator, after specifying certain property, went on to say: "All which said property herein given I will and direct to be vested and given in proper and legal manner to my said daughter and to her children free from the debts or disposition of her present or any future husband," and in a subsequent item of the will, after mentioning the property theretofore given to each of his daughters, and therein given to make their shares equal, without mentioning their children, the testator concluded: "The shares coming to my several daughters and their children to be secured to them in legal manner and form as heretofore directed and specified in this will," —it was held that the will contained indications of intention sufficient to take the case out of the ordinary rule that where there is a devise or bequest to a mother and her children, the mother and children take a joint estate, and that the direction that

pressed, but not given legal form;<sup>50</sup> as in the case of a memorandum of instructions for a will or some such informal instrument operating as a will where no will has been formally drawn.<sup>501</sup> The words must, however, import that the whole fund, and not merely the share taken by the parent, is to be settled or secured.

As to whether a direction, in a gift to a mother and children, that the interest given to the parent shall be for her separate use, so as not to be subject

to the property be given "in proper and legal form" imported a settlement of the property upon the mother for life, remainder to her children, born or to be born.

<sup>50</sup> *In Re Bellasis* (1871) L. R. 12 Eq. (Eng.) 218, 24 L. T. N. S. 466, 19 Week. Rep. 699, an informal instrument creating a trust "for my niece, Mrs. Chas. Milford and her children," was held to create a trust for Mrs. Milford for life, with remainder to her children as joint tenants.

<sup>501</sup> Compare *Cator v. Cator* (1851) 14 Beav. 463, 51 Eng. Reprint, 364, set out in footnote 84, *infra*.

<sup>60</sup> *In Re Seyton* (1887) L. R. 34 Ch. Div. (Eng.) 511, North, J., said that he had been unable to find any case in which the mere direction, in a gift to a parent and children, that the interest to the parent should be for her separate use, has been held sufficient in itself, without more, to warrant the construction that the parent takes for life, with remainder to the children. Continuing, he said: "In the cases of *De Witte v. De Witte* (1840) 11 Sim. 41, 59 Eng. Reprint, 788, 9 L. J. Ch. N. S. 270, 4 Jur. 625; *Bustard v. Saunders* (1853) 7 Beav. 92, 49 Eng. Reprint, 998, 7 Jur. 986, and *Fisher v. Webster* (1872) L. R. 14 Eq. (Eng.) 283, 42 L. J. Ch. N. S. 156, 26 L. T. N. S. 765, it was held that the mother and children took as joint tenants, although the mother took for her separate use. In the cases of *Froggatt v. Wardell* (1850) 3 De G. & S. 685, 64 Eng. Reprint, 651, 14 Jur. 1101; *French v. French* (1840) 11 Sim. 257, 59 Eng. Reprint, 872, and *Jeffery v. De Vitre* (1857) 24 Beav. 296, 53 Eng. Reprint 372, there was a trust for the separate use of the parent, and she was held to take for life, with remainder to her children. But the reason in each case obviously was because the testator intended all the children of the parent to take,—an intention which would have failed if the parent and children living at the testator's death had taken immediate vested interests as joint tenants, and other children had been subsequently born. In *Bain v. Lescher* (1840) 11 Sim. 397, 59 Eng. Reprint, 926, the reason for the judgment is not given; but the form of the gift quite explains the conclusion that a settlement was meant, without supposing that the Vice Chancellor intended to depart from the view he expressed in *De Witte v. De Witte* a few months before." L.R.A.1917B.

to the debts, acts, and control of her husband, imports a desire that the property shall be settled, and so negatives the presumption that the mother and children are to take concurrently, the cases are not altogether harmonious.<sup>60</sup> It may be said, however, to be the prevailing opinion that where the words creating the separate use apply to the whole fund or legacy, they will be construed as giving the mother a life interest,<sup>61</sup> provided they indicate an in-

*In Neweom's Trusts* (1878) Ir. L. R. 1 Eq. 373, it was said: "It has been held that small expressions of an intention to make the gift one to the parent for life, with remainder to the children, are sufficient to lead the court to give that construction to such gifts. Amongst other expressions, words giving a separate use in the fund to a mother have been construed as sufficiently showing an intention to make her tenant for life of the whole fund, though the decisions on this point have not been uniform."

<sup>61</sup> Where a fund is given to a wife and her children, coupled with words creating a separate use in the mother of the whole fund, it is a sufficient indication to overthrow the presumption of an intent to give a concurrent interest. *Gordon v. Jackson* (1899) 58 N. J. Eq. 166, 43 Atl. 98.

See also in this connection, *Bunch v. Hardy* (1879) 3 Lea (Tenn.) 543, set out in footnote 55, *supra*.

A gift to the separate use of a married woman is conclusive against the children's participating with the mother during her lifetime. *Ogle v. Corthorn* (1844) 9 Jur. (Eng.) 325, 14 L. J. Ch. N. S. 337.

*In French v. French* (1840) 11 Sim. 257, 59 Eng. Reprint, 872, where testator, after giving a legacy of £5,000 to his son, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts, or control of her husband, gave a legacy of the same amount to his daughter Mrs. A., "in trust as aforesaid for the use of herself and children," it was held that the words "in trust as aforesaid" clearly meant that the income of the fund should be paid to her for her separate use, showing that the testator did not mean that the children should be let in to participate with their mother, but that she should take an interest in the fund for her separate use for her life, with remainder to her children. In *Neweom's Trusts* (Ir.) *supra*, it is said that it is not easy to reconcile *French v. French* (1840) 11 Sim. 257, 59 Eng. Reprint, 872, with *De Witte v. De Witte* (1840) 11 Sim. 41, 59 Eng. Reprint, 788, 9 L. J. Ch. N. S. 270, 4 Jur. 625, unless there were in the context of the will in the later case expressions leading to the conclusion that the testator intended to make a difference between the interests given to Mrs. De Witte and her children in the bequest under consideration,

tention that the mother shall take a different interest from that given to the children;<sup>62</sup> but that if they are equally applicable to the interest of the children as to that of the mother,<sup>63</sup> or if they apply simply to the mother's interest, whatever that may be,<sup>64</sup> the rea-

son fails, and the ordinary rule that all take concurrently must prevail.

and those given to daughters of the testator in other bequests expressly given for life, with remainders to their respective children.

It has sometimes been held that the presumption that parent and children are to take concurrently is displaced where it appears that testator meant future as well as existing children to

ing that the words should be restricted, contrary to their ordinary meaning, to the interest of the mother, or that they give her an interest in the whole fund.

In the case last above cited, where testator directed the payment of a share of his residuary estate to the widow of his nephew "for the sole and separate use of herself and her family by my said late nephew," it was held that she and her children took as joint tenants.

In Jackson v. Coggin (1859) 29 Ga. 403, a will by which testator gave to his daughter "and her children free from the disposition of any future husband" certain property was construed as giving the daughter, not a life estate in the property bequeathed, but an estate in fee jointly with her children, notwithstanding the use of the words "free from the disposition of any future husband;" since if the object of the testator was to protect the property given to his daughter from the marital rights of any future husband, these words would be just as necessary whether she took one share in fee or an estate for life in the whole.

In Dawson v. Bourne (1852) 16 Beav. 29, 51 Eng. Reprint, 686, where testator gave his residuary estate "to be equally divided between my nieces, Jane Dawson and Mary Dawson, and I confine my said legacies hereinbefore mentioned to be given to my nieces Jane Dawson and Mary Dawson and their children without comprehending their husbands, unless they, my said last mentioned nieces or either of them should die without issue," it was held that the only way to give effect to the words was to give the residue between the nieces equally for their separate use for life, and after their death to their children, and if they should have no children, then to the nieces absolutely.

<sup>62</sup> Newsom's Trusts (Ir.) supra.

<sup>63</sup> Ibid.

<sup>64</sup> In Newsom's Trusts (Ir.) supra, it was said, after a review of the decisions, that the result of all the cases is that where there are words giving the mother a separate estate in the entire fund, the fund must be settled to the separate use of the mother for life, with remainder to the children at her death as joint tenants; but that where the separate use is not attached to the entire fund, but to the interest of the mother, whatever it may be, or to the interests of all alike, it has no such operation, and they all take together as joint tenants; and that although it is informal and untechnical to direct the shares of children generally, male and female, to be in trust for their separate use, this consideration will not warrant the court in holding that the words should be restricted, contrary to their ordinary meaning, to the interest of the mother, or that they give her an interest in the whole fund.

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In De Witte v. De Witte (Eng.) supra, where testator bequeathed his residuary estate in trust for the sole, exclusive, and peculiar use and benefit of his daughter Sarah and her children, independent of her husband, it was held that, as there was no reason apparent on the face of the instrument why the words used by the testator should not be taken in their plain and ordinary sense, the daughter did not take merely a life estate, with remainder to her children, but jointly with them.

A similar conclusion was reached upon the authority of the foregoing case in Bustard v. Saunders (1853) 7 Beav. 92, 49 Eng. Reprint, 998, 7 Jur. 986, construing an executory agreement for the settlement of a sum of money to be secured for the benefit of a sister "and her children so that the same might not come to the hands or power of her husband."

In Fisher v. Webster (1872) L. R. 14 Eq. (Eng.) 283, 42 L. J. Ch. N. S. 156, 26 L. T. N. S. 765, it was held that neither a provision that "all that is willed unto my daughter [naming her] to be under her own care and for her own benefit," nor a declaration that it shall not "be subject to the debts, engagements, control or disposition of any husband," sufficiently indicated an intention that, under a residuary bequest to the daughter "for her own benefit and her children, or only one child if she should have any," the daughter should take a life interest, with remainder to her children, rather than jointly with them.

take.<sup>65</sup> While this may be a valid presumption where the bequest is of personal property, which will vest absolutely at the testator's decease, it has not always been recognized;<sup>66</sup> and properly does not apply where real property is the subject of the gift, in which case the estate taken by the parent and existing children may open to admit after-born children, who take by executory devise.<sup>67</sup> It has, however, been applied in the case of real property,<sup>68</sup> the reason given being that "it is a singular intention to impute to the testator that the parent's interest in the estate should continually diminish on the birth of a new child."<sup>69</sup> But inasmuch as this is an inevitable result of the form in which

the gift is made, it is hard to see where there is anything "singular" in the intention. Any incongruity in the result is not attributable to the fact that the gift is to future as well as existing children, but to the assumption that the parent was the primary object of the testator's solicitude.

It has been held that the fact that the testator uses the term "children" in the plural, when there was but one child in existence at the time of making the will, shows that it was not his intention that the children should take immediately.<sup>70</sup>

An intention that the children are to take in succession to, rather than concurrently with, the parent, has been in-

See also in this connection, *New England Mortg. Secur. Co. v. Gordon* (1895) 95 Ga. 781, 22 S. E. 706, set out in footnote 16, supra; *Bently v. Ash* (1906) 59 W. Va. 641, 53 S. E. 636, in footnote 14, supra.

<sup>65</sup> In *Jeffery v. De Vitre* (1857) 24 Beav. 296, 53 Eng. Reprint, 372, where there was a bequest to a married woman "for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband," it was held that the only way in which the testator's intention that all the children should take might be effected was by giving a life interest to the mother and the fund afterwards to the children.

In *Bridges v. Wilkins* (1857) 56 N. C. (3 Jones, Eq.) 342, where testator provided: "I give and bequeath the balance of my property to my sisters that may be living at the time of my death and their lawful issues except the slaves. . . . The slaves of which I am now seised and possessed I give to my mother during her natural life and after her death to go to my sisters and their children as above mentioned with the express condition that no property of which I am now possessed or may hereafter fall heir to shall go to any but my sisters directly and their progeny and not their husbands," and left surviving him six sisters, only one of whom was married and had children at the time when his will was made and at his death, it was held that as he certainly did not intend to exclude the children which his unmarried sisters might have, it was necessary to adopt the construction that the sisters should take estates for life in the slaves and other property, with remainders to their children.

<sup>66</sup> In *Alcock v. Ellen* (1692) Freem. Ch. 185, 22 Eng. Reprint, 1150, where a man devised a term for years to his daughter and her children, she then having three children, and also to such other children as she should have, it was held that the woman and her three children took jointly each a fourth part, and that the after-born children took nothing.

See also *Dunn v. Bank of Mobile* (1841) 2 Ala. 152, and *Lynn v. Hall* (1897) 101 L.R.A.1917B.

Ky. 738, 72 Am. St. Rep. 439, 43 S. W. 402,—set out in footnote 16, supra.

<sup>67</sup> See footnote 14, supra.

<sup>68</sup> In *Downes v. Long* (1894) 79 Md. 382, 29 Atl. 827, where testator devised certain land "to the wife and children of my son William Thomas Long, now living and to any other legitimate child or children which may be hereafter born to him," it was held that though a gift to "children" simpliciter, without additional description, means a gift to the children in existence at the death of the testator, provided there are children then in existence to take, this rule can have no application where, as in the present case, there are words showing the testator's desire that all the children of his son shall have an equal interest in the estate; and that to effectuate this intention the wife will be regarded as having an estate for life, with remainder to her children by her then husband.

In *Jeffery v. Honeywood* (1819) 4 Madd. Ch. 398, 56 Eng. Reprint, 752, where testator gave certain estates to his daughter Mary and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her and their heirs and assigns forever, as tenants in common, and not as joint tenants, it was held that as it was plain that after-born children would be included in this devise, and as it would be a singular intention to impute to a father that his daughter's interest in the estate should continually diminish upon the birth of a new child, the devise should be considered as containing two gifts: one to the mother without words of limitation superadded, and another to her children, their heirs and assigns; and that these two gifts could only be rendered sensible by construing, as the words import, a life estate to the mother, and a remainder in fee to the children.

<sup>69</sup> See *Jeffery v. Honeywood* (Eng.) supra.

<sup>70</sup> *Hannan v. Osborn* (1834) 4 Paige (N. Y.) 336; *Hill v. Thomas* (1878) 11 S. C. 346; but compare *Bently v. Ash* (1906) 59 W. Va. 641, 53 S. E. 636, set out in footnote 14, supra.

ferred where they are referred to as "heirs,"<sup>71</sup> or as taking "after" their parent,<sup>72</sup> or according to the parent's

will.<sup>73</sup> The same inference has been drawn from a limitation over should the parent "leave no issue."<sup>74</sup>

<sup>71</sup>In *Goss v. Eberhart* (1859) 29 Ga. 545, where testator, having previously disposed of his property to his wife and children, went on to provide: "My will and desire is and I do hereby give and bequeath all of the property of every description that I have given or may hereafter give to each of my daughters I give to them and their children heirs of their body and not subject to be sold by their respective husbands or liable for their debts in any manner whatever," it was held that the employment of the word "heirs" indicated that the children were not to take a present estate, but one that should come to them after the death of their mother; and therefore that they took by way of remainder rather than a present estate jointly with their mother.

In *Woodruff v. Woodruff* (1861) 32 Ga. 358, where testator bequeathed certain property "in trust for my daughter Frances Woodruff and her heirs born and to be born," it was held that, as the class of persons to take after Frances Woodruff must be postponed until her death, the bequest should be construed as vesting in her a life estate, with remainder to her children whensoever born.

In *Schaefer v. Schaefer* (1892) 141 Ill. 337, 31 N. E. 136, where a testatrix bequeathed to a daughter certain property "in trust for her sole use and benefit and of her children and their children thereafter. But in the event that my daughter . . . should die and leave no children as heirs to the within mentioned property, then it is my will and desire that all of said property shall go to my brother," it was held to be plain that under the will the daughter took only a life estate, and that her children took a remainder in fee, which opened up to let in after-born children.

In *Chadwick v. Wilson* (1893) 73 Hun, 485, 26 N. Y. Supp. 394, where a testator provided: "As I know nothing of the whereabouts of my son Melville E. Wilson whether he is dead or alive I know not and as I have given him much more than any of the others of my children I give and bequeath to him the 12 acres known as the 'Carr lot' or its equivalent provided I sell my farm in trust for his heirs," and it appeared that the testator was uninformed as to whether Melville had children, it was held that it was not unreasonable to infer from the language used and from the circumstances disclosed that the intention of the testator was to devise to Melville a life estate in the property in question, with remainder to his children.

In *Wilson v. Vansittart* (1770) 2 Amb. 562, 27 Eng. Reprint, 360, where testator devised and bequeathed his residuary estate to his brother "and to his heirs male to be divided among them share and share alike, reserving out of the whole residue and remainder aforesaid the sum of £100 which I give unto my nephew John Wilson and the

sum of £100 which I give unto my nephew W. Stephenson, and the further sum of £800 which I desire may be equally divided amongst the other grandchildren of my father's first marriage," it was held, on grounds which are not stated in the report, that the brother took an estate for life, with remainder to his children equally.

In *Crawford v. Trotter* (1819) 4 Madd. Ch. 361, 56 Eng. Reprint, 738, 20 Revised Rep. 312, a legacy "to Lady Scott and to her heirs (say children)," she having children living, was held to give the legatee named a life interest, with remainder to her children; the word "heirs," which was used as synonymous with "children," importing that they were to take after her death.

But compare *Moore v. Leach* (1857) 50 N. C. (5 Jones, L.) 88, set out in footnote 17, supra, where the phrase used was "her children, the lawful heirs of her body," and it was held that the rule applied.

<sup>72</sup>In *Cooper v. Mitchell Invest. Co.* (1910) 133 Ga. 769, 29 L.R.A. (N.S.) 291, 66 S. E. 1090, a will by which testator devised and bequeathed certain land and personalty "to my children by my first wife and their children after them" was construed, as giving a daughter a life estate with remainder over to her children, born and to be born.

<sup>73</sup>In *Re Buckmaster* (1882) 47 L. T. N. S. (Eng.) 514, where testator devised to his two sons the whole of his freehold property "as tenants in common, share and share alike, and in their respective proportions to their children or according to their wills," and at the date of the will one of the sons had children and the other had none, it was held that the words "according to their wills," which, of course, could only take effect at the death of the respective parents, showed that the children were not to take together with their parent; and, accordingly, that the devise was a gift in fee simple to the testator's two sons as tenants in common, with a superadded executory devise at the death of each of them of his share to his children or his devisees.

<sup>74</sup>In *Lampley v. Blower* (1746) 3 Atk. 96, 26 Eng. Reprint, 1023, where testatrix devised to her two nieces "each one half of the produce of bank stock and to their issue and if either of them should happen to die before the legacy becomes due to her, and leaves no issue, the share of her so dying shall go to the survivor," it was held that the phrase "leave no issue" showed that the issue should take after the death of their mother, rather than in joint tenancy with her.

In *Shepard v. Shepard* (1887) 60 Vt. 109, 14 Atl. 536, where testator gave his residuary estate "in equal shares" to his four sisters, "to them and their children forever, with this condition, that if either of my said sisters should die, leaving no children, then her share as aforesaid to the other

The presumption of an intention that the parent and children shall take concurrently has been held to be negatived where the parent is given a power to determine the portions to be taken by the children.<sup>75</sup>

sisters living, in equal shares," it was held that, in order to give full force to every clause and every word of the bequest, it must be construed as giving a life estate to the sisters, with remainder to their children surviving. The court said: "The language of the bequest is not that of an unqualified gift to the four sisters. First, their children are to take in same manner with them. Then the condition shows, whatever estate they severally take, is liable to be defeated on the contingency, if any of them die, leaving no children. The language of the entire bequest impresses us that it was the testator's intention, as natural affection would prompt, to provide primarily for his sisters. When we look at the condition, we find that they were not to take in fee, for the share thus taken was to be kept intact so it could, on the contingency there named, pass to the surviving sisters. Then their children were to take forever, or absolutely."

<sup>76</sup> In *Re Byrne* (1892) Ir. L. R. 29 Eq. 250, involving the construction of the following devise: "I bequeath to my wife [certain lands] to be held by her for her own and all my children's use and benefit. But I leave it entirely in her power to fix the portion that each of my children is to get out of my property," it was held that the power to determine the children's shares negatived the idea of a joint tenancy, and that the wife was a trustee of the property for herself and her children, with large discretionary power of determining what should be the children's interest when their shares should come to be allotted.

In *Mill v. Mill* (1875) Ir. Rep. 9 Eq. 104, affirmed in (1877) Ir. Rep. 11 Eq. 158, where testator bequeathed to his wife, should she continue unmarried, all his property, for the benefit of herself and her family; with the further provision that if she married, she should get £100 and the remainder of his property should be divided share and share alike among his children and the survivors of them; and the testator nominated and appointed the wife to execute the will "according to the real meaning and spirit of what is specified above," and recommended her to be guided by the advice of a certain person in all matters relating to the disposal of his property and the education of his children and the advancement of their well-being in society,—it was held that, considering the will in its entirety, it would be impossible to reconcile or account for its language on the basis of a merely joint tenancy being thereby given to the wife and children, but that the widow during widowhood took a life estate, with a power of appointment among her children, and that, in default of appointment, L.R.A.1917B.

Where a legacy is payable in part at once and in part at a future period, the parent will take for life, as otherwise different classes of children might take the two portions.<sup>76</sup>

Where the words of distribution are

the children would take as tenants in common.

In *Crockett v. Crockett* (1848) 2 Phill. Ch. 553, 41 Eng. Reprint, 1057, 17 L. J. Ch. N. S. 230, 12 Jur. 234, where a testator directed that all his property should be "at the disposal of his wife for herself and children," it was held to be absolutely inconsistent with the provisions of the will to hold that the children would take jointly with their mother, but that, as between herself and her children, the mother was either a trustee, with a large discretion as to the application of the fund, or having a power in favor of the children, subject to a life estate in herself.

In *Ward v. Grey* (1859) 26 Beav. 485, 53 Eng. Reprint, 986, where a bequest was made "to Mrs. Horatia Ward and her children," which the testator thereafter referred to as a legacy to her "and her family," Sir John Romilly said that, although he could not find any distinct authority on the subject, he was of opinion that the legatee and her children did not take as joint tenants, but that she took an estate for life in the fund, with a power of appointment amongst her children, and, in default of appointment, and subject to her life estate, the children would take the bequest equally among them. This case is cited in *Theobald on Wills* as "going beyond the present tendency of the court."

<sup>76</sup> In *Morse v. Morse* (1829) 2 Sim. 485, 57 Eng. Reprint, 869, where testator bequeathed to his daughter, Anne Morse, "and her children for their sole use and benefit £5000; £3000 thereof to be paid within one year after my decease and the other £2000 within one year after the decease of my wife; and I do appoint [certain persons named] trustees for the said sums of money for my daughter Anne Morse and her children," it was held that, as it was clear that the testator did not intend an immediate payment of the two legacies, and there would be an inconsistency with respect to them if the mother did not take a life interest, since then different classes of children would become interested in the two portions of the legacy, such a construction should be put upon the bequest as would make all the children participants; namely, that the mother should take a life interest, with remainder at her decease to all her children.

In *Scott v. Scott* (1860) 11 Ir. Ch. Rep. 114, where a sum of money of which another person had the use for life, and certain other personal property, was bequeathed in trust for the use, benefit, and behoof of a niece "and her children, without the control or intermeddling of her husband, and to be paid at such times and in

used as applying to the children only, as in the case of a gift to one and his children "as tenants in common if more than one," the parent takes a life estate only.<sup>77</sup> But the presumption that the parent and children are to take concurrently is, of course, not repelled, but, on

the contrary, is confirmed, where the words of distribution include the parent and children alike.<sup>78</sup>

The fact that the fund is given to the wife in trust for herself and her children,<sup>79</sup> or "for the benefit of" herself and children,<sup>80</sup> has been held not to

such manner as my said trustees shall in their discretion think fit," it was held that, as children born to the niece during the continuance of the life interest would, according to the ordinary rules of construction, be entitled to share in the money, the will should be given a construction which would admit them to participate in the other property as well; and therefore that the niece should be regarded as taking an estate for life, with remainder to her children.

<sup>77</sup>In *Burnsall v. Davy* (1798) 1 Bos. & P. 215, 126 Eng. Reprint, 867, where testator devised his residuary estate to his niece "and the issue of her body lawfully to be begotten as tenants in common (if more than one), but in default of such issue or being such if they shall all die under the age of twenty-one years and without leaving lawful issue of any of their bodies then I devise the same unto my cousin," it was held that as the words "tenants in common" could only apply to the issue, since the niece and one of the issue could never take as tenants in common, the niece took an estate for life only, with remainder to her issue after her death.

In *Doe ex dem. Gilman v. Elvey* (1803) 4 East, 313, 102 Eng. Reprint, 851, it was suggested, though not decided, that a devise to one and to the issue of his body, his, her, or their heirs, equally to be divided if more than one, should be held to be a devise for life to the person named, with remainder in fee to his issue, if he had any.

<sup>78</sup>In *Eccard v. Brooke* (1790) 2 Cox, Ch. Cas. 213, 30 Eng. Reprint, 99, 2 Revised Rep. 31, where testatrix bequeathed stock to trustees in trust after the death of A, to transfer the same "unto and amongst all and every the nephews and nieces that shall be then living as well on the side of my late husband as of mine to wit, the said Jane Lundy or her children," etc., "to be equally divided between them share and share alike," it was held that, in view of the directions that they should take equally, share and share alike, the children of the nephews and nieces took concurrently with their parents.

In *Salmon v. Tidmarsh* (1859) 5 Jur. N. S. (Eng.) 1380, where testator directed all his real and personal estate to be sold and the proceeds held by trustees "for the use and benefit of my wife Diana and our nine children and any after-born child in such manner as my said trustees may from time to time think proper, during the widowhood of my said wife and at the full discretion of my said trustees nevertheless it is my desire that they first set apart thereout for the separate use and benefit of my daughter, L.R.A.1917B.

ter, Susannah the sum of £300 and all the rest to be equally divided between my said wife and children (inclusive of Susannah) on their severally attaining twenty-one and my said wife continuing my widow and unmarried," it was held that though the first part of the will would give an estate to the wife for her life or until her second marriage, and upon her death or marriage the property would go to the children, the words "equally to be divided between them" showed that the widow and children were to take jointly.

In *Bradley v. Wilson* (1867) 13 Grant, Ch. (U. C.) 642, where testator bequeathed certain personal estate to his two sisters "and to their children, all to share alike if living," it was held that the sisters did not take life interests, but that the direction "all to share alike" showed that they took with their children as tenants in common.

In *Mason v. Methodist Episcopal Church* (1876) 27 N. J. Eq. 47, a bequest to testator's sister and her children of "\$1,000 to be invested on bond and mortgage of real estate and the interest to be collected and paid over to them annually and equally divided between them," was held, in view of the context, to be an immediate gift to the mother and her children who were living at the death of the testator, as tenants in common in equal shares.

<sup>79</sup>Newell v. Newell (1872) L. R. 7 Ch. (Eng.) 263, where the Lord Chancellor said: "I cannot find that the authorities bear out the proposition that a simple gift to the wife in trust for herself and her children will warrant the court in presuming that the fund was intended to be settled. Many reasons may be suggested for the fund being given in that form. The testator associates his executors, in whom he reposed confidence, with his wife in the executorship, and wishes them to assist her in getting in the estate, paying his debts, and attending to those duties which his wife alone might not be competent to discharge; and then he might very well say that, as soon as his estate was got in, he wished the executors to part altogether from the management of his affairs, and the whole to be handed over to his wife, the most natural person whom he could select; and what is there in the joint tenancy between her and her children more inconsistent with her having the management of the whole fund, than there is in a tenancy for life, with remainder to her children?"

<sup>80</sup>In *Jubber v. Jubber* (1839) 9 Sim. 503, 59 Eng. Reprint, 452, where testator bequeathed to his wife the use of all his property "for the benefit of herself and un-



be sufficient to indicate any intention that the wife should take an estate for life, with remainder to the children, rather than that the wife and children should take as joint tenants; though a different conclusion has been reached in a case in which the legacy was given to a third person, in trust, for the benefit of the parent and her children.<sup>81</sup>

It has been held that no implication that the parent is to take a life estate

only can be drawn from the fact that the parent, a married woman, is given power to dispose of the property by will if there are no children.<sup>82</sup>

The presumption arising from the form of gift, that the parent and children are to take concurrently, is not repelled by a "name and arms" clause.<sup>83</sup>

The solution of the question which forms the subject of this note may be assisted by reference to other gifts,<sup>84</sup> or

married children, that they may be comfortably provided for as long as my wife, Martha may remain in this life." it was held that the widow and the children who were unmarried at the testator's death were entitled equally to the income of the residuary fund during the life of the widow.

In *Curtis v. Graham* (1864) 12 Week. Rep. (Eng.) 998, where testator gave to his wife "all my copy-hold, freehold and personal estate whatsoever, to and for her absolute fee and dominion in fee simple forever and ever, and to her heirs, executors, administrators and assigns; also all my personal, leasehold and general possession to and for her use and for the use of my dear children. I hereby authorize her to appropriate any part thereof for her immediate use, and for that of her children,"—it was held that as there was nothing in the context showing a succession, and no words importing an absolute interest in the wife, with a trust to dispose of it, the only conclusion that could be arrived at was that it was a gift to the wife and children as a class, to take together, not as tenants in common, but as joint tenants.

<sup>81</sup> In *Rich v. Rogers* (1859) 14 Gray (Mass.) 174, where a testator, who had made one specific provision for his sisters in the gift of annuities without any reference whatever to their children, subsequently bequeathed to one of them "for the benefit of herself and her own children the sum of \$25,000 in trust," and made a similar provision for another sister, it was held that, as the legacies were given to be held by a trustee, and, being so held, were not directly appropriated to the sister and her children, but to her, "for the benefit of herself and her children," the true construction of the bequest was that each of the married sisters should take the income of the sum bequeathed in trust for the benefit of herself and her children for her life, and that the principal, after her death, should be divided among her children.

<sup>82</sup> In *McCord v. Whitehead* (1896) 98 Ga. 381, 25 S. E. 767, where testatrix devised and bequeathed her entire estate to her executors in trust, "that that part or portion that may be set apart for each of my daughters may be made over to trustee or trustees for each of them and their children and not subject to the debts or contracts of said trustee or any husband with which any of them now have or may hereafter intermarry, and in the event of having no children such as have none are au-

thorized to devise it in any manner they think proper," it was held that, notwithstanding the superadded words defining what was to become of the property if there were no children, such children did not take by way of remainder, but concurrently with their mother, the court saying: "At the time the will now before us was executed, it was quite common, in view of the restrictions which the law then placed upon married women, to annex to the devise of an estate in fee to a woman, the power to dispose of it by will; and, so far from operating as a limitation, this was not only consistent with, but was regarded as indicative of, an intention to create an estate in fee. . . . Nor can any implication that less than a fee is given to the daughters having children be drawn from the fact that the power to devise is given only to such as have no children. The reason for this omission in the case of such as have children is explained by the fact that in the part or portion set apart to such a daughter and her children, the children had an interest which their mother could not devise."

<sup>83</sup> In *Byng v. Byng* (1862) 10 H. L. Cas. 171, 11 Eng. Reprint, 991, where testatrix gave "in trust to my executors for my niece Mary Ann Byng and her children all my Quendon Hall estate in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion house," and various articles enumerated "as heirlooms with my estate," it was held that there was nothing in the will to restrict a mother to an estate for life, or to indicate that the children were to take in succession.

<sup>84</sup> In *Cator v. Cator* (1851) 14 Beav. 463, 51 Eng. Reprint, 364, where testator, who, by his will, had given a life estate to his daughter for her separate use, with remainder to her children, by a codicil headed "instructions to my solicitors," gave another legacy to the daughter "and children for their sole use and benefit," it was held that an intention might be inferred to settle the bequest made by the codicil in the same manner and on the same trusts as the bequest by the will, and therefore that the daughter took a life interest only.

In *Re Owen* (1871) L. R. 12 Eq. (Eng.) 316, 25 L. T. N. S. 489, where a testatrix gave £1,400 to trustees, in trust, to pay the interest thereof to M. for life for her separate use, and the capital to her children (exclusive of her two eldest sons thereafter named and provided for) who should survive her and attain twenty-one, and be-

by allusions made by the testator to the provision made for the parent,<sup>85</sup> or by reference made to other instruments<sup>86</sup> more particularly demonstrating the intention of the testator towards the objects of his bounty.

**IV. Indicia which vary the presumption arising where there are no children, that the children take in succession.**

Where the gift is of personal property, and there are no children at the

time the gift takes effect, the parent necessarily takes absolutely.<sup>87</sup> [This, of course, is not necessarily true in jurisdictions in which the doctrine of executory devises is deemed applicable in the case of personal property.] So, where the gift to the children is contingent upon their being in existence at the testator's decease, the parent will take absolutely, and not merely an estate for life, with remainder to the children.<sup>88</sup>

queathed to the two elder children of the said M. the sum of £1,500 each when and if they should respectively live to attain the age of twenty-one years, and the residue to M. and such of her children, including the two eldest sons, as should attain twenty-one, it was held that the gift of the £1,400 to the younger children, to the exclusion of the two elder sons, who were included in the gift of the residue, and the reference to this in the latter gift, justified the conclusion that the mother took a life interest in the residue.

<sup>85</sup> In *Caffary v. Caffary* (1844) 8 Jur. (Eng.) 329, where a testator declared that a sum of money invested in government securities should, at his wife's death, become "the property of my son Patrick John Caffary and his children," and in the subsequent part of the will referred to such sum as going at his wife's death to his son, it was held that the testator himself had showed that the son should take absolutely, and not jointly with his children.

<sup>86</sup> In *Fesler v. Simpson* (1877) 58 Ind. 83, where testator devised "to my son Walter Simpson and his children . . . the tract of land described in a deed to him made by me and my wife July 7, 1856, to be held as therein provided," and such deed, which had been made but never delivered, was to Walter Simpson and his children, habendum to the said Walter Simpson during his natural life, and at his death to his children in fee simple, it was held that reading the habendum of the deed in connection with the will, and as a part thereof, it was clear that Walter Simpson took only a life estate in the premises.

In *Kidd v. Borum* (1913) 181 Ala. 144, 61 So. 100, Ann. Cas. 1915C, 1226, where testator directed that certain property should be conveyed and delivered to trustees "for the use of my beloved wife Mary Georgiana and her children, William Douglas, James White and Anna Philida, during the natural life of my said beloved wife and at her death to our children forever," it was held that although the provisions of the will, standing alone, are to some extent contradictory and of doubtful import in respect to the estate conferred upon the widow, yet, when considered in connection with a deed of trust by which the testator had conveyed certain property "in trust for the use, support and maintenance of said beloved wife, Mary Georgiana and [her] children, William Douglas, James White and Anna L.R.A.1917B.

Philida, during the natural life of my said wife, remainder after her death in absolute right to my said children above named," and authorizing the trustees "to demand and recover of my executors any legacy or bequest which I may give to my beloved wife and children above named in my last will and testament, and, when received of my executors or administrators, to be held by said trustees for my said wife in the same manner and under the same trust as above provided,"—it made the widow and her children at the time of testator's death tenants in common of an estate for her life, with the remainder of the fee of the whole estate to all her children.

<sup>87</sup> In *Pyne v. Franklin* (1832) 5 Sim. 458, 58 Eng. Reprint, 410, 2 L. J. Ch. N. S. 41, where testator bequeathed the residue of his personal estate to his widow, subject to the payment of two legacies of £200 each to his nieces, Agnes and Frances and their children, to be paid in nine months after the death of his wife, in such shares, proportions, manner, and form as his wife should, by her will, appoint, amongst his nieces and their children, and neither of his nieces had a child at the time of payment, it was held that, as there were no persons to whom the legacies could be paid except the nieces, they therefore must, of necessity, take the whole.

In *Cape v. Cape* (1837) 2 Younge & C. Exch. (Eng.) 543, where testator directed that a legacy "be applied to the support and maintenance of the wife of my said son Henry, and for the support and education of his children born in wedlock," and there were no children at the death of the testator, Alderson, J., said that his impression was that the testator merely intended to give the legacy to the separate use of the wife, and if there had been children born at the time of the death of the testator, it would have been a question whether or not they took an interest under the will; but as there were no children at that time, the wife took it absolutely to her separate use.

<sup>88</sup> In *Gillespie v. Schuman* (1879) 62 Ga. 262, a devise of certain property "to my daughter Malinda P. Collier, and her children if any living" was held not to create a life estate only in the property in the daughter, with remainder to her children, but an absolute estate, where she had no children at the time the testator died.

Where the children are to take only during the parent's life, the construction by which the parent is given a life estate and the children the remainder is

necessarily excluded, and the parent's estate opens upon the birth of a child to let in such child.<sup>89</sup>

<sup>89</sup> In *Gaboury v. McGovern* (1884) 74 Ga. 133, where testator gave the residue of his estate in trust for the benefit and support of his daughter, who was then an infant and unmarried, and her child or children during her life, it was held that the equitable life estate taken by her was subject to open upon the birth of a child to her to let in such child for a use, enjoyment, maintenance, and support with its mother during her life.

In *Mitchell v. Long* (1877) 80 Pa. 516, s. c. sub nom. *Mitchell v. McConahey*, 34 Phila. Leg. Int. 48, where testator devised

to his son certain lands "to him, his wife and children during their natural lives, if he ever should have any, if not, he shall have it all himself," the son being unmarried at the making of the will and the death of the testator, it was held that as the land was not given to John and his wife during their natural lives, and after their death to their children for life, but to John, his wife and children during their natural lives, the son, his wife and his children, took concurrent, and not successive, life estates. E. S. O.

#### NORTH CAROLINA SUPREME COURT.

NATHAN L. CULLENS, JR., et al.,  
v.

WILLIAM E. CULLENS et al., Appts.

(161 N. C. 344, 77 S. E. 228.)

**Deed — conveyance to woman and her children — estate.**

A conveyance of a remainder to a woman and her children forever vests in her and her children living at the time, a life estate in common.

For other cases, see *Deeds, II. c. 2, in Dig. 1-52 N. S.*

(February 19, 1913.)

**APPEAL** by defendants from a judgment of the Superior Court for Hertford County in plaintiffs' favor in an action for partition of certain land. Reversed.

**Statement by Brown, J.:**

The plaintiffs allege that Sarah A. Cullens died seised in fee of said lands, and at her death they descended to her children the plaintiffs and defendant Wm. E. Cullens. The defendant Wm. E. Cullens answers that he denies § 2, and alleges that Sarah A. Cullens died seised in fee of only an undivided one-fourth interest in the land therein described, and that he (defendant) was a tenant owning an undivided one-fourth interest in fee in said land. He

further says that upon the death of Sarah A. Cullens one-eighth of her one-fourth interest descended to him, and that he is now the owner in fee of — part of the land aforesaid. The defendant Perry makes the same answer as his codefendant and claims to be the owner of his interest in the lands, which have been sold by agreement pending this proceeding, and the litigation is over the proceeds. His Honor gave judgment that plaintiffs are tenants in common in fee with defendant Wm. E. Cullens, each of an undivided one-eighth interest, as heirs at law of Sarah A. Cullens. The defendants Cullens and J. W. Perry appealed.

Messrs. Winborne & Winborne, for appellants:

Where land is conveyed to a woman and her children, they take as tenants in common, and only those born at the date of the deed take, unless there is one in ventre sa mère, and then such child will also take.

*Dupree v. Dupree*, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590; *Gay v. Baker*, 58 N. C. (5 Jones, Eq.) 344, 78 Am. Dec. 229; *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155; *Campbell v. Everhart*, 139 N. C. 511, 52 S. E. 201.

Prior to Act of 1784, the courts, in construing wills where the word "heirs" was omitted, but the word "forever" was used, held that a fee passed. The word "forever" showed the purpose of the devisor.

*Vickers v. Leigh*, 104 N. C. 257, 10 S. E. 308; *Cooper v. Mitchell Invest. Co.* 133 Ga. 769, 29 L.R.A. (N.S.) 291, 66 S. E. 1090; *Dillard v. Yarboro*, 77 S. C. 227, 57 S. E. 841.

Mr. Murray Allen also for appellants. Messrs. Pruden & Pruden and S. Brown Shepherd, for appellees:

The deed to Sarah A. Cullens and her children conveyed only a life estate, on as-

**Note.** — For annotation of the question as to when a conveyance to one and his children will give the children an estate jointly or in common with the parent, and when a remainder upon a life estate in the parent, see annotation following this case, post, 76.

For discussion of the same question where it arises out of testamentary dispositions, see note to *Rice v. Klette*, ante, 45. L.R.A.1917B.

count of the absence of the word "heirs" in connection with the name of the grantee, and all of her children took equally an undivided one-eighth interest.

Boggan v. Somers, 152 N. C. 390, 67 S. E. 965; Triplett v. Williams, 149 N. C. 394, 24 L.R.A. (N.S.) 514, 63 S. E. 79; Bryan v. Eason, 147 N. C. 284, 61 S. E. 71; Allen v. Baskerville, 123 N. C. 126, 31 S. E. 383; Smith v. Proctor, 139 N. C. 314, 2 L.R.A. (N.S.) 172, 51 S. E. 889; Tucker v. Williams, 117 N. C. 119, 23 S. E. 90; Mitchell v. Mitchell, 108 N. C. 542, 13 S. E. 187; Ray v. Durham County, 110 N. C. 169, 14 S. E. 646; Anderson v. Logan, 105 N. C. 266, 11 S. E. 361; Stell v. Barham, 87 N. C. 62; Helms v. Austin, 116 N. C. 751, 21 S. E. 556.

Brown, J., delivered the opinion of the court:

The only question presented on this appeal is: What interest has the defendant Wm. E. Cullens in the land sold for partition? It is admitted that Wm. Lassiter owned the land in controversy, and on August 16, 1865, conveyed the same by deed to his daughter, Sarah A. Cullens, and her children, reserving a life estate to himself and his wife, Parthenia. The language of the deed in the premises is "unto Sarah A. Cullens and her children;" and in the habendum, "unto her the said Sarah A. Cullens and her children forever." There is a clause of warranty in these words: "And I, the said William Lassiter, for myself, my heirs and assigns, do and will warrant and defend the right and title of the above-described tract of lands unto the said Sarah A. Cullens and her children forever against the lawful claim or claims of all persons whomsoever." The plaintiffs contend that the deed to Sarah A. Cullens and her children conveyed only a life estate, on account of the absence of the word "heirs" in connection with the name of the grantee, and that all her children took equally an undivided one-eighth interest. The defendants claim that, under said deed, Sarah A. Cullens and her three children living at the date of the deed became owners of the land in fee simple, subject to the life estate of the Lassiters. At the date of the deed Sarah had three children; the defendant W. E. Cullens being one of the three. One of the three children died young, prior to the death of Parthenia, who survived her husband. After the death of Parthenia, Sarah had born unto her several other children, all of whom survived their mother, who died in 1911.

We think it well settled that where land is conveyed, as in this case, to a woman and her children, they take as tenants in com-

mon, and only those born at the date of the deed take unless there is one in ventre sa mère, and then such child would also take; but that fact did not exist in this case. Dupree v. Dupree, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590; Gay v. Baker, 58 N. C. (5 Jones, Eq.) 344, 78 Am. Dec. 229; Heath v. Heath, 114 N. C. 547, 10 S. E. 155; Campbell v. Everhart, 130 N. C. 511, 52 S. E. 201.

The next question is: What estate did Sarah and her children (living at date of the deed) take under it? The plaintiffs contend that only a life estate passed under the deed, while the defendants contend a fee simple passed.

As the word "heirs" nowhere appears in the deed in connection with the grantees, Sarah Cullens and her children, we are of opinion that the said grantees each took only an estate for his or her life. In the recent case of Boggan v. Somers, 152 N. C. 390, 67 S. E. 965, it is held that deeds to land made prior to 1879 will not be construed as in fee in the absence of the word "heirs" in the conveyance, connected with the name of the grantee, and descriptive in some way of the estate he is to take; and a fee will not pass when it appears only in connection with the name of the grantor. In a well-considered opinion reviewing the precedents, Mr. Justice Hoke says: "While our court has long shown a disposition to interpret deeds as conveying a fee simple where such a construction would manifestly best effectuate the intent of the parties, in deeds bearing date prior to the statute of 1879, they have always required, for the creation of such an estate, that, as a mere construction of the legal title on the face of the instrument, the word 'heirs' should appear in the deed as connected with the name of the grantee, and descriptive in some way of his estate, and that such a construction was not permissible when it only appeared in connection with the name of the grantor." See also California Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 483, and Anderson v. Logan, 105 N. C. 266, 11 S. E. 361. In this last case it is expressly held that "where there are no words of conveyance in the instrument, or where the word 'heirs' does not appear in any part of the deed except in connection with the name of the bargainor, or with some expression, such as 'party of the first part,' used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the act of 1879 was passed, will be construed as vesting only a life estate in the bargainee." Stell v. Barham, 87 N. C. 62.

We are advertent to a line of cases which hold that where the word "heirs" does not

appear anywhere in the deed, upon an allegation in the pleadings of mistake, etc., a court of equity will construe the deed as passing a fee simple, when upon the instrument itself such intention plainly appears. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Real Estate Co. v. Bland*, supra. The pleadings in this case fail to present such question. The answers of the defendants contain no allegation that the word "heirs" was omitted by mistake, and that it was the plain intention of the grantor, Wm. Lassiter, to convey the land to his daughter Sarah and her then living children in fee. The defendant asks for no equitable relief. But we are not prepared to say that upon the face of this deed it was the manifest intention of Wm. Lassiter to give the land to Sarah Cullens and her then living children in fee, to the exclusion of those after-born. It was more likely his intention to convey it to Sarah herself in fee, and after her death to her children, using the word "children" in the sense of heirs of her body. But, under the settled decisions of this court, the instrument fails to effectuate such purpose, and, in our opinion, conveys to Sarah and her children living at date of

the deed an estate for life as tenants in common. It therefore follows that the defendant Wm. E. Cullens is the owner for his life of one-fourth interest in the land, and is entitled to the same life interest in one fourth of the proceeds of sale.

It may be that when Wm. Lassiter died the fee descended to Sarah, his daughter, if she was his only heir, and, if so, the defendant Wm. E. Cullens would inherit along with the other heirs at law of Sarah. That will be inquired into on next trial.

The effect of the special proceeding for partition in 1865 between the heirs at law of Wm. Lassiter was not passed on by the judge below and is not presented on this appeal by any assignment of error, and the same is true as to evidence which the court declined to hear, that Sarah Cullens had been in the adverse possession of the land from 1867 to her death in 1911. As Sarah was a life tenant, and, as such, in possession, we fail to see how she acquired title to the fee by adverse possession; but that matter may also be gone into on the next trial.

New trial.

**Annotation—Conveyance to one and his children as giving the children an estate jointly or in common with the parent, or a remainder upon a life estate in the parent.**

*I. In general, 76.*

*II. Instances in which parent and children have been held to take concurrently, 81.*

*III. Instances in which the parent has been held to take a life estate, with remainder to his children, 86.*

*I. In general.*

In order that the question discussed in this note may arise it must first be assumed or decided that the word "children" is used as a word of purchase, and not of limitation. As to when it is used as a word of purchase and when of limitation, see note on the Rule in *Shelley's Case*, 29 L.R.A. (N.S.) at page 1123.

The cases collated in this note are not merely those in which the term "children" is used in naming the parties to the deed or in the granting clause, but include as well cases in which it is omitted from the granting clause, but is used in the habendum or other parts of the deed. Cases in which the children have been named, as well as those in which they are merely described as "children," have been taken; as have cases where the conveyance, instead of being direct to the parent and children, was to a third

person in trust for a person named and his or her children.

The scope of the note, of course, does not include cases in which the parent is expressly given an estate for life, with remainder to the children; nor does it extend to the question whether, where the children are held to take immediately, the parent takes a one-half interest and the children the other, or whether they share per capita.

While the same question as forms the subject of this note may arise in the case of a gift by will to one "and his children," and although decisions on the construction of deeds and wills containing such a provision are often cited interchangeably, certain differences in the rules of construction applicable to the two classes of instruments<sup>1</sup> have seemed

<sup>1</sup> "We cannot safely apply, without much care, the rule of construction applicable to wills to the construction of deeds of conveyance. In construing wills, the intention of the testator is the sole guide, and words must be held to mean what he intended they should mean if it can be done without a clear perversion of their known and plain import. The intention of the devisee is not to be considered; he has no right to make

not only to justify, but to require, their separate treatment.<sup>2</sup>

The decisions collected in this note fall into two classes: those which bring to the construction of conveyances certain technical rules; and those which attempt to ascertain and give effect to the intention of the parties without employing such rules, and with the aid of certain rules of construction evolved by themselves.<sup>3</sup> It is, therefore, impossible to frame general statements which will harmonize with all the cases.

According to what may be termed the primary rule of construction, where the

conveyance is expressed to be to one "and his children," or to one and his children, naming them, and there are children living, the parent and the children then in being will, in the absence of anything to warrant a different construction, take concurrently, either as joint tenants or (where the deed expressly creates a cotenancy, or where what would otherwise be a joint tenancy is declared by statute to be presumptively a cotenancy) as tenants in common.<sup>4</sup> This result follows whether the rule applied is the technical one that persons named as grantees take (unless the habendum shows otherwise)<sup>5</sup>

terms with the deviser; besides, a will can be made, altered by codicil or revoked at the pleasure of the deviser. Not so with a deed of conveyance. To it there must be two parties, each having a right in settling its terms, and in its construction the intention of both parties must be considered. It cannot be altered or abrogated by either party, but only by the act of both. This difference between the rules of construction which govern these two classes of instruments is plainly founded in reason and justice." *King v. Rea* (1877) 56 Ind. 1.

That no construction more favorable to the interests of children ought to be allowed in the case of a deed than in the case of a will is held in *Baird v. Brookin* (1890) 86 Ga. 709, 12 L.R.A. 157, 12 S. E. 981, the court saying: "Children and grandchildren being the natural objects of a testator's affections, it is to be supposed that in the making of his will he usually bears them in mind, and desires them to share in and enjoy his bounty. This is manifest from the large number of wills providing, in one way or another, for the testator's descendants. Deeds are contracts, in the making of which both contracting parties are supposed to take care of themselves; and where a grantee intends to contract for the benefit of his children, as well as of himself, having the same natural desire in their behalf as in the case of a testator making a will, and being a party to the instrument, he has the opportunity to secure the end desired by having the deed speak its real purpose plainly and unmistakably. It would seem, then, that no rule more favorable to the interests of children ought to be allowed in the one case than in the other. We have seen what construction has been uniformly put upon wills containing language like that in the deed before us; and, on general principles, we can see no good reason why such deeds should not be similarly treated."

<sup>2</sup>For discussion of the question as one of testamentary construction, see annotation to *Rice v. Klette*, ante, 46.

<sup>3</sup>Under the old system of conveyancing, the office of the premises of a deed was rightly to name the feoffer and feoffee, and to describe the land to be conveyed; and the office of the habendum was to name again the feoffee, and to limit the certainty of the L.R.A.1917B.

estate. If the habendum was repugnant to the premises, either in the quantity of the thing conveyed, the estate, or the grantee, it was void. But the habendum might determine the estate granted, enlarge, explain, or qualify the premises, and might name a new grantee if the estate given was not immediate, but by way of remainder. In modern times, the inclination of the courts is to look to the whole of the instrument, without reference to formal divisions, in order to ascertain the intention of the parties, and not to allow technical rules to override the intent. *Beecher v. Hicks* (1881) 7 Lea (Tenn.) 207.

<sup>4</sup>Cases stating this rule are: *Plant v. Plant* (1905) 122 Ga. 763, 50 S. E. 961; *Faloon v. Simshauser* (1889) 130 Ill. 649, 22 N. E. 835; *King v. Rea* (1877) 56 Ind. 1; *McFarland v. Hatchett* (1904) 118 Ky. 423, 80 S. W. 1185; *Brabham v. Day* (1898) 75 Miss. 923, 23 So. 578; *Hamilton v. Pitcher* (1873) 53 Mo. 334; *Dupree v. Dupree* (1853) 45 N. C. (Busbee Eq.) 164, 59 Am. Dec. 590; *Gay v. Baker* (1859) 58 N. C. (5 Jones, Eq.) 344, 78 Am. Dec. 229; *Heath v. Heath* (1894) 114 N. C. 547, 19 S. E. 155; *Helms v. Austin* (1895) 116 N. C. 751, 21 S. E. 556; *King v. Stokes* (1899) 125 N. C. 514, 34 S. E. 641; *Darden v. Timberlake* (1905) 139 N. C. 181, 51 S. E. 895; *Fales v. Currier* (1875) 55 N. H. 392; *Sease v. Sease* (1902) 64 S. C. 216, 41 S. E. 898; *Porter v. Lancaster* (1912) 91 S. C. 300, 74 S. E. 374; *Arrington v. Roper* (1876) 3 Tenn. Ch. 572; *Beecher v. Hicks* (1881) 7 Lea (Tenn.) 207; *Norton v. Reed* (1897) — Tenn. —, 42 S. W. 688.

For instances in which the rule has been applied, see cases set out in II. infra.

<sup>5</sup>The reference to "children" as grantees may be so explained by the habendum as to give the children an interest in succession to, rather than concurrently with, the parent. See *Doty v. Wray* (1880) 66 Ga. 153; *Wager v. Wager* (1815) 1 Serg. & R. (Pa.) 374, set out in infra III.

The effect of other language in a deed to cut down the estate conveyed by the granting clause is discussed in the note to *Carl-Lee v. Ellsberry*, 12 L.R.A.(N.S.) 956, where it is said that the rule that the granting clause of a deed will prevail over subsequent clauses which would have the effect

an immediate estate, or the independent rule of construction by which it is presumed that the parents and children were intended to take concurrently; the practical difference between the two rules being that under the first the construction is varied only where the grantor has proceeded in due form to define the extent of the separate estate to be enjoyed by the grantees,<sup>6</sup> while, under the second, the construction may be varied by implications of a different intention found in other parts of the instrument, or in the relationship of the parties

thereto. Since at common law a grantee must be a person in being, after-born children can take no interest under the conveyance,<sup>7</sup> unless *en ventre sa mère* at the time of conveyance,<sup>8</sup> and provided the conveyance is one operating under the statute of uses.<sup>9</sup> That where a present estate is granted, only existing children are to take, is also presumed to be the intention of the grantor.<sup>10</sup>

But even where technical rules of construction prevail, it has been held that where it is clearly the intention of the parties that future as well as existing

to abridge the estate conveyed stands unquestioned, the differences of opinion concerning it being in regard to its application: that while it has sometimes been given effect as a rule of property, the consensus of modern decision is that it is a rule of last resort, applicable only where there is an irreconcilable repugnance between the clauses, so that it is impossible to discover with anything like certainty the intention of the parties; but that the intention, wherever discoverable, must be given effect, and that in seeking such intention the formal divisions of the deed are to be disregarded, and the deed is to be considered as a whole, and not in separate and distinct parts, as was formerly done.

A supplemental note on the same question may be found in 24 L.R.A.(N.S.) 514.

<sup>6</sup>Cf. *Wallace v. Craig* (1887) 27 S. C. 524. 4 S. E. 74, set out in *infra* II.; also *King v. Rea* (1877) 56 Ind. 1, where it is said that in the construction of deeds of trust the expressed trusts will always govern the words in the habendum; but this is not so in a deed of conveyance merely between the vendor and vendee. In such cases the distinction between words of limitation and words of purchase must be preserved, and the rights of the parties maintained accordingly.

<sup>7</sup>The rule of law is that under a conveyance to A and his children, if A have children at the time of the conveyance, the children take jointly with the parent, and after-born children are excluded. *Moore v. Lee* (1894) 105 Ala. 435, 17 So. 15.

Only such children as are alive at the time of the conveyance take thereunder. *Loyless v. Blackshear* (1871) 43 Ga. 327.

In *Glass v. Glass* (1880) 71 Ind. 392, it was held, construing a conveyance by way of advancement from a father to his son "and to the children of the said James C. Glass and assigns forever," that although it was the manifest intention of the grantor to convey an interest in the land to the children of James C. Glass who might thereafter be born to him, as well as the one then in being, effect could not be given thereto by reason of the well-settled rule that there must be a person in existence to receive as well as to give a conveyance of an immediate estate.

In *Blackburn v. Blackburn* (1902) 109 L.R.A.1917B.

*Tenn.* 674, 73 S. W. 109, it is said that in the cases in which it has been held that a conveyance to a mother and her children, without qualifying words, vests title in the then living children and the mother as tenants in common, to the exclusion of children coming into being thereafter, this rule is vested either upon the idea that a freehold could not be created to take effect in futuro, as at common law livery of seisin was essential to such estate, or else upon an implication from the instrument of an intention upon the part of the grantor that the title should pass to the living children as if they had been named therein.

Other cases supporting the position that after-born children are to be excluded from participation are: *Varner v. Young* (1876) 56 Ala. 260; *Burnett v. Sumerlin* (1900) 110 Ga. 349, 35 S. E. 655; *Plant v. Plant* (1905) 122 Ga. 763, 50 S. E. 961; *Beauchamp v. Fitzpatrick* (1909) 133 Ga. 412, 65 S. E. 884; *Powell v. James* (1914) 141 Ga. 793, 82 S. E. 232; *Faloon v. Simshauser* (1889) 130 Ill. 649, 22 N. E. 835; *King v. Rea* (1877) 56 Ind. 1; *Gay v. Baker* (1860) 58 N. C. (5 Jones, Eq.) 344, 78 Am. Dec. 229; *Heath v. Heath* (1894) 114 N. C. 547, 19 S. E. 155; *Porter v. Lancaster* (1911) 91 S. C. 300, 74 S. E. 374; *Beecher v. Hicks* (1881) 7 Lea (Tenn.) 207; *Livingston v. Livingston* (1886) 16 Lea (Tenn.) 448.

<sup>8</sup>*King v. Rea* (1877) 56 Ind. 1; *Powell v. Powell* (1869) 5 Bush (Ky.) 619, 96 Am. Dec. 372.

On right of infant *en ventre sa mère* to take as grantee in deed, see note in 44 L.R.A. 489.

<sup>9</sup>See, as holding that a child *en ventre sa mère* cannot take as grantee by a common-law conveyance, *Dupree v. Dupree* (1853) 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590.

It is otherwise, however, where the conveyance is to uses, for then, the legal estate vesting in the trustee, the rule of the common law is supposed to be satisfied, and the use is allowed to shift so as to include an unborn child. *Gay v. Baker* (1860) 58 N. C. (5 Jones, Eq.) 344, 78 Am. Dec. 229.

<sup>10</sup>See *Blackburn v. Blackburn* (1902) 109 Tenn. 674, 73 S. W. 109, in footnote 7, *supra*.

In *Plant v. Plant* (1905) 122 Ga. 763, 50 S. E. 961, it was held that there was noth-

children shall take an interest under the deed, and the conveyance is one operating under the statute of uses,<sup>11</sup> after-born children may take as beneficiaries of a shifting or springing use.<sup>12</sup>

Where the conveyance is not directly to one and his children, but is in trust for them, the difficulty occasioned by the rule that only persons in being can take as grantees disappears, and the question whether after-born children may take will depend solely upon whether the terms of the trust include them.<sup>13</sup> In such a case also there is a stronger presumption that after-born as well as existing children were intended to take.<sup>14</sup>

Under the technical rule of construction that those who are not parties to a deed can take no present interest under it, where "children" are not mentioned as parties to the deed, but are introduced by a subsequent clause, they cannot take

except as remaindermen; and such conveyances are accordingly construed as giving the parents a life estate, with remainder to the children,<sup>15</sup> unless the reference in the habendum to the children of the grantee is held merely indicative of the motive for the conveyance, rather than as creating any estate in the children.<sup>16</sup>

In cases which proceed independently of the technical rules of construction, however, children have been held to take jointly with the parent, although mentioned in the habendum only.<sup>17</sup>

The two presumptions, that where a conveyance is to one and his children the parent and children were intended to take concurrently, and that only existing children were intended to take, will yield to indications of a contrary intention.<sup>18</sup>

Thus, the fact that the conveyance is

ing in a deed to the party of the second part as "trustee of his wife [name] and their children," which deed conferred upon the trustee a power to sell and reinvest and to mortgage the trust property during his lifetime, to use, control, and dispose of the rents, issues, and profits as he might see fit, without accountability to the cestuis que trust, or either of them, or to any successor in the trust, to indicate an intention on the part of the maker of the deed that after-born children should be entitled to participate.

<sup>11</sup> As to the extent to which the statute of uses is in force in the United States, see note to *Blake v. O'Neal*, 16 L.R.A. (N.S.) 1148.

<sup>12</sup> In *Mellichamp v. Mellichamp* (1888) 28 S. C. 125, 5 S. E. 333, it was held, construing a deed conveying land to a woman "and the children she already has and may hereafter bear by her husband," that the intent of the grantor to include after-born children might be given effect (there being persons in existence then competent to take the estate conveyed) by regarding such persons as trustees of a shifting or springing use, first for themselves, and second for themselves and the after-born children as they should respectively come into being.

So also, in *Reeves v. Cook* (1905) 71 S. C. 275, 51 S. E. 93, a deed granting property to a woman "and the heirs of her body which she has or may have by" her husband was construed as conveying to the woman and her children, including those born after the conveyance, as tenants in common.

For other instances in which children born after the conveyance took effect were held to be entitled upon their birth to an equal share with their parent and the other children, see *Dunn v. Bank of Mobile* (1841) 2 Ala. 152; *Southern R. Co. v. Hays* (1907) 150 Ala. 212, 43 So. 487; *Cessna v. L.R.A.* 1917B.

*Cessna* (1868) 4 Bush (Ky.) 516; *Powell v. Powell* (1869) 5 Bush (Ky.) 619, 96 Am. Dec. 372,—set out in II. *infra*.

<sup>13</sup> Although no title in law will vest in children thereafter born, notwithstanding a clear declaration of the grantor's intent that the after-born children shall take, they will take as beneficiaries under a trust by deed, and the living grantees under a direct deed will hold the legal title in trust for themselves and the after-born children. *Arrington v. Roper* (1876) 3 Tenn. Ch. 572.

<sup>14</sup> In *Ragedale v. Mabry* (1874) 8 Baxt. (Tenn.) 300, where a husband purchased certain real estate and caused it to be conveyed to a trustee for his wife "and her children," it was held, judging from the most obvious import of the words, that this being a continuing trust, the words "her children" referred to all persons who might answer the description of the children of that marriage during the existence of the trust, including those born subsequent to as well as those born before the date of the conveyance.

<sup>15</sup> See *Foster v. Shreve* (1869) 6 Bush (Ky.) 519; *Blair v. Osborne* (1881) 81 N. C. 417; *Beacroft v. Strawn* (1873) 67 Ill. 28; *Moreland v. Hunley* (1867) 37 Ga. 342,—set out in III. *infra*.

<sup>16</sup> For an instance of this, see *Mauzy v. Mauzy* (1884) 79 Va. 537.

<sup>17</sup> See *Henderson v. Sawyer* (1896) 99 Ga. 234, 25 S. E. 312; *Huie v. McDaniel* (1898) 105 Ga. 319, 31 S. E. 189; *Brasington v. Hanson* (1892) 149 Pa. 289, 24 Atl. 344; *Chandler v. Jost* (1886) 81 Ala. 412, 2 So. 82,—set forth in II. *infra*.

<sup>18</sup> A very slight indication of an intention that the children should not take jointly with the mother will suffice to give the estate to the mother for life, with remainder to her children. *Beecher v. Hicks* (1881) 7 Lea (Tenn.) 207.

A slight indication of intention will induce the courts to give the deed a construc-



in the nature of a family settlement will raise a counter presumption that after-born as well as existing children are to take thereunder. And where it may be inferred that the parent is intended to have the enjoyment of the whole, or that the parent is not to take an estate of inheritance in any part of the property, the children necessarily take by way of remainder; though in some instances conveyances in the nature of family settlements have been held to give the children an interest jointly with the parent during the lifetime of the parent, as well as the remainder after the parent's decease.<sup>19</sup> So, in Kentucky, it is held that if a husband makes provision for his wife and children, an intention should be presumed upon his part to give the whole of it to her for life, remainder to the children, unless the contrary purpose appears from the terms of the provision or the circumstances attending it.<sup>20</sup>

tion which will permit after-born children to participate in the benefit of the conveyance. *Blackburn v. Blackburn* (1902) 109 Tenn. 674, 73 S. W. 109.

<sup>19</sup> See *Davis v. Hunter* (1857) 23 Ga. 172; *Luquire v. Lee* (1905) 121 Ga. 624, 49 S. E. 834; *Jarvis v. Quigley* (1849) 10 B. Mon. (Ky.) 104; *Hallam v. Ashford* (1902) 24 Ky. L. Rep. 870, 70 S. W. 197; *Williams v. Williams* (1885) 16 Lea (Tenn.) 164,—set out in II. infra.

<sup>20</sup> *Smith v. Upton* (1890) 12 Ky. L. Rep. 27, 13 S. W. 721.

While gifts and conveyances to a wife and her children under the ordinary rule would create a joint tenancy, the courts in the construction of instruments executed by a husband to his wife and children are always inclined to construe the instrument as creating an estate for life in the wife, with remainder to the children. *Koenig v. Kraft* (1888) 87 Ky. 95, 12 Am. St. Rep. 463, 7 S. W. 622.

<sup>21</sup> A father making provision for his child and that child's children may well be supposed to have intended them to take jointly. They are all of his blood and are the natural objects of his bounty; but when a husband makes a conveyance to his wife and their children there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself. *Davis v. Hardin* (1880) 80 Ky. 672.

<sup>22</sup> In *Bullock v. Caldwell* (1884) 81 Ky. 566, it was said: "In *Davis v. Hardin* (1880) 80 Ky. 672, this court said: 'A father making provision for his child and that child's children may well be supposed to have intended them to take jointly. They are all of his blood and the natural objects of his bounty.' If others were named in such a grant than the children, there would then be no room for a conten-

Two reasons have been given for this rule: first, that the provision for the wife may not be diminished during her lifetime, and second, that if she takes jointly with her children, the husband's bounty may by her death pass into the hands of a stranger, even as against himself.<sup>21</sup> This presumption has been held not to apply where a father makes provision for his child and that child's children;<sup>22</sup> though the broad rule stated in some of the later Kentucky cases makes no account of this distinction.<sup>23</sup>

In some states, notably Kentucky, Pennsylvania, and Tennessee, it has been thought necessarily to follow from the fact that after-born children are intended to take that they must take as remaindermen, and consequently that where an intention to benefit after-born children is indicated, the parent takes an estate for life.<sup>24</sup> This overlooks the possibility of such children taking through

tion, and because the word 'children' is used affords no reason for inferring an intention on the part of the grantor to make a different disposition of the estates than the plain language of the instrument indicated, and then to reverse the rule when applied to strangers, for the reason that such a conveyance is susceptible of but one construction. Nor is there any reason to suppose that the draftsman would employ such language in a conveyance when the grantor's purpose is to give or grant the estate to the daughter for life and the remainder to her children."

<sup>23</sup> See, for example, *Hall v. Wright* (1905) 121 Ky. 6, 87 S. W. 1129.

<sup>24</sup> In *Blackburn v. Blackburn* (1902) 109 Tenn. 674, 73 S. W. 109, it is said that if the deed, when taken all together, discloses a purpose upon the grantor's part that all the children of the mother, without regard to the time of their birth, shall become beneficiaries of the property conveyed, then, to effectuate this purpose, the mother will be converted into a tenant for life and the children into remaindermen, the remainder vesting in those living at the date of the instrument, and the estate opening upon the subsequent birth of children so as to embrace them; or else a mother will be held to be trustee for herself and her then living as well as her after-born children.

In *Hall v. Wright* (Ky.) supra, it is said that the application of the joint-tenancy rule should only be made, if at all, in cases where it clearly and affirmatively appears that at the time the donor acted he knew there could be no after-born children. "We cannot believe, unless the contrary intent clearly appears, that the donor ordinarily, in the use of language granting or devising property to his child and his child's children, intends that his own child having one child shall first own one half in fee, and

a shifting use. It has led to its being stated in some cases as an absolute rule that a deed to a man and his children, or to a woman and her children, will be presumed to convey a life estate to the parent, with remainder to the children. In view of the fact that if it is intended that the parent shall take a life estate, with remainder to the children, it is both natural and easy to say so, this rule seems rather far-fetched. The flounderings through which the Kentucky courts have come to face in a direction opposite from that in which they started may be traced through their decisions.

Where, at the time of the conveyance, the grantee named has no children, the presumption is that the term "children" is a word of limitation rather than of purchase, giving such grantee an estate tail; but this presumption may be rebutted, and in such case the grantee named is usually held to have an estate for life, with remainder to the children;<sup>28</sup> though this does not necessarily follow, since, where the conveyance is one operating under the statute of uses, or is in trust for the parent and children, the estate of the parent will open to admit his children as they come into being.<sup>29</sup>

*II. Instances in which parent and children have been held to take concurrently.*

"B having divers sonnes and daughters, A giveth lands to B et liberis suis, et a lour heires, the father and all his children do take a fee simple joyntly by force of these words (their heires); but if he had no childe at the time of the feoffment, the childe borne afterwards shall not take." 1 Co. Litt. 9a.

Dunn v. Bank of Mobile (1841) 2 Ala. 152, a deed of gift by which the donor declared the intention that the donee and her children then in life, who were designated by name, and those thereafter to be born, should enjoy the property conveyed immediately after the donor's death, it was held that the mother did not take an

estate for life, to the exclusion of her children during that period, but that those in life obtained a present interest immediately upon the donor's death as tenants in common with their mother, and that the children born after that event became, upon their birth, entitled to an equal share with their mother and elder brothers and sisters.

In Chandler v. Jost (1886) 81 Ala. 412, 2 So. 82, a conveyance to a married woman, habendum "to her for the joint use of herself and her children, Bella and Francis, and such other children as shall be born to her of her present marriage," was held to give her only a partial interest in the property as tenant in common with her children.

In Sullivan v. McLaughlin (1891) 99 Ala. 60, 11 So. 447, it was held that there was nothing in a deed whereby the husband conveyed to his wife "and the heirs of her body by myself as husband" certain described lands "to have and to hold to the said [wife] and the heirs of her body by myself as husband and to her assigns in the right and for the interest of her said heirs as aforesaid," from which it could be inferred that the grantor intended to postpone the interest of his children, who accordingly took jointly with their mother.

In Varner v. Young (1876) 56 Ala. 260, it was held that, under a deed conveying certain property, in consideration of natural love and affection for the grantor's wife and children, to a trustee as trustee of the wife "and her children, to her and their proper use and exclusive benefit and behoof forever," the wife and her then only child took an equal undivided interest, and that after-born children took no interest whatever.

In Moore v. Lee (1894) 105 Ala. 435, 17 So. 15, it was held that under a deed whereby the grantor, in consideration of love and affection for his daughter, conveyed certain land to "the said Ida B. Lee and her children forever," "and for her own benefit and behoof forever," the daughter did not take a life estate with

then, on the birth of another child, own one third in fee, and then one fourth, and so on, until in his old age only he may finally come to know what land he really does own."

<sup>28</sup>In New Hampshire, the rule has been laid down that where there is a grant to a woman and her children, and there is nothing to show that the term "children" is used in the sense of "heirs of the body," and there are children living at the time of the grant, they will take as tenants in common with their mother; but that where there are no children, the woman takes an estate for L.R.A.1917B.

life, with remainder to the children. See Fales v. Currier (1875) 55 N. H. 302.

In Hall v. Wright (Ky.) supra, it is said that the same construction must obtain whether there are any children in being at the time of the deed or not, for the donor is in the same state of ignorance as to future children in the one case as in the other. The unborn children, when there are already children and when there may be more, and the unborn children when there are as yet none, are presumably alike the subject of the donor's thoughts.

<sup>29</sup>See footnotes 12 and 13, supra.

remainder to her children, but jointly with her children then in esse.

In *Southern R. Co. v. Hays* (1907) 150 Ala. 212, 43 So. 487, a deed to "Fannie Hayes and her two children, Bessie, Thomas (Hayes) and Clifton Hayes and any succeeding heirs of her body," "to have and to hold to Fannie Hayes and her children and their heirs and assigns forever," was held to give the property conveyed to Fannie and her children then living, and to those who might be born to her after its execution.

In *Brenham v. Davidson* (1876) 51 Cal. 352, a deed by which the grantor conveyed certain property to his wife and to his son Peter, and to such other heirs as his wife might have during the marriage, and after her decease to the children of the marriage, their heirs and assigns forever, was held, without discussion of the question, to vest the estate in the wife and son, in equal moieties as tenants in common, in fee simple.

In *Davis v. Hunter* (1857) 23 Ga. 172, it was held that the proper interpretation of a deed of gift to the grantor's daughter and her then husband and her children then or afterward born, for their support and maintenance during the natural lives of said daughter and her husband, remainder to the children, —was to give the title to the property conveyed to the grandchildren and a joint estate in the usufruct during the daughter's life to the daughter, her husband and her children.

In *Loyless v. Blackshear* (1871) 43 Ga. 327, it was held that under a conveyance to a trustee for M. "and her children," M. and her children then in life took what at common law would have been a joint estate, but which, under the statute, was an estate in common in fee simple, and not a life estate to M., with remainder to her children.

Under a deed granting property in trust "for the sole and separate use and benefit of the said Frances Catharine Bridges and any children she may have, free from the control or contracts of any husband the said Frances may hereafter marry," the grantee takes as tenant in common with her children. *Pierce v. Brooks* (1874) 52 Ga. 425.

In *Chess-Carley Co. v. Purtell* (1885) 74 Ga. 467, it was held that under a conveyance made to one as trustee for his wife and her "present heirs," his wife and her children which she then had took the property as tenants in common.

In *Henderson v. Sawyer* (1896) 99 Ga. 234, 25 S. E. 312, it was held that where premises described in a deed were there-

by granted, bargained, and sold to a named person "to have and to hold unto her . . . and the heirs she may have by" her husband, "to them and their own proper use, benefit and behoof forever, in fee simple," the effect of such deed was to convey the title to the grantee named and her three children in life when it was executed, as tenants in common.

In *Huie v. McDaniel* (1898) 105 Ga. 319, 31 S. E. 189, where a father in the granting clause of a deed conveyed to his daughter, "her heirs and assigns," a certain tract of land, the habendum clause, however, being "to have and to hold said land and its appurtenances unto" the daughter and her two children, naming them, "made equal as heirs," it was held that the conveyance should be construed, to effectuate the real intention of the parties, as passing an estate in common to the daughter and her two children.

Under a grant to one and his children the title will vest in such one and his children then living as tenants in common, to the exclusion of after-born children, in the absence of anything further to show the intention of the grantor. *Burnett v. Summerlin* (1900) 110 Ga. 349, 35 S. E. 655.

In *Luquire v. Lee* (1905) 121 Ga. 624, 49 S. E. 834, it was held that the estate created by a deed conveying land to a trustee "to have and to hold the said tract or parcel of land to the said (trustee) his heirs and assigns forever, upon the special confidence and trust nevertheless, for the sole and separate use of Nancy R. Lee and her children during the natural life of or widowhood of said Nancy R. Lee; and at her death or marriage this trust to cease and the property to be equally divided between the children of said Nancy R. Lee living at her death share and share alike,"—was a joint life estate in Mrs. Lee and her children during her life, with a fee-simple estate in remainder to the children who should survive her.

In *Beauchamp v. Fitzpatrick* (1909) 133 Ga. 412, 65 S. E. 884, it was held that under a deed whereby the grantor, in consideration of love and affection, conveyed certain land to a trustee for his daughter and the children of her body, "for the sole and separate use of the said [daughter] and her children as aforesaid, their heirs and assigns," the daughter and her children in being at the time of the conveyance took as tenants in common.

In *Walker v. Walker* (1913) 139 Ga. 547, 77 S. E. 795, it was held that a deed

whereby the grantor, in consideration of love and affection, conveyed to his wife and their four children, naming them, certain property, "to have and to hold the said tract of land under them the said [names] their heirs and assigns, together with all and singular the rights members and appurtenances thereof to the same belonging, to their own proper use and benefit forever in fee simple, provided nevertheless that such tract of land herein granted shall not be sold unless for the purpose of division of same, as hereinafter specified, by said parties of the second part except upon application to the superior court of said county by the said [wife] if in life and all such children who shall be living and shall have attained their majority at the time of such application, and upon leave granted by the judge of said court for such sale and provision made by said judge by the reinvestment of the proceeds of said sale in an estate of like nature with the one herein created and provided further that the corpus of the estate granted by this deed or arising from reinvestment above mentioned shall not be encroached upon nor shall division of the same be made until the said [wife] shall have died and all of said children who may live for so long have attained their majority; and provided further that if at the time of the said division any of the parties of the second part shall have died leaving no children or descendants of children then the share of said party or parties shall be divided among those of said parties of the second part living at said time share and share alike; but if said deceased party shall have left a child or children or descendant of children, then said child or children or descendant of children to take the share of their deceased ancestor,"—did not create a life estate in the wife with remainder over to the children, but conveyed the land in fee to the wife and children named, with a provision that no division of the property should be made until after the death of the wife and the majority of the children who might live to reach majority; the fee conveyed, however, being subject to the divested as to any grantee who might die before the time for division.

Under a deed conveying an immediate estate, with present enjoyment, to a woman and her children, the title vests in the woman and such children as are living at the time of the conveyance as tenants in common, and children thereafter born to her take no interest under such L.R.A.1917B.

deed. *Powell v. James* (1914) 141 Ga. 793, 32 S. E. 232.

In *Jarvis v. Quigley* (1849) 10 B. Mon. (Ky.) 104, where a conveyance of slaves in the nature of a marriage settlement, was in trust for the use and benefit of the wife of a certain person "and the heirs of her body begotten by" such person and contained the recital: "It being the distinct understanding of the parties hereto that the aforesaid slaves and each of them are in no event to become liable to or for the debts of the aforesaid [husband] but said slaves and each of them and their increase are to be held, kept and used by the aforesaid trustee for the sole and exclusive use and benefit of the aforesaid Eleanor and the heirs of her body by the aforesaid [husband]," it was held that although the conveyance for the sole use of the wife and her children in being and in expectancy might be understood as giving to the wife an interest in common with her children, which might go to her husband on her death, yet as this was not the necessary construction of such conveyance, and as it was expelled by the provision that in no event should the property become liable for the husband's debts, it would best comport, with such provision and with the obvious intent of the grant to construe it as giving to the wife no interest beyond her own life, and vesting in the children, at her death, whatever interest she had.

In *Cessna v. Cessna* (1868) 4 Bush. (Ky.) 516, it was held, construing a contract whereby the vendor, for a valuable consideration, bound himself to convey a tract of land to his son "and his lawful children," that the children took as purchasers, and that the estate would open up to children born after the date of such contract. In *Hall v. Wright* (1905) 121 Ky. 16, 87 S. W. 1129, the case of *Cessna v. Cessna* (Ky.) supra, is explained by saying that no contention was made by the parties or considered by the court involving the suggestion of giving the first taker a life estate with remainder to the children.

In *Powell v. Powell* (1869) 5 Bush (Ky.) 619, 96 Am. Dec. 372, where a husband conveyed certain property through an intermediary to his wife and her child or children begotten by him, it was held that a child born shortly after the date of the conveyance eo instanti became a joint tenant with her mother by the legal effect of the deed. But in *Davis v. Hardin* (1880) 80 Ky. 672, it was said with reference to the foregoing case that it would no doubt have been held that

the wife took only a life estate if the question had been raised and the attention of the court had been called to *Webb v. Holmes* (1843) 3 B. Mon. (Ky.) 404; but that the child claimed only one half of the estate, and the case of *Webb v. Holmes* does not appear to have been cited. And in *Hall v. Wright* (Ky.) *supra*, it is said that the case of *Powell v. Powell* (Ky.) *supra*, is not in accord with the established rule in Kentucky.

In *Tucker v. Tucker* (1880) 78 Ky. 504, a deed without formal caption, reading "Know all men that William Hunt . . . in consideration of [the payment of a specified amount of money] paid by John C. Tucker, doth hereby bargain, sell and convey to Martha Ann Tucker and the heirs of John C. Tucker their heirs and assigns forever the following real estate," was held to vest an absolute estate in *præsent* in Martha Ann Tucker and her two children then living as joint tenants. The court further said: "The fact that John C. Tucker paid a portion of the purchase money cannot alter the construction. His intention does not enter as an element into the construction of the deed from Hunt; but if it did, the will of John C. Tucker clearly manifests that he understood that the deed from Hunt vested the land in his children, Foster and Rachel. He wills the bulk of his estate to his last wife and to his daughter Virginia, and assigns as a reason that Foster and Rachel are the owners of the home place (the land in controversy) and that the disposition made by him will equalize the children." This provision of the will is said, in *Hall v. Wright* (Ky.) *supra*, apparently to have constrained the court to effectuate the manifest intention of the father.

In *Bullock v. Caldwell* (1884) 81 Ky. 566, it was held that under a conveyance from a father to his daughter "and her children, of the second part, to have and to hold said tract of land to the parties of the second part, their heirs and assigns forever," the children living at the time of the conveyance took a present interest in the property conveyed, although their names were not inserted in the deed.

In *Hallam v. Ashford* (1902) 24 Ky. L. Rep. 870, 70 S. W. 197, a deed made by a father to a daughter and her children, the granting clause of which was: "This deed of conveyance made and entered into this the 13th day of April, 1897 between George Davis of Mercer County, Kentucky, of the first part and Melinda Ashford and her children she now has and any other she may hereafter have of

the second part witnesseth: The said party of the first part, for and in consideration of the sum of \$1 cash in hand paid and natural love and affection I have for my said daughter, Melinda Ashford, wife of Levy Ashford, and her living children, and any other that she may hereafter have, do hereby sell and convey to said Melinda Ashford and her children during the life of said Melinda Ashford, and at her death to go directly to her then living children or heirs of any dead ones, the following described property,"—was construed as giving Melinda Ashford and her children a joint tenancy in the land during her life, and the fee simple at her death to her then living children or the heirs of any who should fail to survive her, leaving issue.

In *Brabham v. Day* (1898) 75 Miss. 923, 23 So. 578, it was held that a conveyance "to Eliza Day and her children" gave to her child then living an estate as tenant in common with the mother.

In *Tyler v. Lilly* (1902) 81 Miss. 606, 33 So. 445, a deed, made by filling in a printed form, and bearing marks of haste, carelessness and inattention, expressed to have been made between the party of the first part and "C. J. Bolen and children, parties of the second part," and witnessing, "that the said party of the first part in consideration of the sum of \$500 to him paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant, bargain and sell convey and convey and confirm unto the party of the second part his heirs and assigns the following described lots . . . unto the said party of the second part and unto theirs heirs, executors and administrators and the said party of the first part for his heirs, executors and administrators do hereby covenant and agree with the said party of the second part theirs heirs and assigns and the said party of the first part will warrant and defend the title to the said premises unto the said party of the second part and to theirs heirs and assigns forever,"—was construed to give a child of C. J. Bolen living at the time of the conveyance a one-half interest in the land as tenant in common, notwithstanding the use of the word "his" in the phrase "his heirs and assigns" in the granting clause.

In *Gay v. Baker* (1860) 58 N. C. (5 Jones Eq.) 344, 78 Am. Dec. 229, it was held that a deed reciting as a consideration the love and affection which the donor had for Elizabeth Gay and her children, and conveying negroes to a trustee

"for the proper use, behoof and advantage of my daughter aforesaid, together with her children aforesaid," and which did not disclose any intention to give in succession to the daughter the use for life and then to her children, but, on the contrary, declared that the daughter should have the use together with the children, and that the whole equitable interest should belong to the daughter and her children in common, vested an estate in the mother and the children then born and one in ventre sa mère, as tenants in common, to the exclusion of after-born children.

In *Shirlock v. Shirlock* (1847) 5 Pa. 367, a deed naming as party of the second part "Mary Shirlock in trust for herself and her children," and granting "unto the said Mary in trust for herself and her children and unto their heirs and assigns [certain property] to have and to hold unto the said Mary Shirlock for herself and her children their heirs and assigns,"—was construed as giving Mary Shirlock and her children an estate in common in fee simple; the court below (the judgment of which was affirmed per curiam) saying that the plaintiff's claim founded on the construction giving a trust to Mary Shirlock and a fee to the children could not be supported, for if they claimed as cestuis que trust merely, their estate would determine with that of the trustee, for in deeds special words of limitation are always essential; but that all difficulty on the point might be obviated by considering the words "their heirs" to refer to both Mary Shirlock and her children, and treating them all as grantees in the deed. This construction was, however, repudiated in *Coursey v. Davis* (1863) 46 Pa. 25, 84 Am. Dec. 519; and in *Hague v. Hague* (1894) 161 Pa. 643, 41 Am. St. Rep. 900, 29 Atl. 261, it is said that *Shirlock v. Shirlock* has never been followed and has been several times questioned and departed from in subsequent cases, and cannot now be regarded as authority.

In *Brasington v. Hanson* (1892) 149 Pa. 289, 24 Atl. 344, it was held that under a deed granting lands to Sally Brasington "for the only use and behoof of the said Brasington and her heirs, viz: Samuel, Milton, Oscar and Albert H. Brasington," Sally Brasington took as a tenant in common with her four children L.R.A.1917B.

named, rather than a life estate, with remainder to such children.

In *Wallace v. Craig* (1887) 27 S. O. 524, 4 S. E. 74, construing a deed of gift from a daughter to her mother, whereby the donor conveyed certain lands to a trustee "to hold for the sole and separate use, benefit and behoof of Mrs. Laura S. Craig and her children," it was held that although it was obvious that the donor intended to convey the land to her mother primarily for her benefit, and incidentally for that of her children, and that the mother should take a life estate for the use of herself and children, and the children the remainder, such intention could not be given effect; and that, under the rule in *Wild's Case*, the mother and her children took as tenants in common.

In *Foster v. Glover* (1895) 46 S. C. 522, 24 S. E. 370, it was held that under a conveyance which, for and in consideration of natural love and affection for the grantor's son and his family, and for the sum of \$50 paid by the trustee, conveyed property to such trustee in trust for the sole and separate use of Mrs. Sarah A. Foster and her children, Mrs. Foster and each of her children living at the time of the execution of the deed took concurrently.

In *Porter v. Lancaster* (1911) 91 S. C. 300, 74 S. E. 374, a deed whereby a husband, for a valuable consideration, conveyed lands to his wife "and the issue of her body by me, Charles Smith begotten . . . to have and to hold all and singular the premises before mentioned unto the said Priscilla Smith and the issue of her body as aforesaid their heirs and assigns forever," was held to vest the property in the wife and the issue of her body by the grantor living at the time of the execution of the deed, as tenants in common.

In *Gray v. Hays* (1847) 7 Humph. (Tenn.) 588, a deed made in consideration of natural love and affection of the grantor for his daughter, to a trustee for such daughter and her child and such other children as she might have, was held to vest the property jointly in the daughter and her children.

In *Barnes v. Vickers* (1874) 3 Baxt. (Tenn.) 370, a deed to a woman and her five children was held to have vested them with title as tenants in common.

In *Williams v. Williams* (1885) 16 Lea (Tenn.) 164, it was held that the mere construction of the language of a deed whereby a husband conveyed land to his wife "for her sole and separate use and benefit, together with her children; she

to have control of the property and in the event of her death before his [the husband's] the property to revert to him in trust for his children," was that the wife took a life estate for herself, with a trust in favor of the children jointly with her during life, with remainder to the children after her death, the husband, if surviving, taking the legal estate for the benefit of the children of the marriage.

In *Livingston v. Livingston* (1886) 16 Lea (Tenn.) 448, a conveyance starting out with a recital that it is made between the first party "and his wife Mary W. Livingston and his children" of the other part, and undertaking, for the nominal consideration of \$1 "and the love and affection he bears his said wife and children" to convey "unto the said Mary W. Livingston and his children their heirs and assigns forever" certain lands, to have and to hold "to the said Mary W. Livingston and his children their heirs and assigns forever," with the usual covenant of warranty "to his wife Mary W. Livingston and his children as aforesaid"—was held to be plainly in present to the grantor's wife and his then children; and that after-born children could claim no interest thereunder.

In *Yarbrough v. Whitman* (1908) 50 Tex. Civ. App. 391, 110 S. W. 471, a deed "to Lucy Ann Haile and to her children, jointly," was held to convey an equal share to the person named and each of her children then living.

**III. Instances in which the parent has been held to take a life estate, with remainder to his children.**

In *Elmore v. Mustin* (1856) 28 Ala. 309, a deed by which the grantor, in consideration of natural love and affection, granted to his daughter "the following named property and to her children the natural heirs of her body at her death,—namely [describing the property], to have and to hold all and singular the above named property hereby given and granted unto the said Sarah Elmore, my daughter, her executors and administrators forever, as her and her children's property,"—was construed as giving the daughter a life estate, with remainder to such of her children as might be living at her death.

In *May v. Ritchie* (1880) 65 Ala. 602, a deed by which the grantor conveyed certain property in trust "for my said daughter, Christiana and the heirs of her body," following the description of the property with the words, "which said property I give in trust to Samuel

Jordan, for the use of my said daughter, Christiana and the heirs of her body for their support and the support of her children; and at the lawful age of her youngest child after her death then the above property to be divided among her children," was held (the words "heirs of her body" being construed as synonymous with "children") to give the daughter an equitable estate for life with remainder to her children.

In *Moreland v. Hunley* (1867) 37 Ga. 342, a deed the words of conveyance in which were "do give and grant unto my said daughter a negro woman and her children to have said negroes and their increase unto my said daughter and her children free from the control of her husband" was construed, in view of the absence of words of inheritance, to give the daughter only a life estate in the slaves, with remainder to her children.

In *Doty v. Wray* (1880) 66 Ga. 153, it was held that a deed whereby the grantor granted to A "and her three children," to have and to hold for and during her natural lifetime for her own sole and proper use and benefit, stipulating that after her death, at such time as her youngest child should come of lawful age, the property should be divided to the children named, and should either die before arriving at lawful age, leaving no lawful issue of their bodies, then among the survivors, A took a life estate, with remainder to those of her three children named in the deed who should be in life when the youngest attained his majority.

In *Burnett v. Summerlin* (1900) 110 Ga. 349, 35 S. E. 655, it was held that a voluntary deed from a father to his son "and his children" and their heirs and assigns, conveying a tract of land "for the use and benefit of [the son] during his natural lifetime and to his children at his death, but in no event to be subject to the debts, contracts or liabilities of" the son, with habendum clause to the son "and his children, their heirs, executors, administrators and assigns in fee simple," conveyed to the son a life estate, with remainder to his children.

In *Beacroft v. Strawn* (1873) 67 Ill. 28, it was held that under a deed conveying land to Nancy L. Beacroft with habendum as follows: "The said land hereby conveyed to be held and used by the said Nancy L. Beacroft during her natural life, free from the debts, contracts and liabilities of the husband of said Nancy L. Beacroft, and at her

death to go to the children of her body . . . to have and to hold as aforesaid the land, premises and appurtenances aforesaid unto the party of the second part their heirs and assigns forever." Nancy took a life estate, with remainder to her children.

In *Webb v. Holmes* (1843) 3 B. Mon. (Ky.) 404, a conveyance containing the following recitals and terms: "This indenture, made and entered into this 25th day of July, 1812, between Henry Crist and Rachael his wife, . . . of the one part, and Francis and Sarah Thomas . . . of the other part, witnesseth, that for the love and good will for them and their children, that intending to convey to Sarah Thomas a certain dower in lands, for the entire benefit of her and his children, do hereby and by these presents, transfer, set over, and convey to her and her children forever, [certain described lands] which said tract of land, with all and singular its appurtenances thereunto belonging, we do hereby transfer and convey to said Sarah Thomas and her children forever, as above mentioned, clear and free from encumbrances,"—was held to give Sarah Thomas an estate for life, with a remainder in fee to all her children, those born subsequently to the date of the deed as well as those born previously thereto. The court said: "This is a deed, inter partes, in which Crist and wife are named parties on the one side, and Sarah Thomas and her husband on the other; the children are no parties, nor are they named as such in the caption of the deed, which, by the designation of the parties, is intended to confine the deed to those who are named, in exclusion of all others as contracting parties. And as a stranger, who is not party to a deed, can derive no legal interest under it, or maintain covenant on it, so it is well established that those who are not parties to a deed can take no present interest under it; but those who are not parties may take by way of remainder (Co. Litt. 231, a; Doe ex dem. Wells v. Scott (1814) 3 Maule & S. 308, 105 Eng. Reprint, 624; *Lowther v. Kelly* (1722) 8 Mod. 116, 88 Eng. Reprint, 91; 4 Comyns's Dig. title 'Fait,' D. 2 and the notes seq., Principal and Agent, 243). So to give to the deed operation at all, as to the children, they must be construed to take in remainder only, as they cannot take a present joint interest with the mother. And surely such construction should be given to the deed as to give some beneficial interest to the children, as they were clearly intended to be provided for. By giving

to them an estate in remainder in fee, to take effect after the life estate of their mother, they all may be provided for, not only those who were born before, but those who were born after, the date of the deed, for in that case there is a freehold to support the remainder, until all the children are born. And it may be fairly presumed that it was as much the object of the donor to provide for after-born children as those that were born before the date of the deed. Besides, the use of the term 'dower' in the caption, which the donor says he intended to convey to Sarah Thomas, which term, in common parlance, means a life estate, strengthens the conclusion that a life estate to her and remainder to her children was intended."

In *Rogers v. Payne* (1853) 14 B. Mon. (Ky.) 167, it was held that a conveyance in trust for the separate use of the wife of the grantor and such children as she then had or might have, and to the survivors or survivor of them, did not give the wife any joint interest with the children then in existence, because the unborn children, if there should be any, would also be entitled to an interest in the estate; but that she took an estate for life, with remainder to her children surviving her. The court said: "This disposition of the estate is such as would naturally have suggested itself to the mind of the donor as reasonable and proper; and the conclusion that such was his object is strongly fortified by that clause in the conveyance which authorized the trustees, on the request of the mother alone, to sell any part of the estate, holding the proceeds, for the same uses and trusts that the estate before the sale was subject to. A construction of the instrument that would apply the words referred to, to the children alone, or to the mother and children jointly, and make the estate conveyed merely a life interest in the children, until it passed to the survivor of the whole of them, although barely allowable according to a mere literal interpretation of the language used, would be so unnatural in its consequences, and so repugnant to the presumed intention of the donor, who was the father of the children, as to be wholly inadmissible. By such a construction, the interest of one of the children in the estate, instead of passing to his children upon his death, would pass to his surviving brothers and sisters, and so on, until the whole of the estate would vest in the last and sole survivor. Such a disposition of the estate could not have been



contemplated by the donor when he executed the deed, and would be utterly repugnant to his feelings as a father."

In *Foster v. Shreve* (1869) 6 Bush (Ky.) 519, it was held, in view of the rule that those who are not parties to a deed can take no present interest under it, but may take by way of remainder, that, in order to give any operation to the words "the present heirs" in a deed expressed as having been made between Weathers Smith, of the one part, and Susanna Rogers, of the other part, and granting unto the said Susanna Rogers "and her present heirs" certain lands, "to have and to hold all and singular the improvements and appurtenances thereto belonging unto the said Susanna Rogers and her present heirs forever," and concluding with a covenant of warranty of title to Susanna Rogers "and her present heirs," the persons designated therein as "the present heirs" of Susanna Rogers must be held to take in remainder only.

In *Davis v. Hardin* (1880) 80 Ky. 672, a conveyance which recited that it was "between David W. Jones of the first part and Mary E. Jones and William B. Jones, infant child of Mary E. Jones, of the second part," whereby a husband conveyed certain property in trust for "the said Mary E. Jones and William B. Jones and any other child or children of her begotten by the said David W. Jones," was construed, in the light of the attendant circumstances and the relation of the parties, and the further circumstance that the deed provided for the enjoyment of the use of the property by the grantor and his wife unless the trustee should take possession of it, and in that case that he should pay the entire rents and profits to the wife, thus showing that it was not the grantor's purpose to make a present provision for the child then in being or those that should be thereafter born, and the fact that his only child was then an infant of tender years,—as giving his wife a life estate with remainder to their children, rather than a joint interest with the children, as the result of such construction would be that the bounty of the grantor might be entirely diverted from his family and blood.

In *McGinnis v. Banta* (1882) 4 Ky. L. Rep. 256, a conveyance in trust for the grantor's wife and "her children by her present marriage," in consideration of love and affection, was held, in order to give effect to the purpose of the grantor, to secure the land to the exclusive use of his wife and his children by

their marriage, to vest the wife with an estate for life, remainder to the children.

In *Meriwether v. Meriwether* (1888) 10 Ky. L. Rep. 669, 10 S. W. 272, a conveyance made by one who had purchased the estate of a husband at a sheriff's sale, in pursuance of an agreement whereby he recited that he had made such purchase in trust for the wife and her children, and promised to convey to her and her children as soon as the rents and profits of the land should have reimbursed him for his outlay, was held to create a life estate in the wife, with remainder to her children, rather than a joint tenancy with them.

In *Smith v. Upton* (1890) 12 Ky. L. Rep. 27, 13 S. W. 721, it was held that under a conveyance made at the instance of a husband who was the equitable owner of the land, to his wife "and her children," the wife took, not a half interest therein, but a life estate, with remainder to the children, upon the ground that, in view of the relation of the parties, such was presumably the husband's intention.

In *Bodine v. Arthur* (1890) 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904, a deed the conveyancing clause of which was "have this day, given, granted bargained and sold to Hettie Bodine," and the habendum clause of which was "to have and to hold unto the said Hettie E. Bodine, wife of the said B. W. Bodine, and to her children by him begotten, forever," was held to limit the estate conveyed to Mrs. Bodine to a life estate with remainder to her children begotten by R. W. Bodine, the court saying: "According to the uniform decision of this state, such conveyances give to the named vendee a life estate, remainder to the children. This construction grows out of the fact that, as there must be parties, vendors and vendees, in order to make a valid conveyance, none but parties vendees can take a present estate. Such parties may be designated by their proper names, or by such other designation as will identify the particular persons meant as vendees. In this case the expression 'her children by R. W. Bodine, begotten' does not identify the particular individuals who are to take, because they, or some of them, may hereafter be born. Hence, they cannot be deemed parties vendees in the sense of taking an immediate estate; but they can take an estate in remainder. See *Foster v. Shreve* (1869) 6 Bush (Ky.) 522. Such conveyances, thus construed, are effective, otherwise not; and as it

must be presumed that the grantor intended all the parts of the deed to have the effect that the law gives to the language used, consequently it must also be presumed that he intended to grant a life estate, with remainder, unless, as intimated, the contrary intention appears."

In *Goodridge v. Goodridge* (1891) 91 Ky. 507, 16 S. W. 270, a deed by which a husband, in consideration of "the love and affection which the party of the first part has to his wife, Margaret and the children of the party of the first part now born and those hereafter to be born of the said parents," granted and conveyed to the party of the second part "and said children" certain described property, was held, in order to effectuate the evident intention of the grantor to provide for future children, and having regard to the natural and usual feelings and motives by which a person is shown to be influenced in disposing of his property, to give the wife a life estate in the whole, with remainder to the children, rather than a fee jointly with the children.

In *Fletcher v. Tyler* (1891) 92 Ky. 145, 36 Am. St. Rep. 584, 17 S. W. 282, a deed made upon consideration furnished by Woodson Fletcher, husband of Chloe Ann Fletcher, and the father of the then-born children of her body, reading: "This indenture made and entered into this the 28th day of May, 1861 by and between O. F. Stirman of one part and Chloe Ann Fletcher and the heirs of her body by Woodson Fletcher upon her begetting, for and in the consideration," etc. . . . "Do hereby sell and convey to Chloe Ann Fletcher and the heirs of her body aforesaid,"—was held, in order to give effect to the husband's evident intention to provide for future as well as for existing children, to give the wife a life estate, with remainder to their children, rather than a joint present interest in fee with those then living.

In *Baskett v. Sellers* (1892) 93 Ky. 2, 19 S. W. 9, a deed the granting clause of which was "for and in consideration of natural love and affection the said party of the first part has for his daughter, . . . the said A. B. H. Farley, and his son, T. L. Farley, parties of the second part, the party of the first part has this day sold and by these presents doth grant, bargain, sell and convey to the parties of the second part the following described land," with habendum "to them my said daughter and son and their children forever," it was held that

as the word "children" was evidently used in its popular sense and as indicating the desire of the grantor to provide for his two children and their children, should they have any, the grantees should be regarded as taking a life estate only, with remainder to their children.

In *Barth v. Barth* (1901) 23 Ky. L. Rep. 1246, 64 S. W. 993, a conveyance by which a father, in consideration of love and affection for his daughter, conveyed to her husband "in trust for the said [daughter] and such child or children as she may have, and in case any of said children shall die leaving issue then the said issue shall take the share which the parent would have taken if living, and the said George W. Barth with the said Sarah Ann, his wife, during her life may occupy the premises aforesaid as they may choose, or if the said Sarah Ann shall consider it best during her life he shall rent the said premises and apply the said rent aforesaid to the maintenance of himself and the said Sarah Ann and her children, and in case of her death then the rent thereof shall be applied to the support and maintenance of the said children,"—was construed, in order to effectuate the intent of the grantor as disclosed by the entire conveyance, construed in the light of the relationship of the parties and the attendant circumstances, as giving the daughter, not a joint interest with her children, but an estate in the whole property for life, with remainder at her death to her children.

In *McFarland v. Hatchett* (1904) 118 Ky. 423, 80 S. W. 1185, it was held that under a deed the caption whereof named as party of the second part Sarah Hatchett, reciting that "the party of the first part sells and hereby conveys to said Sarah Hatchett and her children a certain lot of ground . . . to have and to hold to her and the said Sarah Hatchett and her children," Sarah Hatchett (who apparently had no children at the time of the conveyance) took only a life estate, with remainder to her children.

In *Hall v. Wright* (1905) 121 Ky. 16, 87 S. W. 1129, a deed the caption of which recited that it was made between the grantors and the grantee named (who was a son of the grantors, and who had at that time several children living and others afterward born) "and his children," the granting clause of which recited a conveyance to the grantee, without any words of inheritance or mention of his children, and the habendum

dum of which recited that the grantors would warrant and defend the title unto the grantee named "and his children forever," was held, in order to effectuate the presumable intention of the grantors to give after-born as well as existing children an interest, to give the son an estate for life, with remainder to his children.

In *Brumley v. Brumley* (1905) 28 Ky. L. Rep. 231, 89 S. W. 182, a deed the granting clause of which was to the parent, without mention of his children, with habendum to him and his children, was held, notwithstanding a provision therein that "the said party of the second part shall not sell any portion of said lands without the express consent of the party of the first part, but after the decease of the party of the first part then said party of the second part may sell any portion of said land," to give the grantee named a life estate with remainder in fee to all of his children, whether in being at the date of the conveyance or born afterwards.

In *McCready v. Morris* (1906) 29 Ky. L. Rep. 588, 94 S. W. 24, it was held that a deed made by a husband to his wife, the caption of which named only the wife as the party of the second part, but which in the granting clause purported to convey "to the party of the second part and to such child or children as she may have by her husband, George W. McCready at the time of her death or to the descendants of any such if any such descendants there should be, the said first party has as before stated conveyed to the second party and to her such children, if any and their descendants, if any, the following tract or parcel of land," etc., the wife took an estate for life, with remainder to her children, subject to be defeated by their death in their mother's lifetime.

In *Salzer v. Johnson* (1908) 32 Ky. L. Rep. 709, 107 S. W. 210 (in which the deed was made for a valuable consideration), it is said to be well settled in Kentucky that a conveyance to a woman and her children creates a life estate in the mother, with remainder to her children.

In *Bowe v. Richmond* (1908) 33 Ky. L. Rep. 173, 109 S. W. 359, where a deed which, though from one unrelated to the grantees, was made as directed by the husband and father, who furnished the consideration therefor, and which was accordingly regarded as if made by himself, named in its caption the purchaser's wife and her children by him as the parties of the second part, and in its grant-

ing clause recited that the conveyance was "to the party of the second part and heirs," habendum "to the second party and her heirs and assigns forever," it was held, in view of the purchaser's evident purpose of providing for his wife and children, that the wife took a life estate, with remainder to her children by him, including such of them as were born after the execution of the deed.

In *Hall v. Wright* (1910) 137 Ky. 39, 127 S. W. 516, it was held that though the words "and his children" did not appear after the parent's name in the caption or in the granting clause, but only in the habendum, the parent nevertheless took a life estate, with remainder to his children.

In *American Nat. Bank v. Madison* (1911) 144 Ky. 152, 38 L.R.A.(N.S.) 597, 137 S. W. 1076, it was held that a deed by which a father and mother in consideration of the love and affection which they bore to their daughter and her children, the children being then alive, granted property to the parties of the second part, who were described as the daughter and "her bodily heirs," conveyed a life estate to her and the remainder to her children; the court saying: "The intention is gathered from the language or words of the writing, and this language should always be read in the light of attending circumstances and the relation of the parties to the contract. When thus considered it is apparent that the grantors in the case under consideration were wanting to provide for their daughter and her children a home which she should enjoy to the fullest extent during her life, and they likewise desire to make provision for her children. This purpose can only be effectuated by construing the language used to create an estate for life in the wife, with remainder to her children. To hold that the language used created a joint tenancy or joint ownership among their daughter and her children would be to defeat the evident aim and intent of the grantors."

In *Virginia Iron, Coal, & Coke Co. v. Dye* (1912) 146 Ky. 519, 142 S. W. 1057, where the deed in question was made upon a consideration furnished by the husband, it was said to be a well-settled rule of construction that a conveyance to a woman and her children creates a life estate in the mother, with remainder to her children.

In *Ewing v. Milliken* (1912) 148 Ky. 837, 147 S. W. 770, a deed made upon a consideration furnished by the parent named therein as grantee, conveying the

property to "Laura H. Ewing, Alice, Virginia, and M. M. Ewing and such other children as may be hereafter born to the said Laura H. Ewing and C. S. Ewing; and in the event of the death of any of them the interest of the one dying to go to and be held by the survivors equally," was held to give Laura H. a life estate in the land, with remainder to her children.

In *Rice v. Klette* (Ky.) ante, 45, it is said that where there is nothing in a deed or will to show a contrary purpose, the rule is to hold an estate deeded or devised to a man and his children, or to a woman and her children, as a life estate to the first taker, with remainder to the children.

In *Duncan v. Medley* (1914) 160 Ky. 684, 170 S. W. 31, a deed reading, "I do give to Hattie E. Duncan our daughter, her children the heirs of her body and W. T. Duncan her husband his lifetime interest in 168 3-4 of land by his compliance with the following payment . . . We do hereby give to our beloved daughter and the heirs of her body and her husband W. T. Duncan his lifetime interest by complying with the above named conditions," was held to give W. T. Duncan and Hattie E. Duncan a life estate, with remainder to their children.

In *Downing v. Birney* (1897) 112 Mich. 474, 70 N. W. 1006, a deed naming as party of the second part "Lorainie Spicer wife of Ezekiel Spicer," and witnessing "that in consideration of \$100 paid by the said Ezekiel Spicer to the parties of the first part they have bargained and sold, and do hereby convey to the said Lorainie Spicer [certain property], to have and to hold the said lots to the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors and to the assigns of the said Lorainie and Ezekiel, forever," with a covenant of warranty of "the lawful title hereby conveyed, to the said lots, of the said Lorainie, to the children of her body begotten by the said Ezekiel, to her heirs, executors, and to the assigns of the said Lorainie and Ezekiel," it was held, in view of the fact that in its premises the deed made Lorainie Spicer the only grantee, and as his children were introduced only by the habendum, and as the party thus introduced cannot take as grantee, being a stranger to the premises, but may take by way of remainder, the children did not take jointly with their mother but as remaindermen; the court saying: "We have no doubt that it was designed that

Lorainie should have a life estate, at least, in the entire premises. Everything indicates it. First, we have the grant, which, standing alone, is clearly that; second, the clause in the habendum mentioning the children contains no words of inheritance, which would be necessary to give them a fee simple; and, third, it seems to have been contemplated that Lorainie and her husband might, in some contingency not clearly indicated, dispose of the premises, while such a provision as to the right of the children is significantly wanting."

In *Kinney v. Mathews* (1879) 69 Mo. 520, a conveyance to a woman "and all her children she now has or ever will have," was construed, in order to give effect to the intention of the grantor to benefit after-born as well as existing children, as vesting a life estate in the mother, with remainder to the children.

In *Chesnut v. Mears* (1857) 56 N. C. (3 Jones, Eq.) 416, where a husband, in consideration of love and affection for his wife, "as well as for her better maintenance and support," conveyed to a trustee "in trust for my said wife, Polly," certain negroes "for the said Polly Meares and her children which she has, or may have, by me; . . . the conveyance and warranty as aforesaid subject to the following restrictions: that the said trustee nor none who succeeds him ever dispossess my said wife, Polly and my children which I have or may have by her, of the said property and shall suffer her to enjoy together with the children the benefit, use and profits of the said negroes forever," it was held that, in order to effectuate the express object of the grantor to provide a support and maintenance for his wife, the deed should be construed as giving her an estate for life, with a remainder to all her children as a class, since a construction which would enable the children to take as tenants in common with her would enable them, when they became of age, to demand a partition, and thus leave their mother destitute in her old age.

In *Blair v. Osborne* (1881) 84 N. C. 417, a deed in the premises of which a mother alone was mentioned as the party of the second part, but with habendum to her and her children, was held, in order to avoid repugnancy between the premises and the habendum, and having regard to the rule that the habendum shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder,—to give an estate for life to the

mother and an estate for life in joint tenancy to her children in remainder.

In *Wager v. Wager* (1815) 1 Serg. & R. (Pa.) 374, where the deed under construction was made, in consideration of natural love and of a sum of money, to the grantor's son-in-law and his wife, "and to the children and heirs of the said" daughter and "the heirs and assigns of such children," habendum to the said son-in-law and his wife and to the children and heirs of the said wife, to and for the proper use, benefit, and behoof of the son-in-law and his wife during the term of their joint lives and of the life of the survivor of them, and from and immediately after the decease of the survivor of them to and for the use, benefit, and behoof of the children and heirs of the body of the said wife, lawfully begotten, their heirs and assigns forever, in equal shares as tenants in common, it was held that the explanation of the general terms of the premises afforded by the habendum showed the grantor's intention to be that the son-in-law and his wife should take estates for life, with remainder to their children; that the estate taken by the children being a remainder, and there being nothing to indicate an intent to confine the gift to the children in existence at the date of the will, but, on the contrary, the inference being that he intended to provide for all the daughter's children, the remainder taken by such children opened to let in after-born children.

In *White v. Williamson* (1858) 2 Grant, Cas. (Pa.) 249, a declaration of trust for the use of a woman and her children, reciting as its consideration that the father of the woman had deposited with the declarant a sum of money to be laid out in land for the use of the woman and her children, it was held that, it being a gift by a father for the benefit of his descendants, the woman should be regarded as taking a life estate, with remainder to her children, rather than a tenancy in common with those then in being.

In *Coursey v. Davis* (1863) 46 Pa. 25, 84 Am. Dec. 519, a deed to a married woman, by whom the consideration was said to have been paid, stated in the premises to be unto the said woman "and her children exclusively and their heirs and assigns," habendum unto her "and her children exclusively and their heirs and assigns forever, to them and their only proper use, benefit and behoof and to and for no other use, intent, meaning or purpose whatsoever," and L.R.A.1917B.

with special warranty "to and with the said [woman] and her children and their heirs and assigns,"—was construed as giving the woman a life estate, with remainder to her children, including those born after the date of the conveyance.

In *Hague v. Hague* (1894) 161 Pa. 643, 41 Am. St. Rep. 900, 29 Atl. 261, a deed made by a father to a daughter by way of gift, and naming as grantees "Sarah Jane Hague and her children," was held, in order to effectuate the presumable intention of the grantor to provide for all his daughter's children, to vest in the daughter an estate for life, with remainder to her children, as well those born after as those born before the date of the conveyance.

In *Wolford v. Morgenthal* (1879) 91 Pa. 30, a deed whereby, in consideration of a sum of money paid by F, certain land was conveyed to trustees in trust for the use and benefit of the wife of F "and her heirs forever, that is, the children, if any begotten by" F, "and her daughter Elizabeth Wire (who was a daughter by a former marriage) is to be made equal, to be for them and their heirs forever after the decease of" F, habendum "for the use and benefit of the said [wife] and her daughter Elizabeth Wire and the children begotten by [F], if any, upon the body of the said [wife]," was construed as giving the wife a life estate, with remainder in fee to her children as a class, such remainder vesting in Elizabeth, who was living at the time of the execution of the deed, and opening to let in the after-born children as their births respectively took place.

In *Moore v. Simmons* (1859) 2 Head (Tenn.) 546, where property was conveyed by deed to trustees to be sold and divided in equal shares between certain persons named, among whom was Sally Simmons, "that portion that may belong to Sally Simmons . . . to be held by said trustees in trust for the only proper use, benefit and behoof of the said Sally Simmons and her children . . . the same being intended to be held in trust by said trustees for the use and benefit of the said last-named children of the said Simpson Shaw and their heirs," it was held that the reference to children did not give them a joint interest with their mother, but that, taking the whole instrument together, and in view of the consideration by which it was prompted, the intention was to give the entire estate to the daughter to her separate use, by which

she would be enabled to support herself and children as a family, and, that if this was not so, but a joint interest was vested in the children, the object intended could be defeated by any creditor of the children.

In *Beecher v. Hicks* (1881) 7 Lea (Tenn.) 207, a conveyance reciting that it was entered into by and between the grantor and Sarah Catharine Hicks, wife of James Franklin Hicks, of the second part, and conveying "to the said Sarah Catharine Hicks wife of James Franklin Hicks the following described lot," "to have and to hold the above-mentioned lot and bargained premises, together with all the improvements etc., unto her the said Sarah Catharine Hicks, wife of James Franklin Hicks, for her sole and separate use and benefit," with a covenant of warranty of title made by the grantor with "the said party of the second part her heirs and assigns," was held, in order to effectuate the evident intention of the parties to confer a benefit upon any future as well as existing children, that the wife should be considered as taking only an estate for life, with remainder to her children.

In *Blackburn v. Blackburn* (1902) 109 Tenn. 674, 73 S. W. 109, construing a deed reciting that the grantor, for the love and affection he bore his daughter, and for a nominal money consideration, did "give, transfer and convey to the said Mary McMillion Blackburn, wife of Jas. K. Polk Blackburn and her children forever" certain lands, with covenant of warranty "to the said Mary McMillion Blackburn and her children," and with the further provision "that in the event of the death of Mary McMillion Blackburn, wife of James K. Polk Blackburn, before her said husband, then . . . he, the said James, . . . shall have by three disinterested landowners in said county . . . set apart for him 400 acres of the above-described lands: . . . to have and to hold and use and occupy during his lifetime, and at his death to go to the said children, bodily heirs of said Mary McMillion Blackburn; and further, the said Blackburn and his said wife are hereby put in possession of all of said lands and improvements . . . to their own use, said Blackburn having control . . . of the said place with all the proceeds thereof during the lifetime of his said wife and then to the said 400 acres herein provided for . . . during his lifetime," it was held that as there was nothing to show why the grantor should have preferred the living to the exclusion of

the after-born children of his daughter, and as, if his purpose was to make the then-living children of his daughter the special object of his bounty, it would have been both easy and natural to have named them, and, further, as an intention to restrict the daughter to a life estate was evidenced by the paragraph where it is provided that "the said Blackburn and his said wife are hereby put in possession of all said lands . . . and every part thereof to their own use, said Blackburn having control and management . . . during the lifetime of his wife," the wife took a life interest in the whole, and the husband a life interest in the 400 acres contingently provided for him, and the children living at the date of the deed a vested remainder which opened up to admit after-born children.

In *Hubbird v. Goin* (1905) 70 C. C. A. 320, 137 Fed. 822, where a grantor, in consideration of love and affection and a substantial money consideration, conveyed "to Elmira Hubbard and children" certain described real estate, with the provision, "it is expressly agreed by the grantee in accepting this deed that she shall not sell, convey or encumber or in any manner dispose of the same but to retain the same for the use of herself and her children forever," it was held that although, if the deed had stopped with the granting clause to Elmira Hubbard and the children, it might with plausibility be said that the mother and two children in being took the whole fee as tenants in common, yet, taking the deed as a whole, it manifested a purpose on the part of the grantor to vest in his daughter a life estate and to secure the remainder in her children, including those born after as well as before the date of the conveyance.

E. S. O.

# KENTUCKY COURT OF APPEALS.

J. H. GRAY, Appt.

v.

COMMONWEALTH OF KENTUCKY.

(171 Ky. 269, 188 S. W. 354.)

**Sunday — barber shop — work of necessity.**

The operation of a barber shop on Sunday for the service of all applicants, for the

Note. — For barbering on Sunday as a work of necessity, see annotation following this case, post, 97.

customary fee, is not a work of necessity within the exception of the Sunday law. For other cases, see *Sunday*, III. b, in Dig. 1-52 N. S.

(September 29, 1916.)

**A**PPEAL by defendant from a judgment of the Criminal Branch, of the Circuit Court for Jefferson County convicting him of violating the Sunday law. Affirmed.

The facts are stated in the opinion.

Mr. Henry J. Tilford for appellant.

Messrs. M. M. Logan, Attorney General, and D. O. Myatt, Assistant Attorney General, for the Commonwealth.

Hurt, J., delivered the opinion of the court:

The appellant, J. H. Gray, by means of a warrant charging him with a violation of § 1321, Ky. Stat., was brought before the police court for the city of Louisville. He was adjudged to be guilty of the offense denounced by the statute, and a fine of \$50 and the costs of the prosecution imposed upon him. He appealed from the judgment of the police court to the circuit court. A trial by jury was duly waived, and the judge of the circuit court heard and determined both the facts and law of the case. A trial resulted in appellant being found guilty as charged in the warrant, and the same penalty for his offense was imposed by the circuit court as was imposed by the police court. His motion for a new trial being overruled, he has appealed to this court.

The ground relied upon in the circuit court for a new trial, and in this court for a reversal of the judgment, is that the judgment is contrary to law and the evidence. The facts of the case are as follows: The appellant was a barber who conducted the business of a barber in his shop, which was located at 418 West Walnut street, in the city of Louisville, and the conduct of the business was his regular trade and calling, and that on the 2d day of April, 1916, which was Sunday, or the Sabbath, the appellant opened his shop as usual, and there shaved and trimmed the hair of several persons, in fact, all the persons who entered the shop on that day and requested that such services be rendered them, and he also employed another barber in shaving persons and trimming their hair in his shop on the same day, and for all the services rendered the persons for whom barbering was done the appellant charged the customary sums, which they paid.

There being no dispute as to the facts, the only question for determination is whether the facts above stated constituted L.R.A.1917B.

a violation of § 1321, Ky. Stat. and whether the circuit court erred in construing the proven facts to be a violation of the statute and imposing the penalty for its violation. The statute is as follows: "No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity, or work required in the maintenance or operation of a ferry, skiff or steamboat, or steam or street railroads. If any person on the Sabbath day shall himself be found at his own, or at any other trade or calling, or shall employ his apprentices, or other person, in labor or other business, whether the same be for profit or amusement, unless such as is permitted above, he shall be fined not less than two nor more than fifty dollars for each offense. Every person or apprentice so employed shall be deemed a separate offense. Persons who are members of a religious society, who observe as a Sabbath any other day in the week than Sunday, shall not be liable to the penalty prescribed in this section, if they observe as a Sabbath one day in each seven, as herein provided."

The appellant does not contend that he was not engaged in working at his own trade or calling, or that he did not have other persons employed in the work of barbering for profit on the Sabbath; neither does he contend that barbering is not a work or business; but his sole contention is that the business of shaving persons and trimming their hair and performing the other services usually rendered by a barber for his patrons is a work of necessity, within the meaning of the statute, and that the performance of such work is within the exception in the statute and therefore lawful. It will be observed that the law-making department of the government has not declared any works or business to be works of necessity, except the ordinary household offices, or work required in the maintenance or operation of a ferry, skiff, or steamboat, or steam or street railroads. As to what other works or business are works of necessity, and when any particular work or business is a work of necessity, and lies within the exception in the statute, is left to be determined by the courts upon the facts and under the circumstances of each particular instance.

It is apparent that the changing conditions of civilization, the improvements in the methods of transportation to meet the demands of increasing commercial relations, the demand of social relations, which did not formerly exist, have made works which were once not regarded by the common sense of the country as works of necessity to be regarded and held by that same common sense as works of necessity. It is also ap-

parent that ordinary avocations, which are not ordinarily works of necessity, may by the exigencies of occasions become works of necessity. The harvesting of a tobacco crop is not commonly or ordinarily a work of necessity, but if the chill of the atmosphere portends a destructive frost upon the night following the Sabbath Day, the common sense of the country declares the immediate cutting of the crop to be a work of necessity. Exigencies may arise in almost every trade or calling, which is not ordinarily a work of necessity, which will make upon the occasion the work of the trade or calling a necessity. A new condition may arise in the manner of doing business, and may become the ordinary way of doing business, and thus make work, which theretofore was not a work of necessity, become one. Hence no hard and fast rule can be adopted which should be applied to all works and at all times and under all circumstances for determining what are works of necessity within the meaning of the statute.

All the states have statute laws which make it unlawful to do the work of one's calling, or the trade of another, upon the Sabbath Day; but all of them make an exception of works of necessity and charity. Under these statutes many adjudications have been made by the courts touching what are works of necessity within the meaning of the statutes; but many of them are based upon statutes which are different in their terms to our statute, and which cause the adjudications to be valueless in determining the question of what is a work of necessity within the exception of our statute. The state of Massachusetts has a statute which declares that: "Whoever on the Lord's Day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity or charity, shall be punished," etc.

The supreme judicial court of the state, in *Com. v. Dextra*, 143 Mass. 28, 8 N. E. 756, while declining to decide whether it was a work of necessity to cut hair and shave beards on the Lord's Day, held that *Dextra*, a barber, was amenable to the penalty prescribed by the statute for keeping open his barber shop upon that day for the purpose of following his trade as a barber. In *State v. Kuehner*, — Mo. App. —, 110 S. W. 606, the Missouri supreme court held that it was not a work of necessity, within the exceptions to the Sunday law in force in that state, for a barber to ply his usual avocation on that day by cutting the hair and shaving a customer. The same court held to the same view in *State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10. In *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555, L.R.A.1917B.

the court held that judicial notice would be taken that the shaving of his customers by a barber is a work done by him in the course of his ordinary calling, and is not a work of necessity within the exception of the statute. In *McCain v. State*, 2 Ga. App. 389, 58 S. E. 550, the supreme court of the state of Georgia referred to and approved the conclusion of the court in *State v. Frederick*, supra. In *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, the court held that, while the bare fact of shaving some particular individual under exceptional circumstances might be upheld as a work of necessity, the public exercise of the occupation of shaving and hair cutting could not be justified as a work of necessity.

It should be borne in mind that the enactment of the statute prohibiting work and labor upon the Sabbath Day was not an attempt to enforce any religious duties, but is a civil regulation, authorized by the legislature in the exercise of the police power of the state, and that the necessity which must exist to bring the doing of any work within the exception of the statute is not an absolute, unavoidable, physical necessity, but as defined by the court in *Lane v. State*, 68 Tex. Crim. Rep. 4, 150 S. W. 637, and by this court in *Com. v. Louisville & N. R. Co.* 80 Ky. 291, 44 Am. Rep. 475: "The law regards that as necessary which the common sense of the country, in its ordinary modes of doing its business, regards as necessary."

The fact that in a great many of the states the legislatures have adopted statutes making it unlawful to engage in the business of barbering on the Sabbath Day, and that in this state a statute having that end in view was enacted by the general assembly, would indicate conclusively that the common sense of the country, in its ordinary modes of doing business, does not regard the business and work of barbering as a necessity which would justify engaging in it upon the Sabbath. The statute referred to as having been adopted in this state was held to be unconstitutional, because its enactment was contrary to the provisions of § 59, subsections 4 and 29, of the Constitution. *Stratman v. Com.* 137 Ky. 500, 27 L.R.A.(N.S.) 949, 136 Am. St. Rep. 299, 125 S. W. 1094. In *Flagg v. Millbury*, 4 Cush. 243, another definition for the necessity, which brings a work within the exception of the statute, was announced, and the courts of several states have adopted the definition. It is: "That the necessity meant is not 'a physical and absolute necessity, but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case.'"



If this definition should be accepted, it might then be asked: What is the moral fitness and propriety of following the avocation of a barber on Sunday? It certainly cannot be said that it is a work of necessity upon the part of the barber.

It is argued by some that barbering is a work of necessity, because it is not convenient for some persons to have themselves shaved on Saturday, or else they are too much engaged upon other days to have the services of a tonsorial artist upon any day except Sunday. It has been said that the best thought and ablest writers of modern times agree, and human experience has demonstrated, that it is to the best interest of the human family that the members of it have days of rest, and that such days are essential to the moral and physical well-being of society. The Sunday statute was adopted as an assistance to the conservation of the lives and health of all the citizens of the country, to promote their morality and love of family and home. It enables the people who toil daily to be in the society of their wives and children, and to have the benefit of religious worship, upon one day out of seven. As said by Justice Field in *Ex parte Newman*, 9 Cal. 502, in reference to the Sunday statute in force in the state of California: "Its requirement is a cessation from labor. In its enactment the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

The barbers and their associates should be permitted to have the benefits of cessation from labor one day in seven, as other citizens. Those who desire the services of a barber have six whole days in which to secure them. In *Ex parte Kennedy*, 42 Tex. Crim. Rep. 148, 51 L.R.A. 270, 58 S.W. 129, the court of criminal appeals of Texas, adopting the definition of a work of necessity as defined in *Flagg v. Millbury*, supra, said: "The necessity must be a real, and not a fancied, one; there must not be merely an honest belief on the part of the de-

fendant that the necessity exists, but the actual existence of the necessity must be shown. Nor does the exception embrace work which is merely convenient, but not necessary."

This view was approved in *Hennersdorf v. State*, 25 Tex. App. 597, 8 Am. St. Rep. 448, 8 S.W. 926. In *Com. v. Waldman*, 140 Pa. 89, 11 L.R.A. 563, 21 Atl. 248, the court, referring to the contention in that case that the work of the barber in shaving persons on Sunday was a necessity, said: "While we concede that it may be a great convenience to many persons, we are not prepared to say, as a question of law, that it is a work of necessity."

In *McCain v. State*, 2 Ga. App. 389, 58 S.E. 550, work done by McCain, who was a barber, in that case, was the shaving of certain members of a club upon Sunday, who contended that the work was one of necessity, because they were so engaged in their own affairs upon Saturday that they had not time to secure a shave, except upon Sunday. The supreme court of Georgia said: "While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still this fact does not make shaving necessary or the work of the barber one of necessity."

In 24 Am. & Eng. Enc. Law, 544, the text is as follows: "The business of a barber in shaving his customers is a matter of convenience, and not a work of necessity or charity, and therefore it does not come within the exception."

In 37 Cyc. 553, the text states: "It is well settled that the fact that it is convenient and profitable to perform certain labor or transact certain business on Sunday does not render it a necessity."

Referring particularly to the work of barbering, it is said in 37 Cyc. 545: "Barbering is laboring, within the meaning of general statutes prohibiting labor or 'worldly employment' on Sunday, and is not generally considered a work of necessity."

In the light of the foregoing authorities, while the shaving of a particular person by a barber under exceptional circumstances upon the Sabbath may be a work of necessity, yet, where a barber is simply doing his work of shaving and cutting the hair of his customers and doing for them the regular services of a barber on the Sabbath, it is not a work of necessity, and does not lie within the exception of the statute; and hence the appellant was guilty of the offense of which he was convicted, and the judgment appealed from is affirmed.

**Annotation—Sunday: barbering as a work of necessity.**

This note does not include cases involving statutes that in express terms forbid barbering on Sunday or the keeping of barber shops open on Sunday. The only question that can arise directly under such statutes is one involving the power of the legislature to prohibit one particular class of persons working on Sunday without prohibiting other classes in the same way. On this phase of the question, see *Stratman v. Com.* 27 L.R.A.(N.S.) 949; also see notes in 14 L.R.A.(N.S.) 1259, and 15 L.R.A.(N.S.) 646.

Practically all the states have general statutes which in effect prohibit Sunday labor, except work of necessity and charity. The wording of these statutes is not uniform, but the question here considered presupposes that barbering on Sunday falls within the prohibited kinds of labor unless it can be classed as a work of necessity. Cases like *Palmer v. Snow*, explained in next to the last paragraph of this note, holding that barbering is not within the general prohibiting clause, are in general excluded.

The decisions are practically in harmony on the general proposition that a barber who opens his shop on Sunday and serves the general public or his customers generally is not engaging in work of necessity within the meaning of the exception. They are not in harmony as to the necessity of barbering under circumstances other than those just stated. Of course, the circumstances and facts are never the same in the different cases, but the language used by the courts indicates that some courts are much more inclined to require a higher standard of necessity than others are.

**Who should make the classification—  
—in general.**

Some courts have held, and perhaps all could be reconciled to the proposition, that the court should decide as a matter of law that a barber who keeps his shop open on Sunday and serves the general public or his customers generally is not performing labor of necessity within the meaning of the exception, but that it should permit the jury to decide in each case whether the work was a necessity under the special circumstances of the case, where there are special circumstances that might take the case out of the general rule, even though the facts are not controverted. The Pennsylvania cases cited *infra* appear to go upon the theory that the question

is entirely for the court; but it should be observed that the question in all those cases was the legality of a summary conviction, in which the court decides the questions of fact as well as the law, so that the holdings are not what they at first might appear to be. On the other hand, the Indiana court appears to hold that the whole question is one for the jury, but it will be observed that the jury had found correctly, under the instruction of the court.

**—the legislature.**

As already stated the question of constitutionality of the statute is the only one raised where the statute directly and in express terms prohibits barbering on Sunday, and that question is not within the scope of this note.

There are two cases (*State v. Petit* (1898) 74 Minn. 376, 77 N. W. 225, affirmed in (1899) 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, and *Stark v. Backus* (1909) 140 Wis. 557, 123 N. W. 98) in which the court construed a general statute to which there had been added an amendment providing that barbering shall not be considered a work of necessity or charity within the meaning of the exception. In both cases the court took the position that, before the amendment, barbering was not a necessity, so that the amendment really added nothing. See quotation from the *Petit* Case under next heading.

**—by the jury.**

The position taken by the court in *State v. Schatt* (1907) 128 Mo. App. 622, 107 S. W. 10, is probably the correct position so far as permitting the jury to decide is concerned, and perhaps all the other cases could be reconciled with this position. In this case the court said: "If the proposition be clear that the particular act of labor performed is one of necessity, that is to say, if the labor is so clearly a work of necessity that no two reasonable minds would differ thereabout, the court may treat it as a matter of law, identically as in other cases, and, under such circumstances, no doubt would be justified in so declaring. Second, on the other hand, if the question is one about which reasonable minds might well differ, it is then essentially one of fact, and, as such, within the province of the jury. And third, if the proof is so clear that no two reasonable minds could differ on the proposition, that no possible element of necessity whatever entered into

the particular act of labor performed, then the court may, as a matter of law, treat the case as falling within the penalties, and not within the exception to the statute as one of necessity or charity. We are fully persuaded that the propositions stated are sustained by the supreme court in *State v. Granneman* (1896) 132 Mo. 331, 33 S. W. 784. [See also *State v. Frederick* (1885) 45 Ark. 347, 55 Am. Rep. 555.] In the Arkansas case last cited, the court there held that the labor of a barber in shaving his customers is so clearly a worldly labor or work as to render it entirely unnecessary for the indictment to negative the act as one of either necessity or charity. In *State v. Granneman* (Mo.) supra, our supreme court cited the Arkansas case to the proposition that it was a question about which reasonable minds could not differ, and therefore essentially a question of law when nothing more appeared than that the barber prosecuted his calling on a Sabbath day, as in the case at bar. See also *State v. Wellott* (1893) 54 Mo. App. 310, which bears the same construction, to say the least." This idea probably explains the apparent inconsistency between the holdings in *Spaith v. State* (1889) 10 Ohio Dec. Reprint, 639, 22 Ohio L. J. 329, and *State v. Schuler* (1890) 10 Ohio Dec. Reprint, 806, 23 Ohio L. J. 450. In the former case, which was a case in which the facts were not disclosed by the record, the court took the position that it could not decide as a matter of law that shaving persons on Sunday was not a necessity, while in the latter case it was held that keeping open a barber shop on Sunday and shaving all who come is, as a matter of law, not necessary.

It has been directly held that the question is one of fact for the jury to decide under proper instruction. *Ungericht v. State* (1889) 119 Ind. 379, 12 Am. St. Rep. 419, 21 N. E. 1082. But the jury had convicted the defendant under instructions that left practically no discretion except as to facts. In result, the decision is not opposed to the principle announced by the Missouri court.

In *State v. Petit* (Minn.) supra, the court takes the position that, under a statute which provided that "all labor on Sunday is prohibited excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health or comfort of the community,"—the question of whether or not a particular work is one of necessity.

is in many cases a question for the jury; but, after the legislature had added a clause by amendment, "provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity," the question so far as barbering is concerned had become one of law, and that the legislature had power to classify works of necessity in this way. The court said: "If keeping a barber shop open on Sunday for the purposes of shaving and hair cutting was not a work of necessity or charity, within the meaning of the original statute, the amendment has not changed the law, and the statute, as it now stands, is not open to the objection of being class legislation. Under the original statute, what were works of necessity or charity was largely left to be decided as a question of fact, which would often be a question for the jury. The effect of the amendment was to make this a question of law, instead of fact, as to keeping a barber shop open. In the exercise of the police power in establishing a day of rest, a very large discretion must be allowed to the legislature in determining what kinds of labor or business should be prohibited, and what are and what are not works of necessity or charity; and unless their classification is manifestly purely arbitrary, and not founded upon any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, the courts have no right to interfere with the exercise of legislative discretion. Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more, and during later hours than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday if such shops were to be permitted to be kept open on Sunday, the employees would ordinarily be deprived of rest during half of that day."

— the court.

In *State v. Frederick* (1885) 45 Ark. 347, 55 Am. Rep. 555, it was held that the court will take judicial notice that the shaving of his customers by a barber is a "worldly labor" or work done by him in the course of his ordinary calling, and not a labor of necessity or charity within the exception to the statute.

ute, so that a demurrer to an indictment will not be sustained for the omission of an allegation that the acts charged were not a work of necessity or charity. The statute is not quoted, but the language used by the court indicates that it was a general statute forbidding all regular labor on Sunday except labor of necessity and charity. See quotation from *State v. Schatt* (1907) 128 Mo. App. 622, 107 S. W. 10, *supra*, for a reasonable interpretation of this decision, in respect to the duty to submit the question to the jury.

In *Com. v. Waldman* (1891) 140 Pa. 89, 11 L.R.A. 563, 21 Atl. 248, affirming (1890) 8 Pa. Co. Ct. 449, the court, in an appeal from a summary conviction, said: "It is contended now, however, that the defendant was entitled to a jury trial, and that it is for a jury to say whether shaving a man's face and cutting his hair are works of necessity. If such questions were submitted to a jury we would have no rule at all. One jury would find one way and another jury would decide the other way; so that the practical result would be that one barber would be compelled to close his shop on Sunday while that of his rival would be open. The practical difficulty of the case cannot be met in this way; nor has any authority been shown for the claim to trial by jury. When the legislature shall decide that in every case of a petty summary conviction the defendant shall have the right to a jury trial, they will probably say so in language too clear to be misunderstood." It must be observed that the court in this case was passing upon the power of the legislature to provide for a summary conviction and upon the question whether or not it had done so, rather than on the province of the jury under general Sunday statutes.

And in all of the cases cited to the general proposition under the last heading, *infra*, the courts either hold or assume that, at least under the circumstances of the particular case, the question was one of law for the court to decide.

#### The substantive question.

It seems quite clear that the question of what is a work of necessity within the meaning of these clauses excepting works of necessity from the effect of the Sunday statutes, cannot be settled by definition. In *Ungericht v. State* (1889) 119 Ind. 379, 12 Am. St. Rep. 419, 21 N. E. 1082, the court said: "Many legal definitions of the word 'necessity' are to be found in the authori-

ties, but the following from the Chicago Legal News (vol. 12, p. 44) seems to give the result of all the authorities upon the subject: 'The law contemplates that the community has a general need that all should rest on Sunday; most of the affairs and doings of week day are less important than this need of a rest day; but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental occupation during others; to nurse and heal the sick; to provide prompt burial of the dead—these and some other objects are superior to the need of general repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than its day of rest.' It is perfectly clear, however, that the word 'necessity' as used in the statute, is incapable of an accurate and comprehensive definition. Any attempt by the courts to frame a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to circumstances, and is, therefore, more a question of fact than of law. *Mueller v. State* (1881) 76 Ind. 310, 40 Am. Rep. 245. In this case it is said: 'What does necessity, as used in this law, mean? It may be said, as has been said before, that it does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done, under the circumstances of any particular case. *Morris v. State* (1869) 31 Ind. 189. Generally speaking, it ought to be an unforeseen necessity, or, if foreseen, such as could not reasonably have been provided against,' and this court held that the question should be decided by the jury. In *State v. Wellott* (1893) 54 Mo. App. 310, the court said: "It is hardly possible to give such a definition of necessary work as will meet the requirements of different cases. The futility of the effort to gather this from adjudicated cases will be readily seen by a reference to the decisions. Ringgold, Law of Sunday, pp. 230, et seq. and cases cited. It is not enough that it shall be more convenient to do the work on Sunday than on other days of the week. *Phillips v. Innes* (1837) 4 Clark & F. 234, 7 Eng. Reprint, 90. Generally speaking it ought to be an unforeseen necessity, or, if foreseen, such as could not reasonably have been provided against. *State v. Ohmer* (1889) 34 Mo.

App. 115; *Ungericht v. State* (1880) 119 Ind. 381, 12 Am. St. Rep. 419, 21 N. E. 1082. Neither must the necessity be of the party's own creation. *Bucher v. Fitchburg R. Co.* (1881) 131 Mass. 156, 41 Am. Rep. 216. Now as to the act of shaving the two witnesses, Smith and Cox, the defendant was little more than serving the mere convenience of his customers; it would seem to have been a necessity of their own creation. But, however this may be, the evidence shows that the defendant on the Sunday in question was engaged in barber's work for various other people. Indeed defendant was prosecuting his trade and performing his customary work for all who applied at his place of business. The test of necessity in individual cases was not considered. The state's case was made *prima facie* by proof that defendant was then and there prosecuting his work, not apparently a work of necessity; if it was work of necessity, such as comes within the exception to the statute, the burden to show it was cast on the defendant. *Troewert v. Decker* (1881) 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Fleming v. People* (1863) 27 N. Y. 329; *Bosworth v. Swansey* (1845) 10 Met. (Mass.) 363, 43 Am. Dec. 441; *State v. Frederick* (1885) 45 Ark. 347, 55 Am. Rep. 555; *Cleary v. State*, 56 Ark. 124, 19 S. W. 313; *State v. Elam* (1886) 21 Mo. App. 290; *State v. O'Brien* (1881) 74 Mo. 549."

A barber is, when shaving his customers or cutting their hair in his shop on Sunday, engaged in work that is not a work of necessity or charity within the meaning of a clause in a Sunday statute excepting works of necessity and charity from its operation. *State v. Frederick* (1885) 45 Ark. 347, 55 Am. Rep. 555; *McClelland v. Denver* (1906) 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014 (statement by way of argument); *McCain v. State* (1907) 2 Ga. App. 389, 58 S. E. 550; *State v. Linsig* (1916) — Iowa, —, 159 N. W. 995; *GRAY v. COM. ante*, 93; *State v. Wellott* (1893) 54 Mo. App. 310; *State v. Schatt* (1907) 128 Mo. App. 622, 107 S. W. 10; *State v. Kuehner* (1908) — Mo. App. —, 110 S. W. 605; *Com. v. Waldman* (1891) 140 Pa. 89, 11 L.R.A. 563, 21 Atl. 248, affirming (1890) 8 Pa. Co. Ct. 449; *Com. v. Williams* (1853) 1 Pearson (Pa.) 61; *Com. v. Jacobus* (1870) 1 Campb. (Pa.) 491; *Stout's Case* (1886) 2 Legal Rec. Rep. (Pa.) 311, as cited in *Brightly's Dig.* 1877-1889, p. 4836; *Com. v. Stodler* (1882) 15 Phila. (Pa.) 418 (not a direct holding on the point); *Paizer v. L.R.A.* 1917B.

*Com.* (1886) 4 Kulp (Pa.) 286 (but justice's record held defective on certiorari); *State v. Lorry* (1874) 7 Baxt. (Tenn.) 95, 32 Am. Rep. 555 (see comment on this case, *infra*); *Ex parte Kennedy* (1900) 42 Tex. Crim. Rep. 148, 51 L.R.A. 270, 58 S. W. 129; *State v. Sopher* (1903) 25 Utah, 318, 60 L.R.A. 469, 95 Am. St. Rep. 845, 71 Pac. 482; *Stark v. Backus* (1909) 140 Wis. 557, 123 N. W. 98 (see comment on this case, *infra*); *Phillips v. Innes* (1837) 4 Clark & F. 234, 7 Eng. Reprint, 90; *Reg. v. Taylor* (1882) 19 Oan. L. J. 362.

In *Com. v. Dextra* (1886) 143 Mass. 28, 8 N. E. 756, the court so construed the statute that it was unnecessary to decide whether barbering was a work of necessity or not, as keeping the shop open for any kind of work was held to be a violation of the statute.

In *Stone v. Graves* (1887) 145 Mass. 353, 13 N. E. 906, the court refused to hold as a matter of law that shaving an aged and infirm person in his own home by one who was not a barber by trade on Sunday is not a work of necessity, and it sustained a finding that the work was necessary.

But in *State v. Linsig* (1916) — Iowa, —, 159 N. W. 995, where the statute provided that "if any person be found on the first day of the week, commonly called Sunday, engaged in carrying firearms, dancing, hunting, shooting, horse racing, or in any manner disturbing a worshiping assembly or private family, or in buying or selling property of any kind, or in any labor except that of necessity or charity, he shall be fined not more than five nor less than one dollar," the court said: "The exception provided by the statute for works of necessity and charity is made in somewhat general terms without specifying what works are of that character. It could not be otherwise, for the demands of necessity and charity are ever varying, and the same act which may be a work of necessity or charity on one occasion may not be properly so-called on another occasion; its character in that respect depends upon the peculiar circumstances in each case. If the accused person makes the point that the work done by him was an act of charity or necessity, the record may or may not be such as to carry the question to the jury. It has been held as a matter of law that the ordinary work or employment of a barber is not a work of charity or necessity within the meaning of the Sunday law (*State v. Frederick* (1885) 45 Ark. 347, 55 Am. Rep. 555;

*Com. v. Waldman* (1891) 140 Pa. 98, 11 L.R.A. 563, 21 Atl. 248; *State v. Granneman* (1896) 132 Mo. 326, 33 S. W. 784; and we think the rule so established is too clearly right to call for argument."

In *Com. v. Waldman* (1891) 140 Pa. 98, 11 L.R.A. 563, 21 Atl. 248, the court said: "We are now asked to say that shaving is a work of 'necessity' and therefore within the exceptions of the Act of 1794. It is perhaps as much a necessity as washing the face, taking a bath, or performing any other act of personal cleanliness. A man may shave himself, or have his servant or valet shave him, on the Lord's Day without a violation of the Act of 1794. But the keeping open of his place of business on that day by a barber, and following his worldly employment of shaving his customers, is quite another matter; and, while we concede that it may be a great convenience to many persons, we are not prepared to say, as a question of law, that it is a work of necessity within the meaning of the Act of 1794. We do not make the law; our duties are limited to interpreting it, and we feel ourselves bound by the construction which our predecessors have placed upon the act for nearly a century."

In *Com. v. Williams* (1853) 1 Pearson (Pa.) 61, the court of quarter sessions of Dauphin county, after holding that barbering is not generally a work of necessity within the meaning of a statute which provides that if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, etc., they shall forfeit and pay \$4, etc., said; "It is said that the evidence makes out a case of necessity in this instance; that the persons shaved were sick the night before and unable to remain at the shop; that they were shaved in the morning as a mere matter of accommodation without charge, and the shop was not opened. If it had been made to appear that the men were sick for want of shaving, or that, being sick, they or their physician considered that it would add to their health, or was essential to their comfort, to be shaved that day, it would present a case of necessity justified by law; but no such proof was made. The work being done gratuitously makes it no less within the inhibition of the act; if it did, a man's neighbors might justify laboring on Sunday to assist him in raising a house

or a barn, as a matter of friendly accommodation; and the shop being open, or otherwise, cannot make the act more legal. Men are as much prohibited from carrying on their daily avocations secretly as openly on that day." The court was here reviewing the record of a summary conviction before a justice of the peace, most likely on certiorari, so that the question of submitting the issue to the jury could not arise. The ruling is, on the general principle, in harmony with the great weight of authority, but is much too harsh in the application of the principle to the particular facts.

In *McCain v. State* (1907) 2 Ga. App. 389, 58 S. E. 550, where the statute provided that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary callings on the Lord's Day or any part thereof (works of necessity or charity only excepted);" and it was shown that the defendant "was a barber, pursuing his business and work of his ordinary calling during the week in a shop in the city of Rome. On Sundays he went to the house occupied by the Elks Club and in a room set apart for the purpose he shaved members of the club, receiving therefor whatever the members saw fit to give him. No other persons except members were shaved, and no compulsory charge was made, but the amount paid by the members was 25 cents a shave. It was also shown that some of these members, on account of being engaged all day Saturday, could not conveniently get a shave on said day, and, in order to present a decent appearance in attendance at church, they thought it necessary to get a shave on Sundays," the court said: "The contention of the plaintiff in error, that the work of shaving the members of the club was a work of necessity, because such members, by reason of their occupation on Saturdays, could not get a shave, and cleanliness demanded a daily shave, cannot be reasonably upheld. While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still this fact does not make shaving necessary or the work of the barber one of necessity. The statute makes no exception in favor of a man who cannot shave himself, or who cannot conveniently procure someone to shave him on a week day. Many states have statutes expressly prohibiting the opening,

of barber shops on Sundays, and expressly declaring that shaving is not an act of necessity. But it needs no decision of the courts or the declaration of the statute to convince men of ordinary intelligence and experience that shaving is not a work of necessity within the meaning of that term, as constituting the exception in the statute now under consideration."

*Ip. State v. Lorry* (1874) 7 Bax. *Tenn.*, 35, 32 Am. Rep. 555, the barber seems to have been incorrectly indicted and the judgment was quashed, but the court clearly indicated that it considered barbering on Sunday a violation of a statute that prohibits Sunday labor generally and excepts works of necessity and charity.

In *Ex parte Kennedy* (1900) 42 Tex. Crim. Rep. 148, 51 L.R.A. 270, 58 S. W. 129, the court said: "We may concede that there may be isolated cases which should suggest a necessity for a tonsorial artist, and the statutes of some of the states make an exception in favor of shaving a corpse. But we do not understand that to be the case here presented; the insistence being that a barber can ply his vocation on Sunday for the benefit of all customers; that it is necessary for their convenience; and that it is a work of necessity, so far as he is concerned. We might concede it would be a matter of convenience to many of his customers, but it would by no means follow that it would be a work of necessity as to the barber. We believe that our statutes, in authorizing a work of necessity on Sunday, meant something more than mere convenience. It apprehended that there must be some peculiar exigency which would authorize Sunday labor. It might be more convenient to a number of citizens to buy their groceries or dry goods on Sunday, but this would not render it necessary for them to do so, when there are six days in the week in which they could provide these wants. It might be more convenient to the farmer in harvesting season to utilize all seven days of the week, but this would not make it necessary. Still there might be some occasions when the merchant would be authorized to sell some article of merchandise on account of necessity; and there might be an exigency for the farmer to harvest his grain on Sunday. And so it is with the trade of the barber. There are six full days in which the citizen can apply to the barber to have his hair cut or shampooed, or his beard shaved; but this would not imply that there

might not be an exigency in which the barber might use his tonsorial art for the benefit of someone who required his labor as a necessity. But unless there should occur some peculiar reason showing that, under the circumstances in the particular case the attendance of a barber was a work of necessity, he would not be relieved from the operation of the statute."

In *Stark v. Backus* (1909) 140 Wis. 557, 123 N. W. 98, the legislature had amended the general statute by providing that barbering shall not be considered a work of necessity or charity, and it was held that inasmuch as barbering was not a work of necessity before the amendment was passed, the statute was not an unconstitutional discrimination against barbers. This point is not, as a distinct question, within the scope of the note. See notes referred to, *supra*, on this question.

In *Phillips v. Innes* (1837) 4 Clark & F. 234, 7 Eng. Reprint, 90, the question arose in connection with an attempt to enforce a contract of apprenticeship. The apprentice was to work as a barber on "holidays" as well as other days, and he refused to work on Sundays, and defended upon the ground that, if the contract required him to work on Sundays, it was illegal under a Scottish statute which prohibited a work of all trades and callings except of "necessity or mercy." The defense was sustained by the House of Lords on the ground that keeping a barber shop open on Sunday for the public was not a work of necessity. Lord Brougham, in the course of his opinion said: "The cases of accident mentioned in the court below, such as the case of a person falling down or receiving a contusion or other wound in the head, on Sunday, or the seizing of a madman after breaking loose from the asylum, did not apply here; for the taking the one to the apothecary's shop, and the other back to the asylum, would not be illegal, but would come within the exception in the statutes, both of Scotland and England. Would such acts be at all similar to the keeping open shop for all who would choose to come on the Sunday, whether the operation might or might not admit of delay till Monday, or might or might not have been performed on the Saturday evening? Such an operation, and the cases referred to, were by no means similar. Gain, in fact, was the object of the master; and such work, being for hire merely, could not come within the description of 'duties of necessity or

mercy.'” The court in *Palmer v. Snow* [1900] 1 Q. B. (Eng.) 725, 64 J. P. 342, 69 L. J. Q. B. N. S. 356, 82 L. T. N. S. 199, 16 Times L. R. 168, 48 Week. Rep. 351, distinguished the statute in the case before it from the one in the *Phillips Case*, and held that a barber who shaves his customer on Sunday is not a “tradesman or laborer,” within the meaning of the statute, and thus avoided the necessity of passing upon the question as to whether it is a work of necessity.

In *Reg. v. Taylor* (1882) 19 Can. L. J. 362, the court followed the *Phillips Case* and held that barbering is in general not a work of necessity within the exception to the Sunday statute. *Wilson, Ch. J.*, who wrote the opinion, said: “I do not say that a barber connected

with an hotel or boarding house may not, by arrangement with the hotel or boarding-house keeper, follow his ordinary calling on Sunday in such hotel or boarding house, and be considered in the light of a servant kept in a private family to do the family work of a barber on Sunday as well as upon other days.” And *Osler, J.*, in concurring, said: “I feel bound by the decision of the House of Lords in the case of *Phillips v. Innes* (Eng.) *supra*. In my judgment the cases of a baker and a barber are not distinguishable. I question very much the expediency of prohibiting barbers from carrying on their business on the first day of the week.”

J. W. M.

## KENTUCKY COURT OF APPEALS.

MERIDIAN LIFE INSURANCE COMPANY, Appt.,  
v.  
MARY C. MILAM.

(172 Ky. 75, 188 S. W. 879.)

**Insurance — time of incontestability — how reckoned.**

1. The period after the expiration of which a policy of life insurance is incontestable is calculated from its date, and not from the day on which it was delivered to the insured.

For other cases, see *Insurance*, III. e, 2, f; Time, in *Dig. 1-52 N. S.*

**Time — reckoning — when insurance policy becomes incontestable.**

2. The day on which a policy of life insurance bears date is included in reckoning the period after which it is incontestable.

For other cases, see *Insurance*, III. e, 2, f; Time, in *Dig. 1-52 N. S.*

**Insurance — time for paying premium.**

3. The fact that a life insurance premium was not paid before the death of the insured on the day on which it was due does not avoid the policy, since he had the whole of that day in which to pay it.

For other cases, see *Insurance*, III. f, 2; Time, in *Dig. 1-52 N. S.*

(November 2, 1916.)

APPEAL by defendant from a judgment of the Circuit Court for Logan County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Note. — As to date from which the period to which a defense is limited in life insurance policy is to be computed, see annotation following this case, post, 105.  
L.R.A.1917B.

Messrs. Browder & Browder and John Weaver, for appellant:

Defendant is not cut off from any defense it may have to this policy on the ground that it agreed with the insured that if death should ensue at any time after one year from the date of the policy, the contract should become incontestable.

*Frankfort v. Farmers' Bank*, 105 Ky. 811, 49 S. W. 811; *Smith v. Cassity*, 9 B. Mon. 192, 48 Am. Dec. 420; *Moor v. Covington City Nat. Bank*, 80 Ky. 305; *Chiles v. Smith*, 13 B. Mon. 461; *Handley v. Cunningham*, 12 Bush, 401; *Wood v. Com.* 11 Bush, 220; *Louisville R. Co. v. Wellington*, 137 Ky. 719, 126 S. W. 370, 128 S. W. 1077.

Delivery is essential to the validity of any written contract. It is the final act which consummates the agreement, and is as necessary as the signature of the maker, and without it all other formalities are ineffectual; and without it a deed or insurance policy is void ab initio.

*Gore v. Dickinson*, 98 Ala. 363, 30 Am. St. Rep. 67, 11 So. 743; *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Doe ex dem. Herbert v. Herbert*, Breese (Ill.) 278, 12 Am. Dec. 192; *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99; *Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545, 80 N. W. 539; *Hughes v. Easten*, 4 J. J. Marsh. 572, 20 Am. Dec. 239; *Samson v. Thornton*, 3 Met. 275, 37 Am. Dec. 135; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Manufacturers' L. Ins. Co. v. Anctil*, 28 Can. S. C. 103.

Mr. S. R. Crewdson for appellee.

Miller, Ch. J., delivered the opinion of the court:

On June 8, 1914, the appellant, the Meridian Life Insurance Company, of In-



dianapolis, Indiana, issued its policy contract to James W. Milam, whereby, in consideration of a promise of \$49.18 then paid, and the agreement of Milam to pay a like sum annually on June 8th for eight years thereafter, and after the expiration of the nine years to pay an annual premium of \$98.36, it insured the life of James W. Milam for \$2,500. Mary C. Milam, the wife of James W. Milam, was named as the beneficiary in the policy. James W. Milam died on June 8, 1915; and, proofs of death having been made, and the company having declined to pay the policy, Mary C. Milam filed this action on September 2, 1915, to recover the amount named in the policy.

There is no dispute about the facts of this case; the controverted questions relate solely to the law of the case. The policy contains this provision: "This policy shall not be in force until the first premium has been paid thereon, and the policy duly delivered during the lifetime and good health of the insured."

It also contained this further provision: "In case of death after one year from the date hereof this policy shall be incontestable, except for nonpayment of premiums, provided the covenant for military and naval service in time of war, as provided in the application, shall have been complied with."

By his application, which is made a part of the contract of insurance, Milam agreed: "That death by my own hands, or occasioned by my own act, whether voluntary or involuntary, whether I be sane or insane, or whether death be intended or anticipated as the result of such act, or in consequence of the actual or attempted violation of the law, within one year from the date of any policy issued hereunder, shall invalidate the insurance and forfeit the payment of the company."

By way of defense the answer alleged:

(1) That, while the policy bears date June 8, 1914, it was not actually delivered until June 13, 1914; (2) that Milam, the insured, committed suicide on June 8, 1915, which was within one year from the date of the policy, and that, by the terms of the application above set forth, all liability under the policy was thereby annulled; and (3) that the policy was procured by fraud in this respect, that at the time of and before the date of the policy, Milam was affected with gallstones and that he fraudulently concealed that fact, and represented that he had never suffered from that disease.

The circuit court sustained a general demurrer to the answer; and, the defendant having declined to further plead, judgment L.R.A.1917B.

went for the plaintiff for the amount of the policy. The company appeals.

The governing point upon which the whole case hinges is this: Did Milam die after one year from the date of the policy? If he did, the policy, by its terms, is incontestable, and the judgment of the circuit court was right.

1. In order to avoid the effect of the one-year clause after which the policy could not be contested, the company alleged, and now contends, that while the policy bears date June 8, 1914, yet, as a matter of fact, the policy was not delivered, or the first premium paid, until June 13, 1914; and that, Milam having died on June 8, 1915, he died within a year "from the date" of the policy.

We see no merit in this contention. While it is true that insurance companies frequently, and we believe usually, do not deliver a policy upon the day of its date, nevertheless all the provisions of the policy as to payments of future premiums, its maturity if it runs for a term, and similar provisions, are calculated from the day of its date. Of course, the insured can contract for a policy to be dated on any date after the date of his application; but, as a matter of routine business, policies are usually dated either according to the date of the application, or of its execution, and are subsequently delivered without any question being made upon that subject. But the rights of the parties to the contract are determined by the date, and all future premiums are to be paid accordingly.

If Milam had died on June 12, 1915, without having paid his second premium due on June 8, 1915, could it be said that his policy had not lapsed for failure to pay the premium when due, according to the terms of the contract? Under such a state of case would the company concede that his policy was in force on June 12, 1915, and that Milam had until that day to pay the premium? We think not. Furthermore, the policy, by its terms, provides that the period of incontestability shall be calculated "from the date" of the policy, not from the date of its delivery. So by the very terms of the policy the one-year period of incontestability began to run on June 8, 1914.

2. The company further insists, however, that if June 8th is to control as the date of the policy, then Milam died within one year from that date, and the policy is contestable under the provisions avoiding it for suicide and fraud, and that the demurrer to the answer relying upon those defenses was improperly sustained.

So, speaking concretely, the case resolves itself to this: Was June 8, 1915, the day of Milam's death, within or after one year from June 8, 1914?

The rule in regard to the computation of time is well settled, and is this: When the computation is to be made from the act done, the day on which the act is done must be included; but, when the computation is to be made from the day itself, and not from the act done, then the day on which the act is done must be excluded from the computation. *Handley v. Cunningham*, 12 Bush, 401; *Moor v. Covington City Nat. Bank*, 80 Ky. 307; *Frankfort v. Farmers' Bank*, 105 Ky. 811, 49 S. W. 811; *Erwin v. Benton*, 120 Ky. 548, 87 S. W. 291, 9 Ann. Cas. 264; *Geneva Cooperage Co. v. Brown*, 124 Ky. 16, 124 Am. St. Rep. 388, 98 S. W. 279; *Newton v. Ogden*, 126 Ky. 101, 102 S. W. 865; *Louisville R. Co. v. Wellington*, 137 Ky. 728, 126 S. W. 370, 128 S. W. 1077; and the cases there cited; and *Lowry v. Stotts*, 138 Ky. 251, 127 S. W. 789. The working of the rule may be illustrated by reciting the facts and the conclusions reached in two of the cases cited.

In *Handley v. Cunningham*, supra, the question was whether the act of 1871 reducing the legal rate of interest from 10 per cent to 8 per cent was in force on September 1st of that year, the date of the notes in question. The statute provided that it should "take effect and be in force from and after the 1st day of September, 1871." The court applied the rule that, when the time is counted from a day, the day was not to be included, and held that the act of 1871, was not in force on September 1, 1871. *East Tennessee Teleph. Co. v. Frankfort*, 142 Ky. 408, 134 S. W. 475, is also a good illustration of this application of the rule. But in *Frankfort v. Farmers' Bank*, 105 Ky. 811, 49 S. W. 811, the statute required that an appeal should not be granted except within two years next after the right of appeal accrued. In that

case the judgment was rendered on January 21, 1896; the appeal was granted on January 21, 1898. It was held that the appeal had not been granted within two years next after the judgment had been rendered, because the two years expired on January 20, 1898, the day before the appeal was granted.

In the case at bar, therefore, the year of incontestability must be computed from the dating of the policy, which was an act done on June 8, 1914. Manifestly, therefore, June 8, 1914, must be included in the computation, and the first year of the policy expired on June 7, 1915. Otherwise the year would have contained 366 days, instead of 365 days. But by the terms of the policy the insured was not required to pay the second premium until the first day of the second year, and, as there are no parts of days to be considered, he had all of June 8, 1915, in which to pay the second premium; and consequently the policy remained in force throughout that day. Milam having died on June 8, 1915, while the policy was in force, and not contestable, it became a charge against the company. The fact that he had not paid the premium for the second year when he died cannot affect the appellee's rights under the policy, since Milam was not then in default in the payment of any premium. Indeed, the company does not claim that the policy lapsed for failure to pay the second premium.

It follows, therefore, that since Milam did not die within one year from the date of the policy, it was incontestable upon either ground relied upon, and that the Circuit Court properly sustained the demurrer to the answer.

Judgment affirmed.

Petition for rehearing denied December 15, 1916.

### Annotation—Insurance; date from which the period to which a defense is limited in life insurance policy is to be computed.

The above question is covered in the annotation to *Gans v. Aetna L. Ins. Co.* L.R.A.1915F, 703 to which this is supplementary.

It will be noticed that the court decided in *MERIDIAN L. INS. CO. v. MILAM*, ante, 103, that, under the provisions of the policy there involved, the period after the expiration of which the policy was to be incontestable was to be calculated from the date of the policy, and not from the date of its delivery to the insured; and also that the day on which the policy was dated should be included in reckoning the period after which it was to be incontestable.

L.R.A.1917B.

The question involved in *Anderson v. Mutual L. Ins. Co.* (1913) 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914B, 903, is somewhat similar to the first question in *MERIDIAN L. INS. CO. v. MILAM*. In the *Anderson* Case a policy was "caused to be executed and issued" which bore the date of May 22, 1908, and referred to an application made May 21st, to which a medical examiner's report was attached, and the policy recited that it was issued in consideration of a stated sum and the payment of a like sum upon May 22d in succeeding years. It appeared that one application had been returned by the insurer June 24, 1908, and

a second one signed, but that no medical report was attached to the second, and that a copy of the first application was attached to the policy. Both applications provided that the insured would not die by his own hand "during the period of one year next following the date of issue," and the policy provided that the insurer should not be liable in case the insured committed suicide "during the period of one year after the issuance of this policy as set forth in the provisions of the applications indorsed hereon." The first premium was paid May 21, 1908, and the second a year later; the insured committed suicide June 12, 1909, so that his death resulted from his own act less than a year after the date when the policy was signed by the officers of the insurer, but more than a year from the date designated in the policy as its date. It was held that the date of the policy determined its issuance, and that the insurer was liable, as the insured had not committed suicide within one year from that date.

The court said: "It must, of course, be admitted, in accordance with the respondent's claims, that the expressions 'date of this policy,' and 'issuance of this policy' are not, according to the ordinary acceptance of the terms, synonymous. The word 'issuance,' as applied to a contract like a policy of insurance, would, if standing alone, probably be taken to mean, either the signing (without delivery) of the contract by the authorized officers of the insuring company . . . or, perhaps, the act of delivery of a fully written and signed policy. . . . But in construing any writing, the usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found. We must endeavor to ascertain, from an examination of the entire instrument, read in the light of the circumstances surrounding its execution, the sense [in] which the parties employed the particular phrase in question.

"Here we find that the policy incorporates, as a part of the contract, the application of May 22d. Unquestionably the word 'issuance of this policy,' in the policy itself, were intended to mean the same thing as 'date of issue' in the application. The insurer, acting, so far as the record shows, with full knowledge of all the facts, elected to base its policy upon the first application, to date its policy May 22, 1908, the day upon which the medical examination of Anderson had taken place, to make the premiums

payable on the 22d day of May of successive years, to make the principal sum payable in the event of death within twenty years from the apparent date of the policy, and to make dividends payable on the 22d day of May of each year. In all these particulars, the company expressed its intention to fix the rights of the parties with reference to the 22d day of May in just the same way that these rights would have been fixed if a policy had been actually signed and delivered on that day. It is perfectly competent for the parties to agree that a policy shall be antedated, and, when this is done, the policy takes effect by relation from the date agreed upon."

In *American Nat. Ins. Co. v. Thompson* (1916) — *Tax. Civ. App.* —, 186 S. W. 254, a policy issued August 11, 1913, stated that it was issued in consideration of the application and the payment of a stated sum for term insurance for one year, ending the 29th of November, 1914, and the payment of a like sum on the same date each year, and a rider attached to the policy provided that, in consideration of the application for "short-term insurance," together with the application for the policy to which the rider was attached, dated July 29, 1913, and the payment of a stated sum, the life was insured, "under the aforesaid policy for like amount and under like conditions as stated in said policy for the period July 29, 1913, to November 29, 1913, inclusive, preliminary to the date when the principal contract shall become in full force." The question in dispute was whether a provision of the policy limiting liability "if during the first policy year the insured shall commit suicide" should be construed to mean the year beginning August 11, 1913, the date of the issuance of the policy, or November 29, 1913, the date of the expiration of the "short-term" insurance and the date from which the policy provided the yearly premiums should be computed. The former construction was adopted, it being held that the rider providing for the short-term insurance was a part of the policy, and that there was but one contract of insurance, and that the "first policy year" contemplated by the suicide clause began on August 11, 1913, the date of the issuance of the policy, so that a recovery for the full amount on the policy was not barred by the insured's committing suicide more than a year after such date.

J. T. W.

## KENTUCKY COURT OF APPEALS.

I. W. HOLCOMB, Appt.,

v.

GRAND LODGE, BROTHERHOOD OF  
RAILROAD TRAINMEN.

(171 Ky. 843, 188 S. W. 885.)

**Insurance — total disability — loss of sight.**

A railroad employee is not totally disabled by the destruction of one eye and injury to the other so that he is not able to perform the duties of his employment, within the meaning of a benefit policy insuring against total disability, which is defined *inter alia*, as complete and permanent loss of the sight of both eyes, if he is able to go about without assistance and recognize persons 30 or 40 feet distant.

For other cases, see *Insurance*, VI. c. 2, in *Dig. 1-52 N. S.*

(November 1, 1916.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for McCracken County dismissing an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Campbell & Campbell, for appellant:

Loss of eyesight, under the provisions of § 68 of the constitution, means the loss of the usefulness of the eyes for the purposes to which, in their normal condition, they were susceptible of application.

*Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, 121 Am. St. Rep. 782, 106 N. W. 108; *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293; *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799; *Sneck v. Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545, 156 N. Y. 669, 50 N. E. 1122; *Sneck v. Travelers' Ins. Co.* 81 Hun, 331, 30 N. Y. Supp. 881; 1 Am. & Eng. Enc. Law, 301; *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326.

Total disability is a relative matter, and must be applied to an insured considering his vocation at the time of injury, and anything which prevents an insured from doing substantially all of the necessary and material things required in his customary vocation is, within the meaning of an insurance policy, a total disability.

*Wolcott v. United Life & Acci. Ins. Asso.*

**Note.** — As to what constitutes disability within meaning of accident or health policy, see annotation following this case, post, 108, L.R.A.1917B.

55 Hun, 98, 8 N. Y. Supp. 263; *Commercial Travelers Mut. Acci. Asso. v. Springsteen*, 23 Ind. App. 657, 55 N. W. 973; *McMahon v. Supreme Council, O. C. F.* 54 Mo. App. 468; *Commercial Ben. Asso. v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423; *Albert v. Order Chosen Friends*, 34 Fed. 721; *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 398.

Mr. F. E. Graves also for appellant.

Messrs. Wheeler & Hughes, for appellee:

Under a contract of insurance which provides for indemnity when the beneficiary has suffered "complete and permanent loss of sight of both eyes," no recovery can be had for impairment of vision without the loss of sight.

*Lyon v. Railway Pass. Assur. Co.* 46 Iowa, 631.

Turner, J., delivered the opinion of the court:

In December, 1911, the appellee, a fraternal insurance company, issued to appellant a policy of insurance in class C of its organization, wherein it agreed, in consideration of the premiums paid and to be paid, to pay appellant or the named beneficiary in the event of his death or total disability the sum of \$1,500 in accordance with the terms of the contract.

It was provided in appellee's constitution that policies issued by it in class C should be for \$1,500, and that the full amount thereof should be payable upon the insured becoming permanently or totally disabled within the meaning of § 68 of the constitution. Section 68 reads as follows: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand, at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot, at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

Appellant at the time the policy was issued was a flagman employed by a railroad company, and thereafter, on the 6th day of May, 1912, while engaged in his said occupation, was injured by a cinder which struck him in the left eye, by reason of which he was made practically blind in that eye, and because of which injury he lost his position as flagman, and was unable to obtain another position of a similar kind.

This is an action seeking a recovery on

the insurance policy upon the theory that appellant was totally and permanently disabled within the meaning of the policy and of the constitutional provision quoted.

By agreement of parties the cause was submitted to the court, without the intervention of a jury, for the trial of both the issues of law and fact; that the court, after separating its finding of law and fact, entered a judgment dismissing the plaintiff's petition, and from that judgment this appeal is prosecuted. The only question necessary to be determined is whether there was such a total disability as is contemplated in the provision quoted.

The evidence shows that the cinder struck the appellant in the left eye, and that he was almost totally blind in that eye, although he could still tell daylight from dark; that both of his eyes were affected, and that at times the right eye was almost as bad as the left eye; that sometimes he could tell persons across the street; that he lost his position as flagman because of the injury to his eye, and had been refused similar employment upon application to other companies for that reason; that he and his wife had since run a lunch counter or restaurant, but that he had been unable to do any work which required the use of his eyesight; that since the accident he had been able to walk around the streets alone without a cane or other assistance, and to drive a buggy around the streets of Paducah; that during the progress of the trial he was able to recognize persons in the court room 30 or 40 feet distant from him.

The argument for the appellant is that total disability within the meaning of the policy is a relative matter, and must be applied in this case to the insured in the light of his vocation as a flagman; that it must be held to be a total disability because it prevents him from discharging the customary duties of that vocation; and that, as appellant was at the time the contract was entered into a flagman and engaged in the operation of trains, the contract must be construed as having particular reference to his vocation as such trainman, and that, inasmuch as the loss of one eye is a total

disability so far as that vocation is concerned, the contract should be interpreted in the light of his occupation.

That there are cases justifying such an interpretation where reference is made in the policy of insurance to the insured's vocation, and the contract may be fairly interpreted from its terms to have reference to his particular vocation although he may thereafter be able to follow a different vocation, there is no doubt. As in this case, if the policy had undertaken to indemnify the appellant against any such total disability as would prevent him from following his occupation as a flagman, then undoubtedly he could recover; but in the policy in question his occupation is not referred to, and his occupation must be treated as a mere circumstance, and not as a determining factor in fixing the liability of the organization.

It is true that the appellant at the time the contract was entered into was a trainman, and it may be true, as asserted in appellant's brief (although the record does not disclose it), that none other than trainmen were eligible to membership in the organization, but that is not to be deemed conclusive in the absence of some provision in the contract that he was to be indemnified for such total disability as might prevent him from following *that* vocation as distinguished from a total disability to follow *any* vocation. For, although appellant at the time was a flagman, it cannot be assumed that, if he thereafter ceased to be one, the insurance would have ceased if he had continued to pay his premiums.

The policy in this case clearly was not an insurance against such total disability as might prevent appellant from following his vocation as a flagman, but was against such total disability, in a broader and more comprehensive sense, which might prevent him from following that or any other vocation.

The language is clear, explicit, and unambiguous, and that appellant has not suffered the complete and permanent loss of the sight of both eyes is perfectly clear, and for that reason there can be no recovery.

The judgment is affirmed.

### **Annotation—What constitutes disability within meaning of accident or health policy.**

The earlier cases on this question are discussed in the annotations to *Turner v. Fidelity & C. Co.* 38 L.R.A. 529; *Keith v. Chicago, B. & Q. R. Co.* 23 L.R.A. (N.S.) 352; *Industrial Mut. Indemnity Co. v. Hawkins*, 29 L.R.A. (N.S.) 635; and *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 34 L.R.A. (N.S.) 126. L.R.A.1917B.

As to liability for indemnity against total disability which results from an injury for which an independent indemnity is provided, see annotation to *Anderson v. Aetna L. Ins. Co.* 28 L.R.A. (N.S.) 730.

As to liability for death under policy insuring against permanent or total dis-

ability, see *Hill v. Travelers' Ins. Co.* 28 L.R.A.(N.S.) 742.

As to construction and effect of condition in accident or health policy that assured must be confined to the house to entitle him to indemnity, see annotation to *Breil v. Claus Groth Plattsdsutschen Vereen*, 23 L.R.A.(N.S.) 359, and *Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes*, 42 L.R.A.(N.S.) 700.

**Inability to do anything.**

Supplementing annotation in 38 L.R.A. 530, and 23 L.R.A.(N.S.) 352.

In *Indiana Life Endowment Co. v. Patterson* (1914) 55 Ind. App. 291, 103 N. E. 817, the averments of total and permanent disability in a complaint were held sufficient on demurrer where it was alleged that the insured's injury was total and permanent; that he was totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood, and was totally and permanently disabled from performing any kind of manual labor whatever; that he was also permanently disabled from following his usual occupation.

The court in this case refused to disturb a verdict for the insured, holding that the evidence, the substance of which does not appear, was sufficient to warrant a finding that he had been totally and permanently disabled.

**Ability to do some small act.**

Supplementing annotation in 38 L.R.A. 529, and 23 L.R.A.(N.S.) 353.

In *Davis v. Midland Casualty Co.* (1914) 190 Ill. App. 338, it was held unnecessary to constitute "total disability" that the insured be helpless.

The question of total disability in that case was held one of fact, there being evidence that the insured, a farmer, had received an injury to his hand which disabled him for some time from doing any work, although he was able to go around and give instructions to others; and a verdict for the insured was held to be justified by the evidence.

And in *Great Eastern Casualty Co. v. Robins* (1914) 111 Ark. 607, 164 S. W. 750, the insured, a publisher of a newspaper, was held totally disabled and prevented from performing any and every duty pertaining to any and every kind of business or occupation within the meaning of an accident policy, where it was shown that he was unable to perform any of the duties pertaining to his business, although during a short period he made an occasional trip down to his

office and gave instructions to his foreman.

**Ability to attend to part of usual business.**

Supplementing annotation in 38 L.R.A. 531 and 23 L.R.A.(N.S.) 353.

In *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (1916) — *Tex. Civ. App.* —, 185 S. W. 979, the court quoted with approval from the decision *Fidelity & C. Co. v. Getzendanner*, set out in the annotation in 23 L.R.A.(N.S.) 354, to the effect that, under a policy providing for indemnity in case of injuries which wholly-disable and prevent the insured from performing any and every kind of duties pertaining to his occupation, the insured is entitled to recover, although he was not absolutely disabled to do some acts usually done by him in carrying on his occupation.

The court did not set out the evidence, but stated that it appeared from it that the insured, a railroad conductor, could perform some of his duties, but could not perform others; and that it also appeared what his duties were; and held the question whether he was totally disabled a relative one of fact for the determination of the jury.

In *Hefner v. Fidelity & C. Co.* (1913) — *Tex. Civ. App.* —, 160 S. W. 330, a provision of an accident policy for indemnity in case of injuries resulting in total disability that prevented the insured from performing any and every kind of duty pertaining to his occupation was construed to mean a disability which prevented the performance of any substantial part of the insured's business.

The evidence in this case was held sufficient to take the question to the jury whether the insured had suffered a total disability, where it in substance tended to show that the insured, an attorney at law, from the time of the accident was not prevented from performing all of the duties required in his profession, but that he was unable to perform many of the duties incident thereto, among which was work in the library and the taking charge of and conducting lengthy cases in court.

In *Fidelity & C. Co. v. Joiner* (1915) — *Tex. Civ. App.* —, 178 S. W. 806, where the accident policy provided for certain indemnities in case the insured suffered immediate total disability, and defined total disability as disability "that prevents the insured from performing any and every kind of duty pertaining to his occupation," it appeared from the evidence that the in-

sured, a commercial traveler, sustained an injury in an automobile accident, and that he was badly bruised and skinned in several places, and almost immediately went to bed, but there was evidence that a little over two weeks thereafter he made a short trip for the purpose of transacting business, and solicited one customer and received a payment from another; but the evidence showed that at this time he was almost exhausted and in a nervous condition; and it was held that the question whether he was totally disabled was for the jury; and a judgment against the insurer was sustained.

In this case the insurer contended that, because the insured solicited the order and collected the debt subsequently to his injury, he performed duties pertaining to his occupation after the accident, and that it therefore appeared as a matter of law that he was not totally disabled within the meaning of the policy. With reference to this contention the court said: "We agreed it conclusively appeared as claimed that the assured, after he suffered the injuries, performed duties pertaining to his occupation, but we do not agree that his doing so established as matter of law that he was not 'totally disabled' within the meaning of those words as used in the policy. It not infrequently happens that one suffering from injuries to his person performs duties pertaining to his occupation which he is wholly unable, in the reasonable and proper sense of those words so used, to perform, and that as a consequence, because he was unable to do so, he suffers death or an aggravation of his injuries. In a case in which such a result follows the performance of the duty, the performance thereof, instead of establishing that the assured was able to perform it, it seems to us, would establish the contrary. We think, therefore, that to construe the language in the policy as meaning what appellant contends it means would be unreasonable. . . . In reaching the conclusion indicated, the fact that the words 'total disability' used in the policy are defined therein as disability 'that prevents the assured from performing any and every kind of duty pertaining to his occupation' has not been overlooked, but when it is remembered that the word 'prevent' is synonymous with the word 'hinder,' and that the latter might properly be substituted for the former where it is used in the quotations made from the policy, it is obvious that appellant has no cause to complain that we ignored L.R.A.1917B.

the definition, for undoubtedly the jury had a right to find from the testimony that the disability the assured suffered as a result of the injuries 'hindered' him in the performance of every kind of duty pertaining to his occupation."

In *Bachman v. Travelers Ins. Co.* (1916) — N. H. —, 97 Atl. 223, the question of the insured's total disability for a specified term was held for the jury, where there was evidence that during the period in question the insured, who was a traveling salesman, went out upon the road at different times, took some orders, and that others were sent to him, and that he received a compensation on account of these orders; and there was also evidence tending to prove that during the time in question the insured's mental faculties were impaired, so that he was incapable of performing services of any value whatever in his line of business, and that the orders taken did not result from valuable services performed by him. It was urged in this case that because the insured went about and received orders for which he was paid, it could not be found that he was without earning capacity, and that, since his efforts produced revenue, total disability could not be found; and that one who earns must have earning capacity. The court stated that the answer to this was that it could be found that the payments in question were made for what his employers believed that he did for them when in fact he did nothing; that it could be found that his capacity to give and hold trade was gone, although neither he nor his employers fully realized the situation until a subsequent date.

In *Continental Casualty Co. v. Wynne* (1912) 36 Okla. 325, 129 Pac. 16, the action was on an accident policy issued to a deputy sheriff engaged in making arrests, insuring against injury which caused total inability to engage in any occupation; and there was evidence that, while the insured was suffering from an accidental injury, and unable to work or perform the duties of his office, he had handed a few subpoenas to some jurors or witnesses upon a certain occasion. It was held that an instruction was proper which, after stating that before the plaintiff could recover it must be shown that the injury caused total and continuous disability to engage in any occupation, stated that, even though during the time he claimed to be totally and continuously disabled, he did perform some trivial services, this should not be so construed as to prevent him

from recovering for all of the time, if it was found from the evidence that he was, when the trivial services were rendered, unable to have performed them; the court stating that the test was not whether he did perform any services of any character, but whether he was able to perform services of any sort or character.

In *National Life & Acci. Ins. Co. v. O'Brien* (1913) 155 Ky. 498, 159 S. W. 1134, where a policy provided for indemnity in case of accidental injuries which wholly and continuously from the date of the accident disabled and prevented the insured from performing every duty pertaining to any business or occupation, it was held that the language should be construed to mean that the disability would be total if of such a character as to prevent the insured from transacting any kind of business pertaining to his occupation, and that it was sufficient if the disability was such as to prevent him from doing all the substantial acts required of him in his business.

The evidence in this case, which was in effect that the insured for brief intervals following the accident got up from his bed and was able to go out of the house, but could not perform any material work pertaining to his business, was held to show that his disability was so total and continuous as to prevent him from performing any substantial work or duty pertaining to his business or occupation.

In *Workingmens' Mut. Protective Assn. v. Roos* (1916) — Ind. App. —, 113 N. E. 760, where the policy provided for a specified indemnity in case an injury should, from the date of the accident, disable and prevent the insured from performing every duty pertaining to any and every kind of business or occupation, and as to partial disability provided that "if such injury shall wholly and continuously from date of accident disable and prevent the assured from performing one or more important duties pertaining to his occupation, or in the event of like disability immediately following total loss of time, the association will pay the assured for the period of such partial disability," it was held that the words, "total loss of time," in the last provision, when read in connection with the stipulation in reference to total disability, made it clear that the insured would not be entitled to recover for total disability except in the event of a total loss of time, as he must have been prevented from performing

every duty pertaining to any and every kind of business or occupation.

And in this case an instruction that, if a person was so disabled that he was disqualified and rendered unable to perform substantially and in a reasonable way his usual and ordinary work and vocation, he was totally disabled within the meaning of the language used in the policy, was held incorrect.

The court stated that they had been unable to find a decision which had had occasion to construe language of the same import as that found in the policy before them.

#### **Ability to work in other occupation.**

Supplementing annotation in 38 L.R.A. 534, and 23 L.R.A. (N.S.) 356.

It will be noted that in *HOLCOMB v. GRAND LODGE, B. R. T. ante*, 107, where the policy provided that the full benefit should be payable upon the insured's becoming permanently or totally disabled within the meaning of a section of the constitution providing that any member in good standing who should suffer the amputation or severance of an entire hand at or above the wrist joint, or who should suffer the amputation or severance of an entire foot, or who should suffer the complete and permanent loss of sight of both eyes, should be considered totally and permanently disabled, the court held that, notwithstanding the fact that the organization was one which accepted only railroad trainmen as members, yet the policy was not an insurance against such total disability as might prevent the insured from following his vocation as a flagman alone, but was against such total disability in a broader sense, which might prevent him from following that of any other vocation.

In *Indiana Life Endowment Co. v. Reed* (1913) 54 Ind. App. 450, 103 N. E. 77, where the insurer issued a life insurance policy with certain provisions for burial and disability benefits, to one who it knew was an illiterate laborer, and the policy provided for a certain indemnity if the insured should become totally and permanently disabled from performing any and all kinds of manual labor or business upon which he might depend for a livelihood, and provided that total and permanent disability as used in the policy should be understood to mean such disability as should render the insured totally incapable of doing, performing, managing, or directing any service of any kind or character by which he might earn a livelihood, it was



held that if, from an injury received, the insured was totally and permanently incapacitated from earning a livelihood, the insurer could not rightfully refuse to pay because of a mere possibility that, by education or otherwise, he might at some time become able to earn a living in some manner or by some means not then available to him.

In this case, where the insured had suffered the loss of a hand through an accident, it was held that this injury would not necessarily entitle him to recover the indemnity provided for in case of total and permanent disability; but the question whether he was disabled within the meaning of this provision was held one of fact to be determined by the jury.

**What loss of members constitutes disability.**

Supplementing annotation in 38 L.R.A. 535, and 23 L.R.A.(N.S.) 358.

As to extent of loss or mutilation contemplated by provision as to loss or removal of bodily member or part thereof, see annotation to *Moore v. Aetna L. Ins. Co.* L.R.A.1915D, 264.

Under a certificate providing for the payment of a specified amount in case of total disability as defined by the by-laws, one of which provided, among other things, that a member suffering by means of a physical separation the loss of four fingers of one hand at or above the third joint, or of three fingers and a thumb of one hand at or above the third joint, should be considered totally and permanently disabled, a recovery for a total disability cannot be had where the insured's hand was crushed and an amputation of the second, third, and fourth fingers was had above the third joint, and the bone in the palm connecting with the first finger was injured in such a manner that one half the power and efficiency of the first finger was lost, but the entire first finger and thumb were left remaining attached to and part of the hand, since the evidence did not bring the injury within the meaning of the clause defining total disability. *Mady v. Switchmen's Union* (1911) 116 Minn. 147, 133 N. W. 472.

In *Whitton v. American Nat. Ins. Co.* (1916) 17 Ga. App. 525, 87 S. E. 827, the policy provided for certain indemnities in the event of a total and permanent loss of sight of both eyes, or loss of both arms or both legs, or one arm and one leg, or one eye and one limb, or in case the insured should become "totally and permanently disabled to

such extent as to render it impossible for him to engage in any gainful occupation whatever," and expressly provided that "the total and permanent disability referred to must be such that there is neither then nor at any time thereafter any work, occupation, or profession that the insured can sufficiently do or follow to earn or obtain any wages, compensation, or profits," and where the evidence only showed the loss by accident of one eye, it was held that it was not shown that he was totally disabled within the meaning of the term as defined in the contract, as it appeared that he was not wholly unable to earn or obtain any wages, compensation, or profit.

In *Rabb v. North American Acci. Ins. Co.* (1916) 28 Idaho, 321, 154 Pac. 493, where the policy provided for the payment of one third of the principal sum for the loss of entire sight of one eye resulting from accident, and also provided that, for total loss of time resulting necessarily and solely from injury through accidental means, an indemnity of a specified sum per month should be paid for a certain period, it was held that the insured, who had lost one of his eyes through an accident and also received a fracture of his leg by reason of the same accident, was not limited in his recovery to one third of the principal sum, but was also entitled to recover the monthly indemnity for the period during which he was unable to work on account of the fracture of his leg.

In *Convery v. Brotherhood of Railroad Trainmen* (1914) 190 Ill. App. 479, a provision of the constitution of a fraternal beneficiary association reading: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise," when taken in connection with another section providing that the beneficiary fund should be distributed exclusively in paying death, total and permanent disability, and benevolent claims as described in the section quoted, and another section providing that all claims

of disability not coming within the quoted provision should be held to be addressed to the systematic benevolence of the brotherhood,—was held not to exclude all liability for any other kind of permanent disability than that enumerated therein, the court holding that the words, "but not otherwise," at the end of the quoted section, referred to the furnishing of the proof, and did not have the effect of excluding liability for all other forms of permanent injury; and the insured in this case was allowed to recover the amount of his certificate for an injury sustained to his knee which resulted in a total and permanent dis-

ability, from performing the duties of a railroad trainman, in which occupation he had been engaged.

In *Bond v. Grand Lodge, B. R. T.* (1911) 165 Ill. App. 490, where the insured, a brakeman, received an injury to his foot which crippled him, evidence was held admissible that he had made application to several railroads, and had been examined by their surgeons, and had been refused employment because he was not physically qualified to perform duties on trains, as such evidence was competent as tending to prove that he was totally disabled by his injury.

J. T. W.

# NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL S. STALEY, Appt.,

v.

SOUTH JERSEY REALTY COMPANY,  
Resp't.

(83 N. J. Eq. 300, 90 Atl. 1042.)

## Contempt — classification.

1. Contempts are of two sorts, civil and criminal; in a civil contempt the proceeding is a remedial step in a cause inter partes, and, if the contemnor be imprisoned, it is only until he performs some required act beneficial to the other party; criminal contempts are offenses against organized society and are punishable as such in a proceeding at law which, while it may be administered by the court in which the contumacious conduct occurred, is no part of the private litigation therein.

*For other cases, see Contempt, I. a, in Dig. 1-52 N. S.*

## Same — criminal — rights of accused.

2. A proceeding instituted in the court of chancery for the purpose of having that court adjudge whether or not the defendant in a cause pending therein was guilty of a contemptuous violation of an injunction issued by it is a proceeding at law in a criminal contempt in which the defendant is entitled to all of the substantial rights of a person accused of crime that are consistent with the summary nature of the proceeding and the processes of the tribunal in which it is administered, one of which rights is that the incriminating testimony shall be given by witnesses subject to cross-examination and impeachment under the ordinary rules of evidence.

*For other cases, see Contempt, II. in Dig. 1-52 N. S.*

## Headnotes by GARRISON, J.

Note.—As to applicability, in proceeding to punish criminal contempt, of rules of evidence in criminal cases, see annotation following this case, post, 118.  
L.R.A.1917B.

## Same — ex parte order.

3. A punitive order of the court of chancery in such a proceeding made upon ex parte affidavits will be set aside.

*For other cases, see Appeal and Error, VII.*

*1, 3, a, in Dig. 1-52 N. S.*

## Evidence — affidavits.

4. Ex parte affidavits to which the rules of evidence are not applied are not juridical evidence, and hence are incapable of supporting a judicial decision in a proceeding at law.

*For other cases, see Evidence, IV. g, in Dig. 1-52 N. S.*

(June 15, 1914.)

**A**PPEAL by defendant from an order of the Court of Chancery adjudging him guilty of contempt for violation of an injunction restraining him from disposing of or claiming the right to convey title to certain lands. Reversed.

## Statement by Garrison, J.:

Two bills to quiet title were filed in the court of chancery against Samuel S. Staley and others, in one of which a final decree was entered on April 2, 1909, and in the other of which a final decree was entered on October 22, 1909. In each case a permanent injunction was awarded restraining Staley from disposing of or claiming the right to make title to certain lands referred to in the said decrees respectively. On June 18, 1910, upon proceedings for contempt for the violation of this injunctive provision of the earlier decree, Staley was adjudged guilty and ordered to pay a fine of \$50 for the use of the state. On September 22, 1910, an order in the other suit was made upon Staley requiring him to show cause why he should not be adjudged guilty of contempt of court for the violation of the permanent injunction awarded in that case. This order was returnable at the chancery chambers at Jersey City on October 3, 1910,

and was served on Staley personally. At the time and place designated in this order to show cause the vice chancellor took up the consideration of the proceeding for contempt, and has made, for the purposes of this appeal, the following written statement of what then occurred: "An order to show cause was signed and served upon the respondent, Staley, who was then sojourning in Philadelphia. He did not appear at the hearing on the return day, but sent his counsel, who moved that a day might be fixed for taking the deposition of the respondent, who counsel represented desired to have a hearing in open court. He presented no answering affidavits. His counsel was inquired of as to whether Staley was in court in response to the order to show cause, to which counsel replied that he was not. His counsel stated that he was in Philadelphia, where he lived. I then examined the petition, and finding that the respondent, Staley, had been adjudged guilty of contempt on a former action, and had been fined \$50, inquired of his counsel if the fine and costs had been paid, to which his counsel replied that Staley had not paid the fine because he could not raise the money, but that he thought that Staley should be entitled to a hearing without having complied with the previous order of the court. Counsel for the complainant then moved that the order be made absolute, and this was done."

Thereupon the following order was made and filed: "It appearing to the chancellor that, upon petition filed by the complainant in the above-entitled cause, an order was entered, dated 22d day of September, 1910, requiring the defendant, Samuel S. Staley, to show cause before the chancellor, at the chancery chambers, in the city of Jersey City, on Monday, the 3d of October, 1910, at 10 o'clock in the forenoon, why he should not be adjudged guilty of contempt of court, in violation of the terms of the permanent injunction granted against him in the above-entitled cause, and be punished accordingly; and it further appearing by affidavits that copies of said petition and order were duly served personally upon the said Staley, as required by the terms of said order; and the court, after considering the said petition and the affidavits attached thereto, being of opinion that the said defendant, Staley, did commit the contempt with which he is charged, and violated the terms of the injunction aforesaid, and that his conduct was calculated to impair, defeat, and prejudice the rights of the complainant in this cause, and was an affront to the dignity and power of this court: It is thereupon on this 4th day of October, 1910, on motion of Lewis Starr, solicitor of the complainant, ordered that the said Samuel S. Staley be and he is L.R.A.1917B.

hereby adjudged to be guilty of contempt by reason of the misconduct alleged in said petition, and that he pay to the clerk of this court a fine of \$50 for the use of the state, and that he pay to the complainant the costs of these proceedings to be taxed. And it is also ordered that, as further punishment for his said conduct, that the said Samuel S. Staley be committed to the common jail of the county of Camden, at Camden, in this state, and there confined for a period of three months from the date of his commitment, to run concurrently with a similar term of imprisonment imposed in another cause pending in this court between the parties hereto by order, dated this day, and for a further term until he shall have paid said fine and costs, as aforesaid, unless the chancellor shall see fit sooner to discharge him. And it is further ordered that a warrant issue accordingly, directed to any sheriff, constable, or other peace officer of the state of New Jersey."

From this order Samuel S. Staley has appealed, specifying as one ground of appeal that he was entitled to have proof made of his alleged contempt by competent testimony with opportunity to cross-examine the witnesses that testified against him.

Messrs. George H. Bates and Leo Belmont, for appellant:

Defendant was entitled, upon the rule to punish him for contempt, to require proof to be made of the contempt and to be confronted with the witnesses upon whose testimony he was accused, in order that he might have an opportunity for cross-examination and to produce witnesses in court in contradiction thereof, and the right to be examined and have the opportunity, if desired, to purge himself of any contempt, if such were proved.

Seastream v. New Jersey Exhibition Co. 69 N. J. Eq. 15, 59 Atl. 914.

The vice chancellor has no power to punish for any contempt not committed in the presence of the court.

Re Haines, 67 N. J. L. 442, 51 Atl. 929; Oscar Barnett Foundry Co. v. Crowe, 80 N. J. Eq. 109, 74 Atl. 964; Frowley v. Superior Ct. 158 Cal. 220, 110 Pac. 817.

The act alleged to have been committed by the defendant and which, by the order appealed from, it was attempted to punish as a contempt, if it were such, was a civil, and not a criminal, contempt, as those terms are known and used in the law, and such contempt as that charged in this case is not punishable by imprisonment for a definite term.

Re Brewster, 15 N. J. L. J. 360; Frank v. Herold, 64 N. J. Eq. 371, 51 Atl. 774; Thompson v. Pennsylvania R. Co. 48 N. J.

Eq. 105, 21 Atl. 182, 49 N. J. Eq. 318, 24 Atl. 544; Re Dill, 32 Kan. 668, 40 Am. Rep. 505, 5 Pac. 39; Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257; Neeley v. State, 98 Miss. 816, 33 L.R.A. (N.S.) 138, 54 So. 315, Ann. Cas. 1913B, 281; Re Rice, 181 Fed. 217; State ex rel. Crow v. Shepherd, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; Powers v. People, 114 Ill. App. 323; Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567; Wages v. Com. 13 Ky. L. Rep. 925; Ex parte Robertson, 27 Tex. App. 628, 11 Am. St. Rep. 207, 11 S. W. 669; People ex rel. Munsell v. Oyer & Terminer Ct. 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259, 8 Am. Crim. Rep. 163; Clay v. Waters, 101 C. C. A. 645, 178 Fed. 385, 21 Ann. Cas. 897; People v. Kizer, 151 Ill. App. 6; Stewart v. State, 140 Ind. 7, 39 N. E. 508; Frowley v. Superior Ct. 158 Cal. 220, 110 Pac. 817; Saal v. South Brooklyn R. Co. 122 App. Div. 364, 106 N. Y. Supp. 996; Re Clark, 208 Mo. 121, 15 L.R.A. (N.S.) 389, 106 S. W. 990; Ex parte Wright, 65 Ind. 504; Haskett v. State, 51 Ind. 176; Costilla Land & Invest. Co. v. Allen, 15 N. M. 528, 110 Pac. 847; Gorham v. New Haven, 82 Conn. 153, 72 Atl. 1012; Vilter Mfg. Co. v. Humphrey, 132 Wis. 587, 13 L.R.A. (N.S.) 591, 112 N. W. 1095; Hake v. People, 230 Ill. 174, 82 N. E. 561; Anderson v. Indianapolis Drop Forging Co. 34 Ind. App. 100, 72 N. E. 277; Patterson v. Wyoming Valley Dist. Council, 31 Pa. Super. Ct. 112; Androscoggin & K. R. Co. v. Androscoggin R. Co. 49 Me. 392; Ex parte Gudenoge, 2 Okla. Crim. Rep. 110, 100 Pac. 39; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

Inability to comply with an order of the court is a sufficient excuse for failing to do so and a good defense in proceedings for contempt.

Re Brewster, 15 N. J. L. J. 360; State v. Gulick, 17 N. J. L. 435; Den ex dem. Hendrickson v. Hendrickson, 18 N. J. L. 366; Pennsylvania R. Co. v. Thompson, 49 N. J. Eq. 318, 24 Atl. 544; Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289; Grand Lodge, K. P. v. Jansen, 62 N. J. Eq. 737, 48 Atl. 526; Jenkins v. State, 60 Neb. 205, 82 N. W. 622; Herrington v. Cassem, 82 Ill. App. 594; Re Davison, 143 Fed. 673; State ex rel. McLean v. District Ct. 37 Mont. 485, 97 Pac. 841, 15 Ann. Cas. 941.

Mr. G. Doré Cogswell also for appellant.

Mr. Lewis Starr for respondents.

Garrison, J., delivered the opinion of the court:

Contempts are of two sorts, "civil" and "criminal." The distinction has been fre-

quently pointed out. Dodd v. Una, 40 N. J. Eq. 672, 5 Atl. 155; Thompson v. Pennsylvania R. Co. 48 N. J. Eq. 105, 21 Atl. 182; Frank v. Herold, 64 N. J. Eq. 371, 51 Atl. 774; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; Gompers v. United States, 233 U. S. 604, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693, Ann. Cas. 1915D, 1044 (1914). In a "civil contempt" the proceeding is remedial, it is a step in the cause the object of which is to coerce one party for the benefit of the other party to do or to refrain from doing some act specified in the order of the court. Hence, if imprisonment be ordered, it is remedial in purpose and coercive in character, and to that end must relate to something to be done by the defendant by the doing of which he may discharge himself. As quaintly expressed, the imprisoned man "carries the keys to his prison in his own pocket." Re Nevitt, 54 C. C. A. 622, 117 Fed. 451. "Criminal contempts," on the other hand, as the term implies, are offenses against organized society which, although they may arise in the course of private litigation, are not a part thereof, but, like other criminal offenses, raise an issue between the public and the accused. Hence if imprisonment be adjudged, it is, by analogy with the criminal law, punitive in purpose and definite in character. So marked is the difference between the two sorts of imprisonment that it serves as a practical test by which the two sorts of contempt may be distinguished.

As was said by Mr. Justice Lamar in Gompers v. Buck's Stove & Range Co.: "The distinction between refusing to do an act commanded—remedied by imprisonment until the party performs the required act, and the doing of an act forbidden—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

Judged by this test, the order brought up by this appeal was for a criminal contempt; it was for the doing of an act forbidden, and the punishment was imprisonment for a definite term. In principle the present case is indistinguishable from Frank v. Herold, in which, as in this case, the defendants were adjudged guilty of a contempt of the court of chancery for wilfully violating a restraining order of that court, and were sentenced to imprisonment for a definite term. The appeal was dismissed by this court upon the express ground that the proceeding was a criminal contempt in which, as the law then stood, an appeal did not lie. The legislature has since given a right of appeal under which the present case is now before us. This statute was passed in 1909

(P. L. 270), and because of the previous absence of an appeal in criminal contempts the questions that now arise are for the most part *res nova* in this court.

The Herold Case establishes beyond question the criminal character of the present contempt; and the other cases cited are also precedents for the authority of the court in which the contumacious conduct is alleged to have occurred to institute and carry through such criminal proceeding to its termination. In *Dodd v. Una*, Mr. Justice Depue described this proceeding as "of a criminal nature, instituted by the court of its own motion—heard by it in a summary manner—and punishable by imprisonment until the contempt be purged, or by a fine payable to the state."

It is not essential that the proceeding should be instituted by the court of its own motion; the matter may be, and in actual practice generally is, brought to the attention of the court by complainant's counsel who, in such case, acts as *amicus curiæ*. However set on foot, the person at whom the criminal proceeding is directed is entitled throughout to such of the substantial rights of a person accused of crime as are consistent with the summary nature of the proceeding and the processes of the forum in which it is administered. One of these rights of the accused is that the facts by which his guilt is determined and his punishment meted out shall be established by the oaths of witnesses subject to cross-examination and impeachment under the ordinary rules of evidence, unless the accused has either expressly or by implication waived the right thus intended for his protection, as to which latter point nothing is now decided. *Magennis v. Parkhurst*, 4 N. J. Eq. 433; *Buckley v. Perrine*, 55 N. J. Eq. 518, 36 Atl. 1037, 1088; *Holt's Case*, 55 N. J. L. 384, 27 Atl. 909.

Extended citation is unnecessary in view of the fact that the right of which we are speaking is upon fundamental principles applicable to all trials for criminal offenses, and in criminal offenses the sort of evidence by which the guilt of the accused may be established depends not upon the character of the tribunal by which he is tried, but upon the nature of the offense for which he is tried, so that evidence that would be inadmissible upon an indictment for contempt, tried by the courts of ordinary criminal jurisdiction, is equally so when tried in a summary way by the court of chancery.

"These contempts are infractions of the law visited with punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic L.R.A.1917B.

of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure (3 Transactions of the Royal Historical Society, N. S. p. 147, 1885), and that at least in England it seems that they still may be, and preferably are, tried in that way."

The quotation is from the opinion delivered by Mr. Justice Holmes in *Gompers v. United States* (1914) 233 U. S. 604, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693, Ann. Cas. 1915D, 1044. The relegation of criminal contempts to the courts of ordinary criminal jurisdiction insures a tribunal in which the functions of prosecutor, judge, and jury are exercised by different officers against none of whom was the contumacious conduct directed; if, however, the affront is to be punished by the tribunal at which it was aimed, and which by its constitution is both judge and jury and accuser as well, it is all the more important that there should be a scrupulous observance of the substantial rights of the defendant, one of which unquestionably is that of being represented by counsel when the incriminating testimony is given with right to cross-examine the witnesses, who are in effect state's witnesses, and to lay, if possible, the foundation for their contradiction or impeachment.

In the case now before us no witnesses were examined, although the accused was represented by counsel who was present in court upon the return of the rule to show cause. Counsel, it is true, moved for a continuance, which was denied; but such motion had reference solely to the taking of the deposition of the defendant, and in no way suggested that the case against the defendant should be made out otherwise than by lawful testimony. This motion for a continuance the court denied apparently because of an unpurged contempt in another cause. The denial of this motion was a matter of discretion that we do not review. When, however, this motion was disposed of, there remained nothing for the court to do but to hear the rule to show cause which on its face disclosed that its object was to have the court adjudge whether or not the defendant was guilty of a contemptuous violation of its permanent injunction, i. e., a proceeding at law for a criminal contempt, and not a motion in the equity cause or a step in that private litigation. This is the precise point on which the case of *Gompers v. Buck's Stove & Range Co.* turned, in which the ground of reversal was that, while the judgment was appropriate only to a proceeding at law for a criminal

contempt, the proceeding throughout was framed and treated as part of the civil cause in equity. "There are some differences," said the court in that case, "between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself,"—citing a large number of cases.

It is hardly necessary to add that among these substantial rights is that the defendant's guilt must be proved by judicial evidence, i. e., by testimony to which the ordinary rules of evidence are applied, which is not the case with *ex parte* affidavits such as those upon which the defendant in the case before us was convicted. These *ex parte* affidavits, if served upon the defendant, as to which the case is silent, were not legal evidence in a proceeding at law such as this. *Baldwin v. Flagg*, 43 N. J. L. 496.

The chancery rules referred to by Mr. Justice Depue do not, and could not, make such affidavits evidence in this criminal proceeding; they were lacking in the essential elements of legal evidence. As was said by Chief Justice Beasley in *State v. Bd. of Public Works*, 58 N. J. L. 362, 33 Atl. 966, speaking of the *ex parte* affidavit on which the writ of certiorari is allowed: "Such oath has no semblance of juridical testimony. The rules of evidence are not applied to it, and it is used against a party who has no knowledge of its existence. Such a basis as this is incapable of supporting anything in the nature of a judicial decision."

The defendant is not to be held responsible for the manner in which the case against him was conducted; his counsel waived nothing and acquiesced in nothing excepting as to the adverse ruling of the court on his motion for a continuance. If the incriminating witnesses had been sworn and examined as they should have been, he was there to cross-examine them or to lay the ground for their contradiction or impeachment. The *ex parte* affidavits, if known to the defendant, were not recognized by him as legal evidence; answering affidavits were not filed, hence the defendant did not even apparently acquiesce in that method of trial. We can reach therefore but one conclusion, and that is that the order sentencing the defendant to a definite term of imprisonment for a criminal contempt was made L.R.A.1917B.

without any evidence of his guilt that was legally admissible in such a proceeding.

That an order so made will be set aside upon appeal goes without saying. It may well be that such order is also open to the same objection that led the Supreme Court of the United States to set aside a similar order in *Gompers v. Buck's Stove & Range Co.* the syllabus of which case is: "A punitive sentence appropriate only to a proceeding at law for criminal contempt where the contempt consisted in doing that which had been prohibited by an injunction could not properly be imposed in contempt proceedings which were instituted, entitled, tried, and up to the moment of sentence, treated as a part of the original cause in equity."

If there is any essential difference between the case cited and the one before us it is not apparent upon a somewhat careful examination; or perhaps it would be more frank to say that, while it is apparent that there is no difference, we prefer to place our decision upon the meritorious ground already stated rather than upon the narrow one of an error in procedure.

We are asked by the appellant's counsel to say that the vice chancellor, in any event, had no power to make the order appealed from and § 102 of the Chancery Act and the case of *Seastream v. New Jersey Exhibition Co.* 69 N. J. Eq. 15, 59 Atl. 914, are cited to us.

The conclusion we have reached renders it unnecessary to consider this question, but we point out that § 102 applies to the vice chancellors sitting as judicial officers, and not to orders made by the chancellor with or without their advice. It may also be well to point out that what was said by Chancellor Magie in the *Seastream* Case was not approved by this court when that case came before it upon appeal (*Seastream v. New Jersey Exhibition Co.* 72 N. J. Eq. 377, 380, 65 Atl. 982), and also that the absence of an appeal, which was an influential factor in the case in chancery, has since been altered by the enactment of the statute under which the present appeal is now before us. It is further argued that, if a vice chancellor may try a criminal contempt, he can do so only when the matter is expressly referred to him, and that such a reference is not covered by the general chancery rules. The question is not free from difficulty, and is not now passed upon for the reason that such a decision is entirely unnecessary to the rights of any party now before us.

For the reason already stated, the order brought up by this appeal is reversed.

**Annotation—Applicability in proceeding to punish criminal contempt of rules of evidence in criminal cases.**

- I. Introductory, 118.*
- II. Accused as witness, 118.*
- III. Ex parte evidence, 119.*
- IV. Presumption of innocence and burden of proof, 122.*
- V. Degree of proof, 123.*
- VI. Various questions of evidence, 127.*
- VII. Miscellaneous, 129.*

***I. Introductory.***

The preliminary difficulty in this subject is that the courts often do not inform us whether they consider the contempt in question as civil or criminal; for while, generally speaking, civil contempts are remedial, and criminal contempts are in support of the court's dignity, there is considerable difference of opinion as to which class certain contempts belong. Under these circumstances it has not been sought to collect cases where the court does not indicate that it considers the contempt criminal, though some of such cases are included. The reader will understand that where the contempt is not referred to as "criminal" that the court has not definitely so characterized it.

Statements are occasionally found in the cases that contempt is a criminal proceeding or is of a quasi criminal nature, etc., which do not inform us whether the particular case is considered to be a criminal or a civil contempt. There is indeed authority to the effect that all contempt proceedings are of a criminal nature, and that the rules of evidence applicable to proceedings to punish for contempt generally are those of the criminal law. 4 Enc. Pl. & Pr. 766-769. It is stated in 1 Whart. Crim. Ev. 10th ed. § 350, note, that "a proceeding in contempt in a Federal court is a criminal case to be prosecuted in the name of the United States."

The reader is reminded that contempts as regards evidence are of two classes: (1) A contempt committed in or near the court's presence where the court proceeds summarily by its own knowledge; and (2) other contempts. It is of course with the second class that we are here concerned.

For right of one charged with contempt to notice and hearing, see the note to *Mylius v. McDonald*, 10 L.R.A.(N.S.) 1098.

For necessity of finding facts before adjudging one guilty of contempt, see L.R.A.1917B.

the note to *Hoffman v. Hoffman*, 30 L.R.A.(N.S.) 564.

For effect of denial under oath to purge one of criminal contempt, see the note to *O'Flinn v. State*, 9 L.R.A.(N.S.) 1119.

For the question whether a proceeding for contempt for violation of an injunction is civil or criminal, see the notes to *Vilter Mfg. Co. v. Humphrey*, 13 L.R.A.(N.S.) 591; *Gompers v. Buck's Stove & Range Co.* 34 L.R.A.(N.S.) 874; and *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.* 42 L.R.A.(N.S.) 793; also the note to *Enterprise Foundry Co. v. Iron Moulders' Union*, 13 L.R.A.(N.S.) 598, as to the same question, where the injunction is against interfering with another's employees.

For necessity and sufficiency of notice of injunction to render one not a party guilty of contempt in disobeying it, see the note to *Garrigan v. United States*, 23 L.R.A.(N.S.) 1295.

***II. Accused as witness.***

***In his own behalf.***

It has been held that, as a contempt proceeding is in the nature of a criminal prosecution, one charged with contempt is not competent as a witness in his own behalf. Thus, where a bench warrant was issued accusing respondent of wilful misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, and also of wilfully conversing with grand jurors about matters of importance before them, and tampering with witnesses before them, it was held that in answer to the warrant by way of purging himself of contempt, the respondent might have filed an affidavit, but, the proceeding being in the nature of a criminal prosecution, he was not competent to testify as a witness in his own behalf, and there was no error in the refusal of the court to allow him to be examined as a witness. *Harwell v. State* (1882) 10 Lea (Tenn.) 544.

***Compelled to testify—interrogatories.***

It has been held under the practice requiring the accused to answer interrogatories, that he could not object that it was compelling him to give evidence against himself.

Thus, one charged with contempt for attempting to obstruct the administration of justice by soliciting a bribe while

acting as juror could not complain of the order requiring him to answer interrogatories, as such order was not against the provision of the Constitution providing that no person shall be compelled in any criminal case to give evidence against himself, as this was not a criminal proceeding. *O'Neil v. People* (1904) 113 Ill. App. 195.

So, in *State v. Soule* (1844) 8 Rob. (La.) 500, where the court issued an attachment against an attorney for the language of a petition filed by him for a rehearing, and also propounded interrogatories, it was held that he had no right to refuse to answer the interrogatories on the ground that he could not be compelled to answer them. The court said: "The right of the court to propound interrogatories to the defendant is as unquestionable as the right to attach his person. The practice is almost universal, and is not deviated from, except in those cases where the court have other evidence before them upon which they can act. When presented, the court has a right to have them answered; and we do not believe the defendant is protected by the clause of the Constitution he invokes. The interrogatories in this case were not propounded for the purpose of compelling the defendant to give evidence against himself, but to enable him, if he could, to exculpate himself from the alleged contempt. This he has refused to do, and thereby aggravated the first offense."

#### —oral testimony.

The cases on this subject leave the matter in some doubt.

It was held in *State v. Sieber* (1907) 49 Or. 1, 88 Pac. 313, that one accused of criminal contempt cannot refuse to answer questions on the ground that he is thus compelled in a criminal prosecution to testify against himself, as a proceeding for contempt is not a criminal prosecution, the court disapproving *Ex parte Gould* (Cal.) *infra*, and saying: "If the questions propounded to a party at his examination for the alleged commission of a contempt tended in any manner to incriminate him, he would be entitled to rely upon the constitutional guaranty invoked herein. . . . In the case at bar the questions asked were not of that kind, and hence no error was committed in requiring the defendant to answer the inquiries."

A somewhat similar opinion was expressed (obiter) by Smith, J., in *Merchants' Stock & Grain Co. v. Board of L.R.A.* 1917B.

*Trade* (1912) 120 C. C. A. 582, 201 Fed. 20.

The contrary was held in California, where contempt of court is a public offense and expressly declared to constitute a misdemeanor. *Ex parte Gould* (1893) 99 Cal. 360, 21 L.R.A. 751, 37 Am. St. Rep. 57, 33 Pac. 1112. It was there held that, in a proceeding against a person for the violation of an injunction, an order to show cause why he should not be punished for contempt having been issued, the respondent could not be compelled to testify. His objection was good that he could not be compelled to be a witness against himself, as the proceedings were of a criminal nature.

In *Gompers v. Buck's Stove & Range Co.* (1911) 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, Lamar, J., said: "It is certain that in proceedings for criminal contempt the defendant is presumed to be innocent. He must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

It has been held in Kansas that one charged with a contempt, which is also a crime, cannot be compelled to take the stand and give evidence, as this would be against the constitutional provision that "no person shall be a witness against himself." *Re Nickell* (1892) 47 Kan. 734, 27 Am. St. Rep. 315, 28 Pac. 1076; *Re McKenna* (1892) 47 Kan. 738, 28 Pac. 1078.

In *Re Haines* (1902) 67 N. J. L. 442, 51 Atl. 929, it was held that one charged with contempt in failing to obey a subpoena to attend and give evidence upon an indictment cannot be required to take the stand in advance of proof against him. The court said: "At the hearing upon which the appellant was adjudged in contempt, he was required to go upon the stand and convict himself before a particle of testimony was put in the case proving that he was in contempt. No person should be required to purge himself of contempt, except for contempts in the presence of the court and affecting its dignity, prior to the legal proof of his guilt. The defendant cannot be required to give such proof against himself."

#### III. *Ex parte evidence.*

There is a direct conflict in the courts as to whether affidavits may be received in evidence in criminal contempt.

#### *Ex parte evidence inadmissible.*

Some of the cases hold with *STALEY v.*



**SOUTH JERSEY REALTY Co.** ante, 113, that *ex parte* evidence may not be received.

Thus, in *New Jersey Patent Co. v. Martin* (1909) 166 Fed. 1010, the court said that disobedience of an injunction would be a criminal contempt, but held that, whether it was a civil or criminal contempt, as the punishment might subject him to imprisonment, he ought not to be convicted on *ex parte* affidavits.

So, in a criminal contempt it was held that the *ex parte* accusing affidavit and the answers to interrogatories by a third person were alike inadmissible. The court said: "If evidence beyond the examination of the defendant is gone into, I think only such evidence should, in general, be received as would be admissible on the trial of an indictment for the same offense." *Bates's Case* (1875) 55 N. H. 325.

So, in *Welch v. Barber* (1884) 52 Conn. 147, 52 Am. Rep. 567, it was held error in a criminal contempt to admit the complaining affidavit, the court saying: "The affidavit had performed its office when it satisfied the court that this was a case which it ought to notice. It could not be received in evidence to prove guilt without violating two cardinal principles in all criminal trials,—the right of the accused to confront the witnesses against him in open court, and his right to cross-examine them. The error was not healed by the subsequent appearance of two of the affiants as witnesses."

An affidavit made by a party charging a justice and a constable of contempt in disobeying a certiorari is not sufficient to prove the fact, especially in the face of sworn answers denying the allegations. *Ex parte Kilgore* (1877) 3 Tex. App. 247.

In *State ex rel. Russell v. Ives* (1895) 60 Minn. 478, 62 N. W. 831, where it does not appear whether the contempt was civil or criminal nor whether there was any answer, it was held that the complaining affidavit was not competent evidence of guilt.

(In *Una v. Dodd* (1884) 38 N. J. Eq. 460, where the managers of a savings institution were charged with contempt in investing funds contrary to the order of the chancellor, and an application was made to take the depositions of witnesses against them residing out of the state, the court, in holding that it had power to take such depositions, stated that it was quite unimportant whether the proceeding was classified as civil or criminal contempt, and said: "The managers are not under indictment nor on trial for a

crime; they are not, in this matter, entitled to a trial by jury, nor to be confronted with the witnesses against them. They have a right that the court shall, according to its accustomed methods, ascertain whether the charges are true or not before pronouncing judgment, but not that the court shall depart from its ordinary course of practice." But the judgment was reversed on other grounds in (1885) 40 N. J. Eq. 672, 5 Atl. 155 [cited in the principal case], where the court seemed to consider the case one of civil contempt.)

(*Baldwin v. Flagg* (1881) 43 N. J. L. 496, cited in *Staley v. South Jersey Realty Co.* ante, 113, was not a case of contempt.)

#### Contra.

On the other hand, other cases hold that *ex parte* evidence is admissible.

Thus, where the defendant, charged with contempt for attempting to obstruct the administration of justice by soliciting a bribe while acting as juror, refused to answer the interrogatories, and the information was supported by affidavits, the court found him guilty of contempt; and it was held that he could not object that, as the conviction was based upon affidavits, he was deprived of his constitutional rights to meet the witnesses face to face, as, however criminal the contempt, it was not a criminal proceeding within the meaning of the Constitution. *O'Neil v. People* (1904) 113 Ill. App. 195.

So, in a proceeding against the respondent for contempt in attempting to bribe a juror, an information having been filed and the respondent, having been ordered to answer, declined to do so and stood mute, it was held that the refusal might be treated by the court as an admission of the charges contained in the information, as standing mute in a contempt case was not equivalent to a plea of not guilty in a criminal case. *Toozier v. State* (1903) 5 Neb. (Unof.) 182, 97 N. W. 584.

(In *Nebraska Children's Home Soc. v. State* (1899) 57 Neb. 765, 78 N. W. 267, where the court referred to the matter as being rather remedial than punitive, it was held that where the demurrer of the respondents to the information had been overruled, it was correct to hold that, by failing to answer, they confessed the information and tendered no issue, and that the trial court properly refused to receive evidence; the court stating that doubtless if an answer had been tendered the trial

court would have permitted it to have been filed.)

—under statute.

It has been held that the statute may properly provide that the evidence against the respondent in contempt proceedings may be by affidavit.

In *State v. Harris* (1905) 14 N. D. 501, 105 N. W. 621, contempt for violation of an injunction against using premises as a house of prostitution, it was held that the complaining affidavit might be received in evidence where the statute provided that "upon the original affidavits, the answer, and subsequent proofs, the court or judge must determine whether the accused has committed the offense charged;" and it was further provided as to appeal in contempt cases that "upon such appeal the supreme court may review all the proceedings had and affidavits and other proof introduced by or against the accused." The court said: "Under these provisions, it seems too clear for discussion that affidavits may be used and considered on the hearing in contempt cases. The proceeding is not a trial. The defendant has no constitutional right to be confronted by the witnesses against him. The reception of affidavits to establish the offense is generally sustained by the authorities."

In *State v. Mitchell* (1892) 3 S. D. 223, 52 N. W. 1052, which was a proceeding to punish for contempt a person who was defendant in a proceeding by the state against him in which an injunction had been issued in relation to intoxicating liquors, where the statute provided that upon the examination of the charge of contempt the evidence "may be oral, or in the form of an affidavit, or both," the court said: "Defendant argues that he was thus deprived of his constitutional right 'to meet the witnesses against him face to face.' This right, however, is confined to 'criminal proceedings,'—such prosecutions as also entitled him to 'a speedy public trial by an impartial jury.' Const. § 7, art. 6. The authorities cited on the last point, *supra*, fully exhibit the character of contempt proceedings. While they are criminal in their nature, they are not of themselves criminal actions or prosecutions. They are incidental to and may occur in any action, civil or criminal, and neither the constitutional right to be tried by a jury, nor to be confronted with the adverse witnesses, exists in such proceedings. It was therefore competent for the law to provide that in such

proceedings the evidence might be by affidavit, or oral, or both."

A provision of the statute providing that "the affidavits upon which the attachment for contempt issues shall make a prima facie case by the state" has been held not unconstitutional as being an encroachment of the legislative, upon the judicial, powers. *State v. Mitchell* (S. D.) *supra*, where the court said: "It is claimed that it undertakes to determine in advance, regardless of what the affidavits may in fact state, that they shall be prima facie evidence of an offense which may be punished criminally, thus seeking to deprive the courts of the power to determine whether the affidavits state sufficient facts to support a conclusion of guilt or not. This construction of the language of this section is too narrow. It must be construed with reference to the known and well-understood procedure of the courts.

In the enactment of the provision criticized by the defendant, the legislature presumed, as they reasonably might, that no attachment would be issued by any court, 'unless a clear case' therefor appeared from the affidavits presented, and when such justifying facts did appear to the satisfaction of the court, and an attachment was issued, then the affidavits upon which it was so issued should 'make a prima facie case for the state.' The court first determines whether the affidavits make a case of contempt, and upon that determination grants or withholds the attachment; and the manifest meaning of the law is that, if the court regards the affidavits as sufficient to justify its issuing an attachment, they shall be held upon the hearing as sufficient to make a prima facie case against the defendant. So construed, this provision is neither unreasonable nor novel. The theory of an ordinary order to show cause is that the party in whose favor it is granted has made a prima facie case, entitling him to certain relief, and upon the strength of such prima facie case the adverse party is called upon to show cause to the court, if any he have, why such relief should not be granted, in accordance with the prima facie case made, and this theory and practice prevail equally in proceedings for contempt."

It may be noted that, in *Re Cole* (1907) 23 L.R.A. (N.S.) 255, 90 C. C. A. 50, 163 Fed. 180, where the conviction of contempt was reversed, it was held that the provision of the Federal Constitution entitling an accused to the right to be confronted by the witnesses against him

does not apply to a summary proceeding to punish one for contempt in refusing to comply with an order in bankruptcy, in refusing to turn over property; also that in *Manderscheid v. District Ct.* (1886) 69 *Iowa*, 240, 28 N. W. 551, no objection was made to the affidavits in the court below; and in the same case in the Supreme Court of the United States (1889) 134 *U. S.* 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424, it was held that the clause in the United States Constitution giving the accused in criminal cases the right to be confronted with the witnesses against him did not apply to the states.

#### *IV. Presumption of innocence and burden of proof.*

By the weight of authority one accused of criminal contempt is entitled to the presumption of innocence. *Jones v. United States* (1913) 126 C. C. A. 407, 209 *Fed.* 585; *Burdick v. Marshall* (1896) 8 *S. D.* 308, 66 N. W. 462; *State v. Ralph Snyder* (1890) 34 *W. Va.* 352, 12 S. E. 721; *Lamar, J., in Gompers v. Buck's Stove & Range Co.* (1911) 221 *U. S.* 418, 55 L. ed. 797, 34 *L.R.A.*(N.S.) 874, 31 *Sup. Ct. Rep.* 492. See also *State v. Edwards* (1902) 15 *S. D.* 383, 89 N. W. 1011.

"If false swearing in the presence of the court constitutes direct contempt, then judicial knowledge of its falsity is, in our opinion, indispensable to the right of the court to exercise authority to commit therefor, and there is nothing in the record to disclose that the court knew or could know that the testimony was false." *People v. Stone* (1913) 181 *Ill. App.* 475.

In *Hunt v. State* (1904) 27 *Ohio C. C.* 16, affirmed without opinion in (1905) 72 *Ohio St.* 643, 76 N. E. 1132, in reversing a conviction for contempt, in filing certain papers, as not supported by the evidence, also for proceeding without written charges, the court said: "It is a quasi criminal proceeding. The presumptions are all in favor of the persons charged with the offense, i. e., in favor of innocence. It is not a case of the character where a court reviewing the conviction is to assume, in the absence of evidence to the contrary, that the action of the tribunal below was correct and lawful. It is a case where the guilt of the person convicted must appear affirmatively in the record. The offense is in its character like those set forth in the chapter of the Criminal Code on offenses against public justice."

The same quotation in part was made *L.R.A.*1917B.

in *Tracy v. State* (1906) 28 *Ohio C. C.* 453, holding that where the sole ground alleged in a journal entry and bill of exceptions for a judgment and sentence of contempt is that motions falsely charged the trial judge with improper or irregular conduct, and the motions were not otherwise objectionable and were filed in due course of procedure, bad faith of the attorneys filing the same will not be presumed.

In *Herald-Republican Pub. Co. v. Lewis* (1913) 42 *Utah*, 188, 129 *Pac.* 624, a criminal contempt for a publication, there was no hearing, the trial court proceeding on the ground that the publication was admitted and that it was in law contemptuous; but it was held on the appeal that the prosecution had the burden as in other criminal cases of making out a prima facie case. The court said: "Though sufficient facts are alleged to constitute a constructive and criminal contempt, and though the person charged therewith stands mute, still the court under the statute may not treat such allegations as confessed, and upon them pronounce a judgment of conviction. The court nevertheless is required 'to investigate the charge.' It no doubt may, without proof or evidence, pronounce such a judgment if a plea of guilt or an answer equivalent thereto is entered. But the court here was not justified in regarding the answers as equivalent to such a plea. They put in issue about every allegation in the affidavits alleged, except the publications." The statute referred to provided: "When the person arrested has been brought up or has appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him. . . . Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged; and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding \$200, or he may be imprisoned not exceeding thirty days, or both."

But in sustaining a conviction of a court officer for contempt in giving information of the issue of a criminal warrant, the court considered that the trial court had a right to show certain inferences of the failure of the officer to make explanations as to certain facts, and said: "While the proceedings were quasi criminal in their nature, it was not the prosecution of a criminal offense in fact,

under which the party accused could deny to the authority he was bound to respect and suppress any information that would exonerate him. He was not prosecuted for a criminal contempt upon indictment or complaint, but under proceedings which authorized the court to call for specific explanations to secure respect for its authority; and appellant's failure to make such explanations cannot be excused by a reliance upon the presumption that belongs to a party accused in a strictly criminal proceeding under Gen. Stat. 1894, § 5658." *State v. O'Brien* (1902) 87 Minn. 161, 91 N. W. 297.

If the party charged with contempt sets up an affirmative defense, the burden is in general upon him to prove it. (Compare bankrupt's failure to turn over money or property, *infra*, V.)

In *State v. Nelson* (1914) 29 N. D. 155, 150 N. W. 267, a proceeding for contempt on account of a certain publication, the court held that the burden of proof was upon the defendant to show the truth of the allegations made by him, which he refused to do, thereby in effect admitting their falsity.

In *Kornik v. Kornik* (1913) 3 Tenn. C. C. A. 41, which was a proceeding to punish the respondent for contempt in failing to obey the orders of the court as to counsel fee and temporary alimony in a divorce suit, the court, while stating that a contempt proceeding is of a criminal nature and must be tried as if the party were under indictment, said that *prima facie* or presumptively he ought to have obeyed the order of the court, and the burden of proof was upon him to show that he was unable to do so, he having urged his inability as a defense. The court further says that there was evidence that he was able to pay, —that the evidence did not preponderate against such a finding,—and that, although they should treat it as a criminal case in which the presumption of innocence obtains, they must affirm.

In this connection reference may be made to *St. Louis & S. F. R. Co. v. State* (1910) 26 Okla. 764, 110 Pac. 749, contempt by a railroad company in violating orders of a Corporation Commission, where the court did not characterize the contempt as civil or criminal. It was there said: "The burden is upon the prosecution to prove that the contemner is guilty of the facts of contempt with which it is charged; but, where the contemner admits the acts constituting the alleged contemptuous conduct and relies on other facts, such as inability to per-

form the order or failure to perform it from mistake or misapprehension as to the meaning of the order or other circumstances not within its control, the burden is upon the contemner to establish such matter of defense. 3 Enc. Ev. 470. Inability to perform the duties required by an order is an excuse for a nonperformance, and likewise where a failure to perform has been due to misapprehension of the order, or where it has resulted from a mistake, and the contemner presents such facts as a reasonable excuse to the court, ordinarily he will be discharged upon payment of the costs and expenses of the proceeding (9 Cyc. 57); but such defenses are in their nature affirmative, and he who seeks to rely upon them must prove them."

#### V. Degree of proof.

##### Reasonable doubt.

In criminal contempt the guilt of the accused must be established beyond reasonable doubt. *United States v. Carroll* (1906) 147 Fed. 947 (endeavoring to influence or bribe a witness); *Jones v. United States* (1913) 126 C. C. A. 407, 209 Fed. 585 (falsely swearing in a bail bond); *King v. Ohio & M. R. Co.* (1877) 7 Biss. 529, Fed. Cas. No. 7,801; *Burdick v. Marshall* (1896) 8 S. D. 308, 66 N. W. 462; *Kidd v. Virginia Safe Deposit & Trust Corp.* (1912) 113 Va. 612, 75 S. E. 145; *State v. Ralph Snyder* (1890) 34 W. Va. 352, 12 S. E. 721; *State v. Davis* (1901) 50 W. Va. 100, 40 S. E. 331, 14 Am. Crim. Rep. 282 (obiter); *Lamar, J., in Gompers v. Buck's Stove & Range Co.* (1911) 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492.

In a jurisdiction where the respondent may purge himself of criminal contempt by his answer, it was said and held in *People v. Hille* (1915) 192 Ill. App. 139, where the respondent was accused of criminal contempt in making false representations to the court as an attorney in a criminal case: "Before it can be successfully maintained that the making of the representations on the occasion and under the circumstances in question was a contempt of the court, it must appear beyond a reasonable doubt from the personal knowledge of the court, or by admissions from the lips of the defendant himself in open court, and in the presence of the court, and from no other source whatsoever, that (1) the representations so made were false and untrue when made; (2) that the defendant knew of their falsity when

he made them; and (3) that he made them knowing their falsity and with a wilful and malevolent intention of assailing the dignity of the court, or of interfering with its procedure and the due administration of justice."

(To convict in a case of criminal contempt, the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, but when there is evidence tending to show guilt the finding of facts by the trial court cannot be reviewed by the United States circuit court of appeals. *Schwartz v. United States* (1914) 133 C. C. A. 576, 217 Fed. 866; *Oates v. United States* (1916) — C. C. A. —, 233 Fed. 201.)

In quashing an information for criminal contempt the court said: "The proceeding is to be strictly construed in favor of the personal liberty of the defendant. As it is to vindicate the dignity of the court in compelling respect for its mandate, a judge may best demonstrate his title to respect by according to the accused the benefit of any reasonable doubt in his own mind as to the obligatory force of his command, and whether or not its disobedience was wilful." *United States v. Atchison, T. & S. F. R. Co.* (1905) 142 Fed. 176.

Where in the case of alleged contemptuous behavior in the presence of the court by an attorney, the court, instead of proceeding summarily to punish him, had a trial and took evidence, it was held on appeal that the proceeding was criminal in its nature, and that as the evidence failed to show beyond a reasonable doubt that the defendant was guilty of a wilful purpose to obstruct the proceedings of the court or to insult or humiliate the judge, etc., the conviction must be reversed. *Connell v. State* (1907) 80 Neb. 296, 114 N. W. 294.

There are a number of cases holding that the guilt of the person accused of the contempt must be established beyond a reasonable doubt, which apparently state this to be the rule as to contempts generally. *Accumulator Co. v. Consolidated Electric Storage Co.* (1892) 53 Fed. 793 (attachment denied in alleged violation of injunction against infringement of patent, as proceeding is criminal in its nature and character); *United States v. Jose* (1894) 63 Fed. 951 (taking away property in possession of a receiver); *Sabin v. Fogarty* (1895) 70 Fed. 482 (taking property out of the hands of the deputy marshal of the court); *Re Cashman* (1909) 168 Fed. 1008 (failure to answer questions,—stating that, proceedings for contempt be-

ing criminal in their nature, contempt must be proved beyond a reasonable doubt, but that the admission of the accused would prove it); *Hollister v. People* (1904) 116 Ill. App. 338 (failure to obey a subpoena issued by a master in a civil case,—stating that imposition of a fine or sentencing a person for contempt is the rendering of judgment in a criminal case); *Richardson v. Thompson* (1899) 59 Neb. 299, 80 N. W. 909 (violation of order restraining interference with right of challenge at registration, as proceedings in contempt are in their nature criminal); *Oscar Barnett Foundry Co. v. Crowe* (1909) 80 N. J. Eq. 109, 74 Atl. 964 (disobedience of an injunction, as a contempt proceeding in quasi criminal); *Burdick v. Marshall* (1896) 8 S. D. 308, 66 N. W. 462 (as proceedings for contempt are essentially criminal in their character); *State v. Fredlock* (1902) 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153 (violation of injunction,—holding the evidence sufficient under the rule that contempt is in the nature of a criminal offense, that its punishment is criminal in its character, and that the evidence must establish guilt beyond a reasonable doubt).

A contempt of court being considered a criminal offense, the guilt of the respondent must be proved beyond a reasonable doubt. *State v. Cunningham* (1890) 33 W. Va. 607, 11 S. E. 76, contempt by commissioners of a county court in refusing to obey a mandamus ordering them to settle and sign a bill of exceptions in an election case, where the court said: "This being a criminal case, the respondent is entitled both to the presumption of innocence, and that of conformity to official duty (see *Alderson v. Kanawha County* (1889) 32 W. Va. 648, 5 L.R.A. 334, 25 Am. St. Rep. 840, 9 S. E. 868), and if the relator traverse the return, he must prove the delinquency of the respondent beyond all reasonable doubt."

In *Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co.* (1904) 63 C. C. A. 607, 129 Fed. 105, in holding there had been no disobedience of an order forbidding infringement of a patent, the court said: "It is immaterial to consider the distinction sometimes noticed between criminal and civil contempts, inasmuch as both kinds involve the vindication of the authority of the court, whether the remedy incidentally inure to the benefit of a party or not. . . . The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be par-

tially remediable or not; and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt."

There are also other cases where it does not appear whether the court considered the contempt civil or criminal, where evidence beyond a reasonable doubt has been required; for example:

Where there is a reasonable doubt whether a published article has a reasonable tendency to prevent a fair and impartial trial of the case, the doubt must be resolved in favor of the person accused of contempt. *State ex rel. Dorrian v. Hazeltine* (1914) 82 Wash. 81, 143 Pac. 436.

In order to punish an assignee for wilfully disobeying an order to produce books, the proof must show beyond a reasonable doubt that he had wilfully refused to do what the court directed. *Re Wegman* (1899) 40 App. Div. 632, 57 N. Y. Supp. 987 (denied that he ever had them); *Watertown Paper Co. v. Place* (1900) 51 App. Div. 633, 64 N. Y. Supp. 673 (stated they were lost).

In *Potter v. Low* (1858) 16 How. Pr. (N. Y.) 549, it was held that one would not be required to show cause, etc., under an order restraining him from transferring, etc., his unexempt property, when it did not appear beyond a reasonable doubt that he had disobeyed the order, and as the order only applied to property owned when it was made, and it was not shown that the money he had paid was not earned thereafter, the motion was denied.

In *Saal v. South Brooklyn R. Co.* (1907) 122 App. Div. 364, 106 N. Y. Supp. 996, it was held that the proof must show beyond a reasonable doubt that the defendants had wilfully refused to do what the court directed in enjoining them, where there was no prohibition of any express acts.

In a proceeding to punish respondent for contempt for executing a false and fraudulent bond in discharge of a mechanics' lien, as the proceeding deprived him of a trial by jury, the fact of his insolvency should be made to appear beyond a reasonable doubt and also that he had been guilty of perjury. *Johnson v. Austin* (1902) 76 App. Div. 312, 78 N. Y. Supp. 501, which, however, would appear to be a civil contempt under the Code definition.

It may be noted that, in proceedings against bankrupts for contempt in failing to turn over money or property, the courts do not usually characterize the

contempt as civil or criminal. It is generally held in these cases that it must be shown beyond a reasonable doubt that the money or property is within the bankrupt's control.

*Re Anderson* (1900) 103 Fed. 854; *Re Meyer* (1900) 98 Fed. 839; *Re Goldfarb Bros.* (1904) 181 Fed. 643; *Re Switzer* (1905) 140 Fed. 976; *Re Mize* (1909) 172 Fed. 945; *Re McCormick* (1899) 97 Fed. 566 (as the punishment may involve imprisonment). See also *Re Walder* (1906) 142 Fed. 784. See also as recognizing the rule *Re Schlesinger* (1899) 97 Fed. 930, affirmed in (1900) 102 Fed. 117; *Re De Gottardi* (1902) 114 Fed. 328; *Ripon Knitting Works v. Schreiber* (1900) 101 Fed. 810; also *Moody v. Cole* (1906) 148 Fed. 295 (holding the proceeding criminal in its character, but the evidence inducing belief beyond a reasonable doubt). See also the note to *Re Cole* 23 L.R.A.(N.S.) 256, on failure or refusal of a bankrupt, or person having money or property belonging to a bankrupt, to deliver it to a trustee, as a contempt of court.

"The court, in making an order to commit a bankrupt to jail as for contempt for failure to account for goods and money, should be governed by the same considerations which would influence a jury in a criminal prosecution, giving to the bankrupt the benefit of any reasonable doubt." *Re Switzer* (1905) 140 Fed. 976.

As finding that the bankrupt had the property in his possession, that a jury would have so found, while affirming the rule that the facts must be established upon proof beyond a reasonable doubt or which must be clear and convincing in the case of a bankrupt failing to turn over property as ordered, see *Re Levy* (1905) 73 C. C. A. 558, 142 Fed. 442.

(A bankrupt cannot be committed for failure to pay over money as part of the bankrupt estate, unless he is given notice of a claim that will be made that the money in question is a part of the bankrupt's estate; and an order that it is part of it, made without such notice and ordering him to show cause why he should not pay over, cannot cure the initial defect, his commitment of contempt on such an order is a nullity. *Re Rosser* (1900) 41 C. C. A. 497, 101 Fed. 562.)

#### Contra.

The rule as to reasonable doubt is not entirely unanimous.

In *State v. Harris* (1905) 14 N. D. 501, 105 N. W. 621, a case of contempt for violation of an injunction, where the

court does not state whether the contempt was civil or criminal, the court, in holding that the guilt need not be shown beyond a reasonable doubt, said: "It is contended that in such cases the accused must be shown to be guilty of the contempt beyond a reasonable doubt. The proceedings being criminal in their character, some cases uphold that contention. The weight of authority, however, does not support that rule. The statute lays down no rule as to the degree of proof. It simply says that the court shall determine whether the accused has committed the offense. In contempt cases the rule generally followed is that the offense must be clearly shown to have been committed."

In this connection reference may be made to *Re Fellerman* (1906) 149 Fed. 244, holding that to commit for contempt a bankrupt refusing to surrender his books of account and falsely swearing, it is not necessary to prove with the strictness of criminal practice the false swearing. It is enough if the witness's conduct tends to bring the authority of the law and of the court into disrespect or disregard. But in this case the false swearing, or some of it, was shown by contradictory statements by the bankrupt.

In a New York case of criminal contempt a distinction is made between the proof of the duty and the proof of the disobedience of it, holding that the former is to be shown beyond doubt, but not the latter. In *Re McCormick* (1909) 117 N. Y. Supp. 70, briefly reported also in 132 App. Div. 921, affirmed in (1909) 196 N. Y. 571, 90 N. E. 1161, where an order convicting of a criminal contempt under § 8 of the Code of Civil Procedure and confirming a referee's report was affirmed, and where the referee holds that the guilt need not be shown beyond a reasonable doubt, he says: "While the inquiry relates to acts styled criminal, the proceeding is not a criminal action. It is a civil special proceeding . . . and the question of guilt or innocence—the issue to be determined—must be resolved in accordance with the rules of proof applicable to civil cases. In contempt proceedings, the party proceeded against is entitled to the benefit of any doubt which may exist by reason of the form of the statute under which punishment is invoked, or in the form of the order which it is claimed he has disobeyed, so far as a doubt is thus cast upon the fact of the prohibition of an act which is claimed to have been committed. L.R.A.1917B.

. . . But upon the question of the degree of proof to be looked for to support the fact of the commission of an act in such a proceeding as this, where the inhibition is clear, the court is to treat the case in its aspect of a civil, as distinguished from a criminal, proceeding. It is the character of the proceeding itself which controls upon this question; and, while the fact to be proved may involve the finding of the commission of a crime, that fact, in a civil case such as this, is to be determined upon the preponderance of the evidence, giving proper regard to the existence of the presumption of innocence when determining the weight of the evidence; but the fact of guilt need not be found beyond a reasonable doubt. *New York Ferry Co. v. Moore* (1886) 102 N. Y. 667, 6 N. E. 293." The Ferry Case had nothing to do with contempt, but the court there observed (6 N. E. 297) that "there is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence. Where a judgment for the plaintiff involves crime or moral turpitude on the part of the defendant, the court should always require satisfactory proof, and, when that has been given, judgment should follow regardless of consequence."

There seems to be no authority in contempt cases for the distinction made in the McCormick Case between the proof of the duty and the proof of its violation. Of the cases heretofore cited requiring proof beyond reasonable doubt to be necessary, the only ones where the doubt was confined to the duty were: *Hollister v. People* (1904) 116 Ill. App. 338 (conflict as to tender of witness fees); *Richardson v. Thompson* (1899) 59 Neb. 299, 80 N. W. 909 (failure of proof of knowledge of order); *Kidd v. Virginia Safe Deposit & Trust Corp.* (1912) 113 Va. 612, 75 S. E. 145 (failure of proof of knowledge of order which indeed did not order the respondent); *Oscar Barnett Foundry Co. v. Crowe* (1909) 80 N. J. Eq. 109, 74 Atl. 964 (doubt whether act done was forbidden); *Saal v. South Brooklyn R. Co.* (1907) 122 App. Div. 364, 106 N. Y. Supp. 996 (no prohibition of any express acts); and also it seems *United States v. Atchison, T. & S. F. R. Co.* (1905) 142 Fed. 176.

**"Clear" proof.**

In some cases it is stated that the proof must be "clear," etc.

Thus, where the accused was held not guilty of violating an injunction, the court said: "A contempt of the character here charged is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding. No punishment should be inflicted unless the facts constituting the contempt have been clearly and satisfactorily established." *Woodruff v. North Bloomfield Gravel Min. Co.* (1891) 45 Fed. 129.

In *Weeks v. Smith* (1856) 3 Abb. Pr. (N. Y.) 211, the court in denying an application for an attachment for an alleged criminal contempt, asserting disobedience of an order, said: "This proceeding being criminal in its nature, the acts constituting the alleged contempt must not only be clearly proved, but they must be a positive violation of the plain terms of the process or order of the court. The act for the commission of which punishment is invoked must be one which the court has expressly forbidden. The disobedience complained of must be 'wilful.' If the order be ambiguous or doubtful, or fairly capable of a construction which will consist with the person's innocence of any intentional disrespect to the court, I think the court should not interfere to punish for a contempt."

In this connection reference may be made to the following cases not stated to be civil or criminal contempts, where the court stated that the evidence must be clear etc.: *Celluloid Mfg. Co. v. Chrolithion Collar & Cuff Co.* (1885) 23 Blatchf. 205, 24 Fed. 585 (holding that a violation of an injunction ought to be shown by clear proof, the proceeding being in its nature somewhat criminal); *State ex rel. Chrisman v. Small* (1907) 49 Or. 595, 90 Pac. 1110 (injunction, proof of guilt should be "clear and conclusive"); *Wells v. District Ct.* (1905) 126 Iowa, 340, 102 N. W. 106 (where, in annulling a judgment for contempt by a party to the action as attempting to influence a juror, the court said: "Contempt proceedings are in their nature criminal, and, before a conviction is had, the proof of guilt should be clear and satisfactory"); *Sawyer v. Hutchinson* (1910) 149 Iowa, 93, 127 N. W. 1089 (where the court declined to interfere with the decision of the court below refusing to convict of contempt in a sharp conflict of testimony, on the question of L.R.A.1917B.

the violation of an injunction restraining the respondent from the sale of intoxicating liquors contrary to law, and said: "A contempt proceeding, being quasi criminal in nature, calls for a greater weight of evidence than an ordinary civil case; and the rule generally prevailing in other states is that a clear case should be made out before an accused will be punished for violating an injunctive decree. . . . And such appears to be the rule with us"); *Keenhold v. Dudley* (1915) — Iowa, —, 151 N. W. 1076 (where, in holding that they would not interfere with the decision of the trial court finding the evidence sufficient to show contempt in attempting improperly to influence a juror, the court said: "While, under the rules governing such cases, the contempt or guilt of the defendants should be clearly established, we are not disposed to interfere too much with the trial judges in attempting to keep sources of justice pure, and in seeing to it that trials before them are conducted in an orderly and proper manner.")

**VI. Various questions of evidence.**

**Deposition taken in another court.**

The deposition of a witness in another court given in obedience to a subpoena cannot be used against him in a proceeding for criminal contempt, under a statute providing that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture." *Hammond Lumber Co. v. Sailors' Union* (1909) 167 Fed. 809.

**Judicial notice.**

For right to take judicial notice of decree in proceeding to punish violation of same as contempt, see the note to *Haaren v. Mould*, 24 L.R.A.(N.S.) 404.

The court will take judicial notice of proceedings in its record, where it is claimed a decree has been violated. *Ferguson v. Wheeler* (1904) 126 Iowa, 111, 101 N. W. 138, not stating whether the contempt was civil or criminal.

In contempt for a publication upon pending proceedings, the court has judicial knowledge that the particular proceeding is pending. *State v. Bee Pub. Co.* (1900) 60 Neb. 238, 50 L.R.A. 195, 83 Am. St. Rep. 531, 83 N. W. 204.



In *Burke v. Territory* (1894) 2 Okla. 499, 37 Pac. 829, a proceeding for contempt for a publication regarding a pending matter in court where the publication was admitted, it was held that the court could take judicial notice of its proceedings, and as all the matters of fact which the court found were matters that were either admitted by the defendant's answer or of which the court could take judicial knowledge, that therefore the allegation by the accused that he was entitled to have the evidence against him produced and an opportunity to refute it must fail.

On the other hand, in *State v. Broome* (1897) 61 N. J. L. 115, 38 Atl. 841, in a proceeding to punish for contempt in disobeying the stay implied in a writ of certiorari which brought up for review a city ordinance, the court held that as the proofs submitted contained neither the ordinance nor the writ, the rule to show cause must be discharged, as this was not a proceeding for private relief, saying: "When the purpose is, as in the present case, merely to punish a party for an alleged disregard of the authority of the court, the proceeding is quasi criminal, and entirely distinct from the suit out of which it sprang."

The court cannot take judicial notice that its clerk, accused of contempt in disobeying an order requiring him not to destroy ballots, knew and understood the contents of the order, although the same judge claimed that he explained it to the clerk when it was made. *Dines v. People* (1891) 39 Ill. App. 565.

In *Myers v. State* (1889) 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43, it was held that the court erred in assuming to take judicial notice of the facts forming the ground of a previous proceeding for contempt, and of the respondent's being adjudged guilty; and that this was none the less so although both proceedings may have been before the same judge. The court stated that, if the facts were competent, they were the subject of evidence.

#### **Other acts of contempt.**

In *Rogers Mfg. Co. v. Rogers* (1871) 38 Conn. 121, a question of contempt for disobedience of an injunction, the court said: "Another question submitted relates to the admissibility in evidence of other acts of contempt than those charged. Evidence of this kind is in general inadmissible. If, however, the party accused seeks to mitigate his offense, by showing that he acted under innocent mistake, or by inadvertence, then

evidence might be proper to show the purpose and spirit of the party in doing the acts specifically charged."

In *Re Fite* (1912) 11 Ga. App. 665, 76 S. E. 397, it was held that "on a trial for contempt in writing and publishing a newspaper article, a subsequent article written and published by the respondent, relating to the same subject matter, and which in substance repeats the offense for which he is on trial, is admissible in evidence, as illustrative of the question of intent."

#### **Accomplice.**

Under the California statute a conviction for contempt will not lie on the uncorroborated testimony of an accomplice. *Re Buckley* (1886) 69 Cal. 1. See also *Re Taylor* (1886) 2 Cal. Unrep. 648, 10 Pac. 88.

In *French v. Com.* (1906) 30 Ky. L. Rep. 98, 97 S. W. 427, it was held that, a criminal contempt being a misdemeanor, all accomplices were principals, and consequently it could not be claimed that the jury should be instructed that there could be no conviction on the uncorroborated testimony of an accomplice (this being a case necessary for a trial by jury, as the punishment was greater than allowed by the statute without a jury), but the court held that the guilt was fully shown without the testimony of the alleged accomplice.

#### **Knowledge of order.**

In declining to commit the respondent for criminal contempt as disobeying an injunction, the court said in *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (1903) 124 Fed. 736: "It is true in a civil case parties to a suit are held to the obligation of taking notice of all orders and judgments in the case, and their civil liabilities will rest upon their duty of taking such notice; but I do not think they can be convicted criminally upon any presumption of that kind. It must be shown, in order to convict them, that they had actual knowledge, and that there was an intentional violation of the order for an injunction."

For necessity and sufficiency of notice of injunction to render one not a party guilty of contempt in disobeying it, see the note to *Garrigan v. United States*, 23 L.R.A.(N.S.) 1295.

#### **Confining evidence to charge.**

Where the statute makes the filing of an affidavit charging the commission of a constructive contempt a prerequisite to the institution of proceedings, testimony offered by the state or by a relator must be confined to and correspond with

the sworn statement, and the examination in a case of disobedience of an order must be confined to show a violation of the order of the court in the manner stated; and it is error in criminal contempt to show a violation in a manner different from that stated in the affidavit. *State v. Sieber* (1907) 49 Or. 1, 88 Pac. 313, the court stating that in such a case the affidavit might be amended by a re-verification, which, however, was not done.

A proceeding for contempt against a person not a party to an action for the disobedience of an injunction granted therein is a criminal proceeding, and the accused is entitled to be informed of "the nature and cause of the accusation" against him, and to be tried on the charge as made, and on no other charge. *Re Reese* (1901) 47 C. C. A. 87, 107 Fed. 942, 14 Am. Crim. Rep. 253, where the theory of the charge was that the accused disobeyed an order against him, and the theory of the conviction was that, while the order was not against him, he obstructed justice by not obeying it.

"Contempt being a criminal proceeding, and the party being entitled to know with what he is charged, it will not be presumed that he was held guilty of some act not specifically alleged in the affidavit or fairly covered thereby. The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused." *Schwarz v. Superior Ct.* (1896) 111 Cal. 106, 43 Pac. 580.

But in *State v. McCarley* (1906) 74 Kan. 874, 87 Pac. 743, where the contempt was for violation of an injunction, and is not characterized as civil or criminal, it was held that there was no error in holding the respondent guilty of acts other than those charged in the affidavit on which the attachment was granted, and which were charged in subsequent affidavits. The court said: "The hearing was continued for several weeks, so that appellant was informed of the nature of the charge. If he had been compelled to go to trial at once upon the offense charged in the accusation, he might, with some reason, complain that it was not the same violation which the prosecutor had in mind when the warrant issued, and against which he was expected to defend. Appellant was entitled to know the nature of the charge against him and to have an opportunity to make his defense. His rights were

fully protected in these respects. He was given a fair trial. The evidence clearly established that he was guilty of repeated violations of the injunction."

#### Rescue.

In *State v. Ackerson* (1855) 25 N. J. L. 209, where the defendant was arrested by the sheriff and rescued the court said: "A rescue is deemed an offense of such a nature that, whenever the sheriff makes return of anyone having been guilty of it, the court will grant an attachment against such person, in the first instance (1 Sellon, Pr. 134), and will proceed to punish him, without going through the ordinary course of his being examined on interrogatories, as no denial on such interrogatories will excuse him. (*Rex v. Elkins* (1767) 4 Burr. 2129, 98 Eng. Reprint, 110.) The return of the sheriff is of itself a conviction of the rescue. It is conclusive evidence of the fact, and if it be false the remedy is against the sheriff for a false return."

#### VII. Miscellaneous.

In *Parks v. Johnson* (1892) 86 Iowa, 475, 53 N. W. 285, where the contempt is not designated as civil or criminal, it was held proper to use in the contempt proceeding as admissions the statements of the respondent made as a witness in supplementary proceedings, although the statute provided that "all examinations and answers under this chapter shall be on oath, and no person shall, on such examination, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud." The court said: "The argument is 'that the word "fraud" is synonymous with the phrase "criminal offense," for the reason that the phrase in this section, "convict him of a fraud," must mean conviction of a criminal offense, as the word "convict" is only applicable to some crime.' If it should be conceded that the word 'fraud' would have application to some criminal offense, it would not avail the plaintiff, because we cannot hold that the word was used for 'criminal offenses' generally. It is never so used. It would be an unnatural use of the word. The contempt proceeding in no manner involved the question of fraud, and nothing in the section rendered the testimony incompetent."

It is proper in criminal contempt to take evidence before an examiner. *Merchants' Stock & Grain Co. v. Board of*

Trade (1912) 120 C. C. A. 582, 201 Fed. 20.

The following cases are of interest in connection with the general subject:

In a case where the proceeding for contempt is for acts committed out of the presence of the court, and the proceeding is not in furtherance of the remedy sought in a suit or in enforcement of the orders or decrees of the court, but to maintain the authority of the court and uphold the administration of justice, if the answer admits the material facts charged to be true and the facts constitute a contempt of court, punishment is imposed upon the answer. *People v. Seymour* (1916) 272 Ill. 295, 111 N. E. 1008.

Refusal to permit a man charged with contempt by publications respecting evidence in a judicial trial, to show in defense that the publications were true, and for this purpose to disprove the accuracy of the reporter's notes which have been offered against him, is such a deprivation of the constitutional right to make a defense as to be a denial of due process of law. *McClatchy v. Superior Ct.* (1897) 119 Cal. 413, 39 L.R.A. 691, 51 Pac. 696.

In *Ex parte Nelson* (1913) 251 Mo. 63, 157 S. W. 794, contempt for publication of a certain article, the answer of the respondent was filed the day before

the time set for the hearing, and the judge, with the answer before him, the night before the hearing, then wrote his opinion and stated that he did this because he knew that no testimony could be offered in the remotest way tending to prove the truth of the article, etc. It was held that the respondent must be discharged, and the conviction annulled, as he was convicted without due process of law, that is to say, that he was tried and found guilty in his absence without an opportunity to introduce any evidence or otherwise to be heard therein; the appellate court considering that the trial was held in the night when the judge wrote the opinion.

In *Re Dingley* (1914) 182 Mich. 44, 148 N. W. 218, where the respondent was convicted of contempt in making a certain publication, and was not given time to show the truth of it, the appellate court dismissed the proceeding on the ground that the respondent had not been given his proper day in court.

Where in a proceeding to punish for contempt for a certain publication, attachment was issued without any preliminary proofs or affidavits, no affidavit or proof was given by the respondent, and no proof given against him, the conviction was set aside. *Re Holt* (1893) 55 N. J. L. 384, 27 Atl. 909. B. B. B.

#### UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

PARLIN & ORENDORFF IMPLEMENT COMPANY et al.

v.

R. L. MOULDEN, Trustee of A. B. Andrews, Bankrupt.

(142 C. C. A. 517, 228 Fed. 111.)

**Lien — promise to pay out of specified fund.**

A promise by an insolvent to pay specified creditors out of the proceeds of insurance on property which has been destroyed by fire gives them a lien on such proceeds which they may follow into property in which he has attempted to invest them as a homestead.

*For other cases, see Liens, I. in Dig. 1-52 N. S.*

(December 1, 1915.)

**Note.** — *PARLIN & O. IMPLEMENT Co. v. MOULDEN* seems to be a case of first impression as to right to follow into a homestead a fund which has been specifically promised to be devoted to payment of debts, L.R.A.1917B.

**P**ETITION by creditors of A. B. Andrews, bankrupt, to review an order of the District Court of the United States for the Eastern District of Texas (Russell, District Judge), affirming an order of the referee allowing an exemption of homestead to him. Reversed.

The facts are stated in the opinion.

Argued before Pardee and Walker, Circuit Judges, and Speer, District Judge.

Messrs. Francis Marion Etheridge, Joseph Manson McCormick, and Henri Louis Bromberg, for petitioners:

While the mere use of nonexempt property in the acquisition of a residence will not prevent the homestead character from attaching thereto when occupied by the head of a family, yet the use of only such funds therefor, after a promise to creditors to use them in the payment of debts, on which promise the creditors have relied and refrained from using legal means for the col-

though the theory of an equitable lien by which the right was sustained in that case has received many other specific applications, as is shown in the foregoing opinion.

lection of their debts, constitutes actual fraud, and will prevent the exempt character of the property from attaching to it.

Re Wright, 3 Biss. 359, Fed. Cas. No. 18,067; Re Lammer, 7 Biss. 269, Fed. Cas. No. 8,031; Pratt v. Burr, 5 Biss. 36, Fed. Cas. No. 11,372; Re Sauthoff, 8 Biss. 35, Fed. Cas. No. 12,380; Re Boothroyd, Fed. Cas. No. 1,652; Re Wood, 147 Fed. 877; Ro Letson, 84 C. C. A. 582, 157 Fed. 78; North v. Shearn, 15 Tex. 175; Re Gerber, 26 Am. Bankr. Rep. 608; McGahan v. Anderson, 51 C. C. A. 92, 113 Fed. 115.

Respondent, after promising to make settlement with his creditors, became the trustee of an express trust of which he was the grantor, the insurance policies and their proceeds the subject matter, and the creditors the beneficiaries, and he could not, of his volition, terminate the trust, nor, with this trust fund, acquire homestead or other exempt property.

Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Thompson v. Caruthers, 92 Tex. 530, 50 S. W. 331; Howison v. Baird, 145 Ala. 683, 40 So. 94; 39 Cyc. 66-248.

Homestead rights cannot be acquired in property purchased with trust funds.

Farmer v. Simpson, 6 Tex. 303; Gage v. Neblett, 57 Tex. 378; Jones v. Male, 26 Tex. Civ. App. 181, 62 S. W. 827; Johnston v. Arrendale, 30 Tex. Civ. App. 504, 71 S. W. 45; Parriss v. Hughes, 50 Tex. Civ. App. 155, 109 S. W. 1140; Wallis v. Wendler, 27 Tex. Civ. App. 235, 65 S. W. 43; Wright v. Straub, 64 Tex. 66; Arnold v. Chamberlain, 14 Tex. Civ. App. 634, 39 S. W. 201; West End Town Co. v. Grigg, 93 Tex. 457, 56 S. W. 49, 747.

When once a homestead has been acquired free of liens, no lien can be placed on it without the consent of the wife, nor then except for specific purposes; and, as a corollary thereto, acts of the husband not participated in by the wife are inefficient to place a lien on the homestead by estoppel.

Cahill v. Dickson, — Tex. Civ. App. —, 77 S. W. 289; Shepherd v. White, 11 Tex. 354, 16 Tex. 172; Moores v. Wills, 69 Tex. 109, 5 S. W. 675; Portwood v. Newberry, 79 Tex. 337, 15 S. W. 270; Wynne v. Hudson, 66 Tex. 1, 17 S. W. 110; House v. Phelan, 83 Tex. 595, 19 S. W. 140.

Messrs. R. R. Neyland, R. O. Merritt, and N. E. Peak for respondent.

Walker, Circuit Judge, delivered the opinion of the court:

On May 6, 1913, prior to the institution of the bankruptcy proceedings, the bankrupt's stock of merchandise was destroyed by fire. It was insured to the amount of \$5,000, but the bankrupt then owed more than this amount. He had previously as-

signed the policies to a bank to secure his indebtedness to it of about \$1,560. Immediately after the fire the bankrupt communicated with his principal creditors by telephone and by letter, made mention of the fire and of the insurance he held, and stated that as soon as he got the insurance money he would pay his creditors as far as it would go. In a short time he collected \$4,950.10 on the policies, and used the part of that amount remaining after the payment of the debt to the bank in the purchase of a homestead. The referee stated his conclusions as follows: "The evidence discloses that immediately after the fire the bankrupt by phone and by letter notified his creditors thereof and caused them to believe that as soon as he collected his fire insurance he would settle with them in full or in part, at least. The creditors rested upon this belief and took no steps to fix a lien by process of law upon the debtor's assets. The bankrupt testified at this time it was his intention to apply his insurance upon his debts, and there is nothing in evidence to contradict this, except his failure to carry it out; but that later he and his wife decided to invest a larger part of the money as a homestead."

It was adjudged by the court that the real estate so purchased by the bankrupt was his homestead, that it was not a part of the bankrupt estate, and that it could not be subjected to the payment of his debts.

The bankrupt's communications with his creditors after the fire had reference to specific personal property of which he was the owner, and clearly manifested his agreement to charge that specific property with the payment of his debts. As matters stood when these statements were made, it was open to the creditors by attachment or garnishment proceedings to subject the policies of insurance, or the amounts payable on them, to liens in their favor. The debtor's voluntary undertaking to dedicate to the payment of his debts the collections to be made on those choses in action was calculated to induce his creditors to forego legal proceedings looking to the same end. What he did stands upon a different footing from a mere promise by him to pay his debts, unaccompanied by a reference to specified property and a manifestation of an intent to charge it. Under familiar principles, a court of equity gives to an agreement that certain property shall be appropriated to the payment of an indebtedness the effect of creating a charge upon that property: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property,

real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. Under like circumstances a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.' In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation." 3 Pom. Eq. Jur. 3d ed. § 1235.

The above statement was quoted with approval in the opinion rendered in the case of *Walker v. Brown*, 165 U. S. 654, 664, 41 L. ed. 865, 870, 17 Sup. Ct. Rep. 453, and the doctrine announced was there so applied as to lead to the holding that certain bonds were subjected to a charge for the payment of debts owing by a third party as a consequence of a statement made with reference to them by their owner in a letter to the creditor which did not more clearly indicate that they were to stand as security for such debts than the above referred-to statements of the bankrupt indicated that the collection on his insurance policies were to be applied to the payment of his debts. The same doctrine was applied in the case of *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, with the result that it was there held that the circumstances of the giving of a check by one bank to another were such that the transaction had the effect of creating an equitable assignment of or lien upon the deposit against which the check was drawn, and was not governed by the general rule that a check, drawn in the ordinary form, does not, as between the maker and the payee, constitute an equitable assignment pro tanto of an indebtedness owing by the bank upon which the check has been drawn. In the course of the opinion rendered in that case it was said: "Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against

the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice." *Fourth Street Nat. Bank v. Yardley*, supra, 165 U. S. page 644.

The frequency of the application in the Federal courts of the doctrine in question is indicated by the citations which accompany the above-quoted and the two succeeding sections of Mr. Pomeroy's text. In the section of that work (§ 1234) which is referred to in the above quotation as containing a statement of the ultimate grounds and motives of the doctrine it is said: "In a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, in addition to the personal obligation, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like."

That the bankrupt's agreement with his creditors as to the application of the amounts to be collected on his insurance policies was such a contract as is described in that statement seems plain. What he did amounted to an unequivocal dedication of the proceeds of the policies, so far as they were subject to his control, to the payment of his debts. This had the effect of conferring upon the creditors with whom he communicated a right over the thing concerning which the contract dealt, and of enabling them, in a court which applies equitable doctrines, to follow the identical thing, and to enforce the bankrupt's obligation by a remedy which operates directly upon that thing. In other words, those creditors were entitled to have the proceeds of the insurance policies applied as the bankrupt agreed that they should be applied,—to treat that as having been done which had been agreed to be done. This right existed against those proceeds when

they were by the bankrupt, in violation of his agreement, invested in real estate. See *Goodnough Mercantile & Stock Co. v. Gallo-way* (D. C.) 171 Fed. 940; *Wilder v. Watts* (D. C.) 138 Fed. 426. The homestead rights acquired by the bankrupt and his wife in that property were subordinate to the rights of the creditors in the fund made use of in making that investment. The assertion of the homestead rights cannot be allowed to defeat the prior and superior rights of the creditors to follow the fund into the property in which it was so improperly invested. and to subject that property to the charge

to which the money used in the purchase was subject when the purchase was made.

It follows that the prayer of the petition to superintend and revise should be granted, and the ruling presented for review reversed; and it is so ordered.

Petition for rehearing denied January 4, 1916.

Petition for a writ of certiorari denied by the Supreme Court of the United States, April 24, 1916 (241 U. S. 669, 60 L. ed. 1230, 36 Sup. Ct. Rep. 553).

## KENTUCKY COURT OF APPEALS.

FRANK MELVILLE, Appt.,

v.

MINNIE ROLLWAGE.

(171 Ky. 607, 188 S. W. 638.)

**Automobile — signal of traffic officer — duty as to care.**

1. The signal of a traffic officer to an automobilist to cross a street intersection does not absolve him from the duty of sounding a warning, slowing his speed, or otherwise exercising reasonable care for the safety of pedestrians on the opposite foot crossing.

For other cases, see *Automobiles, II. a*, in *Dig. 1-52 N. S.*

**Highway — standing on crosswalk — negligence.**

2. A pedestrian is not negligent per se in stopping at a point upon a crosswalk to await the passage of a street car, to which he had proceeded after satisfying himself that no automobile was in the immediate vicinity, without thereafter keeping a constant watch for the approach of such vehicles. For other cases, see *Automobiles, II. b*, in *Dig. 1-52 N. S.*

**Damages — permanent injuries.**

3. Damages for permanent injuries may be awarded to one having a rib torn loose and a floating kidney as a result of a negligent injury, where the attending physicians testify that the injuries are permanent.

For other cases, see *Damages, III. i*, in *Dig. 1-52 N. S.*

**Same — excess — floating kidney.**

4. \$1,250 are not excessive to allow for permanent injuries consisting of a floating kidney and a rib torn from its fastening, which confine the plaintiff to his bed for several weeks, where the physicians' and hospital bills amounted to about \$375.

For other cases, see *Damages, III. i*, in *Dig. 1-52 N. S.*

(October 20, 1916.)

Note. — For signal of traffic officer as affecting duty of travelers to exercise care, see annotation following this case, post, 137. L.R.A.1917B.

**A**PPEAL by defendant from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligent operation of an automobile. Affirmed.

The facts are stated in the opinion.

Messrs. Hubbard & Hubbard, for appellant:

Appellee, in attempting to cross Walnut street without looking to see what traffic was approaching, and by her total disregard of the traffic rules and signals of the traffic officer, was guilty of contributory negligence such as precludes her recovery.

*Dolfinger v. Fishback*, 12 Bush, 474; *Gnau v. Ackerman*, 166 Ky. 258, 179 S. W. 217; *Johnson v. Westerfield*, 143 Ky. 10, 135 S. W. 425; *Peterson v. P. Ballatine & Sons*, 205 N. Y. 29, 39 L.R.A.(N.S.) 1147, 98 N. E. 202; *McCormick v. Hesser*, 77 N. J. L. 173, 71 Atl. 55; *Davis v. John Breuner Co.* 167 Cal. 683, 140 Pac. 586; *Perez v. Sandrowitz*, 180 N. Y. 397, 73 N. E. 228.

The trial court erred in refusing to give the instructions offered by defendant upon the question of the effect of plaintiff's violation of the city traffic ordinance.

*Foley v. Northrup*, 47 Tex. Civ. App. 277, 105 S. W. 229; *Denver Omnibus & Cab Co. v. Mills*, 21 Colo. App. 582, 122 Pac. 798; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 416; *Robinson v. Simpson*, 8 Houst. (Del.) 398, 32 Atl. 287; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193.

Messrs. H. O. Williams and Edwards, Ogden, & Peak, for appellee:

The question of plaintiff's contributory negligence was properly submitted to the jury.

*Williams v. Benson*, 87 Kan. 421, 124 Pac. 531; *T. B. Jones Co. v. Pelle*, — Ky. —, 128 S. W. 305.

The instruction upon the question of the

effect of plaintiff's violation of the city traffic ordinance properly submitted the law.

*Netter v. Louisville R. Co.* 134 Ky. 684, 121 S. W. 636; *Gregory v. Slaughter*, 124 Ky. 347, 8 L.R.A.(N.S.) 1228, 124 Am. St. Rep. 402, 99 S. W. 247.

The instruction given on the measure of damages was fully authorized under the facts.

*National Concrete Constr. Co. v. Duvall*, 153 Ky. 394, 155 S. W. 757.

*Messrs. Williams & Walker* also for appellee.

*Settle, J.*, delivered the opinion of the court:

About 5 o'clock P. M., October 30, 1914, the appellee, Minnie Rollwage, was knocked down and injured at the crossing of Fourth and Walnut streets in the city of Louisville by an automobile owned and operated by the appellant, Frank Melville. Shortly thereafter she brought this action to recover of him damages for the injuries sustained from the collision in question, alleging in the petition that they were caused by appellant's negligent operation of the machine. The latter answered, traversing the averments of the petition and alleging contributory negligence on the part of appellee. The trial resulted in a verdict and judgment in favor of appellee for \$1,250. Appellant complains of the judgments, hence this appeal.

It appears from the evidence that appellee, a young lady twenty-five years of age, was going south on the west side of Fourth street, in company with her sister and another young lady, and that in crossing Walnut street the appellant, who was going west on Walnut street in his automobile, ran into the appellee, knocked her down, ran one wheel of the machine over her body, and knocked the two young ladies with her down as well. Fourth street runs North and South, and Walnut street east and west, the Seelbach hotel being the southwest corner, Selman's mercantile building on the northwest corner, the Stewart Dry Goods Company's building on the southeast corner, and the United Cigar store on the northeast corner. There are double lines of street car tracks on both Walnut and Fourth streets. Not only is every building in this vicinity devoted to business purposes, but the intersection of the streets at this point is notoriously the most congested and busiest intersection in Louisville. The city maintains at this intersection a policeman or traffic officer, who constantly stands on duty directly in the middle of the street. He uses a whistle, one sound of which indicates that vehicles and persons going east and west, or on Walnut street, shall have

the right of way over vehicles and persons moving north and south, or on Fourth street. Two blasts of the whistle indicate that vehicles and persons moving north and south, on Fourth street, shall have the right of way. At the time of the collision in question appellee and her two companions were standing in the space between the two Walnut street car tracks, to which point they proceeded in the attempt to cross Walnut street, but the stop made by them was necessary because an east-bound Walnut street car was standing over the foot crossing immediately in front of them, discharging and taking on passengers. The traffic officer had just given the signal for the car to pass over Fourth street and on east, the conductor had rung the car bell for the car to start, and it was in the act of starting, when appellee and her companions were struck by the automobile, coming from the east and going at a speed of 10 or 12 miles an hour, without slowing up for the Fourth street intersection or giving any warning whatever. After being momentarily halted by the street car appellee's attention was directed to the car, although before she left the pavement in her rear she looked east on Walnut street without seeing appellant, whose automobile was then somewhere on the east or opposite side of Fourth street, and not in her view.

The foregoing facts were shown by the testimony of appellee, her two companions, and other witnesses. Among the latter was J. W. Raymond, the traffic officer, whose position between the point of the accident and the approaching automobile enabled him, better than all others to see what occurred.

His description of the accident was as follows:

Well, sir, about five or ten minutes after 5 that afternoon there was an East Walnut street car going east, and I blew one whistle; that signified for traffic to go east and west. Mr. Melville was coming down in his automobile, and this car was going east. The car had started to go up, and Mr. Melville came down with his automobile and these young ladies there were standing on the south side of the car by the street car.

The court: South side or north side of the street car?

The witness: On the north side. A. (continued): I hollered to him to stop; he never blew his whistle or anything, his horn or anything, and I hollered for him to stop. Just as he was about over here to that table from the women, he hollered, "Look out." As he hollered, "Look out!" he

hit them and knocked all three of them down.

Q. With reference to the speed of his automobile, how was he traveling?

A. He was traveling, I judge it to be, 10 or 12 miles an hour.

Q. At that time, state, please, whether there were many or few people on that intersection.

A. There were quite a few people in the intersection; yes, sir.

Q. Up until the time he hollered "Look out!" had you heard any horn or warning given by the defendant?

A. None whatever. . . .

Q. What were these young ladies doing at that time, when he hollered, "Look out?"

A. They were waiting for this car to pass so they could cross the intersection.

John Walsburger, another police officer, was also near and witnessed the accident. His description of the occurrence was as follows:

Q. Did you notice whether they were walking or standing still, or what they were doing when the automobile approached them?

A. They had to stand still; the car was going east.

Q. The street car?

A. Yes, sir.

Q. Did you hear a horn or any warning given of the approach of this automobile?

A. No, sir; I did not; only the hollering.

Q. How far was the automobile away from these young ladies when he hollered?

A. Well, about 5 foot.

Q. Can you tell the jury about how fast the automobile was running at that time?

A. It was going right between 10 and 12 miles an hour.

The appellant's theory of the accident was that appellee and her companion stepped out from the crowd of persons who were crossing the street, in front of his automobile, when it was only a few feet from them and too late for him to bring his car to a standstill and avoid the accident. He testified that he stopped his machine on the east side of Fourth street, and did not again start it until the traffic officer gave the signal, following which he proceeded across Fourth street down to the point of the accident, at a slow rate of speed; that he sounded the horn of his machine upon starting it after the signal to move from the officer was given, but did not again sound it after starting, although he saw, as he admits, as many as 10 or 12 people on the crossing where appellee was injured, between the car track and pavement. In his opinion, as he stated, there was no necessity for sounding his horn, as

he was on the track over which westbound cars run and the congested condition of the crossing did not extend across the street car track. With reference to the speed of the automobile at the time of the accident, appellant testified that it was not more than 3 or 4 miles an hour, in which he was corroborated by R. O. Wellman, by whom he seems to have been arrested immediately after the accident. Wellman, on cross-examination, said he saw appellee and her companions standing in the street, awaiting the moving of the street car from the crossing, but that they did not step out suddenly in front of the automobile, as testified by appellant. Henry W. Newman, Jr., another witness for appellant, also expressed the opinion that, at the time of the accident, the speed of the automobile did not exceed 3 or 4 miles an hour.

Without further discussing the evidence in detail it is sufficient to say that it abundantly justified the submission of the case to the jury. That introduced for appellee, if believed by the jury, authorized the conclusion expressed by their verdict, viz., that her injuries were caused by appellant's negligent operation of his automobile, and that she was not guilty of such contributory negligence as ought to have prevented the recovery by her of damages for the injuries sustained by reason of appellant's negligence. The signal of the traffic officer, by reason of which appellant claims to have moved his automobile westwardly across Fourth street from the point where he had momentarily stopped it east of that street, did not relieve him of the duty of sounding the horn of his machine, slowing its speed, or otherwise exercising reasonable care for the safety of pedestrians on the opposite foot crossing, and as much of the evidence conduced to prove he failed to observe these duties after seeing a large crowd of pedestrians on the intersection, and by reason thereof appellee was struck by the machine and injured, such failure constituted actionable negligence. If, as testified by appellee, she looked before stepping from the pavement to ascertain whether vehicles were approaching from the east side of Fourth street, from which appellant's automobile came, and discovered none, she was not required thereafter to keep her eyes constantly turned in that direction, nor was it negligence or contributory negligence per se for her to stop in the street by the side of a standing street car to await its passage, in obedience to a signal from the traffic officer, given immediately before or as she stopped. In any event, the question whether appellee was guilty of contributory negligence, as well as that of appellant's negligence, should have been, and



was properly, submitted to the decision of the jury by the trial court. Hence the peremptory instruction directing a verdict for appellant, asked by him at the conclusion of the evidence, was properly refused by the court.

In the very recent case of *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335, the following general principles are emphasized as applicable to an action of the character here involved: (1) It is the duty of the operator of an automobile at street crossings, as well as at other places used by pedestrians, to keep a lookout, to run his machine at a reasonable rate of speed, and to give warning of its approach. (2) It is the duty of a pedestrian, in crossing a street used by automobiles and other vehicles, to exercise such care as a person of ordinary prudence would exercise for his own safety in crossing a street at such a crossing, considering the amount and kind of vehicle traffic thereat. He is not obliged as a matter of law to look or listen for the approach of automobiles in order to keep out of their way, and whether he has exercised the proper degree of care is for a jury to say under all the facts and circumstances shown by the evidence in the case. (3) The pedestrian and the automobilist have equal rights in streets that are set apart for the use of vehicles as well as for the accommodation of pedestrians, and each has rights that the other is bound to respect.

It appears from the record that appellant was permitted to introduce and read in evidence on the trial the following sections of an ordinance of the city of Louisville:

"Section 55. Duties of pedestrians.—The roadbeds of highways and streets are primarily intended for vehicles, but pedestrians have the right to cross them in safety, and all drivers of vehicles shall exercise all proper care not to injure pedestrians, and pedestrians, before stepping from the sidewalk to the roadbed, should look to see what is approaching, and shall not needlessly interfere with the passage of vehicles. Pedestrians shall not cross diagonally the intersection of any highway, and in crossing shall be governed by directions of traffic officers."

"Section 59. Obedience to traffic officers, etc.—Drivers must at all times comply with any direction given by voice, hand or whistle of any officer of the police force as to stopping, starting, approaching or departing from any place, and also as to the manner of taking up or letting off passengers and the loading and unloading of vehicles."

It is insisted for appellant that there was in the matter of receiving her injuries L.R.A.1917B.

a violation by appellee of the provisions of one or both of the above sections, and that the trial court erred in refusing instructions Nos. 1, 2, 3, and 4, offered by appellant, by which the jury would have been advised of the effect to be given in this case to the alleged violation of the provisions of the traffic ordinance. This contention is unsound. As the sections of the ordinance, *supra*, are but declaratory of the common law, their provisions did not require of appellant or appellee any greater or different degree of care than that imposed by the law as uniformly applied by this court and clearly stated in the instructions that were given by the trial court; and, although neither section is named in the instructions, the requirements of each are embraced therein. In other words, the law as expressed by the instructions is not in conflict with any provision of the ordinance, and no provision of either section authorized the negligent operation of the automobile in the manner indulged in by appellant. For the foregoing reasons, and because of the misleading effect they would probably have had upon the jury, the rejection by the court of the instructions offered by appellant on the subject of the ordinances was proper.

In contending that in starting his automobile from the east side of Fourth street, as was done by him, appellant acted in obedience to a requirement of § 59 of the ordinance and a signal given by the traffic officer, his counsel ignore the negligence manifested by his subsequent conduct. He may have been authorized to move his automobile by a signal from the officer, but such signal did not require or authorize him to move it over the intervening street and the crossing being used by appellee without giving the necessary warning of its movements, or at such speed as to make its collision with her unavoidable. The street car by which appellee's progress was obstructed was also put in motion by the same signal that caused appellant to start his automobile, and appellee, upon stopping to await the passing of the car, was rightfully in possession of the crossing, and all the while in plain view of appellant as he approached in his automobile. Consequently her presence there when struck by the automobile, instead of constituting negligence *per se*, seems to have been imperatively necessary, because she could not have gone in front of the moving street car without endangering her life, nor would she have had time to return to the pavement from which she stepped upon the street, without coming into collision with appellant's automobile. In leaving the pavement and going upon the crossing she

obeyed the requirements of § 55 of the ordinance, by looking to see what vehicles were approaching the crossing, at which time appellant's automobile was not in her view; and, after going upon the street, she could not have kept a constant lookout in either direction for the coming of vehicles, because she also had to look to where she walked after reaching the street, to avoid collision with other persons. It cannot therefore be said that her conduct in leaving the pavement and proceeding to the place of the accident as she did, under the circumstances, necessarily constituted negligence.

The only criticism of the instructions of the trial court found in the brief of the appellant's counsel is directed at the seventh and last one, which objection we will later consider. It is their contention, however, that none of the instructions should have been given, because, in their view of the case, there was such a showing of contributory negligence on the part of appellee as entitled appellant to a peremptory instruction, directing a verdict for him. Our consideration of the instructions convinces us that they correctly gave for the guidance of the jury all the law applicable to the issues of fact in the case. In addition to defining ordinary care and the measure of damages in the event of a recovery by appellee, the instructions advised the jury as to the reciprocal rights and duties of the appellant and appellee in their use of the streets, the measure of care required of each, what acts or omissions on the part of appellant in operating his automobile would constitute actionable negligence, entitling appellee to damages for the injuries, if any, thereby caused her, and what acts or omissions upon her part would constitute negligence or contributory negligence that would defeat a recovery. Our conclusion as to the correctness and sufficiency of the instructions was reached by application to the facts here presented of the tests furnished by the very latest decision of this court in the character of case here involved; viz., *Weidner v. Otter*, supra. Indeed, the instructions so nearly conform to the statement of the law as in the opinion of that case expressed as would induce the belief that, in writing them, the trial judge had before him the opinion itself, but for the fact that the record shows that the instructions were written many months before the opinion.

Appellant's objection to instruction No. 7, which gives the measure of damages, is that it permitted, in the event of a verdict for appellee, a recovery of damages for permanent injury. One of the injuries sustained by appellee from her collision with the automobile was a fracture of one of her ribs, which was broken loose. She also received various cuts and bruises about her body and limbs. The evidence shows that she was confined to her bed for two weeks, was then up and about for nearly two weeks, and again confined to her bed; that during the entire time she suffered much physical and mental pain. Upon being confined to her bed the second time it was discovered by the family physician, Dr. Sauter, who examined her, that she had a movable kidney. After an abortive attempt to hold the kidney in its proper position with adhesive straps, it was determined by the physician that an operation for the purpose of permanently securing the kidney in its proper position and relieving her sufferings was indispensably necessary. Thereupon a specialist, Dr. Schachner, was called in. According to his testimony he found appellee to be suffering a great deal of pain, to relieve which and prevent lockjaw an injection of antitetanic serum was necessary. The operation for securing the kidney was performed by Dr. Schachner. It further appears from the testimony of both Dr. Sauter and Dr. Schachner that the movable kidney resulted from her collision with appellant's automobile. The physicians expressed the opinion that her injuries were permanent. In view of the evidence we are of opinion that appellee was entitled to recover upon the ground that the injuries sustained by her were of a permanent nature; that is, such as will probably injuriously affect her health in the future. It was not, therefore, error for the court to embrace in instruction No 7 the recovery of damages for permanent injury.

We are unable to sustain appellant's final contention that the amount of damages awarded appellee by the verdict was excessive. It appears that it will take \$75 of the amount recovered to pay the bill incurred by her while in the hospital, and that her doctor's bills amounted to about \$300. There would therefore be left a little less than \$900 to compensate her for the injuries sustained. We are unwilling to declare this amount unreasonable.

Judgment affirmed.

#### **Annotation—Signal of traffic officer as affecting duty of travelers to exercise care.**

Generally as to reciprocal duty of operator of automobile and pedestrian to use care, see annotation to *Deputy v. L.R.A.1917B*.

*Kimmell*, 51 L.R.A.(N.S.) 989, and earlier annotation there referred to.

As to duty of operator of automobile

with respect to horses encountered on the highway, see annotation to *Messer v. Bruening*, 48 L.R.A.(N.S.) 945.

It will be noticed that the court in *MELVILLE v. ROLLWAGE*, ante, 133, decided that the signal of a traffic officer to an automobilist to cross a street intersection did not absolve him from the duty of exercising reasonable care for the safety of pedestrians on the opposite foot crossing. This conclusion is undoubtedly sound. There is little authority upon the effect of signals of traffic officers upon the duty of travelers to exercise care. It would appear that while signals by such officers do not absolve travelers from using ordinary care, yet that they may to some extent be relied upon, and that they may be taken into consideration with the other evidence in determining whether reasonable care was used under the particular circumstances. This position is borne out by cases disclosed upon the question under annotation.

In *Dennison v. North Penn Iron Co.* (1903) 22 Pa. Super. Ct. 219, which was an action by a pedestrian to recover for an injury received through being struck by a wagon loaded with iron trusses, it appeared that the driver, upon reaching an intersecting street down which he intended to turn westward, stopped at the signal of the traffic officer; when he was signaled by the officer to proceed, he drove slowly, the street being crowded, and went as far to the north side of the intersecting street as possible, and turned slowly, looking ahead at the traffic; the plaintiff was standing on the curbing and saw the iron extending beyond the wagon before it commenced to turn; she did not see the wagon make the turn and was not watching it, but was watching for the traffic officer to signal for her to cross, when she was struck by the projecting iron. It was held that there was no evidence of negligence on the part of the driver, and that the plaintiff was guilty of contributory negligence in not looking at the wagon until it had passed a sufficient distance to allow her to make the crossing safely; that if she was misled by any signal given by the officer, the defendant was not liable for that, and that if she was mistaken in the signal of the officer, she alone was responsible. The court remarked that it was evident that the plaintiff did not look for herself and de-

termine for herself whether or not the crossing was safe, and, with respect to the driver's reliance on the officer's signal, the court stated that he had the right to presume that the officer would prevent pedestrians from crossing until the wagon had passed.

In *Canfield v. New York Transp. Co.* (1908) 128 App. Div. 450, 112 N. Y. Supp. 854, where the plaintiff sought to recover for an injury received by being thrown down while attempting to cross a street by a rope by which one of the defendant's electric hansoms was being towed, it appeared that there was a man on each hansom, and that, in response to the order of a police officer, the machines had been stopped at a street intersection, and that, as the plaintiff attempted to cross, the man on the rear car shouted a warning to the plaintiff, but that she proceeded without seeing the rope, although she testified that there was sufficient light to see the number on the car. It was held that there was no evidence in the case upon which a finding of negligence on the part of the defendant could be predicated. The court remarked that the automobiles were lawfully on the street, that they had been ordered by the traffic officer to stop at the place where they stood, and that the only thing that the drivers could do was to warn the plaintiff, and that they did this.

In *Foster v. Frank Parmelee Co.* (1913) 179 Ill. App. 21, the plaintiff, a pedestrian, while attempting at a street intersection to cross from south to north, was struck by a cab driving from west to east; the movement of pedestrians and vehicles was regulated by a traffic officer, who, at the time the injury occurred, had given a signal for carriages and pedestrians to cross from east to west and west to east, and for an intermission of the north and south movement of travel. The court, in upholding the peremptory instruction of the trial court for a verdict for the defendant, said, with respect to the regulation of traffic by the police officer: "This attempted regulation, of course, neither placed nor released legal obligations of the plaintiff or defendant, but is of importance in considering the only question which was litigated in this cause,—the negligence of the defendant's servant and the due care of the plaintiff."

J. T. W.

**KENTUCKY COURT OF APPEALS.****COMMONWEALTH OF KENTUCKY FOR  
USE OF WILLIAM LEDFORD, Appt.,**

v.

**J. W. HINSON et al.**

(143 Ky. 428, 136 S. W. 912.)

**Official bond — duration — termination  
of term.**

1. The sureties on the official bond of a policeman are liable for his acts only during the term for which he is appointed at the time it is executed, although the premium paid for their undertaking would entitle him to a bond covering a longer period. *For other cases, see Bonds, II. c. 1, in Dig. 1-52 N. S.*

**Same — parol extension — validity.**

2. A parol promise of a surety on the official bond of a policeman whose appointment is for six months, that, in consideration of payment of the premium for a year, the bond may cover another six months' period in case of his reappointment, cannot be enforced by one injured by the wrongful act of the officer, although the agreement was consented to by the municipal authorities, where the statute provides that no action shall be brought to charge any person upon a promise to answer for the misdoing of another unless it is in writing.

*For other cases, see Contracts, I. c. 2; V. c. in Dig. 1-52 N. S.*

(May 2, 1911.)

**A**PPPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County sustaining a demurrer to the petition in an action brought to recover damages for an alleged wanton assault committed by defendant Hinson upon plaintiff Ledford. Reversed as to defendant Hinson. Affirmed as to the other defendants.

The facts are stated in the opinion.

Messrs. Robert H. Winn and R. A. Chiles, for appellant:

Parol evidence is admissible to show the approval of an official bond by the proper officers.

*American Book Co. v. Wells*, 26 Ky. L. Rep. 1159, 83 S. W. 622; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 562; *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549.

The requirement that a bond be accepted and approved is for the benefit of the public, and not for the principal and his sureties.

**Note.**—For effect of the Statute of Frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, see annotation following *Bonicamp v. Starbuck*, post, 144.  
L.R.A.1917B.

The failure, therefore, of approval altogether will not relieve the sureties of their liability.

*American Book Co. v. Wells*, 26 Ky. L. Rep. 1159, 83 S. W. 622; *Reid v. Com.* 123 Ky. 240, 94 S. W. 641; *Growbarger v. United States Fidelity & G. Co.* 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. Rep. 274, 102 S. W. 873; *Com. use of Rosenthal v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340; *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549.

A bond entered into voluntarily, and for a valid consideration, is good as a common-law obligation, though not in conformity to a statute, or even entirely without any statute.

*Combs v. Breathitt County*, 18 Ky. L. Rep. 809, 38 S. W. 138, 39 S. W. 33; *Cotton v. Wolf*, 14 Bush, 238; *Clay v. Edwards*, 84 Ky. 548, 2 S. W. 147.

Paid contracts, or bonds of suretyship, are contracts, and it is the duty of the courts to enforce them.

*Federal Union Surety Co. v. Com.* 139 Ky. 92, 129 S. W. 335; *Walker v. Holtzclaw*, 57 S. C. 459, 35 S. E. 754.

Messrs. Robert L. Page and Lewis Apperson, for appellee Citizens' Trust & Guaranty Company:

The fact that appellee was elected for six months, and then re-elected again for another six months shows conclusively that the term was for six months; and, whatever the term is, the bond only covers for the term, and if there was any agreement that the bond should cover for two terms, that certainly should have been in writing, and not oral, in order to bind a surety.

*Stearns, Suretyship*, § 173; *Offutt v. Com.* 10 Bush, 212; *Bryan v. United States*, 1 Black, 140, 17 L. ed. 135; *Brandt, Suretyship*, § 543; *South Carolina Soc. v. Johnson*, 1 M'Cord, L. 41, 10 Am. Dec. 644; *Moss v. State*, 10 Mo. 338, 47 Am. Dec. 116; 29 Cyc. 1457; 32 Cyc. 77.

Messrs. McChord, Bingham, & Page also for appellees.

Carroll, J., delivered the opinion of the court:

This action was instituted in the name of the commonwealth in behalf of William Ledford against J. W. Hinson, a policeman of Mt. Sterling, Kentucky, and the Citizens' Trust & Guaranty Company as his surety, to recover damages for an alleged wanton assault committed by the policeman upon Ledford. To the petition as amended a demurrer interposed by each of the defendants was sustained upon the ground that it did not state facts sufficient to constitute a cause of action against either of them.

Therefore the only question presented by the record is the sufficiency of the petition as amended.

Mt. Sterling is a city of the fourth class; and under § 3492 of the Kentucky Statutes (Russell's Stat. § 1549) its board of council has the power to appoint a police force "whose term of office shall not exceed two years from the date of election." In § 3497 (§ 1554) it is provided: "Every policeman, before he enters upon the duties of his office, shall give bond, with approved surety, before the mayor, to the commonwealth of Kentucky, in the sum of \$1,000, for the faithful performance of the duties of his office; and for any unlawful arrest, or unnecessary or cruel beating or assault in making an arrest, he and his bondsmen shall be liable to the person so injured on said bond." On December 7, 1909, the council appointed Hinson a policeman for a term of six months beginning on the first Monday in January, 1910. Hinson thereupon qualified as such policeman and gave bond with the Citizens' Trust & Guaranty Company as his surety. The bond, which was entered into by the surety on the 31st day of December, 1909, was conditioned as follows: "Whereas, James Warner Hinson has been duly appointed to the office of policeman in and for the city of Mount Sterling, Montgomery county, Kentucky: Now, we, James Warner Hinson, principal, and the Citizens' Trust & Guaranty Company of West Virginia, surety, hereby covenant to and with the commonwealth of Kentucky for the benefit of the city of Mount Sterling, Montgomery county, Kentucky, in the sum of \$1,000, lawful money of the United States, that the said James Warner Hinson shall well and faithfully discharge the duties of his said office of city policeman according to law." On the 15th of June, 1910, and before the expiration of the first term of six months, Hinson was again elected policeman for another term of six months, and again took the oath of office and continued in the discharge of his duties as policeman. The assault complained of occurred after the expiration of his first appointment and during the period of his second appointment. The bond executed by the company on the 31st of December, 1909, was accepted and approved by the mayor, but no other bond was ever executed by Hinson. It is averred in the amended petition that Hinson paid to the company when it became his surety the full premium for one year, and that it was agreed by and between the trust and guaranty company and Hinson at the time the bond was executed that, if Hinson was re-elected policeman for the six months be-

ginning on the first Monday in July, 1910, the bond executed by it on the 31st day of December, 1909, should cover the remaining six months' period, and that no further action would be necessary in order to hold it liable on the bond as surety. It was further averred that the mayor and council entered into and approved this agreement, and did not require the execution of a bond, but stood upon and relied upon the agreement of the trust and guaranty company to remain bound upon the bond for one year. As the truth of these allegations was confessed by the demurrer, the pleading is to be tested by their sufficiency to constitute a cause of action.

To briefly restate the facts so that the issues may be clearly understood, it appears: (1) That Hinson was appointed policeman on December 7, 1909, for a term of six months, and that before the expiration of this term he was reappointed for another term of six months to begin upon the expiration of the first six months. (2) That subsequent to his appointment in December, 1909, and before he assumed the duties of the office, the trust and guaranty company undertook that Hinson would "well and faithfully discharge the duties of said office of city policeman according to law," and that this bond was approved and accepted by the mayor. (3) That no new bond was executed covering the second term of Hinson, nor was there any written or record evidence of an agreement between Hinson and the company that it should remain upon his bond during his second term; but it was verbally agreed between Hinson and the company that, as he had paid the premium for one year when the bond was executed, this bond should cover the remaining six months of the year if he was re-elected for another term. (4) That the assault complained of took place during the second term.

Taking up first the sufficiency of the pleading as to the trust and guaranty company, and assuming that it entered into the parol agreement with Hinson heretofore set out, the question is: Was this parol agreement sufficient to bind the company for the misdoings of Hinson during his second term?

We think there can be no doubt that the bond executed by the surety company only bound it for the acts of Hinson during his first term. Hinson had only been appointed or elected for six months at the time the bond was executed, and it was to answer for his conduct during this term of six months that the bond was executed. We know of no principle of law that would au-

thorize us to extend this undertaking beyond the term of six months it was executed to cover. On the contrary, all the authorities we have had an opportunity to examine lay it down that, under circumstances like those appearing in this case, the liability of the surety is confined to the term for which the official was appointed or elected. Nor can the mere fact that the officer is reappointed for another term have the effect of increasing the liability of the surety or extending his obligation. The contract of suretyship only contemplated its continuance during the term. We find no language in the bond from which it can be inferred that the surety intended to become responsible for another term under another appointment or election. *Stearns, Suretyship*, § 173; *Brandt, Suretyship*, § 543; *Offutt v. Com.* 10 Bush, 212; *South Carolina Soc. v. Johnson*, 1 M'Cord, L. 41, 10 Am. Dec. 644; *Moss v. State*, 10 Mo. 338, 47 Am. Dec. 116.

Recognizing the force of the argument that the terms of the bond confined the obligation of the surety to the expiration of the first term, the attempt is made to avoid its effect by the assertion that the surety company agreed in consideration of the payment to it by Hinson of the full premium for one year that it would remain bound as his surety for the year if he was reappointed, and that this agreement was approved by the mayor and council. But this agreement on the part of the surety company was not in writing, and was therefore within that section of the Statute of Frauds providing that "no action shall be brought to charge any person . . . upon a promise to answer for the debt, default, or misdoing of another; . . . unless the promise . . . or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent." Ky. Stat. § 470 (*Russell's Stat.* § 1775). This statute presented a complete bar to a recovery against the surety company. The fact that it received a consideration for entering into the verbal agreement relied on did not have the effect of making it liable when in the absence of such consideration it would not have been. The payment of a consideration cannot supply the place of a writing signed by the person to be charged, or have the effect of taking out of this statute an agreement that would otherwise be void. But it is said that the mayor and council consented to and approved this verbal agreement between Hinson and the surety company, and thus made it a valid undertaking. We cannot understand how the consent or approval of the mayor and council could impart validity

to a void agreement between Hinson and the surety company. There was no agreement or contract that the mayor or council could approve or consent to. If a binding agreement had been entered into between Hinson and the surety company, then we would hold that its acceptance or approval of record by the official whose duty it was to accept or approve it was not essential to its validity. *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; *Growbarger v. United States Fidelity & G. Co.* 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. Rep. 274, 102 S. W. 873; *Reid v. Com.* 123 Ky. 240, 94 S. W. 641; *Com. use of Rosenthal v. Teel*, 33 Ky. L. Rep. 741, 111 S. W. 340. But the principle announced in these cases has no application to the one before us, for the simple reason that no second bond was executed that could or should have been approved or accepted, and it is on this vital point that the case of appellant fails. If a bond had been executed that covered the second term of Hinson, its approval or acceptance by the mayor would not be essential to its validity. We think the lower court correctly ruled that the petition as amended did not state a cause of action against the surety company, but we are also of the opinion that it did state facts sufficient to constitute a cause of action against Hinson.

Wherefore the judgment as to the Citizens' Trust & Guaranty Company is affirmed, and the judgment as to Hinson is reversed.

#### OKLAHOMA SUPREME COURT.

JOHN BONICAMP, SR., Plff. in Err.,  
v.

W. H. STARBUCK.

(25 Okla. 483, 106 Pac. 839.)

#### Contract within Statute of Frauds — parol modification — validity.

Parties to a written agreement within the provisions of the Statute of Frauds may not, by subsequent oral agreement, add to or alter one or more of its terms, and thus make a new contract resting partly in writing and partly in parol; and where they do, in a suit on said new contract, testi-

#### Headnote by TURNER, J.

Note. — For effect of the Statute of Frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, see annotation following this case, post, 144.

mony to establish such subsequent agreement is not admissible in evidence. *For other cases, see Contracts, V. a, in Dig. 1-52 N. S.*

(January 11, 1910.)

**E**RROR to the Probate Court for Kay County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged breach of a lease. Reversed.

The facts are stated in the opinion.

Messrs. Tetrick & Curran, for plaintiff in error:

If new terms are sought to be ingrafted upon an original contract which is within the Statute of Frauds, they must be reduced to writing; otherwise the modified agreement cannot be proved; for, to allow a party to sue partly on a written and partly on an oral agreement would be in direct contravention of the statute.

Beach, Contr. §§ 75, 577, 579; 1 Chitty, Contr. 154; 1 Addison, Contr. § 201; Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; Neverman v. Bank of Cass County, 14 Okla. 417, 78 Pac. 382; 3 Parsons, Contr. \*17; 2 Rice, Ev. p. 1261; 1 Greenl. Ev. § 268; 29 Am. & Eng. Enc. Law, 2d ed. 824, 825; Swain v. Seamens, 9 Wall. 254, 19 L. ed. 554; Emerson v. Slater, 22 How. 28, 16 L. ed. 360; Heisley v. Swanstrom, 40 Minn. 106, 41 N. W. 1029; Hanson v. Gunderson, 95 Wis. 613, 70 N. W. 827; Pingrey, Extra Industrial & Interstate Contr. § 81; Rucker v. Harrington, 52 Mo. App. 481; Ringer v. Holtzelaw, 112 Mo. 519, 20 S. W. 800; Nelson v. Shelby Mfg. & Improv. Co. 96 Ala. 515, 38 Am. St. Rep. 116, 11 So. 695; Reid v. Kenworthy, 25 Kan. 701; Fuller v. Reed, 38 Cal. 99.

Messrs. John S. Burger and H. S. Gurley, for defendant in error:

Contracts for improvements and repairs on real estate are not contracts for an interest in or concerning land.

2 Page, Contr. pp. 993, 1840, §§ 655, 1198; Scales v. Wiley, 68 Vt. 39, 33 Atl. 771; Plunkett v. Meredith, 72 Ark. 3, 77 S. W. 600; Clark v. Shultz, 4 Mo. 235; Frear v. Hardenbergh, 5 Johns. 272, 4 Am. Dec. 356; Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863.

The parol agreement made about the time of the written lease may be shown by parol.

Erskine v. Adeane, L. R. 8 Ch. 766, 42 L. J. Ch. N. S. 835, 29 L. T. N. S. 234, 21 Week. Rep. 802, 18 Am. & Eng. Enc. Law, 2d ed. 619; Palmer v. Sanders, 49 Fed. 144; Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Freese v. Arnold, 99 Mich. 13, 57 N. W. 1038; Brant v. Vincent, 100 Mich. 426, L.R.A.1917B.

59 N. W. 169; Flanders v. Fay, 40 Vt. 316; Danforth v. McIntyre, 11 Ill. App. 417; Hope v. Balen, 58 N. Y. 380; Deisher v. Stein, 34 Kan. 39, 7 Pac. 608; Hepworth v. Pendleton, 7 Ohio Dec. Reprint, 601; Powell v. McAshan, 28 Mo. 70; Shuey v. Adair, 18 Wash. 188, 39 L.R.A. 473, 63 Am. St. Rep. 886, 51 Pac. 388; Nonamaker v. Amos, 73 Ohio St. 163, 4 L.R.A. (N.S.) 980, 112 Am. St. Rep. 708, 76 N. E. 949, 4 Ann. Cas. 170; Stark v. Wilson, 3 Bibb, 476; Crocker v. Higgins, 7 Conn. 342; 20 Cyc. 287; Cummings v. Arnold, 3 Met. 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. 31.

Turner, J., delivered the opinion of the court:

On May 2, 1906, W. H. Starbuck, defendant in error, sued John Bonicamp, plaintiff in error, in the probate court of Kay county in damages for the alleged breach of a lease, dated November 1, 1905, wherein the latter undertook to lease to the former for a period of five years from that date a two-story building of certain dimensions located in Blackwell, Oklahoma, "at a monthly rent of \$70 per month, said sum to be increased at the rate of 15 per cent of the sum expended by the first party for purchase price and improvements in excess of the sum of \$4,550; first party to make all necessary improvements and repairs to put property in first-class condition to be occupied as a first-class hotel. Parties to this contract to agree on the improvements necessary therefor." After answer admitting the execution of the lease, and a general denial and reply thereto filed, there was trial by a jury, which resulted in a judgment for plaintiff for \$817.50, and on second trial for \$640; and, after motion for a new trial filed and overruled, to which defendant excepted, he brings the case here for review by petition in error and case-made.

To maintain the issues on his part plaintiff, among other things, introduced in evidence the lease providing as aforesaid, proved that defendant had refused him possession thereunder and had leased the premises to another, and, pursuant to allegations in his petition, over the objection of defendant, was permitted to introduce parol testimony in effect that shortly after the execution and delivery of the lease plaintiff and defendant agreed on what improvements and repairs were to be placed in said building to put it in first-class condition to be occupied as a first-class hotel, which was, among other things, that a bake-shop should be built in the rear of the premises, that the building should be painted and finished, the necessary partitions put up, sewerage and waterworks con-

nection made, and that the rent of the premises thereafter should be \$90 per month.

It is contended by plaintiff in error that the court erred in admitting said testimony, because, he says, that the terms of said lease could not be altered except by a contract in writing, and therefore the judgment is contrary to law. The testimony is objectionable for the reason that a lease for five years is one required by the Statute of Frauds to be in writing, which must contain the whole contract. To permit a party to sue partly on a written and partly on an oral agreement, as is here attempted, would be in direct contravention of the statute. 1 Beach, on Contracts, § 579, lays down the rule as stated, and in § 577 says: "It is also the general rule that the evidence necessary to take the contract out of the Statute of Frauds must all be furnished by the writings; parol evidence not being admissible to supply evidence not found in them." Dana v. Hancock, 30 Vt. 616, 29 Am. & Eng. Enc. Law, 2d ed. 824, says: "The general rule is, contrary to the rule at common law, that parties to a written agreement coming within the provisions of the Statute of Frauds may not, by mere oral agreement, alter one or more of the terms thereof, and thus make a new contract, resting partly in writing and partly in parol. And it has been said that it is not important whether or not the alteration is in a particular which was originally required by the statute to be in writing. If any alteration is made, so that part of the contract has to be proved by oral evidence, it ceases to be a contract in writing, and is thus exposed to all the evils which the statute was intended to remedy." Woods on Statute of Frauds, § 384, says: "It is by the written contract alone . . . that the parties are bound, and more especially is that so in a case where, as here, the contract is one which by the Statute of Frauds is required to be in writing. The intention of the legislature was that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it."

The lease, providing, as it does in effect, that plaintiff was to make all necessary improvements and repairs to put the premises in first-class condition to be occupied as a first-class hotel, and that the parties thereto were thereafter to agree on what improvements and repairs were necessary so to do, standing alone, was incapable of enforcement for uncertainty, for the reason that on its face it left some essential terms to be agreed on in the future. Ringer v. Holtzelaw, 112 Mo. 519, 20 S. W. 800; Day-L.R.A.1917B.

ton v. Stone, 111 Mich. 196, 69 N. W. 515; Bumpus v. Bumpus, 53 Mich. 346, 19 N. W. 29; Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; Gates v. Gamble, 53 Mich. 181, 18 N. W. 631. Recognizing this fact, defendant sought to sustain his cause of action by a subsequent oral contract, the subject-matter of which is found in the original writing, while the contract itself is found in the subsequent oral agreement sought to be proved, connecting itself with the writing as a part of its terms. To enforce said contract would practically annul our statute, supra, and the Statute of Frauds. If a part of the entire contract is void under the statute, it is void in toto (Fuller v. Reed, 38 Cal. 99), and thereby becomes reduced to the grade of a mere unwritten contract (Dana v. Hancock, supra). Such subsequent oral agreement varied the terms of the writing contained in the lease, and plaintiff cannot recover upon said writing as thus qualified.

Browne on Statute of Frauds, 5th ed. § 411, says: "It seems to be well established that where a contract affected by the statute has been put in writing, and the plaintiff, in a case of subsequent oral variation of some of the terms of the written agreement, declares upon the writing as qualified by the oral variation, he cannot prevail,"—citing Cuff v. Penn, 1 Maule & S. 21, 105 Eng. Reprint, 8; Goss v. Nugent, 5 Barn. & Ad. 67, 110 Eng. Reprint, 713, 2 Nev. & M. 28, 2 L. J. K. B. N. S. 127; Harvey v. Graham, 5 Ad. & El. 61, 111 Eng. Reprint, 1089, 6 Nev. & M. 154, 2 H. & W. 146, 5 L. J. K. B. N. S. 235; Stead v. Dawber, 10 Ad. & El. 57, 113 Eng. Reprint 22, 2 Perry & D. 447, 9 L. J. Q. B. N. S. 101; Marshall v. Lynn, 6 Mees. & W. 109, 151 Eng. Reprint, 342, 9 L. J. Exch. N. S. 126,—concerning all of which he says in § 415: "The ground upon which the cases just cited were all decided is this: That the plaintiff sued upon a contract which the Statute of Frauds required to be in writing, but which in fact was partly in writing and partly in parol; and that although originally put in writing, and varied only as to the manner of performance, still the suit could not be said to be upon the original written contract, but upon a new contract made out by incorporating therewith certain oral stipulations."

In Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 77 Am. St. Rep. 46; 25 So. 709, the former brought suit against Jackson on an alleged contract in writing to purchase certain timber. The issue raised on a demurrer to his plea of the Statute of Frauds was whether said alleged contract was void under such statute. The trial



court in effect held that it was, which holding was affirmed by the supreme court. The writing sued on was signed by both plaintiff and defendant. By its terms the latter was to purchase from the former at a stipulated price per acre "the timber from a continuous block of 10,000 acres, consecutive sections, in a northwesterly line from Maplesville, townships 21 and 22," the purchaser to determine upon a continuous body of lands and to designate the same to the seller on a day named. The writing further stipulated that in "case of any material tract recently timbered having been cleared of said timber, or pillaged of same to any material extent, the seller will substitute other lands for cutting in its stead" at any time prior to a certain date. The purchaser failed to designate the lands or pay therefor as provided in the contract, and the land company brought suit in damages for the breach thereof. Defendant pleaded, among other things, the Statute of Frauds for insufficient description of the land, an interest in which was intended to be embraced in the contract. Plaintiff demurred to the plea, which was overruled, and plaintiff appealed. The court, in passing, held in effect that under the Statute of Frauds the written memorandum must describe the subject-matter directly or by reference to something outside of the writing, by resorting to which certainty might be obtained; that the contract furnished no such identification of the land intended to be sold, but, on the contrary, expressly referred the segregation and identification of it to be fixed by subsequent acts in pais, and for that reason was void and would not support an action in damages, and, in passing, said: "So long as the particular lands are not determined upon by Jackson and designated by him to the company, the whole agreement remains at large as to the thing intended to be contracted about, the infirmity of the absence of identification still attaches to the writing, and it cannot be said that

there is any contract to sell any land, because there is no contract to sell any particular land. Had Jackson determined upon and designated the particular 10,000 acres to be sold and purchased, and evidenced such determination and designation by writing, the effect would have been to complete, or, to speak accurately, to make, a contract for the sale of land where no contract before existed,"—and, after holding that every requisite of the contract not being in writing there was no written contract, but that the whole lay in parol, in the syllabus said: "A paper writing, by the terms of which one party agrees to sell and another to purchase the timber from a designated number of acres of land which are to be selected by the purchaser, is, to all intents and purposes, an agreement to make a contract for the sale and purchase of land, and is, until selection is made in writing, void under the Statute of Frauds."

Hence we conclude that the testimony was improperly admitted, and the judgment contrary to law, in that it was based upon a parol contract void under the Statute of Frauds, and are of the opinion that the case should be reversed, unless, as is contended by defendant in error, there has been sufficient partial performance to take the contract out of the statute. On this point the testimony discloses that plaintiff, in anticipation of taking possession under his lease, with the knowledge of defendant, had purchased tables and table ware, linen, counters, shelving, office furniture, and fixtures for use in said hotel, which depreciated in value because of defendant's failure to turn over the premises and plaintiff's consequent inability to so use them.

Defendant in error cites no authority in support of his contention that such would constitute a part performance, and, as we are unable to find any, the case is reversed and rendered.

All the Justices concur.

**Annotation—Effect of the Statute of Frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing.**

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**II. Rule that contract cannot be modified by oral agreement:**

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**V. Extension of time, 171.**

*I. Introductory.*

It is a well-settled rule that a written agreement not within the Statute of Frauds may be modified by the subsequent oral agreement of the parties;<sup>1</sup> the parol-evidence rule excludes only prior and contemporaneous negotiations of the parties; it does not apply to subsequent agreements entered into by them.<sup>2</sup> Whether the Statute of Frauds prevents the subsequent oral modification is the subject of investigation in this note.

The note has been confined to agreements attempting to modify the prior written agreement, and excludes cases in which a discharge of the written agreement was attempted. The subject of the discharge will be discussed in a future note.<sup>3</sup> Modification may consist of two elements: 1st, a discharge of the written contract or some of its terms; 2d, the creation of a new obligation instead of those discharged, so that a phase of discharge is necessarily considered herein. But this extends only so far as it is connected with an attempted substitution. In a great majority of the cases discussed in this note, modification is not separated into its elements. It is true, of course, that modification may not involve a discharge of any element of the

original contract, but consist merely of additions.

The modification of contracts originally oral, but which have been taken out of the Statute of Frauds by part performance, acceptance, etc., is not considered.<sup>4</sup>

The note has also been confined to modification by agreement, as distinguished from a mere forbearance or waiver by one of the parties thereto.<sup>5</sup> The line between these two situations is somewhat indistinct in the cases, however clear it may be in theory, and some cases in which there was, strictly speaking, no agreement, have been included. The note has also been confined to the modification of executory contracts; that is, to the modification before breach, or expiration thereof by its terms. Parol modification after breach or expiration will be the subject of a subsequent note.<sup>6</sup>

Modification of a contract must be distinguished from the entering into a new contract which is to take the place of the old. Examples of new contracts are found in the note.<sup>7</sup> The question as to what amounts to a modification is beyond the scope of the note. If the subsequent agreement is treated as a modification, it is discussed herein, otherwise not. Some examples of facts which have

<sup>1</sup> 6 R. C. L. 299; Elliott, *Contra*. § 1988; 3 Page, *Contra*, § 1348; 2 Page, *Contra*. § 608; 9 Cyc. 597, 598.

That a contract under seal cannot be modified by subsequent oral agreement is the doctrine of some cases, but the contrary is held as to this. 6 R. C. L. 300; Elliott, *Contra*. § 1988; 9 Cyc. 596.

<sup>2</sup> 6 R. C. L. 299; 4 Wigmore, *Ev.* § 2441; 5 Chamberlayne, *Ev.* § 3566.

The court in *Castro v. Illies* (1854) 13 Tex. 229, confuses these two things. After referring to the rule that no written agreement can be added to, altered, varied, or changed by parol testimony, the court points out that in the case at bar it was attempted by subsequent agreement to substitute other lands for those mortgaged, and adds, "What is this but an attempt to alter or to vary or to change a written instrument by parol?"

<sup>3</sup> See *Rogers v. Dockstader*, L.R.A.—, —.

<sup>4</sup> It has been held where a contract for the sale of goods is taken out of the Statute of Frauds by the payment of earnest money, but is not reduced to writing, it does not contravene the spirit or policy of the statute to allow its terms to be varied by parol any more than it would to allow the terms of the original contract to be thus proved. It is competent, therefore, for the parties to extend or vary the time for the performance of such a contract by a subsequent parol agreement at any time L.R.A.1917B.

while it remains executory. *Packer v. Stewart* (1861) 34 Vt. 127.

<sup>5</sup> The mere act of a purchaser in awaiting delivery by his vendor may not in all cases amount to a contract extending time. Where it does not, the Statute of Frauds, of course, has no application. *Ogle v. Vane* (1867) L. R. 2 Q. B. (Eng.) 275, 7 Best & S. 855, 36 L. J. Q. B. N. S. 175, 15 Week. Rep. 564.

<sup>6</sup> See *Thompson v. Robinson*, L.R.A. —, —.

<sup>7</sup> *Pearsall v. Henry* (1008) 153 Cal. 314, 95 Pac. 164, 159.

In *Wilson v. Beam* (1890) 12 Ky. L. Rep. 367, 14 S. W. 362, a purchaser at an auction sale, being unable to give the bond required, wrote to the vendor to that effect, and stated that he would have to renounce the contract. This was acceded to by the vendor, who entered into a new agreement with the vendee relative to the purchase of the same upon new terms as to security. Upon an action for breach of the oral contract, this was treated as a new contract, and not as a modification of the old, and it is held that, the agreement being verbal, no action for its breach can be maintained.

A surety for the lessor of a mill who has verbally assented to a subsequent agreement between the lessor and lessee changing the term of the lease is not relieved of liability on his suretyship. *Smith v. Loomis* (1883) 74 Me. 503. The argument for the surety was that the second arrangement

been held not to amount to modification are, however, given in the note.<sup>8</sup>

It has been suggested that a lease which has less than a year to run after the subsequent agreement may be modified by a parol agreement, since it is then not within the Statute of Frauds.<sup>9</sup> So, an agreement by a mortgagee to accept payment of the mortgage debt in other than money is held not an agreement with respect to a conveyance in land, hence is not within the Statute of Frauds.<sup>10</sup> Other examples of facts held not to present a case within the Statute of Frauds are given in the note.<sup>11</sup>

It may be stated generally at this point that, with the exception of the cases discussed under subdiv. III., the

cases uniformly support the rule that an oral executory modification of a written contract within the Statute of Frauds is unenforceable. This rule is applied in some cases in which it appears that acts have been done in accord with the oral modification, and in some cases at least where it is expressly alleged that such acts were done in reliance upon the oral modification. Other cases in which a party has acted in reliance upon the oral modification, especially where he has completed performance of the obligations imposed upon him by the agreement, hold that the rights of the parties must be determined by the modified agreement. It is difficult, if not impossible, to reconcile the cases in which the

was a new and independent contract substituted for and canceling the first one, and was not binding upon the surety on account of the Statute of Frauds, a contention that was denied.

<sup>8</sup> The question of modification by parol is not raised where the parties by mistake stated a wrong purchase price in their contract for the sale of real estate and subsequently had the scrivener who drew the contract change the amount to the correct purchase price. *Kneedler v. Anderson*, (1892) 43 Ill. App. 317.

An agreement between the vendor and vendee of goods upon the vendee's finding himself unable to pay for the goods, that the vendor should buy them back, is not a modification of the original contract, but a resale. *Blanchard v. Trim* (1868) 38 N. Y. 225.

In *Creigh v. Boggs* (1881) 19 W. Va. 240, specific performance of a written contract for the sale of land was granted, with parol variations in the courses of the land agreed to by the parties subsequently and admitted in the answer, where the variations in the courses were not made, as admitted by the answer, with a view of modifying the original parol understanding of the parties which preceded the written contract, but simply to carry out the original parol agreement and understanding, which the written contract failed to do because of a mutual mistake of the parties.

<sup>9</sup> *Doherty v. Doe* (1893) 18 Colo. 456, 33 Pac. 165. The decision in this case, however, is based upon another ground.

<sup>10</sup> *McKenzie v. Stewart* (1916) — Ala. —, 72 So. 109. It is stated that it is true that the result of the mortgagee's acceptance of the property, agreed to be accepted in payment, would be the release of the land from the mortgage, but the same result would follow from his acceptance of money also, and in either case the release of the land results incidentally from the operation of law, and not from any agreement of the parties.

<sup>11</sup> An agreement by vendors who were under obligation to remove clouds upon their title, with the vendee, to remove the

clouds, has been held an original undertaking, which does not vary, add to, or contradict the written contract of sale, and is, therefore, not required by the Statute of Frauds to be in writing. *Foster v. Hoff* (1913) 37 Okla. 144, 131 Pac. 531, Ann. Cas. 1916B, 218.

It has been held that a written agreement between a grantor and grantees after the conveyance of the land, that a balance on the purchase price should be retained until the grantor had perfected the title, might be modified by oral agreement of the parties that in consideration of an abatement of part of the purchase price so retained the balance of the purchase money should be paid without the perfection of the title as agreed upon. *Negley v. Jeffers* (1875) 28 Ohio St. 100. This is on the theory that the contract was not one within the Statute of Frauds.

The extensions from time to time by parol for periods less than a year, of a contract which was to be performed within a year, are unaffected by the Statute of Frauds. *Donovan v. Richmond* (1896) 61 Mich. 467, 28 N. W. 516.

A subsequent agreement specifying a certain place within a city for the payment of a balance due upon a land contract which specified no particular part of the city for the payment of the balance, is held in *Sayre v. Mohny* (1899) 35 Or. 141, 56 Pac. 526, not to change or qualify the terms of the written agreement, but to be a collateral or independent engagement.

There was an attempt to modify a lease in *Blumenthal v. Bloomingdale* (1885) 100 N. Y. 558, 3 N. E. 292, but no specific objection to the evidence of the modification founded upon the Statute of Frauds was taken when the proof was offered, and there was no exception to the charge that, after breach, the terms of the lease could be modified or altered by a parol agreement; the sole contention being that the substituted agreement which formed the basis of the lessee's right was itself void as a lease for more than one year or revocable as a mere license founded upon no consideration.

oral agreement has been acted upon. A majority of those cases which adhere to the rule that the Statute of Frauds invalidates the oral modification do not consider the fact that the oral agreement has been acted upon; while those adhering to the opposite theory emphasize this fact and thereby present a case of waiver, estoppel, etc. Where the contract is fully executed by both parties, according to the modified agreement, the Statute of Frauds does not invalidate the oral modification.

The foregoing rules have been applied in many cases without reference to the character of the modification. In some a distinction is made in regard to whether the modification is one of a part of the

agreement which itself must be in writing. Other cases have expressly repudiated this distinction where the part sought to be modified is part of the writing. A distinction has also been made in some jurisdictions between an extension of time and other modifications.

## *II. Rule that contract cannot be modified by oral agreement.*

### *1. In general.*

The broad general doctrine is announced in many cases that a contract required by the Statute of Frauds to be in writing cannot be modified by subsequent oral agreement.<sup>12</sup> In some of the

<sup>12</sup> *Adler v. Friedman* (1860) 16 Cal. 138; *Boyd v. Big Thresh Ranch Co.* (1913) 22 Cal. App. 108, 133 Pac. 625, approved in obiter statement in *Fogg v. McAdam* (1914) 25 Cal. App. 522, 144 Pac. 296; *Malikan v. Hemming* (1909) 82 Conn. 293, 73 Atl. 752; *Simonton v. Liverpool, L. & G. Ins. Co.* (1874) 51 Ga. 80; *Mitchell v. Universal L. Ins. Co.* (1875) 54 Ga. 289; *Augusta Southern R. Co. v. Smith & K. Co.* (1899) 106 Ga. 864, 33 S. E. 28; *Willis v. Fields* (1909) 132 Ga. 242, 63 S. E. 828; *Hawkins v. Studdard* (1908) 132 Ga. 268, 131 Am. St. Rep. 190, 63 S. E. 852; *Moore v. Collier* (1910) 133 Ga. 762, 66 S. E. 1080; *Jarman v. Westbrook* (1910) 134 Ga. 19, 67 S. E. 403; *Sikes v. Malloonee* (1912) 11 Ga. App. 632, 75 S. E. 988, holding that a contract of guaranty cannot be modified by oral agreement; *Carpenter v. Galloway* (1881) 73 Ind. 418; *Bradley v. Harter* (1900) 156 Ind. 499, 60 N. E. 139; *Christian v. Highlands* (1903) 32 Ind. App. 104, 69 N. E. 266; *Burgett v. Loeb* (1908) 43 Ind. App. 657, 88 N. E. 346; *Napier Iron Works v. Caldwell & D. Iron Works* (1916) — Ind. App. —, 110 N. E. 714; *Autem v. Mayer Coal Co.* (1916) 98 Kan. 379, 158 Pac. 13; *McComathy v. Lanham* (1903) 116 Ky. 735, 76 S. W. 535. See note 119; *Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433; *Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165; *Cook v. Bell* (1869) 18 Mich. 387; *Brown v. Sanborn* (1875) 21 Minn. 402; *Burns v. Fidelity Real Estate Co.* (1892) 52 Minn. 31, 53 N. W. 1017; *Grand Forks Lumber Co. v. McClure Logging Co.* (1908) 103 Minn. 471, 115 N. W. 406; *Warren v. A. B. Mayer Mfg. Co.* (1901) 161 Mo. 112, 61 S. W. 644; *Rucker v. Harrington* (1893) 52 Mo. App. 481, approved in *Newman v. Bank of Watson* (1897) 70 Mo. App. 135; *Espy v. Anderson* (1850) 14 Pa. 311. But see *Le Fevre v. Le Fevre* (1818) 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; *Ladd v. King* (1849) 1 R. I. 224, 51 Am. Dec. 624; *Hicks v. Aylsworth* (1832) 13 R. I. 562; *Beard v. A. A. Gooch & Son* (1910) 62 Tex. Civ. App. 60, 130 S. W. 1022; *Gurley v. Hanricks* (1911) — Tex. Civ. App. —, 139 S. W. 721. See L.R.A.1917B.

*Adams v. Hughes*, infra; *Pence v. Life* (1905) 104 Va. 518, 52 S. E. 257; *Heth v. Woolridge* (1828) 6 Rand. (Va.) 605, 18 Am. Dec. 751; *Hanson v. Gunderson* (1897) 95 Wis. 613, 70 N. W. 827; *Emerson v. Slater* (1859) 22 How (U. S.) 28, 16 L. ed. 360 (obiter); *Reid v. Diamond Plate Glass Co.* (1898) 29 O. C. A. 110, 54 U. S. App. 619, 85 Fed. 193; *Jones's Case* (1875) 11 Ct. Cl. (Fed.) 733.

*Hill v. Blake* (1884) 97 N. Y. 216, holding that a vendor who had failed to deliver within the time stipulated by the written contract, but had offered to deliver within the time provided by the oral extension could not maintain an action for breach of contract against his vendee for failure to accept the goods sold. The court states that there were no circumstances that would work an estoppel against the defendant. See further, infra, V., especially New York cases.

*Pence v. Life* (1905) 104 Va. 518, 52 S. E. 257, holding that a contract for the sale of land cannot be modified by a subsequent parol agreement, in the absence of some act as part performance to take it out of the operation of the Statute of Frauds.

A verbal modification of a written agreement for the purchase and sale of goods is invalid under the Statute of Frauds. *Schultz v. Bradley* (1874) 57 N. Y. 646. By the verbal agreement the parties sought to increase the amount of the goods to be delivered under the contract.

A stipulation in a deed that it was made upon condition that the grantee live with and care for the grantor during the remainder of his life cannot be waived by parol. *Culy v. Upham* (1903) 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405.

An existing lease for years cannot be turned into a lease at will by verbal agreement. *Den ex dem. Mayberry v. Johnson* (1835) 15 N. J. L. 116.

That a purchaser of land cannot be compelled to take and pay for land not embraced within the written contract, but included in a parol agreement, is held in *Wigginton v. Ewell* (1888) 10 Ky. L. Rep. 383, 9 S. W. 285. In the headnote to the

leading English cases, and some American cases, there is announced a more limited rule to the effect that an agreement resting partly in writing and partly in parol cannot be made the basis of an action. But in other English cases the rule is stated as broadly as the foregoing, and in some at least it is expressly held that the oral agreement does not modify the writing, consequently an action may be maintained on such writing; in such an action the oral agreement

cannot be shown even defensively. It thus appears that the English cases as a whole support the broad rule of the American cases.

The broad rule above stated has been held to apply and prevent the subsequent oral modification of a term of the contract implied by law. Thus, where the legal import of a contract for the sale of real estate is that the balance of the purchase price is to be paid presently, the parties cannot, by parol agree-

case the parol agreement is stated to have been a subsequent agreement. Nothing is said as to this in the opinion, nor is it stated anywhere to have been a modification of the original contract.

The parties to a mortgage cannot, by subsequent parol agreement, substitute lands other than those prescribed in the written instrument, as this would be conveying land by parol. *Castro v. Illies* (1854) 13 Tex. 220.

A subsequent oral agreement between the parties to a contract for the sale of timber, as to what had been growth of the timber between the date of the contract and of the cutting, is stated in *Whitfield v. Rowland Lumber Co.* (1910) 152 N. C. 211, 67 S. E. 512, to be an oral conveyance of an interest in realty.

A supplementary verbal contract by which the lessor of a coal mine agreed to pay an additional royalty for the coal mined was held invalid where neither of the parties had taken any action upon it, but the court does not consider this as a modification of the original lease. *Crawford v. Wick* (1868) 18 Ohio St. 190, 98 Am. Dec. 103, 8 Mor. Min. Rep. 541.

An agreement by a vendor of brick to receive in payment of the brick a certain amount in cash and the balance in two lots cannot, when part of the brick has been delivered, and the purchaser has refused to receive any more, be modified orally by the parties, to the effect that the purchaser should pay for the brick already delivered at the contract price, the purchaser to take one of the lots at the stipulated price, and to pay the balance in cash. The action in this case was brought to secure a conveyance of the lot agreed upon in the oral agreement, and recover the balance of the purchase price. *Burns v. Fidelity Real Estate Co.* (1892) 52 Minn. 31, 53 N. W. 1017.

A bond for title having been merged in a judgment, it has been held that the bond cannot be reinstated and the judgment disregarded by parol agreement. *Scott v. Sanders* (1831) 6 J. J. Marsh. (Ky.) 506.

It is stated in *Westchester F. Ins. Co. v. Earle* (1876) 33 Mich. 143, that a written insurance policy not within the Statute of Frauds may be changed by parol, thus excepting contracts that are within the Statute of Frauds from such modification.

Where the doctrine prevails that a mort-

gage is a lien or security only, and not in any sense a title, a parol agreement that a mortgage shall stand as security for a future loan is ineffectual to create a lien to secure such loan; the one loaning the money does not acquire any equitable lien or right to charge the new advance upon the land. *Stoddard v. Hart* (1861) 23 N. Y. 556. The agreement in this case was contemporaneous with the execution of the mortgage, and is not treated as a subsequent modification of a written agreement.

An oral agreement by the equitable owner of land which has been conveyed to a third person as security for a debt, that the land shall stand as security for still another debt of the equitable owner, is void and unenforceable. *Curle v. Eddy* (1856) 24 Mo. 117, 66 Am. Dec. 699.

The surplus arising from the sale of real property under deeds of trust given to secure debts described in them cannot be retained as security for debts subsequently made on the strength of a parol engagement. *Williams v. Hill* (1856) 19 How. (U. S.) 246, 15 L. ed. 570.

But in *Re Burns* (1909) 171 Fed. 1008, affirmed in (1909) 98 C. C. A. 658, 174 Fed. 1020, where a borrower who had given as security a warranty deed for certain lands, and contemporaneously thereto had taken back from the grantee a bond for title, and who, upon payment of the note given in evidence of the debt, obtained another loan from the grantee, and agreed with him that the deed should stand as security for the larger indebtedness, and with that end in view made certain interlineations in the bond for title, but by inadvertence allowed the sum of money describing the first loan to remain therein, the right of the creditor to a lien upon the land for the larger amount was sustained as against a subsequent creditor of the debtor with notice of the facts.

That the consent of a surety to extend the time of payment of debt need not be in writing, was held in *Bandler v. Bradley* (1910) 110 Minn. 66, 124 N. W. 644.

See *Worden v. Crist*, *infra*, note 113; *Doar v. Gibbs* (1831) Bail. Eq. 371, *infra*, note 114; *Bullis v. Presidio Min. Co.* (1889) 75 Tex. 540, 12 S. W. 397, and *Adams v. Hughes*, — Tex. Civ. App. —, 140 S. W. 1163, *infra*, note 128; and *Creigh v. Boggs* (1881) 19 W. Va. 240, *supra*, note 8.

ment, fix a subsequent specific time for the payment of the balance.<sup>13</sup>

Some courts thus announcing the doctrine first above stated have applied it to its fullest extent, and sustained an action on the written contract, upon the theory that, the subsequent oral modi-

fication being invalid, the written contract is unaffected.<sup>14</sup> But a majority of the cases in which this broad doctrine has been announced have been cases in which the action was upon the contract as modified.<sup>15</sup> The oral modification be-

<sup>13</sup> *Hawkins v. Studdard* (1909) 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 852. See *Giraud v. Richmond* (1846) 2 C. B. 835, 135 Eng. Reprint, 1172, 15 L. J. C. P. N. S. 180, 10 Jur. 360, note 17.

<sup>14</sup> *Willis v. Fields* (1909) 132 Ga. 242, '63 S. E. 828; *Pence v. Life* (1905) 104 Va. 518, 52 S. E. 259.

*Malkan v. Hemming* (1909) 82 Conn. 293, 73 Atl. 752, holding that the vendor in a land contract was entitled to judgment in an action for specific performance of the contract as originally written, if the vendees failed to prove the modification in writing. By the alleged modification the vendees were to convey a tract of land, instead of giving their note secured by a mortgage as was provided in the original writing.

*Burgett v. Loed* (1909) 43 Ind. App. 657, 88 N. E. 346, sustaining an action upon a lease as written and holding invalid an attempted oral modification.

*Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165, holding in an action by a vendee who had paid in full the purchase price for land, to recover damages for not conveying the land according to the terms of the written contract, that the defendant could not show an oral extension of the time of performance for the purpose of showing that he was not in default.

*Grand Forks Lumber Co. v. McClure Logging Co.* (1908) 103 Minn. 471, 115 N. W. 406, holding that parol evidence was inadmissible to prove that the terms of the contract for the sale of timber had been modified by parol. But see the cases from this jurisdiction, *infra*.

*Warren v. A. B. Mayer Mfg. Co.* (1900) 161 Mo. 112, 61 S. W. 644, holding inadmissible parol evidence in an action for breach of contract, to show that the manner of payment had been modified by parol and the plaintiff had not complied with the terms of the modified agreement.

*Eepv v. Anderson* (1850) 14 Pa. 308, holding that evidence of a subsequent parol agreement cannot be received to alter the terms of a written agreement for the sale of land, in an action of covenant by the vendor to recover a part of the purchase price.

*Hanson v. Gunderson* (1897) 95 Wis. 613, 70 N. W. 827, holding in an action by an employee against the members of a co-partnership who had contracted by a written agreement relating to the payment of the plaintiff's wages so as to make themselves jointly liable, that evidence of an oral agreement that the partners should be severally liable each for one half of the wages could not be introduced in evidence. L.R.A.1917B.

*Reid v. Diamond Plate Glass Co.* (1898) 29 C. C. A. 110, 54 U. S. App. 619, 85 Fed. 193, holding incompetent, evidence of a subsequent parol agreement changing the price at which glass was to be delivered and also the amount from that stipulated in a written contract, in an action by the vendor, who had performed according to the written agreement, to recover a balance due on the purchase price.

*In Adler v. Friedman* (1860) 16 Cal. 138, an action upon a promissory note, the defendant was not allowed to prove a parol agreement reducing the interest. It seems that the interest, even after reduction, was beyond the statutory rate, and under the California statute such a claim must be evidenced by writing, or it is invalid and unenforceable. The court states that the effect of the proof in this case would have been to establish a contract upon which the plaintiff could not recover, that no action could be maintained upon it, and no effect could be given to it as a modification of the terms of the original agreement.

A contract of employment of real estate brokers which by the statute is required to be in writing, and which states the amount of the commissions to be received by the brokers, cannot be modified by parol agreement to take property in payment of the commission. *Lincoln Realty Co. v. Garden City Land & Immigration Co.* (1913) 94 Neb. 346, 143 N. W. 230, Ann. Cas. 1914D, 392.

*In Thill v. Johnston* (1910) 60 Wash. 393, 111 Pac. 225, specific performance of a written agreement between the purchasers of property as to division of the property was granted, and the right to show that the contract had been abrogated by a new oral contract denied the defendant.

A parol agreement between lessee and lessor under which the lessee obtained additional space at an increased rental was held not to operate as a waiver, surrender, or cancellation of the prior written lease, in *Lamont v. United States Reduction Co.* (1915) 191 Ill. App. 446.

See *Seymour v. Hughes* (1907) 55 Misc. 248, 105 N. Y. Supp. 249, note 61; *Carpenter v. Galloway* (1881) 73 Ind. 418, note 15.

<sup>15</sup> *Augusta Southern R. Co. v. Smith & K. Co.* (1899) 106 Ga. 864, 33 S. E. 28; *Hill v. Blake* (1884) 97 N. Y. 216; *Heth v. Wooldridge* (1828) 6 Rand. (Va.) 605, 18 Am. Dec. 751.

*Malkan v. Hemming* (1909) 82 Conn. 293, 73 Atl. 752, holding that a vendor could not maintain an action for specific performance against his vendee upon a written contract for the sale of land as modified by parol.

ing invalid, it cannot, of course, form the basis of an action. It was contended

*Simonton v. Liverpool, L. & G. Ins. Co.* (1874) 51 Ga. 76, holding that an insured cannot maintain an action upon an insurance policy for the destruction of goods in a location other than that stipulated in the policy, upon the oral agreement of an agent of the company to change the policy so as to correspond with the new location.

*Bradley v. Harter* (1901) 156 Ind. 499, 60 N. E. 139, holding that no damages could be recovered of a vendor of real estate upon his oral agreement, subsequently made, to accept other real estate in payment of the purchase price, instead of money as provided in the writing. It was urged in this case that the subsequent oral agreement did not destroy, vary, or contradict the written contract, but simply provided for an additional mode of paying the purchase money for the real estate; that it did not even seek to change altogether the manner of its payment; that the written contract was left intact as to that as well as to its other provisions, and the purchase money could still be paid according to the terms of the written instrument. The court, however, held, as above stated, that the agreement in question amounted to an oral modification and was unenforceable.

*Napier Iron Works v. Caldwell & D. Iron Works* (1915) — Ind. App. —, 110 N. E. 714, holding that an action in damages for breach of a written contract for the sale of merchandise could not be maintained upon the written contract as modified by a subsequent oral agreement.

*Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433, holding that no action could be maintained upon a written contract for the sale of goods as modified by a parol agreement for the extension of time for the delivery of the goods.

*Brown v. Sanborn* (1875) 21 Minn. 402, holding that a vendor of straw of certain specifications could not show an oral modification of the specifications in an action against his vendee for refusal to accept.

*Rucker v. Harrington* (1893) 52 Mo. App. 481, holding that a vendor of real estate could not maintain an action for damages for breach of his written contract to give good title as modified by a subsequent oral agreement, upon discovery that he was unable to give good title, that there should be a deduction from the purchase price and a delivery of possession earlier than provided in the written contract, and the purchaser would waive the defect in the title and accept the title as it was.

*Ladd v. King* (1849) 1 R. L. 224, 51 Am. Dec. 624, holding in an action by a vendor who had not performed within the time stipulated in the written agreement, but who had performed within the time fixed by an oral extension, that parol evidence of the oral agreement was inadmissible.

*Beard v. A. A. Gooch & Son* (1910) 62 Tex. Civ. App. 69, 130 S. W. 1022, denying to a purchaser of wood from a tenant who had the right to sell wood from a part of L.R.A.1917B.

the land put in cultivation by him, the right to introduce testimony tending to show a subsequent parol agreement between the landlord and tenant by which the latter was authorized to sell the wood although he had not complied with the terms of the written contract, in an action by such purchaser against the landlord for the value of the wood which he alleged had been unlawfully converted by the landlord.

In *Carpenter v. Galloway* (1881) 73 Ind. 418, an action was brought upon a note given in part payment of a jack. In the contract of purchase the seller agreed to purchase all mules of the jack's getting during that season which complied with certain specifications. This agreement was claimed by the purchaser to have been orally modified by changing the specifications, and for refusal to accept the mules according to the modified agreement the purchaser set up a cross complaint and set-off asking damages for breach of the modified agreement. This relief was denied, the court stating that in case of a contract within the Statute of Frauds it cannot be subsequently modified so as to sustain an action upon the writing as qualified by the oral variation.

A vendee who has failed to make payments as provided in his contract for the purchase of land cannot maintain an action in damages for failure to convey, upon the written contract as modified by oral agreement extending the time of payment and making some new terms as to the manner of payment. *Cook v. Bell* (1869) 18 Mich. 387.

It is held in *Autem v. Mayer Coal Co.* (1916) 98 Kan. 379, 158 Pac. 13, that a vendor who has tendered a deed to his vendee for a less estate than that stipulated in the writing is not entitled to recover the purchase price, the court stating: "If we view the case as one in which the parties contracted in writing for one thing, and afterwards agreed orally upon another thing, we encounter the Statute of Frauds."

A real estate broker cannot recover for the sale of a part of an entire tract of land which he was authorized to sell, upon an oral contract modifying the written contract, authorizing him to make sale of the part thus sold. *Boyd v. Big Three Ranch Co.* (1913) 22 Cal. App. 108, 133 Pac. 623 (obiter).

A mortgage of several lots cannot be affected by a subsequent parol agreement that, upon the payment to the mortgagee of a stated sum for each lot he would release such lot from the mortgage, so as to furnish the basis of an action by a purchaser of such lot from the mortgagor to compel a discharge from the mortgage of the lot thus purchased. *Cooper v. Stevens* (1815) 1 Johns. Ch. (N. Y.) 425.

In *Hawkins v. Studdard* (1908) 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 852, it is held that an agreement for the sale of land the legal import of which is that the payment for the same was to be made

in one case<sup>16</sup> involving a sale of brick in payment of which the vendor was to receive two lots and the balance in cash, that upon an oral modification made after the delivery of part of the brick, that he was to receive one of the lots in question and the balance in cash for the brick then delivered, the original contract remained intact, and that a suit to enforce a conveyance of the lot and recover the balance of the purchase was a suit on the original contract, from which the vendor had merely waived or dropped out the provision as to the conveyance of the other lot. After stating that this is not true in fact, as the vendor claimed and recovered under the new oral agreement a larger money judgment than he would be entitled to under the original contract, the court continues: "It is very clear that the suit is not on the original contract, but upon a new contract made out by incorporating therewith certain oral stipulations varying its terms. If counsel means by 'dropped out' that some of the provisions of the original contract were 'cut off' or 'dropped out' by the subsequent oral agreement of the parties, the Statute of Frauds is still in the way,

for it makes no difference whether the modification consists in adding to or subtracting from the terms of a contract. In either case the terms are altered and the contract is a new one." The court further states that the facts alleged and found may show a good reason for the vendor not having performed, and may state a cause of action for damages for the breach of the contract by the defendant, or for compensation in money for the brick which the vendor delivered, "but they do not make out a case entitling him to specific performance. In other words he is not entitled to specific performance of the original contract, because he himself or his assignor has not performed, and he is not entitled to specific performance of the new one because it is void under the statute."

It is sufficient in the cases discussed in the last preceding paragraph, in which the action was based upon the modified contract, to hold merely that no action can be maintained on a contract resting partly in writing and partly in parol where the contract is one required by the statute to be in writing. Some cases of this kind announce this limited rule<sup>17</sup>

presently cannot be modified by a subsequent parol agreement fixing the time for payment.

In *Jarman v. Westbrook* (1910) 134 Ga. 19, 67 S. E. 403, the owner of land had written a letter to a prospective purchaser offering to sell for a stated price if accepted, and the deal closed within a stated time. Before the time limited the prospective purchaser verbally accepted the proposal and agreed to meet the owner of the land at a date later than that stipulated in the written proposal for the purpose of closing the trade. Upon the refusal of the owner to complete the transaction, an action was brought for the specific performance of the contract. In holding that the action could not be maintained, the court states that the parol agreement that the parties should meet on a day subsequent to the time limited in the written option, and there close the trade on terms different from those stated in the written option, does not entitle the plaintiff to specific performance. "The Statute of Frauds requires that a contract for the sale of an interest in lands shall be in writing, and any modification of a written contract required by law to be in writing must also be in writing in order to be valid."

It is not clear that there was a subsequent modification in *Randolph v. Frick* (1892) 50 Mo. App. 275, but the case is discussed as though there had been one, and it is stated that a contract within the Statute of Frauds cannot be modified by a subsequent oral agreement so as to be enforceable.

The plaintiff who brought the action for damages sought to excuse his nonperformance of the terms of the contract by the oral agreement.

The action in *Moore v. Collier* (1910) 133 Ga. 762, 66 S. E. 1080, was apparently for breach of the written contract as modified by parol, but no report of this case appears, and it is not clear that this was the fact.

<sup>16</sup> *Burns v. Fidelity Real Estate Co.* (1892) 52 Minn. 31, 53 N. W. 1017. And see *Bradley v. Harter* (1901) 156 Ind. 499, 60 N. E. 139, note 15.

<sup>17</sup> *BONICAMP v. STARBUCK*, ante, 141; *Price v. McDowell* (1915) — Okla. —, 153 Pac. 649; *Dana v. Hancock* (1858) 30 Vt. 616; *Goss v. Nugent* (1833) 5 Barn. & Ad. 58, 110 Eng. Reprint, 713, 2 Nev. & M. 28, 2 L. J. K. B. N. S. 127; *Harvey v. Grabham* (1836) 5 Ad. & El. 60, 111 Eng. Reprint, 1089, 2 H. & W. 146, 6 Nev. & M. 154, 5 L. J. K. B. N. S. 235. The court here treats the acts of the parties as an attempt at waiver of the written provision, but holds that a waiver by parol is not binding.

The rule is stated in *Emmet v. Dewhurst* (1851) 3 Macn. & G. 587, 42 Eng. Reprint, 386, 21 L. J. Ch. N. S. 497, 15 Jur. 1115, that an agreement within the Statute of Frauds "must be in writing, and any alteration of it must also be in writing." That case, however, relies upon *Goss v. Nugent* as authority for its statement. The rule is stated thus broadly in *Peters v. Hamilton* (1879) 19 N. B. 284, but reliance is placed upon the English cases.

A contract of hiring within the Statute



without stating the broad general proposition, that a contract required by the Statute of Frauds to be in writing cannot be modified by parol. Consequently, where an action at law is based upon the contract as modified by parol, the action must fail because the agreement is not all in writing.<sup>18</sup> It is stated in the early case of *Goss v. Nugent* that in such a situation "the written contract is not

that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement and partly by the new verbal agreement the . . . contract, therefore, is not a contract entirely in writing." This is true whether the modification consists of a part of the contract which is itself required to be in

of Frauds because not to be performed within a year, which is construed to require the salary thereby agreed to be paid at the end of every year, though not so expressly providing, cannot be modified by a subsequent oral agreement of the parties that the salary shall be paid quarterly, so as to entitle the servant to recover on the quarterly basis. *Giraud v. Richmond* (1846) 2 C. B. 835, 135 Eng. Reprint, 1172, 15 L. J. C. P. N. S. 180, 10 Jur. 360.

See *Hawks v. Studdard* (1908) 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 852, note 13.

Some of the English cases above referred to point out that the English Statute of Frauds does not require all contracts or agents concerning the sale of land to be in writing, but provides merely that no action shall be brought unless the contract is in writing.

In *Hoadly v. McLaine* (1834) 10 Bing. 485, 131 Eng. Reprint, 982, 4 Moore & S. 340, 3 L. J. C. P. N. S. 162, it is held that a carriage maker could recover the price of a carriage although a great number of alterations and additions were made from time to time from those stipulated in the written agreement. *Gaselee, J.*, states that "unless we establish as a general principle that every alteration introduced in the progress of an executory contract is to constitute a distinct bargain requiring a distinct note in writing, I am of opinion that there is no variance in this case, and that there has been a sufficient memorandum of the contract."

<sup>18</sup> *Goss v. Nugent* (1833) 5 Barn. & Ad. 58, 110 Eng. Reprint, 713, 2 Nev. & M. 28, 2 L. J. K. B. N. S. 127, holding that a vendor who had agreed to make good title to the lots which were the subject of the sale could not recover a balance on the purchase price where he was unable to make good title to one of the lots, although the purchaser agreed to waive the necessity of a good title as to this lot, and the vendor afterwards delivered possession of the whole of the lots to the purchaser, which he accepted, but refused to pay a balance due on the purchase money, and relied on the objection to the title.

*Price v. McDowell* (1915) — Okla. —, 153 Pac. 649, holding that a vendee of real estate who had made a cash payment on the contract could not, upon tendering performance according to the contract as modified by a subsequent oral agreement and re-

fusal of the vendor to accept such tender, recover the cash payment.

See *BONICAMP v. STARBUCK*, ante, 141.

A vendee cannot recover for breach of a written contract to convey real estate, where the written contract required a survey to be made by a named person, and the survey was made by another person who was substituted by oral agreement. *Dana v. Hancock* (1858) 30 Vt. 616.

A purchaser of goods to be delivered at a stated date who has orally agreed to extend the time for delivery cannot recover in assumpsit for damages for breach of the contract of his vendor to deliver upon the day agreed, by parol, where he declared upon the writing as modified by the parol agreement. *Stead v. Dawber* (1839) 10 Ad. & El. 57, 113 Eng. Reprint, 22, 2 Perry & D. 447, 9 L. J. Q. B. N. S. 101. See further discussion of this case, *infra*.

Upon the authority of *Stead v. Dawber*, it is held in *Marshall v. Lynn* (1840) 6 Mees. & W. 109, 151 Eng. Reprint, 342, 9 L. J. Exch. N. S. 126, that a written agreement under § 17 of the Statute of Frauds, for the sale of goods, to be sent by a ship on a certain voyage, cannot be modified subsequently by parol to the effect that the goods are to be sent by the ship on a subsequent voyage. The vendor was accordingly denied recovery for nonacceptance of the goods. Referring to the case of *Stead v. Dawber*, the court states that "it does not appear to proceed altogether upon the time being an essential part of the contract, but on the ground that the contract itself, whatever be its terms if it be such as the law recognizes as a contract, cannot be varied by parol."

See *Clark v. Fey* (1890) 121 N. Y. 470, 24 N. E. 703, *infra*, note 23.

An action of covenant on articles of agreement by which the plaintiff undertook to build certain houses for the defendant on or before a certain time, which alleges that the houses were finished on that time, is not sustained by proof of a parol agreement that the time might be extended, and that the whole work was finished before the expiration of the extended time. *Littler v. Holland* (1790) 3 T. R. 590, 100 Eng. Reprint, 749.

But in *Thresh v. Rake* (1793) 1 Esp. (Eng.) 55, a declaration in an action brought to recover a penalty for the breach of a special agreement to assign premises upon a consideration to be determined by a

writing,<sup>19</sup> or of a part which might have been good of itself without writing.<sup>20</sup>

This rule has been held to apply in equity in the absence of fraud,<sup>21</sup> and to prevent the court granting relief on a contract by way of specific performance in favor of one who has not complied with the conditions of the writing, but

fair appraisement made on a certain date, that the appraisement was made and performance generally had on the part of the plaintiff, was held supported, although the evidence showed that the appraisement had been delayed through the fault of the defendant and performance on the agreed day waived by his agents.

<sup>19</sup> *Goss v. Nugent* (Eng.) *supra*, the opinion, however, is not based upon the fact that an essential part of the contract was involved, but it is stated: "But our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing."

It is stated in *Marshall v. Lynn* (1840) 6 Mees. & W. 109, 151 Eng. Reprint, 342, 9 L. J. Exch. N. S. 126, that it is unnecessary to inquire what are the essential parts of the contract and what not, since every part of the contract in regard to which the parties are stipulating must be taken to be material.

<sup>20</sup> *Harvey v. Grabham* (1836) 5 Ad. & El. 61, 111 Eng. Reprint, 1089. In this case there had been an agreement to give a lease, the lessee to pay for straw, fodder, chaff, etc., that was on the premises at the beginning of the lease, the value thereof to be determined by arbitrators in the usual way. Subsequent to the agreement, the lessee entered upon possession of the premises and also of the straw, etc. It was subsequently proposed by the lessee that the value of the straw, etc., be determined by a stated individual, instead of the arbitrators, as provided in the agreement. This was assented to by the lessor, and the appraisement made by the individual agreed upon. The action was one to recover the value as appraised, the lessor stating that he was ready to grant the lease upon the terms agreed upon and upon the payment to him of the amount of the appraisal. The second count was *indebitatus assumpsit* for goods and chattels bargained and sold, under and by virtue of which the defendant had taken the same to his own use. In holding that there could be no recovery of the amount of the appraisal, the court states that "here that part might have been good of itself without writing by reason of the acceptance which is averred in the first count, though it may be otherwise as to the second count, which is for goods bargained and sold, not sold and delivered, and it is contended that as it was competent to the parties to have made two contracts in the first instance—one in

sought to excuse nonperformance by an oral variation.

In the case of *Cuff v. Penn*,<sup>22</sup> a case that has frequently been cited in support of the theory that the Statute of Frauds does not prevent the subsequent modification by parol of a written contract, a vendor at the request of the pur-

writing as to the lease; the other not in writing as to the straw, manure, etc.,—so it was competent to them afterwards by agreement not in writing to separate into two parts the subject-matters of the original agreement, and to substitute a new agreement not in writing as to the straw, manure, etc. We think that is not so, but that the agreement, being entire in the first instance, must so continue, and that it cannot be separated or altered otherwise than by writing. . . . It was attempted to be argued that the original agreement was performed, inasmuch as one person named by mutual consent might be considered as 'competent persons' respectively appointed by the parties, but we think that this construction cannot reasonably be put on the words of the agreement, neither has the plaintiff attempted so to treat it, for he has both in his first count and in his replication to the second plea expressly alleged a waiver of and substitution for, and not a compliance with, the original agreement."

But see *Stark v. Wilson* (1814) 3 Bibb (Ky.) 476, note 50; *Dana v. Hancock* (1858) 30 Vt. 616, note 18.

<sup>21</sup> *Emmet v. Dewhurst* (1851) 3 Macn. & G. 587, 42 Eng. Reprint, 386, 21 L. J. Ch. N. S. 497, 15 Jur. 1115, refusing specific performance to a creditor to compel a guarantor to execute a writing as agreed by him, where the creditor had not complied with the conditions of the writing within the time prescribed. The court states: "It is clear that at law such an agreement as this, namely, to pay the debt of another person, cannot be made, and cannot be varied, by parol, and in this court, unless there be fraud, the same rule prevails."

A written agreement for a lease cannot be subsequently modified by parol changing the time at which the term is to commence. *Jordan v. Sawkins* (1791) 1 Ves. Jr. 402, 30 Eng. Reprint, 407. The term of the lease was stipulated to be for twenty-one years to commence from April; by the modification it was sought to make the lease commence in June. The court states that if the second agreement had been that the lease should commence from June and continue not for twenty-one years absolutely, but for twenty-one years to determine in April, it would have been good, because that would have been no variation, but only waiving a part of the lease. The action was one to enforce specific performance of the agreement with the variations.

<sup>22</sup> (1813) 1 Maule & S. 21, 105 Eng. Reprint, 8.

chaser forbore to deliver goods for some time, but at length informed the purchaser that he had exceeded a reasonable time and requested him to name a time for delivery. Upon refusal of the purchaser to accept the goods an action of assumpsit was brought for nonacceptance. In the second count of the declaration the agreement extending the time for the delivery of the goods is set up and relied upon. Two distinct objections were taken by the defendant to the introduction of parol evidence,—one, that the case involved a written contract for the sale and purchase of goods, and could not be varied by parol; second, that if the subsequent parol agreement was to be considered not as varying the written contract, but as substituting a new one in its place, then it was void by the Statute of Frauds, there being neither a part acceptance nor a part payment under it. The court disposes of the second objection by stating that, by the express provision of the Statute of Frauds, it is only necessary, in order to make a contract for the sale of goods binding upon the parties, that there should be either a note or memorandum of the bargain in writing, or, if there be no writing, that there should be a part payment by way of earnest or a part acceptance of the goods. It is then stated that in the case there existed two indicia pointed out by the statute, namely, a contract for sale in writing and a part performance, so that not only the literal intention, but the spirit also of the statute, was satisfied. The court concludes: "The objection then does not found itself upon a noncompliance with the provisions of that statute, but is more properly this, that an agreement once made in writing cannot be varied by parol." In answering this objection, the court states that what has been done is only in performance of the original con-

tract; that the contract remained, consequently the modification does not violate this rule. It thus appears that the effect of the Statute of Frauds upon the subsequent parol modification of a contract required by the statute to be in writing was not considered in this case in the light in which it is now regarded as affecting contracts. But, whatever may have been the theory of *Cuff v. Penn*, it is clearly established by subsequent English cases that an oral modification of a written contract within the Statute of Frauds is unenforceable. Some of the English cases expressly state that *Cuff v. Penn* is overruled by the later cases.

Where the modification consists of an extension of the time for performance, the English cases at first followed the rule of *Goss v. Nugent*. Thus, it has been held that a creditor cannot compel specific performance by a guarantor of the debtor, of his agreement to execute a guaranty, where the creditor has not complied with the conditions of the agreement within the time prescribed.<sup>23</sup> Any oral agreement extending the time is ineffectual. So, a purchaser of a leasehold interest in land may recover an advance payment where the vendor defaulted in performance on the day stipulated in the writing, notwithstanding an oral agreement to extend time. Evidence of the oral agreement is held inadmissible.<sup>24</sup> A purchaser of goods who has orally extended the time for the delivery thereof cannot subsequently recover damages for nondelivery, where the oral extension amounts to the substitution of a new contract for the written one, the same in all respects as the written one except as to the delivery of the goods and payment therefor.<sup>25</sup> But it has been held in England that an action upon the written agreement for failure to accept goods, by a vendor who at the request of

<sup>23</sup> *Emmet v. Dewhurst* (Eng.) supra.

<sup>24</sup> *Stowell v. Robinson* (1837) 3 Bing. N. C. 928, 132 Eng. Reprint, 668.

At the day agreed upon neither of the parties was ready to carry the contract into effect, not only on account of objections that were taken to the title, which were then in a course of being removed, but also because the brokers had not completed their valuation at that time. Subsequently to the day agreed upon, both the parties were endeavoring to procure the license from the ground landlord for the assignment of the lease. Some objection being raised on this ground, the purchaser wrote the vendor that he considered the contract at an end, and demanded a return of the deposit. Within a few days after this let-  
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ter, and within what appears to the court to be a reasonable time for that purpose. the objection would have been met, "so that the question, as was before stated, is this, Can the day for the completion of the purchase of an interest in land inserted in a written contract be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? and we are of opinion that it cannot." The court states that this "is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds."

<sup>25</sup> *Stead v. Dawber* (1839) 10 Ad. & El.

the purchaser allowed delivery of the goods sold to stand over, cannot be defeated by showing the oral agreement.<sup>25</sup> The court states that the plaintiff is not attempting to enforce any verbal agreement, but is suing on the original agreement, which is in writing.

The distinction between *Stead v. Dawber*<sup>26</sup> and *Hickman v. Haynes*<sup>27</sup> is an elusive one, and rests more in the theory of the respective actions in these cases than in any difference in facts between them. The distinction as expressed by the court in *Hickman v. Haynes* is perhaps as logical a one as can be made, and is as follows: "In *Stead v. Dawber* there was a written agreement for the delivery of goods on a particular day and a subsequent verbal agreement for their delivery on a later specified day, and the court came to the conclusion that the parties intended to substitute the later verbal agreement for the previous written agreement; but in the case now before the court there was no fresh agreement at all for the delivery of the twenty-five tons, which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff in June of the last twenty-five tons of iron; and it should seem that in *Stead v. Dawber* the court would have been in favor of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another." In *Hickman v. Haynes*, the extension of time was granted at the request of the defendant purchaser, and the breach alleged in the action by the vendor was a refusal to accept the goods at the time agreed upon in the written contract. In a subsequent case, the court speaks of such a

situation, and states that "where the vendor, being ready to deliver within the agreed time, is shewn to have withheld his offer to deliver until after the agreed time, in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where, after the expiration of the agreed time and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. . . . In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged if he sued for nonacceptance of an offer to deliver after the agreed period to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shews that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim."<sup>28</sup>

But the English cases have gone farther than to hold merely that no action can be maintained on an agreement resting partly in writing and partly in parol. It has been expressly held that the written agreement is not rescinded by an oral one extending the time for the performance thereof, or modifying it in some other particular; consequently an

57, 113 Eng. Reprint, 22, 2 Perry & D. 447, 9 L. J. Q. B. N. S. 101.

See *Marshall v. Lynn* (1840) 6 Mees. & W. 109, 151 Eng. Reprint, 342, 9 L. J. Exch. N. S. 126, where there was what amounted to a substituted contract.

<sup>26</sup> *Hickman v. Haynes* (1875) L. R. 10 C. P. (Eng.) 598.

The court, after reviewing the English cases, concludes that "the result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiffs' demand, than to prevent the plaintiff from suing on the original contract for a breach of it."

every in answer to the plaintiffs' demand, than to prevent the plaintiff from suing on the original contract for a breach of it."

<sup>28</sup> *Plevins v. Downing* (1876) L. R. 1 C. P. (Eng.) 220, 45 L. J. C. P. N. S. 695, 35 L. T. N. S. 263. It was accordingly held in this case that a vendor who had failed to deliver the goods at the time stipulated in the writing could not recover damages for nonacceptance thereof upon the strength of a subsequent oral agreement. The court states that, in such a situation, the vendors are logically driven to rely upon the subsequent requests of the purchaser either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept; but as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced.

action may be maintained thereon.<sup>30</sup> See comment upon the English cases in the first paragraph of this subdivision.

In an action for specific performance in which the complainant admitted the subsequent modifications and asked to have specific performance of the modified agreement if the defendant so elected, or, if not, for specific performance of the original agreement, the complainant was held entitled to the relief asked.<sup>31</sup> But it has been held in England that variations in a written contract that have been acted upon, so that the original agreement can no longer be enforced without injury to one party, bar an action for specific performance of the original agreement.<sup>32</sup>

The rule that the Statute of Frauds

prevents the oral modification of a writing has been applied in case of a writing which is insufficient under the statute.<sup>33</sup> The courts have failed to discriminate between two entirely different things in this connection. It is one thing to supply an omission from a writing which, because of such omission, fails to comply with the requirements of the Statute of Frauds, and another thing to modify a contract that has been put in writing so as to comply with the statute. This is true although the part sought to be supplied to perfect the defective writing is that agreed upon subsequently. In other words, where the parties have entered into an agreement required by the Statute of Frauds to be in writing, and have failed to put sufficient of the

But in *Marshall v. Lynn* (Eng.) supra, a vendor who was seeking to recover in assumpsit for nonacceptance of goods sold alleged that he was ready and willing to deliver upon the time fixed in the writing, and tendered and offered to perform at that time, but, at the request of the purchaser, delayed performance according to an oral agreement. Recovery was denied in this case.

<sup>30</sup> *Noble v. Ward* (1866) L. R. 1 Exch. (Eng.) 117, 4 Hurlst & C. 149, 35 L. J. Exch. N. S. 81, 12 Jur. N. S. 167, 13 L. T. N. S. 639, 14 Week. Rep. 397, holding that a vendor of goods might maintain an action upon the written contract although there had been an oral agreement extending the time for the performance thereof. It is stated that the declaration was framed so as to fit either the written agreement or the oral agreement, and that the goods were tendered by the vendor to the purchaser in time for either of those contracts. The action was one for damages for nonacceptance. This case was affirmed upon appeal (1867) L.R.A. 2 Exch. 135, 36 L. J. Exch. N. S. 91, 15 L. T. N. S. 672, 15 Week. Rep. 520.

<sup>31</sup> *Vezey v. Rashleigh* [1904] 1 Ch. (Eng.) 834, 90 L. T. N. S. 663, 73 L. J. Ch. N. S. 422, 52 Week. Rep. 442, holding that an agreement to execute a lease cannot be subsequently varied by parol.

And a subsequent oral agreement that goods shipped by a certain vessel should be received by the purchaser from the warehouse, instead of the quay, as provided in the written agreement, is invalid, consequently, in an action by the purchaser against his vendor for failure to deliver, the sufficiency of the delivery cannot be in question where the only attempt at delivery was made from the warehouse. *Moore v. Campbell* (1854) 10 Exch. (Eng.) 323, 2 C. L. R. 1084, 23 L. J. Exch. N. S. 310. The court states that, if the purchaser had accepted and received the goods from the warehouse, or even the delivery or transfer order which was offered as a performance of the contract on the vendor's L.R.A.1917B.

part, there would have been a good answer to the action by way of accord and satisfaction, but, there being no such acceptance, no such question arises in the case. A broker who is held to have acted solely for the purchaser in the transaction requested the goods to be warehoused on the purchaser's account, and the refusal to accept the warehouse orders tendered by the vendor was based upon a discrepancy in the description therein of the amount of the goods.

<sup>32</sup> *Robinson v. Page* (1826) 3 Russ. Ch. 119, 38 Eng. Reprint, 519, 27 Revised Rep. 26.

<sup>33</sup> *Legal v. Miller* (1750) 2 Ves. Sr. 299, 28 Eng. Reprint, 193; *Price v. Dyer* (1810) 17 Ves. Jr. 363, 34 Eng. Reprint, 137, 11 Revised Rep. 102.

<sup>34</sup> *Arky v. F. W. Brockman Commission Co.* (1914) 185 Mo. App. 241, 170 S. W. 353, after stating that the memorandum was insufficient to satisfy the Statute of Frauds, the court continues: "But, as we have said, plaintiff's case proceeds upon the theory of a subsequent oral agreement modifying the prior one evidenced by the memorandum." The court, referring to *Rucker v. Harrington* (1893) 52 Mo. App. 481, states that it is well settled in this state at least that a contract which the Statute of Frauds requires to be in writing may not be modified or varied by a subsequent oral agreement. It was accordingly held in the case that a memorandum for the sale of goods which was insufficient under the Statute of Frauds could not be modified by a subsequent agreement as to the terms of payment.

See *BONICAMP v. STARBUCK*, ante, 141.

In *Whiteaker v. Vanschoiack* (1873) 5 Or. 113, the court refused specific performance of an agreement for the exchange of land where the original written agreement contained an insufficient description of land, and the subsequent oral agreement introduced new terms into the contract and added to and perfected the description of the land. There were other objections, however, to the specific enforcement of the contract in this case.

agreement in writing to comply with the statute, there is no enforceable contract. Any subsequent oral modification the parties agree upon is ineffective because there is no enforceable contract to be modified. It seems unnecessary, therefore, to consider the subsequent agreement, because, it being admitted that the oral agreement is merely supplementary, and there being no enforceable agreement to be supplemented, the oral agreement must necessarily be of no effect.

## 2. *Application as dependent upon character of modification.*

In a large number of cases the character of the modification is not considered; the rule is applied without reference thereto. It has seemed advisable to show in a general way the character of modifications to which the rule has been applied. No attempt has been made, however, to make this treatment exhaustive of the cases which have not made a point of the character of the modification. The rule has been applied and held to prevent: An oral reduction in the rate of interest on a promissory note where such a claim must be evidenced by writing;<sup>34</sup> an oral modification of the provision in an insurance policy as to the location of insured goods;<sup>35</sup> an oral modification of the time for payment of premiums on a life insurance policy;<sup>36</sup> an oral modification of a logging contract as to the timber included therein;<sup>37</sup> an oral extension of the time for the performance of a writ-

ten agreement;<sup>38</sup> an oral modification of the terms of a written contract for the sale of chattels as to the chattels to be delivered thereunder;<sup>39</sup> an oral modification of the specifications of mules which were the subject of sale,<sup>40</sup> or the specification of straw;<sup>41</sup> an oral agreement that a lease for saloon purposes should not be enforced if lessee failed to obtain the necessary license to carry on the saloon business;<sup>42</sup> an oral modification of a written lease by the terms of which the lessee was allowed to sell or dispose of any wood or timber standing upon any part of the premises which he put in cultivation, so that the lessee could sell the wood although he had not complied with the terms of the written agreement;<sup>43</sup> an oral modification of the manner of making payment for goods purchased;<sup>44</sup> an oral agreement between vendor and vendees that payment was to be made in land instead of note and mortgage as provided in writing,<sup>45</sup> or instead of money;<sup>46</sup> an oral modification, upon discovery that vendor could not give good title, to deduct a certain sum from the purchase price and accept the title as it was found.<sup>47</sup>

In some jurisdictions the validity of the subsequent oral modification is dependent upon the character thereof. It has been held that a mere oral extension of time for performance is valid,<sup>48</sup> but if the subsequent oral agreement involves more than a mere extension of time it is not.<sup>49</sup>

So, where the vendor's title to part of

<sup>34</sup> *Adler v. Friedman* (1860) 16 Cal. 138.

<sup>35</sup> *Simonton v. Liverpool, L. & G. Ins. Co.* (1874) 51 Ga. 76.

<sup>36</sup> *Mitchell v. Universal L. Ins. Co.* (1875) 54 Ga. 289.

<sup>37</sup> *Grand Forks Lumber Co. v. McClure Logging Co.* (1908) 103 Minn. 471, 115 N. W. 406.

<sup>38</sup> *Hawkins v. Studdard* (1908) 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 852 (time implied by law); *Napier Iron Works v. Caldwell & D. Iron Works* (1916) — Ind. App. —, 110 N. E. 714; *Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433; *Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165; *Cook v. Bell* (1809) 18 Mich. 387. See *Jarman v. Westbrook* (1910) 134 Ga. 19, 67 S. E. 403, *infra*; *Ladd v. King* (1849) 1 R. I. 224, 51 Am. Dec. 624. But see subdivision V. as to the validity of a subsequent agreement extending time.

<sup>39</sup> *Willis v. Fields* (1908) 132 Ga. 242, 63 S. E. 828.

<sup>40</sup> *Carpenter v. Galloway* (1881) 73 Ind. 418, *see infra*.

<sup>41</sup> A provision in a contract for the purchase of flax straw, that the straw "be delivered in a dry condition and free from L.R.A.1917B.

grass, weeds, and all foreign substances, cannot be modified by parol by waiving the condition or provision that the straw must be free from weeds, and agreeing to receive the same under the contract notwithstanding its weedy condition. *Brown v. Sanborn* (1875) 21 Minn. 402.

<sup>42</sup> *Burgett v. Loeb* (1908) 43 Ind. App. 667, 88 N. E. 346.

<sup>43</sup> *Beard v. A. A. Gooch & Son* (1910) 62 Tex. Civ. App. 69, 130 S. W. 1022.

<sup>44</sup> *Warren v. A. B. Mayer Mfg. Co.* (1900) 161 Mo. 112, 61 S. W. 644.

<sup>45</sup> *Malkan v. Hemming* (1909) 82 Conn. 293, 73 Atl. 752.

<sup>46</sup> *Bradley v. Harter* (1900) 156 Ind. 499, 60 N. E. 139.

<sup>47</sup> *Rucker v. Harrington* (1892) 52 Mo. App. 481.

<sup>48</sup> See *infra*, subdiv. V. But see *Welch v. McIntosh* (1913) 89 Kan. 47, 130 Pac. 641, *infra*, note 83, and *Autem v. Mayer Coal Co.* (1916) — Kan. —, 158 Pac. 13, note 15.

<sup>49</sup> *Banister v. Fallis* (1911) 85 Kan. 320, 116 Pac. 822. It is stated that the agreement produced a new condition which not only became essential to any conveyance at all, but which was regarded and is still re-

the land had failed, and it was agreed that appraisers should value that part, and the parties orally substituted other appraisers, who valued the land to the mutual satisfaction of both parties, whereupon the purchaser took possession and has held possession since, and the vendor paid the balance which fell due the purchaser according to the valuation thus made, the objection of the Statute of Frauds was held not available to the vendor;<sup>50</sup> the court stating that "it cannot, however, be admitted that the agreement comes within the statute. It is in writing and signed by the parties, and, though the parties thereto by subsequent parol agreement substituted other valuers to ascertain the value of the land, that arrangement cannot affect the right of [the purchaser] to a conveyance of the land agreed to be conveyed by the written agreement. The subsequent parol agree-

ment did not alter the rights of the parties under the written contract, but only related to and regulated the manner of ascertaining the value of the land. We are of opinion, therefore, the agreement does not come within the statute." Specific performance was accordingly allowed the vendee to compel the conveyance by the vendor according to the agreement.

In other cases in which the oral modification is held invalid, it is pointed out that the modification involved was of an essential particular of the contract.<sup>51</sup> If the oral modification is as to a matter which is not required by the statute to be in writing, it has been held good.<sup>52</sup> The court in a case involving a sale of timber reasons thus: "While the sale of timber was necessarily reduced to writing, and the parties incorporated into the writing other subsidiary or incidental agreements, yet the force of the

established by the plaintiff as indispensable to the vesting of title in him. Under these circumstances the oral agreement constituted a modification of a written contract for the sale of land, and was itself an agreement for the sale and conveyance of an interest in land, and hence was unenforceable because not in writing.

See *Barton v. Gray* (1865) 57 Mich. 622, 24 N. W. 638, note 114; *McConathy v. Latham* (1903) 116 Ky. 735, 76 S. W. 535, note 120.

<sup>50</sup> *Stark v. Wilson* (1814) 3 Bibb (Ky.) 476.

<sup>51</sup> *Heisley v. Swanstrom* (1889) 40 Minn. 196, 41 N. W. 1029, holding that a stipulation in a contract for the sale of land that if the title of the vendor is not good, and cannot be made good, the agreement shall be void, and the vendor shall not be liable for any damage except to return the cash payment made, cannot be orally modified by an agreement of the vendor that if the vendee would wait, and not buy other land, the vendor would deliver the land in question, and, if he failed to do so, would pay all damages, so as to entitle the vendee to damages.

*Ibid.* The rights of third parties intervened in this case. Apparently the oral agreement was made after the time for the delivery of the deed in the original contract had expired, but no point is made of this beyond the mere statement of the fact.

But see *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34, *infra*.

It is stated in the case that it is "undoubtedly competent for the parties to waive a forfeiture or strict performance as to time, and to consent to performance of the contract in a modified form, so that such substituted performance should stand as a fulfillment of the same by virtue of the acts of the parties . . . but the supplemental contract relied on in this case to es-

tablish a valid legal claim for damages subsisting against [the vendor] in favor of [the vendee] . . . was a modification of the original contract in an essential particular by substituting a new and independent stipulation therein." *Heisley v. Swanstrom* (Minn.) *supra*. It has been expressly held in this jurisdiction that an oral extension of time does not become a part of the contract. See *Scheerschmidt v. Smith* (Minn.) *infra*.

*Hanson v. Gunderson* (1897) 95 Wis. 613, 70 N. W. 827, holding that a written contract relating to the payment of an employee's wages which by implication of law was joint in its obligation, and not several, could not be modified by a subsequent oral agreement to the effect that each of the partners should pay one half the wages. The court states that "this change would affect the contract in an essential particular, in which, by its terms, it was not to be performed within a year. An oral agreement covering that particular is void by the express terms of the statute."

<sup>52</sup> *Murray v. Boyd* (915) 165 Ky. 625, 177 S. W. 468, holding that the provision in a written agreement for the sale of timber that it shall be branded within a certain time may be waived by parol.

*Rank v. Garvey* (1902) 66 Neb. 767, 92 N. W. 1026, 99 N. W. 666, holding that the written authority required by a statute to authorize a real estate broker to sell land might be modified by parol as to the price of the land, since the price at which the agent is authorized to sell is not required to be contained in the writing. This case is approved in *Furse v. Lambert* (1910) 85 Neb. 739, 124 N. W. 146, a case involving the modification of the price in a written authorization for the sale of real estate. The rule of these cases was extended in *Hetzel v. Lyon* (1910) 87 Neb. 261, 126 N. W. 997, to authorize a parol extension

contract of sale was not affected by the other conditions, and a subsequent parol agreement with reference to them cannot properly be said to be within the Statute of Frauds. To illustrate, if one by written contract sells a certain boundary of land, and the contract provides for a subsequent survey to ascertain the boundary before payment is required, a subsequent parol agreement for the sale of more land would be within the Statute of Frauds and, therefore, not enforceable. But if the subsequent agreement merely postponed the time of payment, or waived or rescinded the agreement for survey, there is no reason why that character of agreement would not be binding; since the Statute of Frauds

does not require agreements in relation to such subjects to be in writing. If the parol modification would otherwise be enforceable, its validity is not affected although it is incident to a written contract which concerns a subject that the law requires shall be in writing."<sup>53</sup>

On the contrary the law has been declared "to be well settled that an oral variation of the written contract within the Statute of Frauds, though made in respect of a particular which might, if standing alone, be good by parol, cannot be available as a part of the contract, so long as the whole contract embracing that which is required to be in writing as well as that which is not remains exec-

of the time for the performance of a real estate broker's contract which contained a limitation of the time of its continuance, the court stating that the statute does not require that the time for the existence of the agent's authority to sell be stated in the written contract, and therefore that one of the provisions that may be modified by parol. The commission of the broker cannot be changed by parol, see *Lincoln Realty Co. v. Garden City Land & Immigration Co.* (1913) 94 Neb. 346, 143 N. W. 230, Ann. Cas. 1914D, 392, *infra*, note 61.

In *Sizemore v. Bowling* (1909) — Ky. —, 115 S. W. 737, a vendor and purchaser, upon discovery of the purchaser that he was unable to take and pay for all the land covered by the purchase, agreed orally that he should take a part of the land and pay for the same a sum then agreed upon. He had gone into possession under the written agreement, and after the new agreement remained in possession of the part of the land retained under and by virtue of his entry under the written contract. In an action by the vendor to recover a balance due on the purchase price and have it adjudged a lien on the land, the purchaser pleaded the Statute of Frauds, on the theory, however, that the written contract had been canceled, and that a new contract had been entered into for the purchase of a part of the land. The court denied this contention, holding that it was a modification, and, having so held, sustained the action for the purchase price without much discussion of the effect of the Statute of Frauds upon the right to thus modify the contract. It is stated, however, that "the contract under which Sizemore [the purchaser] holds the land is the written contract . . . as modified by the verbal agreement. . . . This being so, the contract of 1884 [the verbal one] was not within the Statute of Frauds."

A parol agreement between the parties to an oil lease, reducing the amount of the royalty to the lessor upon discovery that the land did not produce oil sufficient to pay for operating the same at the royalty L.R.A.1917B.

prescribed in the lease, in pursuance of which verbal agreement the lessee drilled, equipped, and put in operation additional wells at a considerable expense, and tendered the landowner the royalty agreed upon in the oral agreement, was sustained in *Nonamaker v. Amos* (1905) 73 Ohio St. 163, 4 L.R.A.(N.S.) 980, 112 Am. St. Rep. 708, 76 N. E. 949, 4 Ann. Cas. 170. The court concludes that when the parties entered into the parol contract they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease. The apparent theory of the court is that the parol contract was not within the Statute of Frauds, as it is held it did not relate to an interest in or concerning land, nor was it within the Statute of Frauds on the theory that it was not to be performed within a year, since on its face it was susceptible of being performed within the year. The court also rests the decision in part upon the fact that the lessee had fully performed his part of the contract; and it is stated that the lessor cannot repudiate the contract as invalid and defeat the rights of the lessee. The action was one by the lessor to enforce specific performance of the original written lease; and the court states that courts of equity do not always grant specific performance of contracts, and they will not do so where it would work manifest injustice to adverse parties.

In one case it is stated that if an agreement required to be in writing under the Statute of Frauds is modified by a subsequent oral agreement which does not in itself constitute a contract within the Statute of Frauds, the modification is valid and binding upon the parties. *Stamey v. Hemple* (1910) 97 C. C. A. 379, 173 Fed. 61. In accord with this general statement it was held in this case that an oral agreement extending the time for the performance of an option is valid.

<sup>53</sup> *Murray v. Boyd* (1915) 165 Ky. 625, 177 S. W. 468.



utory.”<sup>54</sup> It was accordingly held in this case that an oral extension of the time of payment of rent under a lease became no part of the contract so as to bind the party, but that the lessor could not declare the contract forfeited for nonpayment, as he had a right to do under the terms of the writing, until the lessee had a reasonable time thereafter in which to make payment, because the failure to pay on due day was caused by the defendant's own conduct. The English cases proceed upon the theory that, when the terms of the agreement have been reduced to writing, it cannot be modified by parol even in respect to a matter which was not required to be in writing.<sup>55</sup>

In one case,<sup>56</sup> the court concludes that all of the terms of the agreement (except possibly the consideration) are required to be in writing; consequently there can be no modification by subsequent oral agreement on the theory that since, in the first instance, it was not necessary that all the agreement should have been in writing, a modification of

such parts as were not so required to be in writing might be had without violating the statute.

It is the theory of some cases that a substitution of other subject-matter creates a new contract, and is not a modification of the old one. In one case involving a sale of iron rails to be shipped “from the other side” at a certain time, a parol modification dispensing with the tender of the contract rails and permitting the carrying and offer of any rails shipped from the other side irrespective of the date of shipment is held to substitute for the sale of the contract iron a new sale of different iron which never before had been the subject of a contract; such new contract being by parol, it is void under the Statute of Frauds.<sup>57</sup>

### 3. Action taken on oral agreement.

It appears in many of the cases discussed in the preceding subdivision that at least one of the parties had acted upon the oral agreement.<sup>58</sup> No point is made of this fact, however, the general

<sup>54</sup> *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34. It was held that the lessee had a right to take the lessor at his word, and consider his contract at an end after it had been declared forfeited by the lessor although without right. Accordingly, he could maintain an action in damages for breach of the agreement.

In *Ladd v. King* (1849) 1 R. I. 224, 51 Am. Dec. 624, an action upon an agreement for the sale of a house and lot in which the vendor agreed to complete the house upon the lot by a certain time, it was urged that the agreement was divisible into two parts, namely, the sale of the land and the finishing of the house; the first was in the Statute of Frauds, and the second not. The court, however, denied this contention, stating that the purchase was of the entire estate, house and lot, and was to be protected at the same time. It is further stated that the true interpretation of the contract is that the sale was to be completed by the stated time; in other words, that the vendor agreed to convey to the purchaser the house and lot complete on or before that date.

<sup>55</sup> See *supra*, notes 23 et seq.

<sup>56</sup> *Rucker v. Harrington* (1892) 52 Mo. App. 481.

<sup>57</sup> *Clark v. Fey* (1890) 121 N. Y. 470, 24 N. E. 703, it is the theory of the New York cases that a sale of goods to be shipped at a stated time makes the date of the shipment a material element in the identification of the property. It is stated that the contract is not for the sale of the goods generally, but for the sale of goods that are to be shipped during the stated period, and, unless such are tendered, the contract is not performed.  
L.R.A.1917B.

See *Marshall v. Lynn* (1840) 6 Mees & W. 109, 151 Eng. Reprint, 342, 9 L. J. Exch. N. S. 126, *supra*, note 18.

<sup>58</sup> In *Carpenter v. Galloway* (1881) 73 Ind. 418, the vendor of mules, having certain specifications, which it was claimed were modified by parol, tendered mules conforming to the modified specifications to the vendee.

The vendee in *Jarman v. Westbrook* (1909) 134 Ga. 19, 67 S. E. 403, had made several trips in his attempt to close up the deal involved in that case, and, in his action for damages, asked for \$250 for traveling expenses incurred.

In *Bradley v. Harter* (1900) 156 Ind. 499, 60 N. E. 139, a case involving a scheme for the sale of lots in which the vendees were to sell the lots and the vendor to convey to the persons thus obtained, an oral agreement was claimed to the effect that the vendor would accept payment in other land instead of money. The vendees claimed to have obtained a number of other purchasers who were willing to pay for the lots in land.

*Christian v. Highlands* (1903) 32 Ind. App. 104, 69 N. E. 266, holding that the relation of trust under which one who held the title for the purpose of paying the debts of the grantor could not be changed into a mortgage to secure or indemnify the holder of the legal title upon his contract of suretyship for the owner, to be entered into in the future, although it appears that the holder of the legal title assumed the obligations of suretyship upon the strength of the oral agreement.

In *Ladd v. King* (R. I.) *supra*, parol evidence showing a subsequent agreement to extend the time of performance in favor of

rule being applied without reference thereto. This rule has been applied in cases involving an extension of time where the party against whom the statute is invoked performed within the time of the oral extension but not within the time fixed in the writing.<sup>60</sup> Other cases, however, consider the fact that the oral agreement has been acted upon. It has been stated in an action on a contract with the United States government to deliver army cloth, in which, after obtaining an extension of time, the vendor purchased a large part of the cloth necessary to fulfil the contract and tendered it to the government, that, so long as the parol agreement extending the time was executory, it imposed no binding obligation upon the government; that, when the extension was made, the contractor should have had the arrangement reduced to writing as required by the statute, or should have stood upon the contract and assumed the liabilities

which had been imposed; attempting to perform amid the circumstances then existing involved new risks; and those new risks would rest upon him until, in a legal manner, they were assumed by the government;<sup>61</sup> that assumption of the risk would have happened if the government had accepted the goods, or if it had entered into a new contract in a manner prescribed by the statute; neither of these events happening, the risk remained with the contractor.

Other cases limit the doctrine to executory modifications.<sup>62</sup> Even in cases that so limit the rule, it is not every action that will render the oral modification good. This question receives further consideration in subdivision IV., *infra*.

### *III. Rule that oral modification of a matter relating to the performance is valid.*

It has been held in some jurisdictions

a vendor who had agreed to finish a cottage on the land sold by a stated time was held inadmissible although the vendor alleged that, relying on the agreement, he proceeded to finish the cottage and did finish it by the time agreed upon by parol, and then and there tendered a conveyance of the lot with proper deed to the purchaser.

*Hanson v. Gunderson* (1897) 95 Wis. 613, 70 N. W. 827, holding invalid a subsequent oral modification of a written agreement by which copartners assumed a joint liability that each should be liable severally for one-half the amount of the obligation, notwithstanding one of the partners paid the amount thus due from him according to the oral agreement.

In one case a lessee was to pay the lessor for certain straw on the premises to be valued by a named person. The lessee subsequently proposed another person as valuer, and this was agreed to by lessor and the valuation made by the person thus proposed. But it was held that the lessor could not recover this valuation. *Harvey v. Grabham* (1836) 5 Ad. & El. 61, 111 Eng. Reprint, 1089, 2 H. & W. 146, 6 Nev. & M. 154, 5 L. J. K. B. N. S. 235, see *supra*.

See *Espy v. Anderson* (1850) 14 Pa. 308, *supra*, note 14, where the vendee had taken possession of the land under the oral agreement.

*Hicks v. Alyswoth* (1881) 13 R. I. 562, note 119. See *Boyd v. Big Three Ranch Co.* *supra*, note 15. Special attention is called to *Moore v. Campbell* (1854) 10 Exch. (Eng.) 326, 23 L. J. Exch. N. S. 310, *supra*, note 30.

<sup>60</sup> *Hawkins v. Studdard* (1908) 132 Ga. 265, 131 Am. St. Rep. 100, 63 S. E. 852; *Cook v. Bell* (1869) 18 Mich. 387.

In *Napier Iron Works v. Caldwell & D. Iron Works* (1915) — Ind. App. —, 110 N. E. 714, the vendor, who claimed the oral L.R.A.1917B.

modification, had delivered part of the iron after the time specified in the written agreement.

In *Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165, a vendor who was sued for failure to convey property sought to show that there had been no default or none which had not been waived by subsequent oral agreement; but this was denied on the theory that the time for the performance could not be extended.

<sup>61</sup> *Knott, J.*, in *Jones v. United States* (1875) 11 Ct. Cl. (Fed.) 733. That acceptance would have imposed an obligation on the government, see *Salomon v. United States* (1873) 19 Wall. (U. S.) 17, 22 L. ed. 46.

<sup>62</sup> *Lincoln Realty Co. v. Garden City Land & Immigration Co.* (1913) 94 Neb. 346, 143 N. W. 230, Ann. Cas. 1914D, 392; *Kingsley v. Kressly* (1911) 60 Or. 167, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746; *Swain v. Seamens* (1869) 9 Wall. (U. S.) 254, 19 L. ed. 554.

*Banister v. Fallis* (1911) 85 Kan. 320, 116 Pac. 822, holding unenforceable an oral modification of an agreement for the sale of real estate, upon discovery of a supposed defect in title that the deeds should not be delivered until the defect was cured.

In *Seymour v. Hughes* (1907) 65 Misc. 248, 105 N. Y. Supp. 249, an oral agreement between landlord and tenant under a lease giving the landlord the option to terminate the tenancy at any time by a certain notice, modifying this lease so as to entitle the tenants to remain in possession of the premises until the expiration thereof at a different rent which was paid by the tenant for several months following the agreement, was held invalid where the unexpired term of the original lease at the time of the agreement was more than a year. The landlord was accordingly held

that modification of certain terms of the contract relating to the performance thereof may be made by parol. The manner of making payment may be modified by parol.<sup>62</sup> The time for performance may be enlarged.<sup>63</sup> But in one case which makes this distinction, the contract is not treated as binding; for, although the extension was for a definite time, the party granting it is held authorized to repudiate it; but it is held in the case which involved a lease that it cannot be repudiated and a forfeiture declared until a reasonable notice of his intention to do so has been given.<sup>64</sup> A conveyance to a person subsequently agreed upon by the vendor and vendee relieves the vendor from an action for breach of his contract.<sup>65</sup> These cases proceed upon the theory that the Stat-

ute of Frauds does not undertake to regulate the performance of a contract.<sup>66</sup> One court argues that "the statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance, that is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts." The court refers to the case of *Stowell v. Robinson* (1837) 3 Bing. N. C. 928, 132 Eng. Reprint, 668, 5 Scott, 196, 3 Hodges, 197, 6 L. J. C. P. N. S. 326, and states that it "was decided on a mistaken construction and application of the Statute of Frauds, and that

entitled to terminate the tenancy according to the writing.

The Georgia cases limit the rule to situations in which its enforcement would not work a fraud, or in which there is no part performance. See Georgia case cited in note 12 and discussion in IV. 1, *infra*.

See *Scheerschmidt v. Smith*, *supra*, note 54.

<sup>62</sup> *Low v. Treadwell* (1835) 12 Me. 441, holding that an agreement for the sale of land payable in brick might be modified so as to make delivery of the brick to a creditor of the vendor a payment. The bricks in this case had been delivered to the creditor of the vendor, and the purchaser was seeking specific performance of the contract to convey as provided in the writing.

The provision in a written contract for the sale of goods that the sale is made on credit may be modified by a subsequent oral agreement requiring the purchaser to give a promissory note in payment or to make payment in cash at a discount. *Cummings v. Arnold* (1842) 3 Met. (Mass.) 486, 37 Am. Dec. 155.

It is stated *obiter* in *Lerned v. Wannemacher* (1864) 9 Allen (Mass.) 412, an action upon a contract for the sale of coal in which the purchasers agreed to send vessels for the same, that an agreement that, if the vessels were not sent, the coal should be shipped immediately, would be good even if made only by parol.

See *Welch v. McIntosh* (1913) 89 Kan. 47, 130 Pac. 641, *infra*, note 83.

<sup>63</sup> *Stearns v. Hall* (1851) 9 Cush. (Mass.) 31.

*Hurlburt v. Fitzpatrick* (1900) 176 Mass. 287, 57 N. E. 464, holding that a subsequent oral modification extending the time for the performance of a contract for the purchase and sale of real estate is not within the Statute of Frauds, in an action by the vendor to recover a cash payment from one with whom it had been deposited to pay over to the vendor in case the vendees failed to perform.

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<sup>64</sup> *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34.

<sup>65</sup> *Long v. Hatwell* (1870) 34 N. J. L. 116; *Moore v. McAllister* (1857) 34 Miss. 500.

<sup>66</sup> *Cummings v. Arnold* (1842) 3 Met. (Mass.) 486, 37 Am. Dec. 155; *Stearns v. Hall* (Mass.) *supra*. See *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34, *infra*, note 125.

In *Low v. Treadwell* (Me.) *supra*, it is stated that the plaintiff, who was seeking a specific performance of the contract to convey, was seeking the performance of a written agreement, and he proved that he has so performed the condition precedent on his part as to be entitled to relief, and that whether the time be the essence of his contract or not it has been waived. Again, after referring to an English decision, to the effect that an agreement to waive a contract for the purchase of land is as much agreement concerning land as the original contract is, and therefore must be in writing, the court states that, without expressing any opinion upon that point, "it is a sufficient answer that the waiver here, if any there was, did not relate to the purchase of lands but to the time of delivery of a quantity of bricks; those bricks indeed formed a consideration of the purchase, but the payment of the consideration may be proved by parol."

The court in *Low v. Treadwell* (Me.) *supra*, in sustaining a subsequent parol agreement between vendor and vendee that the vendee was to deliver the property given in payment of the land to a creditor of his, cites from *Chitty on Contract*, 27, to the effect that a subsequent parol agreement not contradicting the terms of the original contract, but merely in continuance thereof, and in dispensation of the performance of its terms as in prolongation of the term of execution, is good, even in the case of a contract to reduce into writing under the Statute of Frauds.

the distinction between the contract of sale which is required to be in writing and its subsequent performance as to which the statute is silent was overlooked or not sufficiently considered by the court, otherwise the decision perhaps might have been different."<sup>67</sup>

It is accordingly held in these cases that one who has performed according to the substituted agreement may specifically enforce the agreement of the other,<sup>68</sup> or maintain an action thereon,<sup>69</sup> or he may set up the oral agreement in defense of an action for breach of the written agreement, where he has performed<sup>70</sup> or offered to perform<sup>71</sup> according to the oral agreement, but such tender has been refused. The doctrine is not confined to executed contracts. In fact the leading case on this theory involved an executory contract.<sup>72</sup> So far as the oral agreement has been executed by one of the parties, the result is not distinguishable from that in the cases discussed in IV., *infra*.

The theory of the cases is that the action is upon the written contract whether a party who has performed according to the oral agreement is seeking to compel the other party to perform his agreement according to the writing, or whether the action is against the party whose obligation has been modified by parol. In each instance the oral agreement is treated as defensive matter to be shown in answer to the claim that the party whose obligation has thus been modified had not performed his agreement according to the writing. In other words, the writing is held to exist for

the purposes of the action, notwithstanding the oral modification. It is not invalidated by the oral modification.<sup>73</sup> It has been stated that "this distinction avoids the difficulty suggested in some of the cases cited, where it is said that, to allow a party to sue partly on a written and partly on a verbal agreement would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment."<sup>74</sup>

The earlier Massachusetts cases have been construed in a subsequent case<sup>75</sup> as holding that "the action can be maintained only upon the written contract; because to allow a party to sue partly on a written and partly on an oral agreement would be in direct contravention of the statute."

If the party whose obligation has been modified by parol does not perform that obligation, nor the one imposed upon him by the writing, nor offer to do so, he, of course, has no defense to an action for breach of the contract.<sup>76</sup>

Without deciding the general question whether the parties to a written contract may or may not modify the various terms by a subsequent verbal agreement, it is held in this jurisdiction that a verbal modification cannot be admitted as a ground for specific performance.<sup>76a</sup>

<sup>67</sup> *Cummings v. Arnold* (Mass.) supra.

<sup>68</sup> *Low v. Treadwell* (Me.) supra.

<sup>69</sup> *Stearns v. Hall* (1851) (Mass.) supra, holding that one who had accepted an option within the time for which the same had been extended by oral agreement could maintain an action of assumpsit against the defendant for failure to comply with his agreement. The land which was the subject matter of the contract was previously conveyed by the plaintiff to the defendant apparently for the purpose of securing certain advances, the defendant agreeing to reconvey by a stated date if the plaintiff would pay what it had cost the defendant and his charges. This contract was extended by oral agreement, and within the time of the extended oral agreement the plaintiff had accepted. The plaintiff had sold the property, and the action in assumpsit was apparently brought to recover the difference between the selling price and what he was to pay the defendant.

See *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34, *infra*, note 125.

<sup>70</sup> No action can be maintained for the L.R.A.1917B.

breach of a contract for the sale of real estate, where the vendor defendant has conveyed the land to the vendee's wife as agreed upon by the parties. *Long v. Hartwell* (N. J.) supra.

<sup>71</sup> *Cummings v. Arnold* (1842) 3 Met. (Mass.) 486, 37 Am. Dec. 155. The vendor had made a tender of the goods, but the purchaser had refused to comply with the oral agreement.

<sup>72</sup> *Ibid.* And see *Stearns v. Hall* (1851) 9 Cush. (Mass.) 31.

<sup>73</sup> *Whittier v. Dana* (1865) 10 Allen (Mass.) 326.

<sup>74</sup> *Cummings v. Arnold* (Mass.) supra.

<sup>75</sup> *Whittier v. Dana* (Mass.) supra.

<sup>76</sup> *Whittier v. Dana* (Mass.) supra, holding that a vendor of bricks who had not delivered or offered to deliver the same had no defense to an action for breach of his contract.

<sup>76a</sup> *Brooks v. Wheelock* (1831) 11 Pick. (Mass.) 439, holding that a vendor who had agreed to make a deed upon the payment of a certain note given him for the amount of the purchase money could not

The doctrine of the foregoing cases has been expressly disapproved by other courts.<sup>77</sup> It is pointed out in one case<sup>78</sup> that the theory fails to distinguish between substituted performance which has been executed and substituted performance which rests merely on an executory agreement, and it is stated that substituted performance is substituting something else in the place of what was agreed to be done in the writing. "And if an unexecuted oral agreement to do this is binding, other land on other conditions, terms, and stipulations may be orally agreed to be substituted in performance or satisfaction of the writing. This would be juggling with the statutes." After referring to the statement that one of the main designs of the Statute of Frauds was to prevent burdensome fabricated contracts from being imposed upon parties, the court continues: "But a contract is only burdensome because of the consequence of performance flowing from it. Per se the contract is harmless. It is the performance that does the hurt. It is therefore at least equally proper to say that the

principal design of the statute was to protect parties from the performance of burdensome contracts which they never made. Therefore, if you may enforce an oral agreement for a substituted performance of a written agreement, you apply the statute to the shadow and withhold it from the substance. Such application of the statute only makes it necessary that parties have a contract in writing, then, under the guise of performance, the contract enforced is shown by parol."

**IV. Rule that oral modification which has been acted upon is valid.**

**1. In general.**

As shown above, the broad rule that a written contract within the Statute of Frauds cannot be modified by subsequent parol agreement has been applied, although the agreement as modified has been acted upon. On the contrary in many cases where the agreement as modified has been acted upon, the rights of the parties have been held to be determined by the modified agreement,<sup>79</sup> es-

be compelled to make a deed before the note fell due, in pursuance of his verbal agreement to make the deed upon payment of the note before due. The vendor refused to accept payment of the notes not due when tendered him in accord with his verbal agreement.

<sup>77</sup> *Rucker v. Harrington* (1892) 52 Mo. App. 481, approved in *Warren v. A. B. Mayer Mfg. Co.* (1900) 161 Mo. 112, 61 S. W. 644; *Ladd v. King* (1828) 1 R. I. 224, 51 Am. Dec. 624.

<sup>78</sup> *Rucker v. Harrington* (Mo.) supra.

<sup>79</sup> *Beach v. Covillard* (1854) 4 Cal. 315; *Spencer v. McCament* (1907) 7 Cal. App. 84, 93 Pac. 682; *Worden v. Crist* (1883) 108 Ill. 326; *Welch v. McIntosh* (1913) 89 Kan. 47, 130 Pac. 641; *Blake v. J. Neils Lumber Co.* (1910) 111 Minn. 513, 127 N. W. 450; *Moore v. McAllister* (1857) 34 Miss. 500; *Thomson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 13; *Alston v. Connell* (1906) 140 N. C. 485, 53 S. E. 292; *Neppach v. Oregon & C. R. Co.* (1905) 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035; *Scott v. Hubbard* (1913) 67 Or. 498, 136 Pac. 653; *Whiting v. Daughton* (1903) 31 Wash. 327, 71 Pac. 1026; *Smiley v. Barker* (1897) 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684.

A subsequent oral agreement between vendor and vendee by the terms of which the vendor is to accept a conveyance of property in lieu of a note which was to be assigned him and which has been executed in part, at least, by delivery of the property, was sustained in *Baker v. Robertson* (1914) — Tex. Civ. App. —, 163 S. W. 326.

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good by conduct of the parties is recognized in an obiter statement in *Philadelphia, W. & B. R. Co. v. Trimble* (1870) 10 Wall. (U. S.) 383, 19 L. ed. 953.

It was held in *Marsh v. Bellew* (1878) 45 Wis. 36, that a written agreement for the sale of land to be paid at a price to be determined by the quantity of timber on the same might be modified with regard to the price to be paid for the down timber on the land; but it is stated that, under the original contract, it was a matter of at least some doubt whether the vendee was bound to pay for any lumber or timber which was damaged or not merchantable; that this new agreement may therefore be treated as an amicable settlement by the party and a determination of the construction which should be given to the original contract, and limiting it to such timber as was undamaged and merchantable, and making a new contract by which the defendant, in consideration of such construction of the original, agreed to take the down and damaged timber upon the land at the reduced price. The court states that there can be no doubt but that the vendors could enforce the same against the vendee after the defendant had executed the same on his part by cutting and converting the timber to his own use. The vendee in this case did not object to the enforcement of the agreement, and the court adds that there can certainly be no ground for refusing to enforce the same under such circumstances.

In *Harrison v. Prestonburg* (1908) 32 Ky. L. Rep. 864, 107 S. W. 337, it is held that a written agreement between land-owners in platting land for an addition to

pecially if there has been what amounts to a part performance.<sup>60</sup> A vendor of property can defend an action for breach of his contract to convey, by showing that he has conveyed the land which is the subject of the sale in pursuance of a subsequent oral agreement between the parties.<sup>61</sup> Likewise he can defend an

action in specific performance by showing an oral agreement that the title was to be held until a note given for money borrowed by his vendee on which he became surety was paid.<sup>62</sup> A party who has performed according to the oral extension may maintain an action to compel performance by his vendor,<sup>63</sup> or re-

a town, that a part of the land equal in width to a street of which it was an extension should be laid off, but that the same should not become a street, might be modified by a parol agreement that a narrow part of the strip should be excluded from the street, and was thus modified. The plat was drawn, the lots laid out, and a number of them sold with reference to the plat.

A contract extending the time for the performance of a vendor's contract to make a deed which has been executed is thereby taken out of the statute, so as to effect a release of a surety on the vendor's bond. *Bever v. Butler* (1833) *Wright* (Ohio) 367.

*Nonamaker v. Amos* (1905) 73 *Ohio St.* 163, 4 *L.R.A.*(N.S.) 980, 112 *Am. St. Rep.* 708, 70 *N. E.* 949, 4 *Ann. Cas.* 170, see *supra*, note 52.

<sup>60</sup> *Gerard-Fillio Co. v. McNair* (1912) 68 *Wash.* 321, 123 *Pac.* 462; *Oregon & W. R. Co. v. Elliott Bay Mill & Lumber Co.* (1912) 70 *Wash.* 148, 126 *Pac.* 406.

<sup>61</sup> *Beach v. Covillard* (1854) 4 *Cal.* 315. The facts are not clearly stated in this case. It was an action to recover damages for the breach of a covenant under seal to convey certain lots. On the trial of the cause the defendants offered to show that they had conveyed one of said lots to a third party at the verbal direction and request of the plaintiff, and also offered in evidence a receipt signed by the plaintiff for the "deed to said lots described in said bond." This testimony was excluded by the trial court and a judgment rendered for the plaintiff. Upon appeal, this judgment was reversed and new trial ordered.

See *McKinley v. Macbeth* (1911) 113 *Minn.* 148, 129 *N. W.* 216, 389, *infra*, note 91.

<sup>62</sup> *Worden v. Crist* (1883) 106 *Ill.* 326. It is stated that the Statute of Frauds does not prevent the parties to an executory contract for the sale of real estate from agreeing by parol to change the terms of the contract and impose new conditions. In this case the legal title to the land in question was in a third party, and it was agreed by parol that the land should be held by the third party until the note was paid. Upon an action by an assignee of the bond for title whose rights rose no higher than those of the vendee in specific performance, his right to maintain the action was denied; the oral agreement being held a defense.

<sup>63</sup> *Welch v. McIntosh* (1913) 89 *Kan.* 47, 130 *Pac.* 641, holding that a vendor of real estate who was to receive payment in a certain way and who orally agreed to accept payment of a part of the purchase price in cash, and a mortgage for the balance, where upon a check for the cash payment and such

a mortgage were given him, he agreeing to make a deed if, upon examination, he found no more against the mortgaged property than had been represented to him, could be compelled to convey the land as agreed. See *supra*, note 60, as to the effect of acceptance of performance.

One who gave an option upon land, and who, when the optionee was arranging to secure and pay the sum stipulated, requested that the time for the payment of the same be extended beyond the period fixed in the writing, is estopped from pleading the statute and denying his obligation under the contract, in an action by the optionee, who has performed within the time fixed by the oral extension, to enforce the obligation of the contract. It is stated that the optionee, "having consented to the delay at the request of [the optionor], will be taken to have been ready and willing to perform at the time stipulated in the written agreement. Having tendered the amount due within the period fixed by the postponement, he is in no default, and the extension having been given at [the optionor's] request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract, and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the Statute of Frauds, and defeat the plaintiff's recovery, who has forborne a timely performance by reason of [his] request and in reasonable reliance on his assurance." *Alston v. Connell* (1906) 140 *N. C.* 485, 53 *S. E.* 292.

It is held in *Anderson v. Moore* (1893) 145 *Ill.* 61, 33 *N. E.* 848, that the parties to a contract for the sale of real estate may agree by parol that, if the vendee will pay the entire purchase money, the vendor will deliver the deed therefor before the time fixed in the writing. Accordingly, a specific performance was granted, although the bill was filed before the time fixed in the writing for delivery of the deed. Nothing is said as to the Statute of Frauds.

A vendee was granted specific performance in *Maloughney v. Crowe* (1912) 26 *Ont. L. Rep.* 579, 22 *Ont. Week. Rep.* 635, 3 *Ont. Week. N.* 1488. The parties in this case have modified the written agreement by providing that part of the purchase price should be paid at the time stipulated in the writing and the balance should be paid at a subsequent date, upon which possession was to be delivered by the vendor. Apparently, at the time of the action the entire sum was due.

See *Spencer v. McCament* (1907) 7 *Cal.*

cover according to the writing;<sup>84</sup> or maintain an action in damages for non-performance;<sup>85</sup> or recover according to the oral agreement.<sup>86</sup> One who has performed according to the oral agreement can defend an action on the writing,<sup>87</sup> or for damages for default.<sup>88</sup> One who agreed to purchase a certain amount of bark to be peeled by him can defend an action for the purchase price for the amount fixed in the writing, where, by oral agreement, this amount was reduced, and he had acted on the oral

modification, making his contracts accordingly.<sup>89</sup> A vendor cannot declare a contract forfeited for nonpayment within the time fixed in the written agreement, where he has induced the delay.<sup>90</sup>

This rule, that the rights of the parties must be determined by the modified agreement where it has been acted upon, is especially applicable where both parties have governed themselves by the modified agreement and the same has been fully executed.<sup>91</sup>

Where the other party has accepted

App. 84, 93 Pac. 682, *infra*, note 139. See *Low v. Treadwell*, 12 Me. 441, *supra*, note 68. See *Stark v. Wilson*, 3 Bibb (Ky.) 476, *supra*, note 50.

<sup>84</sup> *Moore v. McAllister* (1857) 34 Miss. 500, holding that the obligee in bonds given for the purchase money of lands in each of which there was a clause that it was to be void unless, on or before the time it became due, the obligee made a good title to the land to the obligor, who failed to make title before the first obligation became due, but before the maturity of the second obligation, at the request of the obligor, procured the title to be conveyed to a third party, to whom the obligor had sold,—might recover on the bonds against the obligor.

<sup>85</sup> *Kingston v. Walters* (1911) 16 N. M. 59, 113 Pac. 594, holding valid an oral extension of the time for the performance of the land contract so as to sustain an action by the vendee, who has performed within the time of the extension, against the vendor for damages for breach of his contract in refusing to perform. This is based in part in this case upon the principles of estoppel; the court stating that where a representation as to the future relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it to act, it operates as an estoppel.

<sup>86</sup> *Blake v. J. Neils Lumber Co.* (1910) 111 Minn. 513, 127 N. W. 450, holding that one who had contracted to cut and deliver timber might recover an increased compensation orally agreed upon, where, in reliance on the agreement, he went forward with his contract. The suit was for the increased compensation only, the compensation fixed in the writing having been paid.

<sup>87</sup> *Gerard-Fillio Co. v. McNair* (1912) 68 Wash. 321, 123 Pac. 462; *Oregon & W. R. Co. v. Elliott Bay Mill & Lumber Co.* (1912) 70 Wash. 148, 126 Pac. 406.

<sup>88</sup> *Smiley v. Barker* (1887) 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684.

<sup>89</sup> *Thompson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 14. But see *infra*, note 124.

<sup>90</sup> *Neppach v. Oregon & C. R. Co.* (1905) 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035; *Whiting v. Doughton* (1903) 31 Wash. 327, 71 Pac. 1026. See *Smiley v. Barker* (1897) 28 C. C. A. 9, 55 U. S. App. 125, 87 Fed. 684, and *Scott v. Hubbard* (1913) 67 Or. 498, 136 Pac. 653, *infra*.  
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<sup>91</sup> *Doherty v. Doe* (1893) 18 Colo. 456, 33 Pac. 165, holding that a lessor who had agreed to accept a less rent from his lessee than was stipulated in the writing, and had made a final settlement with him on this basis, has no cause of action against the lessee on the agreement as contained in the writing.

A written lease by the terms of which the tenant was entitled to a portion of the net proceeds of the crop raised on the land may be modified by oral agreement so as to entitle him to one half of the crop, and where the parties have acted upon it in its modified form it is valid to the extent and during the period so acted upon and carried out. *Denison v. Sawyer* (1905) 95 Minn. 417, 104 N. W. 305, holding valid a chattel mortgage given by the tenant on the crop.

*McKinley v. Macbeth* (1911) 113 Minn. 148, 129 N. W. 216, 389, holding that a party to a contract for the exchange of real estate who has performed his agreement as modified by parol is not in default so as to subject him to an action in damages for breach of the contract. The contract involved in this case was performed by both of the parties, and upon application for rehearing it is stated that, such being the fact, the bar of the Statute of Frauds was thereby removed from the entire contract.

Where the rent provided in a lease has been reduced and the lesser sum paid, there can be no recovery of the sum stipulated in the writing. *Bowman v. Wright* (1902) 65 Neb. 661, 91 N. W. 580, 92 N. W. 580. The sum provided for in the parol agreement had been paid and accepted in full during the whole term of the lease.

Where, in pursuance of a subsequent oral contract authorizing an exchange of properties, instead of a sale as provided in the written agreement, the subject-matter of the written contract has passed beyond the control of the parties to that performance of the written contract on either side is impossible, the rights of the parties must be determined according to the subsequent modification; in such a case neither party can predicate any right of action on the writing against the other, because neither can aver performance or an offer to perform his part of such contract. *Lucas v. Cass County* (1905) 75 Neb. 351, 106 N. W. 217.

Where by mistake a contract between a

the performance according to the oral agreement, he can then be compelled to perform according to his agreement contained in the writing.<sup>92</sup>

Specific performance of the written contract will not be decreed when the complainant in the action has by parol waived or discharged the contract, and the defendant by such action has entered into obligations inconsistent with its performance; there is thus presented an equity that will bar the remedy of specific performance.<sup>92a</sup> It has been held that specific performance of the substituted contract will be decreed, if the defendant admits the substituted contract and the complainant chooses to perform it on his part.<sup>92b</sup>

vendor and vendee described too much land, and, upon discovery of the mistake, a proposal was made by the vendor to alter the terms of the written contract and an acceptance of the proposal by the vendee, the final payment, delivery, and acceptance of the deed were held in *Benesh v. Travelers' Ins. Co.* (1905) 14 N. D. 39, 103 N. W. 405, to be a complete execution of that modification of the written contract within the meaning of a statute that a written contract may be altered by an executed parol agreement.

The question of the Statute of Frauds is not directly raised in *Reed v. Chambers* (1834) 6 Gill & J. (Md.) 490. In that case one who had purchased land of an execution debtor, agreeing to pay the amount of the execution and the amount of a mortgage on the premises and the balance to the vendor, agreed with the officer levying the execution, for the purpose of securing the title to the purchaser, that the land should be sold by the officer under the execution. Upon the execution sale the land was bid in by an assignee of the original purchaser at the sum agreed upon. The assignee then sold his title at an advance over this sum, with an understanding that his purchaser was to pay the mortgage debt and the judgment, and the balance to him. As a method of obtaining the title in the last purchaser, it was agreed that he should be returned as the purchaser and obtain a deed from the sheriff. This was accordingly done and the mortgage debt and the judgment discharged, and the balance paid into court. The action was by the last vendor to secure this balance of the purchase money. Apparently, in answer to the objection that the Statute of Frauds prevented this relief, the court states that the contract between the original vendor and his purchaser was legal and binding upon the parties, being in all respects perfectly conformable to the Statute of Frauds. That the verbal agreement subsequently entered into was no variation or change of the written contract for the sale of the land, but only indicated the mode in which the title was to be secured for the purchaser. L.R.A.1917B.

## 2. Theories.

The theories upon which the courts have based the holdings that an oral modification which has been acted upon determines the rights of the parties are not harmonious. Waiver, estoppel, part performance, executed contract, and the rule that a court will not allow the Statute of Frauds to become an instrument of fraud, have each been relied upon in support of the holdings. It is evident that not every act of a party in pursuance of the oral modification should render the modification effective to determine the rights of the parties. As stated above,<sup>93</sup> it is the theory of some cases that no such act renders the oral

In the subsequent Maryland case of *Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433, the court states that the agreement in the former case was fully executed and the lien paid, and the surplus purchase money paid into court, so that there was in fact no question under the Statute of Frauds before the court, since the statute has no application to executed contracts.

See *Le Fevre v. Le Fevre* (1818) 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696, *infra*, note 95.

<sup>92</sup> *Salomon v. United States* (1873) 19 Wall. (U. S.) 17, 22 L. ed. 46. See *Welch v. McIntosh* (1913) 89 Kan. 47, 130 Pac. 641, *see supra*, note 83.

*Swain v. Seamens* (1869) 9 Wall. (U. S.) 254, 19 L. ed. 554, holding that a mortgagee who had agreed to cancel and discharge the mortgage and accept in its stead an insurance policy upon a mill of a certain dimension, to be erected upon the mortgaged premises, could not, in a suit to compel him to cancel and discharge the mortgage as agreed in the written stipulation, set up that the mill was not of the dimensions fixed in the writing, where he acquiesced in a change in dimensions at the time the work was done, and accepted the mill as built and completed, and also accepted the policies of insurance procured on it as security in place of the mortgage.

<sup>92a</sup> *Huffman v. Hummer* (1866) 18 N. J. Eq. 83, 2 Mor. Min. Rep. 242. See *Nona-maker v. Anos*, *supra*, note 52.

In an action for the specific performance of a written contract to convey real estate, it has been held competent for the defendant to show that, by a subsequent parol agreement, he was to retain the title until other money than that named in the original contract (which had been loaned by him) should be repaid, and he may properly refuse to convey until such other money is repaid. *Hewlett v. Miller* (1883) 63 Cal. 185. No mention is made of the Statute of Frauds in this case.

<sup>92b</sup> *Ryno v. Darby* (1869) 20 N. J. Eq. 231. It will be noticed that this was a case of substitution, not modification.

<sup>93</sup> *Jones' Case* (1875) 11 Ct. Cl. (Fed.) 733,



agreement effective unless it is accepted by the other party. But this has not been adopted generally. It is true that, if there is an acceptance of the performance according to the oral agreement, the rights of the parties must be determined thereby, but it does not follow from this that there must be an acceptance to render the oral agreement effective. It may become effective although not accepted. The extent to which the oral agreement must have been acted upon is a matter that is left in considerable doubt, largely through a failure of the courts to consider this phase of the question. An attempt will be made in this connection to show the acts that have taken place in pursuance of the oral modification so far as this can be extracted from the reports, together with the discussion of this question which appears in a few cases. As stated above, the courts have relied on various theories to render the oral modification effective, and it is necessary to note these theories and show what acts have brought the theory adopted into operation.

That equity will not allow the Statute of Frauds to be used as an instrument of fraud is the reason given in some cases for holding the oral modification effective. It has been stated that under this rule equity will decree specific performance, or hold the maker of an oral contract estopped from denying it, when the other party, by virtue of it and under and in pursuance of it, has so far acted that it would be aiding in a fraud to permit the contract to be repudiated,<sup>94</sup> and it has been stated that courts of law under proper allegations will also grant relief in such a case.<sup>95</sup> As to what brings a case within the operation of the rule depends largely upon the facts of the individual case. It may be stated generally that the acts relied upon by the party seeking relief on the oral modification must have been taken by virtue of the oral contract, and under and in pursuance of it. If the acts relied upon have not been so taken, relief cannot be granted.<sup>96</sup>

The foregoing rule has not always been distinguished from that of part performance.<sup>97</sup> It has been held that a part

and see *Moore v. Campbell*, supra, note 32. But the Federal courts have not accepted this theory, as appears from *Swain v. Seamens*, infra, note 107, and *Smiley v. Barker*, infra, note 105.

<sup>94</sup> *Simonton v. Liverpool, L. & G. Ins. Co.* (1874) 51 Ga. 80; *Gerard-Fillio Co. v. McNair* (1912) 68 Wash. 321, 123 Pac. 462; *Oregon & W. R. Co. v. Elliott Bay Mill & Lumber Co.* (1912) 70 Wash. 148, 126 Pac. 406.

It is held in *Kingston v. Walters* (1908) 14 N. M. 368, 93 Pac. 700, that a court of equity in order to prevent fraud will take jurisdiction of an action by a vendee against his vendor to recover damages for failure of the vendor to perform his contract, where the vendee has performed the agreement stipulated by him therein to be performed within an extended time granted by the vendor, where it was alleged that the vendor absented himself from his usual place of business and remained absent for some time, thereby defeating payment within the time of the oral extension.

<sup>95</sup> *Simonton v. Liverpool, L. & G. Ins. Co.* (Ga.) supra.

This rule was applied, and the grantor of a tract of land with the right to a water course through adjoining lands owned by the grantor, held to have no right to destroy the water course which had been placed on another route verbally agreed upon by the parties subsequent to the deed, and which had been so maintained for a period of years prior to the time when the plaintiff in the action had purchased the property. *Le Fevre v. Le Fevre* (Pa.) supra.

<sup>96</sup> *Simonton v. Liverpool, L. & G. Ins. Co.* L.R.A.1917B.

(Ga.) supra, holding that an insured cannot recover upon an insurance policy upon the destruction of the insured goods in a location other than that stipulated in the policy, upon an oral statement made by an agent of the company at the time the goods were being removed that the company would agree to the change in location, and that he would fix it upon the books accordingly, where it appears that the insured would have removed the goods without the parol statement of the agents and was in the act of removing them when it is charged to have been made. The court states that the most the insured claimed to have done in pursuance of the parol agreement is that they failed to take out a new policy, trusting, as they did, that their old one had by the parol agreement of the agent been altered. "It will be noted that they paid no money; they simply trusted to the parol agreement and failed to take out another policy." The court concludes that this was not taking a new position by virtue of the contract in fulfillment of their part of it, so as to bring it within the rule.

One court states that, "to make out a case as we understand the law, the party seeking to set up a parol contract which the law requires to be in writing must show that he has done some act in performance of the contract upon his side, which act of performance has put him in a new position, so as that it would be a fraud upon him to permit the other party who has accepted this part performance to repudiate it." Ibid.

<sup>97</sup> *Gerard-Fillio Co. v. McNair* (Wash.) supra.

performance cannot be made out by mere nonaction on the part of one party to a contract, relying on the parol agreement modifying the writing so as to take the case out of the statute.<sup>98</sup> Nor in the case of a sale of goods does a part payment, and acceptance of part of the goods according to the terms of the written contract, put the written contract in the same category as parol contracts and written contracts not within the Statute of Frauds, thereby subjecting it to modification by a subsequent parol agreement.<sup>99</sup> On the contrary it has been stated obiter<sup>100</sup> that, when a part of the goods which are the subject matter of a sale within the 17th section of the Statute of Frauds have been received and accepted by the vendee, it is competent to prove the contract by parol evidence; consequently a modification of the contract by parol is no violation of

the Statute of Frauds, but in this case evidence of the subsequent modification was held inadmissible because the declaration was based exclusively upon the written agreement. But where there is a performance, or a substantial part performance, by the party against whom the statute is invoked, such performance in pursuance of the oral modification may be used as a defense.<sup>101</sup>

In cases which apply the theories of waiver and estoppel, it has been held that mere nonaction by one party to a contract induced by the other prevents the latter from taking advantage of the Statute of Frauds.<sup>102</sup> In cases involving an extension of time, the act of the party seeking to take advantage of the statute in inducing the other to delay performance is emphasized and held to constitute a waiver.<sup>103</sup> One

<sup>98</sup> *Augusta Southern R. Co. v. Smith & K. Co.* (1899) 106 Ga. 864, 33 S. E. 23. Plaintiff alleged that, relying upon the parol agreement, it postponed the doing of certain essential things beyond the time within which, under the original written contract, it had agreed to do the same. But see subdivision V., *infra*.

<sup>99</sup> *Willis v. Fields* (1909) 132 Ga. 242, 63 S. E. 828. As to whether an oral contract that has been taken out of the statute by part payment or acceptance of part of the goods can be modified by subsequent oral agreement is beyond the scope of this note, but see I., *supra*.

Payment of the consideration is not sufficient to take a new contract abrogating a former one out of the operation of the statute. *Thill v. Johnston* (1910) 60 Wash. 393, 111 Pac. 225.

<sup>100</sup> *Kribs v. Jones* (1875) 44 Md. 396. And see *Walker v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433, *supra*.

<sup>101</sup> *Gerard-Fillio Co. v. McNair* (Wash.) *supra*, holding that real estate brokers could not recover the commission stipulated in a written agreement for the exchange of lands, where the parties liable for the commission had refused to carry out the exchange, unless the commission was reduced, and thereupon it was orally agreed that the commission should be reduced, whereupon the parties carried out the exchange in reliance upon the agreement.

*Oregon & W. R. Co. v. Elliott Bay Mill & Lumber Co.* (1912) 70 Wash. 148, 126 Pac. 408, holding that a lessor could not maintain an action of unlawful detainer against his lessee where, upon a dispute arising as to the title, it was orally agreed that the lessee should not pay him any rent, but might pay the other claimant, where the lessee, in pursuance of the agreement, ceased payment to the lessor and paid the other claimant.

<sup>102</sup> *Alston v. Connell* (1906) 140 N. C. 485, 53 S. E. 292.  
L.R.A.1917B.

See *Kingston v. Walters* (1911) 16 N. M. 59, 113 Pac. 594, *supra*, note 85. See also *Low v. Treadwell* (1835) 12 Me. 441, *supra*, note 66, and *Thomson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 13, *infra*, note 126; *Spencer v. McCament*, *infra*, note 139.

<sup>103</sup> *Neppach v. Oregon & C. R. Co.* (1905) 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035, holding that a vendor of land the title to which was involved in a controversy, who requested of the vendees that payments should not be made according to the written contract until the controversy as to the title should be settled, and the vendees, in reliance upon this agreement, refrained from making the payments as they became due, although they were ready and willing to do so, cannot insist upon a forfeiture of the contract on account of the failure to make such payments. The court states that we deem it "unnecessary to decide at this time whether a contract required by the statute to be in writing can be altered as to the time or manner of performance by a subsequent parol executory agreement between the parties." The action in this case was for breach of the contract.

*Scott v. Hubbard* (1913) 67 Or. 498, 136 Pac. 653, holding that an owner of land who had given an option thereon, payments upon which were due monthly, who had agreed with the optionee to accept an advance payment by a certain date, but who when tendered this payment refused it, could not rescind the agreement for failure to make one of the monthly payments upon the date provided in the written agreement. The owner of the land had previously accepted monthly payments after they had become due, and the court states that his act created the impression that time was not of the essence of the agreement, and, not having given the optionee a written notice of any alteration of his supposed intention, he ought not be permitted to insist upon a forfeiture of the contract for failure to make the monthly

court<sup>104</sup> states: "We know of no principle of law which will permit a party to a contract who is entitled to demand the performance by the other party of some act within a specified time, and who had consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the nonperformance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for nonperformance induced by an unrecalled consent. The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has not been acted upon, but it would be most inequitable to hold that a

default justified by the consent happening during its extension should furnish a ground of action."

Even assuming that the oral contract is invalid, the acts of the party inducing the other not to perform constitute a waiver.<sup>105</sup> The fact that the oral agreement involved matters other than a mere extension of time does not affect this, especially where the other matters were contingent upon the happening of an event which did not occur, so that nothing is claimed upon this part of the agreement.<sup>106</sup>

Some cases in which affirmative action has been taken by the party against whom the statute is invoked consider the necessity of such action having been taken in reliance upon the oral agreement to work an estoppel.<sup>107</sup>

It has been stated<sup>108</sup> in a case which proceeds upon the assumption that an executory oral agreement for the extension of time of performance of a

payment upon the date provided in the written agreement.

*Whiting v. Doughton* (1903) 31 Wash. 327, 71 Pac. 1026, holding that a vendor who had told his vendee that the remaining payments on the contract under which the vendee had been let into possession could be made at his convenience, in reliance upon which the vendee did not make payments at the time stipulated in writing, could not declare a forfeiture of the contract as provided in writing.

<sup>104</sup> *Thomson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 13, as will be seen by a reference to note, 108, *infra*, this was not a case of pure extension of time, although so treated by the courts.

<sup>105</sup> A vendor of sheep who wrote his vendee suggesting a change in the method of delivery, which was agreed to by the vendee, who is thereby induced to remain away from the place of delivery according to be written contract, and from performing according to the written contract, will be held to have waived delivery and payment at the time and place named in the written contract. He cannot therefore declare a default on the part of the vendee, and refuse to return an advance payment on the purchase price, nor can he recover damages for such default. *Smiley v. Barker* (1897) 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684. Upon failure of the vendee to perform according to the written contract, the vendor sold the sheep to other parties and thereby disenabled himself from performing.

<sup>106</sup> *Neppach v. Oregon & C. R. Co. (Or.) supra*. In addition to providing for the extension of the time for making payment as was shown in note 103, *supra*, the agreement provided that, if it should finally be determined that the vendor had no title to L.R.A.1917B.

the premises, the vendees should make no claim for damages, but should be entitled to a return of the money already paid, the controversy over the title having been settled in favor of the vendor. The contingency herein provided did not occur.

But see *Banister v. Fallis* (1911) 85 Kan. 320, 116 Pac. 822, note 135.

<sup>107</sup> Where it was agreed between a mortgagor and mortgagee that the mortgagor should erect a sawmill of certain dimensions upon the mortgaged premises, and that the mortgagee would then release the mortgage and accept as security an insurance policy on the mill, and the mortgagee, by his conduct and best declarations, led the mortgagor to believe that he was content with the change made in the specifications of the mill, and thereby induced the mortgagee to erect a mill upon the changed specification, he is estopped to refuse to discharge the mortgage because the mill does not comply with specifications in the writing. *Swain v. Seamens* (1869) 9 Wall. (U. S.) 254, 18 L. ed. 554.

<sup>108</sup> In *Neppach v. Oregon & C. R. Co.* (1905) 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035, involving the oral extension by a vendor of time for making payment by the vendees, revocation of the oral extension was not pleaded as a defense. It is stated in this case that a letter written by the vendor to the vendees which was not delivered to the vendees until the day on which the time allowed to make the payment expired was not a reasonable time in which to make the payment.

That the agreement may be revoked is also the theory of *Thomson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 14.

See *Scott v. Hubbard* (1913) 67 Or. 498, 136 Pac. 653, *supra*, note 103.

written contract within the Statute of Frauds is invalid, that the oral stipulation can be revoked at any time upon giving the other party notice of its intention to do so, and a reasonable time after such notice to comply with its agreements as provided in the written contract.

After the contract has expired there can be no oral agreement extending the time; there must then be a new agreement, which must be in writing.<sup>109</sup> Modification after the expiration of the contract is not, however, considered in the note.

Other cases proceed upon the theory that the execution of the oral modification takes it out of the Statute of Frauds.<sup>110</sup> The facts that have brought the rule into operation are shown in the note. In one case<sup>111</sup> in which a vendor who had conveyed to a third person at the oral request of the vendee was seeking to recover on bonds given for the purchase price, the contract is treated as fully executed, and it is stated that the Statute of Frauds has been stated to have relation alone to executory contracts, "and can never apply to contracts which have been fully executed, for the reason that such contracts as the latter can never be made the foundation of an action unless they should be connected with some collateral matter. It may be true that this new arrangement could not be enforced if it were merely executory, but this is not the question. The object was not to make a new contract, but merely to stipulate what should be

a performance of the original contract, and it certainly cannot be contended that the parties could not agree that performance might be made in a manner different from that originally stipulated. The party bound to convey performed his contract as soon as he complied with its terms or conveyed in the manner prescribed by the party interested. Performance of contracts may be waived either as to time, place, or manner of performance."

Where the agreement is fully executed by both parties, it is taken out of the statute as shown above.<sup>112</sup>

Some cases do not seem to rely upon the fact that action had been taken upon the oral modification.<sup>113</sup>

#### V. Extension of time.

The character of alterations of written contracts which have been adjudicated are many and varied, as will be seen by reference to the foregoing subdivisions of this note. There is one alteration which has been before the courts so frequently, and which involves distinct questions, so that it has been deemed advisable to make it the subject of an independent subdivision. The alteration in question is that extending the time for the performance of written agreements. It is the theory of some cases that the time for the performance of a written contract within the Statute of Frauds cannot be modified by subsequent oral agreement.<sup>114</sup>

The oral extension cannot be shown in support of a cause of action. Accord-

<sup>109</sup> *Kingsley v. Kressly* (1911) 60 Or. 167, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746.

<sup>110</sup> *Beach v. Covillard* (1864) 4 Cal. 315. See *supra*, note 81, for facts.

*Blake v. J. Neils Lumber Co.* (1910) 111 Minn. 513, 127 N. W. 450, holding that a contract for the cutting and delivering of timber, by the terms of which one of the parties was to perform the work and receive a certain compensation, could be modified by oral agreement by stipulating an additional compensation, and when in reliance upon the new agreement the party had fully performed the contract as modified, he could recover the price agreed upon orally. The written contract covered several seasons, but the oral agreements were from season to season, and the recovery was sought on the work done for one season. This was held a severable contract, on which the recovery might be had as above stated.

<sup>111</sup> *Moore v. McAllister* (1867) 34 Miss. 500.

<sup>112</sup> Note 91 et seq.

<sup>113</sup> *Worden v. Crist* (1883) 106 Ill. 326, where the party against whom the statute L.R.A.1917B.

was invoked had assumed obligations as surety on strength of oral agreement.

It has been held in this jurisdiction that a vendor who has orally agreed to accept a balance on the contract before due, and make a deed for the property, may be compelled to perform his agreement. (*Anderson v. Moore* (1893) 145 Ill. 61, 33 N. E. 848), the court stating that this amounts to a waiver of the time of payment and is good although made by parol.

<sup>114</sup> *Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433; *Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165; *Cook v. Bell* (1869) 18 Mich. 387; *Ladd v. King* (1849) 1 R. I. 224, 51 Am. Dec. 624.

See also *Com. use of Ledford v. Hinson* (Ky.) ante, 139, where, however, the court treats the extension as a new agreement rather than a modification.

It is stated obiter in *Hasbrouck v. Tappen* (1818) 15 Johns. (N. Y.) 200, that a parol agreement to extend the time for the performance by the vendor of his contract to convey land is void under the Statute of Frauds.

In *Blood v. Goodrich* (1832) 9 Wend. (N.

ingly a vendor who has not delivered the property sold within the time specified in the writing cannot show an oral extension of the time, in an action by him for breach of the purchaser's contract to accept and pay for the goods,<sup>115</sup> even though he relied on the oral agreement in completing his contract.<sup>116</sup> Nor can a vendee who has failed to make the payments stipulated in the writing, in which event the vendor might, according to the agreement, avoid the contract and retain payments made, show an oral extension in an action against the vendor to recover damages for breach of the contract.<sup>117</sup>

Nor can the oral extension be shown as defensive matter. A vendor of land cannot show an oral extension of the time for conveyance in an action in damages by the vendee, who has fully performed and paid the purchase money, for failure to convey according to the written agreement.<sup>118</sup>

A writing which is a mere option cannot be modified by parol so as to extend the time within which it may be accepted and thus keep it alive beyond the time fixed in the writing itself.<sup>119</sup> Accordingly, an acceptance and promise to pay the purchase price after the expiration of the time fixed in the writing, but

(Y.) 68, 24 Am. Dec. 121, the court states that the doctrine that the time of performance of a written contract may be enlarged by parol does not apply to contracts for the conveyance of land, or to any other contract where the contract itself would not have been valid if made by parol.

But see *Thomson v. Poor* (N. Y.) supra.

A written agreement for the sale of land in which the vendor agreed to make the title, provided the vendee complied with the terms of the agreement within a stated time, cannot be extended by parol. *Doar v. Gibbes* (1829) Bail. Eq. (S. C.) 371. The action in this case was by the vendee for specific performance, and the relief sought is denied also on the ground that the court had a discretion in such an action.

A vendor who has sold and conveyed land under an agreement that the vendee should search upon the land for coal, and, if coal should be found by a stated date, an additional sum should be paid, cannot recover the additional sum where coal was not found for a number of years after the expiration of the time fixed in the contract, on the strength of a parol agreement to extend the time for making the search. *Heth v. Wooldridge* (1828) 6 Rand. (Va.) 605, 18 Am. Dec. 751.

A contract with the United States government to furnish cloth, which by a special statute is required to be in writing, cannot be modified by an extension of time by parol. *Jones v. United States* (1875) 11 Ct. Cl. (Fed.) 733.

That an oral extension for a longer period than a year is within the Statute of Frauds is the opinion expressed in *Hogan v. Crawford* (1869) 31 Tex. 634, but that case turned upon a lack of consideration sufficient to sustain the agreement independently of the Statute of Frauds. And see *Bullis v. Presidio Min. Co.* (1889) 75 Tex. 540, 12 S. W. 397, and *Adams v. Hughes* (1911) — Tex. Civ. App. —, 140 S. W. 1163, *infra*, note 128.

The postponement of the time for performance of a logging contract is treated in *Barton v. Gray* (1885) 57 Mich. 622, 24 N. W. 638, more in the nature of an independent contract, and it is stated that it must be a valid and binding agreement L.R.A.1917B.

between the parties not void under the Statute of Frauds. The jury having found that the oral arrangement relative to the extension of time of performance could not by its terms be performed within one year from the time of the making thereof, it was void under the Statute of Frauds and as a necessary consequence was held a mere nullity, so that it could not be used for any purpose.

That the time for the payment of premiums on a life insurance policy cannot be changed, see *Mitchell v. Universal L. Ins. Co.* (1875) 54 Ga. 289, *supra*, note 36.

See *Augusta Southern R. Co. v. Smith & K. Co.* (1899) 106 Ga. 864, 33 S. E. 28, *supra*, note 98; *Hawkins v. Studdard* (1908) 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 852, *supra*, note 13; *Napier Iron Works v. Caldwell & D. Iron Works* (1915) — Ind. App. —, 110 N. E. 714, *supra*, note 98; English cases discussed in note 23 et seq.

<sup>115</sup> *Walter v. Victor G. Bloede Co.* (1901) 94 Md. 80, 50 Atl. 433.

<sup>116</sup> *Ladd v. King* (1849) 1 R. I. 224, 51 Am. Dec. 624, *see supra*, note 15, for facts.

<sup>117</sup> *Cook v. Bell* (1869) 18 Mich. 387; *Doar v. Gibbes* (1829) Bail. Eq. (S. C.) 371, *supra*, note 114.

<sup>118</sup> *Abell v. Munson* (1869) 18 Mich. 306, 100 Am. Dec. 165.

<sup>119</sup> *McConathy v. Lanham* (1903) 116 Ky. 735, 76 S. W. 535, holding that no action could be maintained upon an option contract for the sale of real estate where the parties had not performed the agreement until within an extension granted by parol. *Atlee v. Bartholomew* (1887) 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110. See *Jarman v. Westbrook* (1910) 134 Ga. 10, 67 S. E. 403, *supra*, note 15.

In *Hicks v. Aylesworth* (1882) 13 R. I. 562, it was held that the time for accepting an option contract for the sale of real estate could not be extended by parol. The court speaks of the parol agreement in this case being a gratuitous one. The optionee during the time granted by parol had made unsuccessful efforts to obtain the money necessary to accept the option.

In *Lawyer v. Post* (1901) 47 C. C. A. 491, 109 Fed. 512, the verbal agreement extending time included other property as well

within that fixed by the parol agreement, creates no enforceable obligation.<sup>120</sup> The party who accepts the option within the time fixed by the oral extension and seeks to enforce it is seeking to enforce a contract which is not in writing, and therefore void under the statute.<sup>121</sup>

Time may be such a substantial part of the agreement that its modification involves more than the question whether there may be a waiver by parol. In such a case it is held that a parol modification is not good. Thus a written contract for the sale of iron, in the form of a bought and sold note which describes the iron and specifies it to be "for shipment by sail in December, 1879, or January, 1880," cannot be modified by a parol agreement specifying a later date of shipment and delivery.<sup>122</sup> The court states: "I do not think it necessary to inquire whether the mere time of performance might be waived by parol, for that is not the question. The only one before us relates to a substantial matter, one affecting the identity of the thing sold, and without mention of which there could have been no contract, and which, although agreed upon, would have been invalid if not in writing."

In case of a sale of standing timber in which the title to the trees remains in the owner of the land until cut and converted into personalty, and in which the right to cut continues until a stated day, on which day the trees remaining uncut adhere in the land and lapse into the fee from the written instrument, an oral extension is invalid.<sup>123</sup>

While adhering to the theory that an oral extension cannot become a part of the contract so as to bind the parties, it has been held that it may affect their rights when relied upon by one of them,

as that described in the written agreement. The holding that the verbal extension is invalid is perhaps nothing more than obiter in this case, as the court states that there was no evidence of an extension.

<sup>120</sup> *McConathy v. Lanham* (1903) 116 Ky. 735, 76 S. W. 535. The contract in this case involves the sale of a lease for a longer period than one year. The verbal acceptance by the prospective purchaser was made at a time when the lease had a longer period than one year still to run. It was therefore a contract which was required by the statute to be in writing, and the parol agreement was accordingly held invalid. *Atlee v. Bartholomew* (Wis.) supra.

<sup>121</sup> *Atlee v. Bartholomew* (Wis.) supra.

<sup>122</sup> *Hill v. Blake* (1884) 97 N. Y. 216. See supra, note 12 for facts; *Clark v. Fey*, supra, note 57.

<sup>123</sup> *Clark v. Guest* (1896) 54 Ohio St. 298, L.R.A.1917B.

and so far as relied upon, but the party granting the extension may revoke it upon proper notice.<sup>124</sup> Thus it has been held that a lessor who has orally agreed to extend the time for the payment of rent under the lease cannot declare a forfeiture of the lease for nonpayment at the time stipulated in the writing as he had a right to do under the written agreement, until the lessee had a reasonable time thereafter in which to make payment, because the failure to pay on due day was caused by the lessor's own conduct. The case states that a distinction must be kept in mind between the contract itself, which is within the purview of the statute, and the subsequent performance, which is not. The oral stipulation for an extension of the time of payment goes simply to the question of performance, constituting an excuse as it does for the failure to perform according to the terms of the written contract, and a reason why the lessor had no right to declare a forfeiture on account of such failure, and it is suggested that perhaps as good a ground as any upon which to put the rule is that of equitable estoppel; that he who prevents a thing being done shall not avail himself of nonperformance which he himself has occasioned.<sup>125</sup>

Other cases do not consider it necessary to determine whether a contract within the Statute of Frauds can be altered as to the time of performance by a subsequent oral executory agreement where one of the parties has acted upon the oral agreement so that it has become executed before suit is brought for a breach. Such a situation is held to show a waiver by the plaintiff of his right to insist upon the requirements of the written contract.<sup>126</sup>

<sup>43</sup> N. E. 862. The agreement in this case was made before the expiration of the time fixed in the writing. The court emphasizes the fact that both the title and possession of the trees in question remained in the landowner, and this being true his agreement to extend the time in which to take them off was an agreement for an interest in and concerning the trees still standing at the expiration of the written contract. Such verbal extension of time is stated to be clearly within the statute.

<sup>124</sup> *Scheerschmidt v. Smith* (1898) 74 Minn. 224, 77 N. W. 34. That the extension may be revoked so far as it has not been acted upon is held also in *Thomson v. Poor* (N. Y.) infra.

<sup>125</sup> *Scheerschmidt v. Smith* (Minn.) supra.

<sup>126</sup> *Thomson v. Poor* (1895) 147 N. Y. 402, 42 N. E. 13, holding that an owner of land who had entered into a written con-

It has been held if the subsequent agreement is not a mere extension, but involves other matters, that it is invalid.<sup>127</sup>

On the contrary it is held that an oral extension of the time for performance of a contract within the Statute of Frauds, made before the expiration of the written contract, is valid.<sup>128</sup> This rule is held to apply although a definite agreement as to the time of the extension was not arrived at by the parties until the day after the expiration of the time limited in the contract.<sup>129</sup> It appeared, however, in this case which involved a contract for the sale of real estate, that a short time before the expiration of the time limited in the con-

tract the purchaser talked to the vendor and reminded him that the time for the performance of the agreement was about to expire, and that he had not furnished the abstract as agreed. The vendor replied that he had not been able to find the abstract, but that he would give the purchaser time to have it examined.

In a case involving a sale of real estate where the extension was granted at the request of the vendee, who was suing for breach of the bonds for title, the court holds that the plaintiff's conduct can be considered in no other light than a waiver of the condition of the bond so far as it related to the time of its performance, consequently there was no breach.<sup>130</sup> The performance by the

tract with another to peel a specified number of cords of bark from trees on the owner's land during each of several consecutive years could not maintain an action for breach of the written contract upon a failure of the other party to peel the specified number in a stated year, where the parties had orally contracted that a less number of cords be peeled during that year and that the oral agreement was complied with. The court states that the effect of the oral agreement was to change the terms of the original written agreement "as to the time and manner of performance."

*Daniels v. Rogers* (1905) 108 App. Div. 339, 96 N. Y. Supp. 642, holding that a vendor who had offered to deliver to the vendee a deed duly executed conveying good title in accordance with the written agreement, but who, upon the vendee's request and for his benefit, extended the time for closing for three days, might maintain an action for specific performance of the agreement.

See *Neppach v. Oregon & C. R. Co.* (1905) 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035, and *Scott v. Hubbard* (1913) 67 Or. 498, 136 Pac. 653, supra, note 103; *Whiting v. Doughton* (1903) 31 Wash. 327, 71 Pac. 1026, supra, note 103.

<sup>127</sup> *Infra*, note 135.

<sup>128</sup> *Baker v. Whiteside* (1826) *Breese* (Ill.) 132, 12 Am. Dec. 168; *Kissack v. Bourke* (1906) 224 Ill. 352, 79 N. E. 619; *Longfellow v. Moore* (1882) 102 Ill. 289; *Kingston v. Walters* (1911) 16 N. M. 59, 113 Pac. 594, s. c. former appeal (1908) 14 N. M. 368, 93 Pac. 700; *Stamey v. Hemple* (1910) 97 C. C. A. 379, 173 Fed. 61.

An oral modification of a contract for the sale of real estate with reference to the time of making payments was sustained in *Delaney v. Linder* (1887) 22 Neb. 274, 34 N. W. 630, but the court does not discuss the Statute of Frauds.

It is stated *obiter* in *Bullis v. Presidio Min. Co.* (1889) 75 Tex. 540, 12 S. W. 397, that the time for the performance of a contract of lease with a privilege in the lessee to purchase the property may be extended by a verbal agreement, but it is held in this case that the parties did not seek L.R.A.1917B.

a mere extension of the time of performance of the first agreement, but sought a distinct and independent undertaking, which, not being signed by the lessor, was within the Statute of Frauds, and not binding upon him. But see *Hogan v. Crawford* (1869) 31 Tex. 634.

The court in *Adams v. Hughes* (1911) — Tex. Civ. App. —, 140 S. W. 1163, while treating the statement in *Bullis v. Presidio Min. Co.* as dictum, concludes: "We are not disposed to so regard it, however, and would hold ourself concluded by the statement of law referred to, notwithstanding the weight of authority elsewhere." But it was held in the *Adams Case* that where vendor and vendee met at the time stipulated in their contract for closing the contract, and, upon discovery that the vendor did not have a good title to the premises sold, agreed that he should not be required to make a merchantable title as provided in the written agreement, but in lieu thereof should make an effort to cure the defect in his title, but if he should not be able to do so within a reasonable time the vendee would accept his warranty deed for the timber which was the subject of sale, that this entirely changed the conditions of the contract, and absolved the vendee from the obligation to make the payments required by the written agreement, and relieved the vendor from the obligation of tendering a merchantable title by substituting therefor a warranty deed, and this, not being in writing, was not valid.

See *Murray v. Boyd* (1915) 165 Ky. 625, 177 S. W. 468, supra, note 52; and *Heasley v. Swanstrom* (1889) 40 Minn. 196, 41 N. W. 1029, supra, note 51; *Moore v. McAllister* (1857) 34 Miss. 500, supra, note 111; *Alston v. Connell* (1906) 140 N. C. 485, 53 S. E. 292, supra, note 83; *Smiley v. Barker* (1897) 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684, supra, note 106.

<sup>129</sup> *Bourke v. Kissack* (1909) 242 Ill. 233, 89 N. E. 990.

<sup>130</sup> *Baker v. Whiteside* (1826) *Breese* (Ill.) 132, 12 Am. Dec. 168. The Statute of Frauds, however, is not mentioned in this case.

vendee in a contract for the sale of land within the time agreed upon in an oral extension was held a sufficient performance, so as to entitle him to a specific performance of the contract, on the theory of waiver.<sup>131</sup> Again, it is stated that the principles of estoppel will not permit one party to throw the other off his guard, and thus obtain an inequitable advantage by agreeing to extend the time of performance and then insist upon it as written.<sup>132</sup> An oral agreement between a vendor and vendee upon a contest arising with a third party over the vendor's title to the land sold; that further payment under the contract might be suspended until the title should be determined, estops the vendor from claiming a forfeiture of contract for nonpayment of instalments falling due during a determination of the contest proceedings. Accordingly, the vendee may recover the sums paid by him previous thereto, upon the contest being decided adversely to his vendor.<sup>133</sup> The doctrine of estoppel and waiver have been used interchangeably.<sup>134</sup>

But, if the subsequent oral agreement is not a mere extension, but involves other matters, such as that the title of land which is the subject of the contract shall be perfected, it has been held that the oral modification is invalid.<sup>135</sup>

It has been held that time for the performance by a real estate broker of his written agency contract which contains a limitation as to time may be extended by parol, on the theory that time is not required to be stated in the writing.<sup>136</sup>

Under the Massachusetts theory discussed in III., supra, it is held that the time may be extended.

It has been held where there is an option in a contract having a certain time to run, to extend the contract for a further period, that the option may be exercised by any definite notice given before the expiration of the first period, and that the Statute of Frauds has no application in such a case.<sup>137</sup>

A statute has been enacted in some states, expressly providing that a contract in writing may be altered by "an executed oral agreement." It has been claimed where there has been an oral extension of time for the performance of a contract, and the thing which, by the terms of the writing, was to be done, is done within the period provided by the oral extension, that this constitutes an executed oral agreement within the meaning of the statute, but this is denied.<sup>138</sup> It is stated that an oral agreement simply extending time cannot be executed, for there is nothing to exe-

<sup>131</sup> *Bourke v. Kissack* (III.) supra.

<sup>132</sup> *Longfellow v. Moore* (1882) 102 Ill. 289; *Kingston v. Walters* (1911) 16 N. M. 59, 113 Pac. 504, s. c. former appeal (1908) 14 N. M. 368, 93 Pac. 700, holding that a vendee of real estate has the extended time in which to perform.

<sup>133</sup> *Missouri, K. & T. R. Co. v. Pratt* (1902) 64 Kan. 118, 67 Pac. 464.

<sup>134</sup> In *Missouri, K. & T. R. Co. v. Pratt* (Kan.) supra, "the effect of the oral agreement made was not to change the binding effect of the written contract in relation to the land, but was an express waiver of the right to insist upon a default which might be made by the plaintiff in his not making payments in accordance with the terms of the contract. . . . The oral agreement made estops the company from claiming a forfeiture of the contracts for nonpayment of instalments falling due during a determination of the contest proceedings."

<sup>135</sup> In *Banister v. Fallis* (1911) 85 Kan. 320, 116 Pac. 822, the parties to a written agreement for an exchange of land, upon discovery of what they conceived to be a defect in the title of one of them, orally agreed that the papers should be delivered in escrow until the title was perfected. The parties, however, delivered possession of the respective tracts according to the agreement, and subsequently the deeds were taken from the custodian without the L.R.A.1917B.

knowledge of the plaintiff in the action and recorded. The plaintiff then brought suit for the cancellation of the deed which he had executed, to quiet his title to the land which such deed purported to convey, and for damages for the expense he had incurred in the removal of his improvements. Upon the trial he offered to show the parol agreement, and contended that until the title of the defendant was cured as agreed thereby, all papers were to be retained by the custodian without delivery. This offer was rejected, and in sustaining the rejection the supreme court says that the parol agreement not only extended the time for the performance of the contract, but introduced a new condition, which not only became essential to any conveyance at all, but which was regarded and is still regarded by the plaintiff as indispensable to the vesting of title in him.

<sup>136</sup> *Hetzel v. Lyon* (1910) 87 Neb. 261, 126 N. W. 997, see supra, note 52.

<sup>137</sup> *Byrne Mill Co. v. Robertson* (1907) 149 Ala. 273, 42 So. 1008.

<sup>138</sup> *Platt v. Butcher* (1896) 112 Cal. 634, 44 Pac. 1060. It was accordingly held in this case under a statute requiring the employment of a real estate broker to be in writing, that the broker could not recover for his services where he had found a purchaser within an extension fixed by parol agreement.



cute. No affirmative action is required. Such an agreement calls for nothing to be done, and expires by mere lapse of time. It is further stated that an oral agreement does not alter a contract in writing until it becomes an executed oral

agreement. But where one of the parties has relied upon the extension of time, allowing the original time to pass without performing his agreement, the other party has been held estopped to demand a strict performance.<sup>129</sup>

<sup>129</sup> A vendor who has at the request of the vendee extended the time within which the vendee may remove a building which is a part of the consideration for the contract is estopped to insist upon a strict perform-

ance of the contract as written, in an action by the vendee to compel specific performance. *Spencer v. McCament* (1907) 7 Cal. App. 84, 93 Pac. 682. W. A. E.

## ILLINOIS SUPREME COURT.

HOMER K. GALPIN

v.

CITY OF CHICAGO et al.

ELIZABETH C. WAYMAN, Admr., etc., of  
John E. W. Wayman, Deceased, Appt.

v.

COUNTY OF COOK.

(269 Ill. 27, 109 N. E. 713.)

**Statutes — amendment — reference to title.**

1. A statute which attempts to change the beneficiary of the fees to be taxed as costs in criminal prosecutions, by means of the addition of a section to the existing statute by mere reference to the title of such statute, is within a constitutional provision that no law shall be amended by reference to its title only.

*For other cases, see Statutes, III. in Dig. 1-52 N. S.*

**Same — subjects embraced by title.**

2. Provisions of a statute depriving an officer of fees and increasing his salary under a title, An act to provide for payment to him of further compensation, does not comply with a constitutional provision that no act shall embrace more than one subject and that shall be expressed in the title.

*For other cases, see Statutes, I. e, and f, in Dig. 1-52 N. S.*

**Officer — promise to release portion of salary — estoppel.**

3. A public official is not estopped from claiming fees to which by law he is entitled by the fact that, prior to his election, he stated publicly that he would pay them into the treasury, and that after election he complied with the promise.

*For other cases, see Estoppel, III. e, in Dig. 1-52 N. S.*

**District attorney — right to apply fines to uncollected fees.**

4. Failure to tax the fees of the prosecuting attorney as costs against accused in a

criminal proceeding deprives the attorney of the benefit of a statute permitting him, in case the fees cannot be collected from the person against whom they are taxed, to apply to the payment of them any fines and forfeitures collected by the attorney.

*For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.*

**Same — commissions on moneys collected — to what applicable.**

5. A statute giving a prosecuting attorney a commission upon all moneys collected by him applies to money paid the county clerk as fines and penalties when the prosecution was conducted by such attorney, and when the law made it his duty to collect the fines and penalties imposed in suits not prosecuted by him.

*For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.*

**Same — duty to prosecute.**

6. Under a statute making it the duty of the state's attorney to prosecute all actions in which the people of the state are concerned, it is his duty to prosecute those arising under a statute imposing a fine upon persons practising dentistry without a license, and upon public employees and upon employees of the state employment agency who accept fees from applicants for employment.

*For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.*

**Same — violation of park ordinance — duty to prosecute.**

7. A provision of a school law providing that all fines, forfeitures, and penalties except those for violation of municipal ordinances shall be paid to the school superintendent, and requiring the state's attorney to enforce the collection of all such fines, forfeitures, and penalties, makes it his duty to enforce the penalties for violation of ordinances passed by park commissioners under legislative authority, for the violation of which no other provision is made.

*For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.*

**Statute — title — sufficiency.**

8. A provision for the disposal of fines imposed for violation of park ordinances cannot be inserted in a statute entitled, An act in relation to a municipal court in a certain city, under a constitutional provision that no act shall embrace more than

**Note.**—As to agreement to accept less than amount of appropriation, salary, or fee, see annotation following this case, post, 190.

L.R.A.1917B.

one subject and that shall be expressed in the title.

*For other cases, see Statutes, I. e, and f, in Dig. 1-52 N. S.*

#### Statutes — repeal.

9. A statute setting apart the fines and penalties imposed for violation of park ordinances for a police pension fund repealed so much of a former act as entitled the superintendent of schools to moneys arising from that source and imposing upon the state's attorney the duty of collecting them. *For other cases, see Statutes, III. in Dig. 1-52 N. S.*

#### Same — repeal — repugnancy.

10. A statute giving the state's attorney a lien on fines and penalties collected by him, to compensate him for fees taxed against persons prosecuted by him as costs, and not collected, is repealed by statutes appropriating such fines and penalties to specific purposes.

*For other cases, see Statutes, III. in Dig. 1-52 N. S.*

#### District attorney — lien for fees.

11. The lien given by a statute to a state's attorney upon fines collected by him, to compensate him for uncollected fees taxed against persons prosecuted by him, does not extend to fines collected in cases which he is not required to prosecute.

*For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.*

#### Interest — upon money derived from fines — disposition.

12. Interest accumulating upon funds in the hands of a county clerk derived from fines and penalties should be divided among those entitled to the fines in proportion to their respective interests in the principal.

*For other cases, see Fines, in Dig. 1-52 N. S.*

#### Interpleader — questions which may be determined.

13. The right of a county to a return of money paid a state's attorney as salary cannot be adjudicated in an interpleader proceeding by the county clerk to determine the right to moneys accumulated in his hands a portion of which is claimed by such attorney as fees.

*For other cases, see Interpleader, in Dig. 1-52 N. S.*

(June 24, 1915.)

**A** PPEAL from a decree of the Circuit Court for Cook County distributing funds collected by complainant in his official capacity as clerk of the municipal court, in an interpleader proceeding to determine the right to such funds. Reversed.

The facts are stated in the opinion.

Mr. Thomas Marshall, for appellant:

The lien given by § 8, chap. 53, Fees and Salaries Act, and § 239, chap. 122, Schools Act, is the lien of the state's attorney who secured the conviction, and of his representative, and it is not the lien of L.R.A.1917B.

the county of Cook or any other person or corporation.

*Galpin v. Chicago*, 249 Ill. 554, 94 N. E. 961, 159 Ill. App. 135, 176; *People v. Williams*, 232 Ill. 519, 83 N. E. 1047; *People v. Nedrow*, 122 Ill. 363, 13 N. E. 533, affirming 25 Ill. App. 28; *Cook County v. Healy*, 222 Ill. 310, 78 N. E. 623; *Buckingham v. People*, 26 Ill. App. 269; *People ex rel. Honore v. Olsen*, 222 Ill. 122, 113 Am. St. Rep. 371, 78 N. E. 23; *People v. Warren*, 14 Ill. App. 296; *People ex rel. Bussey v. Gault*, 149 Ill. 39, 36 N. E. 576; *Kitchell v. Madison County*, 5 Ill. 163; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Borschenious v. People*, 41 Ill. 236; *People ex rel. Gersch v. Chicago*, 242 Ill. 566, 90 N. E. 259.

The state's attorney is a county officer of that class to which § 10, art. 10, of the Constitution does not apply.

*Butzow v. Kern*, 264 Ill. 498, 106 N. E. 338; *Jimison v. Adams County*, 130 Ill. 558, 22 N. E. 820, affirming 38 Ill. App. 52; *Wulff v. Aldrich*, 124 Ill. 591, 18 N. E. 886; *Cook County v. Healy*, 222 Ill. 310, 78 N. E. 623; *People v. Williams*, 232 Ill. 519, 83 N. E. 1047; *Reports of Atty. Gen.* 1910, p. 451.

The fees of an office are incident to it as fully as the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities; and *Wayman*, as state's attorney, was clearly invested with the right to receive the fees and emoluments as his personal property.

*Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Chicago v. Luthardt*, 191 Ill. 523, 61 N. E. 410; *People v. Williams*, 232 Ill. 519, 83 N. E. 1047; *Butzow v. Kern*, 264 Ill. 505, 106 N. E. 338; *Fell v. McLain County*, 43 Ill. 216; *People ex rel. Ballou v. DuBois*, 23 Ill. 547; *Andrews v. Portland*, 70 Me. 484, 1 Am. St. Rep. 280, 10 Atl. 458; *Borschenious v. People*, 41 Ill. 236; *Galpin v. Chicago*, 249 Ill. 554; *People ex rel. Malley v. Barrett*, 203 Ill. 108, 96 Am. St. Rep. 296, 67 N. E. 742; *Thall v. Dreyfus*, 84 App. Div. 509, 82 N. Y. Supp. 691; *People's Trust Co. v. Smith*, 31 Abb. N. C. 422, 30 N. Y. Supp. 342; *Meehan v. Jones*, 70 Fed. 453.

The interest and title of the state's attorney in the fees is of such a nature and so vested in him that even a pardon or remission by the governor of the state cannot divest him of his vested right thereto.

*Holliday v. People*, 10 Ill. 214; *Meul v. People*, 198 Ill. 258, 64 N. E. 1106.

The compensation of an officer is not based on contract, but is fixed by law. When the compensation is fixed by law there can be no waiver as to the amount,

either by express agreement or by the conduct of the officer.

*Pryor v. Rochester*, 166 N. Y. 548, 60 N. E. 252; *Bates v. St. Louis*, 153 Mo. 18, 77 Am. St. Rep. 701, 54 S. W. 439; 28 Cyc. 459, 460; *Abbott v. Hayes County*, 78 Neb. 729, 111 S. W. 780; *State ex rel. Chapman v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *Bennett v. Orange*, 69 N. J. L. 675, 56 Atl. 1131; *Gallagher v. Lincoln*, 63 Neb. 339, 88 N. W. 505; *Bodenhofer v. Hogan*, 142 Iowa, 321, 134 Am. St. Rep. 418, 120 N. W. 659, 19 Ann. Cas. 1073; *Kehn v. State*, 93 N. Y. 291; *Montague v. Massey*, 76 Va. 307; *Lattimore v. Tarrant County*, 57 Tex. Civ. App. 610, 124 S. W. 205; *Young v. Jefferson County*, 30 Ky. L. Rep. 1209, 100 S. W. 335; *Indianapolis v. Martin*, 45 Ind. App. 256, 89 N. E. 599; *Whiting v. United States*, 35 Ct. Cl. 291; *Gilman v. Des Moines Valley R. Co.* 40 Iowa, 200; *Peters v. Davenport*, 104 Iowa, 625, 74 N. W. 6; *Daniels v. Des Moines*, 108 Iowa, 484, 79 N. W. 269; *Purdy v. Independence*, 75 Iowa, 356, 39 N. W. 641; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Hall v. Gavitt*, 18 Ind. 390; *Hope v. Linden Park Blood Horse Assn.* 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070; *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; 2 Dill. Mun. Corp. 492.

All finances of the county are under the control of the local corporate authorities. The legislature cannot spread a tax in Cook county for county corporate purposes.

*Givins v. Chicago*, 188 Ill. 348, 58 N. E. 912; *McDonald v. Louisville*, 113 Ky. 425, 68 S. W. 413; *Booth v. Opel*, 244 Ill. 317, 91 N. E. 458; *People ex rel. Van Slooten v. Cook County*, 221 Ill. 497, 77 N. E. 914; *Washingtonian Home v. Chicago*, 157 Ill. 414, 29 L.R.A. 798, 41 N. E. 893; *People ex rel. Skinner v. Auditor*, 12 Ill. 307; *People ex rel. Merchants' Sav. L. & T. Co. v. Auditor*, 30 Ill. 434; *People ex rel. Becker v. Miner*, 46 Ill. 384; *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Springfield v. Edwards*, 84 Ill. 626; *Lindblad v. Board of Education*, 221 Ill. 261, 77 N. E. 450; *People ex rel. Ahern v. Bollam*, 182 Ill. 532, 54 N. E. 1032; *State v. Ferguson*, 33 N. H. 427; *Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362; *De Clercq v. Barber Asphalt Paving Co.* 167 Ill. 215, 47 N. E. 367; *Webster v. People*, 98 Ill. 343; *People ex rel. Neil v. Knopf*, 171 Ill. 191, 49 N. E. 424; *Bebb v. People*, 172 Ill. 376, 50 N. E. 185; *Morgan v. Schusselle*, 228 Ill. 106, 81 N. E. 814; *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286; *Cooley, Const. Lim.* § 713; *Pittsburgh, C. & St. L. R. Co. v. State*, 49 Ohio St. 189, 16 L.R.A. 380, 30 N. E. 435; *Hib-* L.R.A.1917B.

*bard v. State*, 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109; *Ramsey v. Hoeger*, 76 Ill. 432; *Lane v. Dorman*, 4 Ill. 240, 36 Am. Dec. 543.

The 2-mill tax under the Constitution of 1848, levied to pay an indebtedness of the state, must be applied to the purpose for which it was intended to be used by the Constitution, and cannot be diverted into the general state revenue fund.

*People ex rel. Skinner v. Auditor*, 12 Ill. 307; *People ex rel. Merchants' Sav. L. & T. Co. v. Auditor*, 30 Ill. 434; *People ex rel. Becker v. Miner*, 46 Ill. 384; *Water Comrs. v. Hall*, 98 Ill. 371; *Alton v. Aetna Ins. Co.* 82 Ill. 45; *Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359; *Springfield v. Edwards*, 84 Ill. 626; *Wright v. Bishop*, 88 Ill. 302; 2 Dill. Mun. Corp. 1237, 1289; *Fuller v. Chicago*, 89 Ill. 294; *Lindblad v. Board of Education*, 221 Ill. 274, 77 N. E. 450; *People v. Williams*, 232 Ill. 519, 83 N. E. 1047; *Walcott v. People*, 17 Mich. 68; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 495, 84 N. W. 1101; *Niles Bryant School of Piano Tuning v. Bailey*, 161 Mich. 193, 126 N. W. 116; *Board of Education v. Macon County*, 137 N. C. 310, 49 S. E. 353; *Yazoo City v. State*, 48 Miss. 440; *Mobile & O. R. Co. v. State*, 51 Miss. 137; *Blair v. Marye*, 80 Va. 485; *Southern R. Co. v. Mecklenburg County*, 148 N. C. 220, 61 S. E. 600; *People ex rel. Biebinger v. Peoria & E. R. Co.* 216 Ill. 221, 74 N. E. 734.

The legislature must prescribe some compensation to the state's attorney; and when prescribed and fixed by law the command of the Constitution is that he "shall receive such compensation as is or may be provided by law."

*People v. Williams*, 232 Ill. 519, 83 N. E. 1047; *Blair v. Marye*, 80 Va. 485; *Thon v. Com.* 77 Va. 289; *Thomas v. Owens*, 4 Md. 189.

House Bills 231 and 232 are invalid as being in express violation of § 13, of art. 4, of the Constitution.

*Lyons v. Police Pension Bd.* 255 Ill. 139, 99 N. E. 337; *Brooks v. Hatch*, 261 Ill. 179, 103 N. E. 745.

House Bill 232, providing additional compensation, is a local and special law within the meaning of the 6th paragraph of § 22, of art. 4, of the Constitution, which prohibits the general assembly from passing local or special laws "regulating county and township affairs."

*Pettibone v. West Chicago Park Comrs.* 215 Ill. 304, 74 N. E. 387; *West Chicago Park Comrs. v. Chicago*, 216 Ill. 54, 74 N. E. 771.

The Acts of 1907, if valid when passed, merely required that the state's attorney

pay over certain fees, and the law that so provided being now repealed, there is now no requirement applying to the Wayman term to pay over the fees.

People ex rel. Burdick v. Board of Education, 166 Ill. 388, 46 N. E. 1099; Farwell v. Benevolent Assn. of Paid Fire Dept. 4 Ill. App. 36; Palmer v. Danville, 166 Ill. 42, 46 N. E. 629; Kipp v. Lichtenstein, 79 Ill. 358; Menard County v. Kincaid, 71 Ill. 587; Wilson v. Ohio & M. R. Co. 64 Ill. 542, 16 Am. Rep. 565; Eaton v. Graham, 11 Ill. 619; People ex rel. Kern v. Nelson, 156 Ill. 364, 40 N. E. 957; Struthers v. People, 116 Ill. App. 481; Allen v. People, 84 Ill. 502; People ex rel. Higgins v. Freeman, 242 Ill. 150, 80 N. E. 667; Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031, affirming 49 Ill. App. 503; Mix v. Illinois C. R. Co. 116 Ill. 502, 6 N. E. 42; Hall v. Steele, 82 Ala. 562, 2 So. 650; Mechem, Pub. Off. 1890 ed. § 942, p. 630.

The representative of Wayman, in any view of this case, is authorized to deduct his 10 per cent commission from the fines and forfeitures and to retain the same. There is no provision anywhere that he pay over his commission to the county.

Buckingham v. People, 26 Ill. App. 269; Morton v. Bailey, 2 Ill. 213, 27 Am. Dec. 767; Doyle v. Wilkinson, 120 Ill. 430, 11 N. E. 890; Fulton County v. Boyer, 116 Ill. App. 388; Hargrave v. Penrod, Beecher's Breese (Ill.) 401, 12 Am. Dec. 201; Reddick v. Cloud, 7 Ill. 670.

Wayman had the power of assignment of the fees, and his lien is enforceable after his death by his personal representative for the benefit of his estate.

Dayhuff v. Dayhuff, 81 Ill. 499; Keith v. Horner, 32 Ill. 524; Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761; 1 Jones, Liens, § 990, p. 682; Telfer v. Kierstead, 9 Abb. Pr. 418; Hubbard v. Clark, — N. J. Eq. —, 7 Atl. 26; Batre v. Auze, 5 Ala. 173; Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 130 Am. St. Rep. 180, 87 N. E. 860; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222; People v. Williams, 232 Ill. 519, 83 N. E. 1047; Galpin v. Chicago, 159 Ill. App. 135; Stewart v. Sample, 168 Ala. 270, 53 So. 182; Thompson v. Cullers, — Tex. Civ. App. —, 35 S. W. 412; Birkbeck v. Stafford, 14 Abb. Pr. 285, 23 How. Pr. 236; Roesch v. W. B. Worthen Co. 95 Ark. 482, 31 L.R.A. (N.S.) 374, 130 S. W. 551; Oberdoerfer v. Louisville School Bd. 120 Ky. 112, 85 S. W. 696; Carnegie Trust Co. v. Battery Place Realty Co. 67 Misc. 452, 122 N. Y. Supp. 697; First Nat. Bank v. State, 68 Neb. 482, 94 N. W. 633, 4 Ann. Cas. 423; Brackett v. Blake, 7 Met. 335, 41 Am. Dec. 442; People ex rel. Grattan v. Dayton, L.R.A.1917B.

50 How. Pr. 143; Mechem, Pub. Off. § 874.

The administratrix succeeds to the legal title to the personal estate, and the title takes effect by relation from the death of the intestate.

Stewart v. Taylor, 9 Lea, 352; Makepeace v. Moore, 10 Ill. 474; Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141; Re Seidel, 2 Woodw. Dec. 259; Chadwick v. People, 108 Ill. App. 620.

The rights of the city are subordinate to those of every other claimant to the fines, penalties, and forfeitures, excepting only the superintendent of schools. The claim of each defendant is subsequent to the prior lien and claim of the Wayman estate.

Galpin v. Chicago, 249 Ill. 554, 94 N. E. 961, affirming 159 Ill. App. 135; People v. Williams, 232 Ill. 519, 83 N. E. 1047.

The action is interpleader, and judicial cognizance cannot be taken of mere equitable claims or rights as between different governmental agencies; and the court should disburse as Galpin, clerk of the municipal court, was directed by law to disburse the fund.

Dyas v. Dyas, 231 Ill. 374, 83 N. E. 229; Galpin v. Chicago, 159 Ill. App. 135; Byers v. Sanson-Thayer Commission Co. 111 Ill. App. 575; Clinton County v. Schuster, 82 Ill. 137.

Messrs. John W. Beckwith, Joseph F. Grossman, Robert Redfield, Francis O'Shaughnessy, Jacob C. LeBoesky, P. J. Lucey, Attorney General, Thomas J. O'Hare, Carl R. Chindblom, John P. Barnes, William F. Struckmann, Walter E. Moss, Howard W. Hayes, Henry P. Chandler, and M. H. Gladstone for appellees.

Cooke, J., delivered the opinion of the court:

On December 13, 1912, Homer K. Galpin filed in the circuit court of Cook county his bill of interpleader, alleging that in November, 1906, he was elected clerk of the municipal court of Chicago and held that office until December 2, 1912; that during the four-year period beginning December 6, 1908, and ending December 1, 1912, the fines and penalties paid to him by persons convicted of violating various statutes and park ordinances particularly mentioned in the bill aggregated the sum of \$191,206.50 and that he has received interest amounting to \$5,998.10 on said fund and \$5,272.30 as interest on funds other than those above mentioned; that John E. W. Wayman, who was state's attorney of Cook county during the said four-year period, the county of Cook, and the superintendent of schools of Cook county, are each claiming the entire fund, and the city of Chicago, the South

Park commissioners, the commissioners of Lincoln Park, the West Chicago Park commissioners, the North Shore Park district, the Ridge Avenue Park district, the state board of pharmacy, the Illinois state board of dental examiners, the state board of commissioners of labor, E. A. Rust, Charles Hagenbucher, Christ Heiser, Joseph Obornij, and Matt A. Berkholz are each claiming specific portions of said fund; that complainant has always been, and is now, willing to pay the amounts collected by him as such clerk, and interest accrued thereon, to the person or persons lawfully entitled to the same, but is, by reason of the various conflicting claims aforesaid, uncertain as to the proper distribution of the fund. All of said claimants were made defendants to the bill, which prayed that they be required to interplead and settle and adjust their demands among themselves.

All of the defendants, except Rust, Hagenbucher, Heiser, Obornij, and Berkholz, who were deputy game wardens and whose interest, if any, in the fund are insignificant, answered the bill, setting up their various claims to the fund or to portions thereof. The boards of trustees of various police pension funds filed an intervening petition, praying that they be made defendants and be permitted to set up, by way of answer, their claims to portions of the fund. The prayer of the petition was granted, and answers were filed by the respective boards of trustees of the police pension funds. Hale Gossart also filed an intervening petition praying to be made a party defendant and claiming \$75 of the fund.

On September 15, 1913, the death of John E. W. Wayman was suggested, and Elizabeth C. Wayman, as administratrix of his estate, was substituted as a defendant in his stead. Thereafter the court entered an order allowing the complainant to retain out of the fund in his hands \$1,049.85 on account of costs and expenses incurred by him in filing the bill of interpleader, and directing him to pay the balance, amounting to \$201,427.05, to the clerk of the circuit court, which was accordingly done and the complainant was dismissed from the suit.

The cause was heard by the chancellor upon a stipulation of facts, and a decree was entered finding that the defendant Hale Gossart is entitled to \$75 of said fund, that the city of Chicago is entitled to \$5,272.32 of said fund, and that the county of Cook is entitled to the balance of said fund, and directing the clerk to distribute the fund among said parties in the proportions in which they are entitled to the same as found by the decree. From that decree Elizabeth C. Wayman, as administratrix, has L.R.A.1917B.

prosecuted this appeal, and various of the defendants who were found to have no interest in the fund, and the city of Chicago, have assigned cross errors.

No complaint is made by any of the parties of that portion of the decree which awards to Gossart \$75 and to the city of Chicago \$5,272.32 of the fund. The controversy here is over the proper distribution of the remainder of the fund, amounting to \$196,079.73.

The Wayman estate claims the entire fund under and by virtue of § 8 of the Fees and Salaries Act and § 239 of the School Law. That portion of said § 8, as amended in 1907, necessary to be here noticed, is as follows: "State's attorneys shall also be entitled to the following fees: . . . All the foregoing fees shall be taxed as costs to be collected from the defendant, if possible, upon conviction. But in cases of inquiry into the sanity or insanity of any person alleged to be insane, in cases on a charge of bastardy and in case of appeal or writ of error in the supreme or appellate court, where judgment is in favor of the accused, the fees allowed the state's attorney therein shall be retained out of the fines and forfeitures collected by them in other cases. Ten per cent of all moneys, except revenue, collected by them and paid over to the authorities entitled thereto, which per cent, together with the fees provided for herein that are not collected from the parties tried or examined, shall be paid out of any fines and forfeited recognizances collected by them. State's attorneys shall have a lien for their fees on moneys except revenue received by them until such fees and earnings are fully paid." Laws 1907, p. 329.

Section 239 of the School Law of 1909 reads as follows: "It shall be the duty of the state's attorneys of the several counties to enforce the collection of all fines, forfeitures and penalties imposed or incurred in the courts of record of their respective counties, and to pay the same to the county superintendent of the county wherein the same have been imposed or incurred, retaining therefrom the fees and commissions allowed them by law." Laws 1909, p. 406.

This provision of the School Law of 1909 is identical with § 2 of article 14 of the School Law of 1889, which was in force when Wayman became state's attorney of Cook county.

The county of Cook claims the entire fund under and by virtue of two acts of the general assembly approved May 17, 1907, both of which have since been repealed. One of these acts is referred to in this proceeding as House Bill 231 and the other as House Bill 232. House Bill 231 was as follows:

"Section 1. Be it enacted by the people of the state of Illinois represented in the general assembly: That 'An Act Concerning Fees and Salaries, and to Classify the Several Counties of This State with Reference Thereto,' approved March 29, 1872, in force July 1, 1872, title as amended by act approved March 28, 1874, in force July 1, 1874, 'Act as Amended by an Act Approved May 15, 1903, in Force July 1, 1903,' be and the same is hereby amended by adding thereto section 9a to read as follows:

"9a. Each state's attorney in counties of the third class, hereafter to be elected, at the end of each and every quarter of the year after entering upon the duties of his office and within ten days after the expiration of his term of office shall pay all fees collected and remaining in his hands into the county treasury of his county." Laws 1907, p. 320.

House Bill 232 reads as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That the state's attorney of Cook county shall be paid by the said county, in addition to the salary which may be paid to him from the state treasury, such further compensation as will make his salary amount to the sum of \$10,000 per annum, which sum shall be in full payment for all services rendered by him.

"Sec. 2. The said compensation shall be paid in equal quarterly instalments; and it shall be the duty of the county comptroller of said county, at the end of each and every quarter of the year, to draw an order or warrant therefor in favor of the state's attorney on the county treasurer of said county, whose duty it shall be to pay the same on its presentation properly indorsed: Provided, that no warrant shall be drawn or money paid unless the state's attorney shall have, for the current quarter, made a report to the commissioners of said county and paid into the county treasury all fees collected by him as state's attorney for said quarter." Laws 1907, p. 323.

The Wayman estate contends that both of these acts were unconstitutional for various reasons, but it will be necessary to consider but one of the grounds urged against each act.

It is contended by the Wayman estate that House Bill 231 violated that portion of § 13 of article 4 of the Constitution which provides that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act."

This provision of the Constitution has been considered in numerous cases decided L.R.A.1917B.

by this court since the adoption of our present Constitution. The question arising in most of the cases has been whether an act which does not in express terms purport to amend another act, but which in fact does alter or change some prior act, is within the constitutional inhibition. Soon after the adoption of the Constitution of 1870 this question was presented in *People ex rel Klokke v. Wright*, 70 Ill. 388. It was pointed out in that case that the act there under consideration did not purport to amend any particular section of any act, and that all that could be said of it in that respect was that by implication it amended the municipal charters of cities. With reference to the constitutional provision above quoted it was said: "It cannot be held that this clause of the Constitution embraces every enactment which, in any degree, however remotely it may be, affects the prior law on a given subject: for, to so hold would be to bring about an evil far greater than the one sought to be obviated by this clause."

In many subsequent cases it has been held that it was not the purpose of the framers of the Constitution to limit or control repeals by implication, but that if an act is complete in itself, and does not purport to amend a prior act, it is not within the constitutional prohibition, although its effect may be to repeal certain provisions contained in prior acts and to substitute new provisions in lieu thereof. *Geisen v. Heiderich*, 104 Ill. 537; *School Directors v. School Directors*, 135 Ill. 464, 28 N. E. 49; *People ex rel. Stuckart v. Knopf*, 183 Ill. 410, 56 N. E. 155; *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *Erford v. Peoria*, 229 Ill. 546, 82 N. E. 374; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; *People v. Jones*, 242 Ill. 138, 89 N. E. 711; *Hollingsworth v. Chicago & C. Coal Co.* 243 Ill. 98, 90 N. E. 276; *People v. Van Bever*, 248 Ill. 136, 93 N. E. 725; *People ex rel. Cant v. Crossley*, 261 Ill. 78, 103 N. E. 537. On the other hand, even though an act professes to be an independent act and does not purport to amend any prior act, still if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject so as to make of the old and the new a connected piece of legislation covering the same subject, the latter act must be considered an amendment of the former and as within the constitutional prohibition. *Badenoch v. Chicago*, 222 Ill. 71, 78 N. E. 31; *Brooks v. Hatch*, 261 Ill. 179, 103 N. E. 745. The case at bar, however, is not governed by the rules laid down in either of the two lines of cases above mentioned, for

the reason that House Bill 231 did not purport to be an independent act or to be complete in itself, but both in the title and in the body of the act it was stated that the purpose of the act was to "amend" the Fees and Salaries Act "by adding thereto § 9a." An examination of the provisions of House Bill 231 in connection with the other provisions of the Fees and Salaries Act discloses the fact that the only purpose of the new act was to amend § 8 of the prior act by changing the beneficiary of the fees authorized by said § 8 to be taxed as costs in favor of state's attorneys in counties of the third class. Under the Fees and Salaries Act as it existed at the time of the adoption of House Bill 231, state's attorneys in all of the counties of the state were the beneficiaries of all the fees enumerated in said § 8. The effect of House Bill 231, if valid, was to take away from state's attorneys in counties of the third class the right to the beneficial enjoyment of such fees and to make the county the beneficiary thereof. House Bill 231 therefore amended a prior law by reference to its title only, and the section amended was not inserted at length in the new act. This was a clear violation of § 13 of article 4 of the Constitution (*People ex rel. Breckon v. Election Comrs.* 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562), and rendered said House Bill 231 inoperative and void.

The situation here is, in principle, the same as that disclosed in *Lyons v. Police Pension Bd.* 255 Ill. 139, 99 N. E. 337. The title of the act there held to violate the provision of the Constitution above quoted was:

"An Act to Amend an Act Entitled 'An Act to Provide for the Setting Apart, Formation, and Disbursement of a Police Pension Fund in Cities, Villages, and Incorporated Towns.'" Laws 1911, p. 170.

The nature of the amendment was the addition to the former act of a new section, to be known as § 3a, extending the benefit of the act to police matrons in the police department of a city upon the terms specified in such additional section. In holding that the amendatory act violated the provision of § 13 of article 4 of the Constitution above quoted we said: "The title gives no intimation of the character of the amendment or the section or part of the act to be amended. The amendatory act was, in fact, an amendment of § 3 of the original act, where, only, it is declared who may become entitled to pensions. . . . The amendatory act changes that section by adding to the persons who may receive pensions, police matrons appointed and sworn, of twenty years' service, and it also contains many provisions applying to L.R.A.1917B.

pensions to police matrons which do not appear in original § 3 and which might have appeared as amendments to other sections or as additional sections. Section 3 as amended is not inserted at length in the new act. In order to ascertain the extent of the provisions of that section to-day, it is necessary to examine not only the amendatory act, but to go back to the former statute and by reading the two together ascertain what persons may become pensioners. This is the condition which § 13 of article 4 of the Constitution was intended to prevent by the provision that 'no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act.' Calling the amendment an additional section does not change its character and cannot evade the constitutional requirement."

In this case, as in the *Lyons Case*, the purpose of the act was expressly stated to be to amend a prior act by adding thereto a new section. The new section added by amendment in the *Lyons Case* increased the beneficiaries who might participate in the fund provided for in the original act, by adding thereto a new class of beneficiaries. The new section added by amendment in this case took away from one class of beneficiaries the right to the fees and commissions allowed them by § 8 of the Fees and Salaries Act and substituted another class of beneficiaries therefor. In this case, as in the *Lyons Case*, the title gave no intimation of the character of the amendment or the section or part of the act to be amended. The amendatory act was, in fact, an amendment of § 8 of the original act, and changed that section by substituting for the beneficiaries specified in said § 8 other beneficiaries designated in the amendatory act. Section 8, as amended, was not inserted at length in the new act; and in order to ascertain the extent of the provisions of that section as it existed after the adoption of House Bill 231, it was necessary to examine not only the amendatory act, but to go back to the former statute, and by reading the two together ascertain the disposition made by law of the fees provided for in said § 8 and the rights of the county with reference to those fees. This case, therefore, as well as the *Lyons Case*, presents a condition which § 13 of article 4 of the Constitution was intended to prevent by the provision that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act."

Section 13 of article 4 of the Constitution also provides: "No act hereafter passed

shall embrace more than one subject, and that shall be expressed in the title."

With reference to this provision we said in *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109: "The title of an act formerly was of little importance. Of recent years, however, by reason of the adoption by most of the states of constitutional provisions similar to the one above quoted, the title to an act in such states is now of very great importance. Some of the reasons which led to the adoption of such constitutional provisions are said to be: First, to prevent 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by inserting provisions into bills of which the titles give no intimation and which might by oversight be carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation being considered, so they might be heard thereon, if they so desire, by petition or remonstrance. And while such constitutional provisions are to be liberally construed in order that a legislative enactment may be sustained, the courts cannot permit such provisions to be disregarded or overridden in the enactment of legislation."

The title of said House Bill 232 was: "An Act Providing for the Payment by the County of Cook of Further Compensation to the State's Attorney of Said County."

This was a companion bill of House Bill 231, and was evidently passed by the legislature on the supposition that House Bill 231 was a valid enactment. Had House Bill 231 been valid, then the objection made by the Wayman estate that the subject of House Bill 232 was not expressed in the title of the act could not be sustained, because, had House Bill 231 taken away the right of the state's attorney to the fees specified in § 8 of the Fees and Salaries Act, the effect of House Bill 232 would have been merely to provide additional compensation for the state's attorney of Cook county. If, however, House Bill 232 be considered alone and without regard to House Bill 231 (and it must now be so considered), then it must be held that it violated that provision of the Constitution last above quoted, because, when so considered, its effect, if enforced, would have been not merely to provide for the payment of further compensation to the state's attorney of Cook county, but also to take away from him the right to the fees and commissions allowed him by § 8 of the Fees and Salaries Act. The title of the act, professing to be the title to an act providing for the payment of further compensation to the state's attorney, gave no

intimation of the provisions of the act depriving the state's attorney of the right to the beneficial enjoyment of the fees and commissions allowed him by § 8 of the Fees and Salaries Act. "Further compensation" means compensation in addition to that already provided for, and it requires no argument to show that provisions in the act which, instead of providing for the payment of further compensation to the state's attorney, attempted to take away from him the compensation then provided for by law, were not within the title of the act and were therefore inoperative and void. It is therefore clear that House Bill 232 must fall with House Bill 231, because, if House Bill 232 be considered as the legislation depriving the state's attorney of Cook county of the fees allowed him by § 8 of the Fees and Salaries Act and requiring the payment into the county treasury of all fees collected by him, the subject of the act was not expressed in the title.

For the reason that the two acts under which the county of Cook claims the fund in controversy were void, it necessarily follows that the county has no valid claim to the fund or to any part thereof, and the decree of the circuit court, in so far as it awards a portion of the fund to the county, is erroneous. Each of these acts has been repealed by a later act, which has been held valid in *Hoynes v. Danisch*, 264 Ill. 467, 106 N. E. 341, *Butzow v. Kern*, 264 Ill. 498, 106 N. E. 338, and *Hoynes v. Ling*, 264 Ill. 506, 106 N. E. 349. The matters determined in those cases have no bearing upon the questions here involved, and the decision in this case does not affect the questions there decided.

From the stipulation upon which the cause was heard in the circuit court it appears that Wayman stated publicly during his campaign for election in October, 1908, that if elected state's attorney he would accept an annual salary of \$10,000 and pay into the county treasury all fees. It further appears that Wayman received from the county treasurer of Cook county, upon warrants drawn by the county comptroller, each of which warrants recited that it was for Wayman's salary as state's attorney, the sum of \$800 per month during his entire term of office, and that during such period he paid to the county treasurer a total of \$62,970.75, which sum he reported to the board of commissioners of Cook county represented the fees received by him as state's attorney during his term of office. It is contended by the various parties, whose claims conflict with that of the Wayman estate, that by reason of this conduct on Wayman's part his estate is now estopped from claiming any portion of the fund in



controversy. With this contention we cannot agree. The fees or salary of an officer, having been fixed by law, become an incident to the office, and it is contrary to public policy for candidates to attempt to attain such office by promises made to the electors to perform the duties of the office for any other or different compensation than that fixed by law. Such promises being illegal, they cannot be enforced. *Abbott v. Hayes County*, 78 Neb. 729, 111 N. W. 780; *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38. Whether, as held by some courts of last resort, such conduct on the part of a successful candidate is sufficient to invalidate his election it is not necessary or proper here to determine, as that question could only be properly presented in a proceeding brought against the officer to test his right to office. It cannot be raised where, as here, the officer's term has expired and the controversy concerns only his right to the fees of his office.

Neither was Wayman estopped from claiming the compensation fixed by statute for his services as state's attorney. In *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031, we said: "It is a novel idea in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all. As we understand the doctrine of estoppel in pais, it is based upon a fraudulent purpose and a fraudulent result. Before it can be invoked to the aid of a litigant, it must appear that the person against whom it is invoked has, by his words or conduct, caused him to believe in the existence of a certain state of things and induced him to act upon that belief. If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to an application of the rule, but will be considered as having acted upon his own judgment solely."

To the same effect is *Finch v. Theiss*, 267 Ill. 65, 107 N. E. 898.

In order to clearly understand the nature of the claims to the fund made by the various claimants other than the county of Cook, it will be necessary to mention the sources from which this fund came into the hands of the clerk of the municipal court.

From the stipulation upon which the cause was heard by the chancellor it appears that the fund in controversy represents the fines and penalties received by the clerk of the municipal court during the four-year period beginning December 8, L.R.A.1917B.

1908, and ending December 1, 1912, and interest thereon; that the receipts from fines in criminal and quasi criminal cases amounted to \$109,369; that the receipts from penalties imposed for violations of the provisions of an act entitled "An Act to Promote Attendance of Children in Schools and to Prevent Truancy," approved June 11, 1897, in force July 1, 1897, and §§ 274 and 275 of an act entitled "An Act to Establish and Maintain a System of Free Schools," approved and in force June 12, 1909, amounted to \$1,222.50; that the receipts from penalties imposed for violations, within the jurisdiction of the city of Chicago, of an act entitled "An Act Defining Motor Vehicles," etc., approved May 28, 1907, in force July 1, 1907, and an act of like title approved June 10, 1911, in force July 1, 1911, amounted to \$230.50; that the receipts from penalties imposed in proceedings instituted by the South Park commissioners for violations of South Park ordinances amounted to \$40,866.50, of which \$17,508 was collected prior to July 1, 1911, and \$23,358.50 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the South Park commissioners, of the Motor Vehicle Acts of May 28, 1907, and June 10, 1911, amounted to \$8,889; that the receipts from penalties imposed in proceedings instituted by the commissioners of Lincoln Park for violations of Lincoln Park ordinances amounted to \$1,324, of which \$405 was collected prior to July 1, 1911, and \$919 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the commissioners of Lincoln Park, of the Motor Vehicle Acts of May 28, 1907, and June 10, 1911, amounted to \$7,949; that the receipts from penalties imposed in proceedings instituted by the West Chicago Park commissioners for violations of West Chicago Park ordinances amounted to \$9,046.50, of which \$4,954 was collected prior to July 1, 1911, and \$4,092.50 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the West Chicago Park commissioners, of the Motor Vehicle Acts of May 28, 1907, and June 10, 1911, amounted to \$11,115; that the receipts from penalties imposed in proceedings instituted by the commissioners of North Shore Park district for violations of North Shore Park ordinances amounted to \$33; that the receipts from penalties imposed for violations, within the jurisdiction of the commissioners of North Shore Park district, of the Motor Vehicle Acts of May 28, 1907, and June 10, 1911, amounted to \$20, that the receipts from penalties imposed in proceedings instituted by the

commissioners of Ridge Avenue Park district for violations of Ridge Avenue Park ordinances amounted to \$5; that the receipts from penalties imposed for violations of the provisions of an act entitled "An Act to Regulate the Practice of Pharmacy in the State of Illinois," etc., approved May 11, 1901, in force July 1, 1901, amounted to \$145; that the receipts from penalties imposed for violations of the provisions of an act entitled "An Act to Regulate the Practice of Dental Surgery and Dentistry in the State of Illinois," etc., approved June 11, 1909, in force July 1, 1909, amounted to \$335; that the receipts from penalties for violations of the provisions of an act entitled "An Act Relating to Employment Offices and Agencies," approved and in force May 11, 1903, amounted to \$599; and that the receipts from penalties imposed for violations of the provisions of an act entitled "An Act for the Protection of Game, Wild Fowl, and Birds," etc., approved April 23, 1903, in force July 1, 1903, in actions in which complaints were filed by E. A. Rust, Charles Hagenbucher, Christ Heiser, Joseph Obornij, and Matt A. Berkholz, deputy game wardens, amounted to \$57.50. The interest which accrued in the hands of the clerk of the municipal court upon the respective sums above mentioned aggregated \$5,998.10. The clerk also received \$5,272.30 interest on funds in his hands other than the funds above mentioned. The item of interest last mentioned was awarded to the city of Chicago, and no complaint is made of the action of the chancellor in that regard.

The Wayman estate claims that the uncollected fees to which Wayman, during his term of office, was entitled by virtue of § 8 of the Fees and Salaries Act amounted to \$416,729.90; that no part of the same has been paid; and that by virtue of said § 8, considered in connection with § 239 of the School Law, the Wayman estate is entitled to all the moneys received by the clerk of the municipal court from fines and penalties, and the interest accrued thereon, to apply on these uncollected fees. The other claimants contend that the uncollected fees to which Wayman was entitled by virtue of said §§ 8 and 239 do not amount to as much as the fund in controversy, so that in any event the Wayman estate would not be entitled to the entire fund. This controversy over the amount of uncollected fees arises from the following state of facts:

Section 8 of the Fees and Salaries Act, as amended in 1907 and as in force when Wayman became state's attorney of Cook county, after providing a fee of \$30 for each conviction for offenses punishable by death or imprisonment in the penitentiary,

allowed a fee of \$15 for each conviction in other cases in courts of record. Laws of 1907, p. 239. In 1909 the legislature amended said § 8 of the Fees and Salaries Act by providing, with reference to the class of cases in which a fee of \$15 was allowed, that "no such fees shall be allowed in any such case tried in the municipal court of Chicago, unless the same be tried by jury or unless the trial thereof shall occupy more than one full day, and then only in case the court shall expressly order such fees to be allowed." Laws 1909, p. 231.

After this act became effective 16,955 convictions were had in criminal cases in the municipal court of Chicago for violations of provisions of the Criminal Code wherein no state's attorney's fees were taxed as costs and wherein no order was entered that any such fees be allowed. The claim for uncollected fees by the Wayman estate includes \$254,325, on account of the 16,955 convictions in the municipal court in which no state's attorney's fees were taxed as costs against the defendants. It also includes \$19,120.65 as a commission of 10 per cent on the principal sum of \$191,206.50 received by the clerk of the municipal court from fines and penalties imposed by the municipal court of Chicago during Wayman's term of office.

It is not necessary to determine whether the provision, added by the amendment of 1909 that no state's attorney's fees should be allowed in certain cases tried in the municipal court of Chicago, violated some provision of the Constitution, or whether, because enacted during Wayman's term of office, it could be enforced against him or against his estate, for the reason that as no such fees were taxed as costs against the defendants in such cases they were not included within the provision of said § 8, authorizing the payment of fees that are not collected from the parties tried or examined, out of any fines and forfeitures collected by the state's attorney. This conclusion necessarily follows from a consideration of the various provisions of said § 8, as amended in 1907 and as again amended in 1909. During all of Wayman's term it was provided by said § 8 that "all the foregoing fee shall be taxed as costs to be collected from the defendant, if possible, upon conviction," and that "the fees provided for herein that are not collected from the parties tried or examined" shall be paid out of any fines or forfeitures collected by them. The intention of the legislature, as thus clearly expressed, was to provide certain fees as compensation for the state's attorney which should be taxed as costs and should be collected from the persons convicted, if possible; but if in any case it

should not be possible to collect the fee from the person convicted, then the same should be paid out of any fines and forfeitures collected by the state's attorney. The state's attorney did not become entitled to any of the fees allowed by said § 8 until the same had been taxed as costs, and it was only when such fees had been taxed as costs and the same could not be collected from the persons against whom they were taxed that the state's attorney had the right to apply fines and forfeitures collected by him to the payment of such fees. In *Galpin v. Chicago*, 249 Ill. 554, 94 N. E. 961, considering what is included within the term "uncollected costs," as used in the Municipal Court Act, where the clerk is authorized to apply moneys received from fines and penalties to the payment of the uncollected costs in criminal and quasi criminal cases, we said: "The phrase 'uncollected costs' as used here was intended to include only costs collectable by means of legal process; that is, costs for which judgment had been rendered but which the proper officer had been unable to collect. Where the law does not provide for a judgment for costs and no judgment therefor is rendered, we are of the opinion that the statute was not intended to authorize the taking of any amount from the fund involved herein, thereby diminishing it to the detriment of the several governmental agencies or governmental purposes to which it might otherwise be applied."

If the provision inserted in said § 8 by the amendment of 1909, taking away from the state's attorney his right to fees in certain cases tried in the municipal court, was invalid as applied to Wayman, it was his duty to have his fees in each case taxed as costs against the defendant, in order that the same might be collected, if possible, from the person convicted. Having failed to pursue that course, his estate is not entitled to have any portion of the fund derived from fines and penalties applied to the payment of such fees.

Said § 8 as amended in 1907 and as again amended in 1909 provided that the state's attorney should be entitled to 10 per cent of all moneys, except revenue, collected by him and paid over to the authorities entitled thereto, and that the same should be paid out of any fines and forfeitures collected by him. As hereinbefore stated, the Wayman estate claims that these commissions amounted to \$19,120.65, being 10 per cent of all fines and penalties received by the clerk of the municipal court from all sources. Whether this contention is to be sustained depends upon whether all of these fines and penalties were "collected" by Wayman, within the meaning

of the statutes allowing such commission. In our judgment fines and penalties paid to the clerk of a court were "collected" by the state's attorney, within the meaning of § 8 of the Fees and Salaries Act, (1) when the prosecution of the case which resulted in the imposition of the fine or penalty was conducted by the state's attorney; and (2) when the law made it the duty of the state's attorney to collect fines and penalties imposed in suits not prosecuted by him. This was assumed, without discussion, in *Galpin v. Chicago*, supra. It must be presumed, there being no evidence to the contrary, that Wayman prosecuted all suits which, under the statute, it was his duty to prosecute. In order to determine upon what fines and penalties a commission of 10 per cent for collection was allowed the state's attorney by said § 8, it is therefore necessary to determine what cases, under the statute, it was Wayman's duty to prosecute and what fines and penalties imposed in suits not prosecuted by him it was his duty, under the statute, to collect. It is conceded by the appellees that it was Wayman's duty, as state's attorney, to prosecute all suits from which the fines and forfeitures in question were derived, except those brought to recover penalties for the violation of the Pharmacy Act, the Dentistry Act, and the Employment Offices and Agencies Act, and those brought to recover penalties for the violation of park ordinances.

Among the duties of state's attorneys, as prescribed by § 5 of the act entitled "An Act in Regard to Attorneys General and State's Attorneys," approved March 26, 1874, in force July 1, 1874, are: "First, to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned. Second, to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district or road district in his county. . . . Tenth, to perform such other and further duties as may, from time to time, be enjoined on him by law." Rev. Stat. 1874, p. 173.

Section 16 of the Dentistry Act of 1909 provides that "any person who shall practise dentistry in this state without being registered or without a license for that purpose, or violates any of the provisions of this act, shall be subject to prosecution before any court of competent jurisdiction upon complaint, information or indictment, and shall, upon conviction, be fined for each

offense in any sum not less than fifty dollars (\$50) nor more than two hundred dollars (\$200). All fines imposed and collected under this act shall be paid to the Illinois state board of dental examiners for its use."

This is identical with the provision contained in the Dentistry Act of 1905.

Section 7 of the Employment Offices and Agencies Act provides that "any superintendent, assistant superintendent or clerk, who shall accept, directly or indirectly, any fee or compensation from any applicant or from his or her representative, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five nor more than fifty dollars and imprisoned in the county jail not more than thirty days."

Section 10 of the same act provides: "It shall be the duty of the commissioners of labor, and the secretary thereof, to enforce this act. When informed of any violation, it shall be their duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. Any person convicted of a violation of the provisions of this act shall be guilty of a misdemeanor and shall be fined not less than fifty dollars (50) nor more than one hundred (100) dollars for each offense, or by imprisonment in the county jail for a period not exceeding six (6) months, or both, at the discretion of the court." Laws 1903, p. 198.

Prosecutions against persons violating the provisions of either of these acts are criminal suits or prosecutions in which the people of the state are concerned, and therefore come within the duties of state's attorneys as prescribed by the first subdivision of the said § 5; and § 15 of the Pharmacy Act expressly provides that "it shall be the duty of the state's attorney of the county where such offense is committed to prosecute all persons violating the provisions of this act upon proper complaint being made."

That portion of the fund derived from fines and penalties imposed for violations of these acts was therefore "collected" by the state's attorney, and he was entitled to a commission of 10 per cent thereon.

It is not made the duty of the state's attorney to prosecute suits for the violation of park ordinances, but it does not necessarily follow that Wayman was not entitled to a commission of 10 per cent upon the fines and penalties received by the clerk of the municipal court from such sources. As early as 1865 the School Law of this state (Laws 1865, p. 124) provided that all fines, penalties, and forfeitures imposed or incurred in any of the courts of record or

before any justice of the peace, except fines, forfeitures, and penalties incurred or imposed in incorporated towns or cities, for the violation of the by-laws or ordinances thereof, should, when collected, be paid to the school superintendent of the county wherein such fines, forfeitures, and penalties have been imposed or incurred, for distribution in the same manner as the common school funds of the state are disbursed, and that it should be the duty of the state's attorneys to enforce the collection of all fines, forfeitures, and penalties imposed or incurred in courts of record, and pay the same over to the school superintendents of the counties wherein the same have been imposed or incurred, retaining therefrom the fees and commissions allowed them by law. These provisions have been included in each revision of the School Law since 1865 and were in force during Wayman's term of office.

It appears from the evidence herein that the South Park commissioners, the commissioners of Lincoln Park, and the West Chicago Park district were created by private acts passed by the legislature in 1869 (Laws 1869, pp. 342-378); and although they were, respectively, empowered to pass ordinances for the regulation and government of the districts over which they were given jurisdiction and control, no provision was made for the collection of fines and penalties imposed for the violation of such ordinances nor for the disposition of moneys arising from such fines and penalties. It therefore followed as a necessary consequence, under the provisions of the School Law, that it was the duty of the state's attorney to collect all such fines and penalties imposed in courts of record for the violation of park ordinances, and to pay the same over to the superintendent of schools after retaining therefrom the fees and commissions allowed him by law. No attempt was made by the legislature to otherwise dispose of such fines and forfeitures until the amendment, in 1907, of § 58 of the Municipal Court Act of 1905. By the said amended § 58 it was provided with reference to fines and penalties imposed in the municipal court of Chicago in quasi criminal cases instituted in the name of any board of park commissioners situated, in whole or in part, within the city of Chicago, that the same should be paid to the clerk of the court and that the clerk should pay over the same as follows: "One half of all fines and penalties to the city of Chicago and one half of the fines and penalties to the . . . board of public park commissioners, . . . in whose favor such judgment shall have been entered."

It is contended that this section of the

Municipal Court Act, in so far as it attempted to dispose of the fines and penalties imposed in the municipal court of Chicago, violated that portion of § 13 of article 4 of the Constitution which provides that no act hereafter passed shall embrace more than one subject and that shall be expressed in the title. The title of the Municipal Court Act is: "An Act in Relation to a Municipal Court in the City of Chicago."

In *Riggs v. Jennings*, 248 Ill. 584, 94 N. E. 32, we said: "The subject of legislation is a municipal court in the city of Chicago. . . . The title of this act covers everything in relation to the creation, organization, jurisdiction, and procedure of the municipal court, and it is not necessary that it should mention the details of the legislation dealing with the various subdivisions of the subject."

Legislation concerning the disposition of fines and penalties imposed by the municipal court do not relate to the creation, organization, jurisdiction, or procedure of the court, and cannot, therefore, be said to relate to a municipal court unless such disposition is incidental to legislation providing for the maintenance of such court. Provisions for the support of park systems or for general city purposes have no relation to the maintenance of a municipal court; neither does the fact the provision in question relates only to fines, penalties, and forfeitures imposed in the municipal court of Chicago bring the provision within the title of the act. Provisions relating to the procedure in the municipal court for the recovery of fines and penalties for the violation of park ordinances, and for the collection of such fines and penalties after they have been imposed, relate to the municipal court, but a provision as to the disposition of moneys collected from fines and penalties imposed in the municipal court no more relates to the municipal court than the disposition of moneys collected from fines and penalties imposed in other courts. In *People v. Roth*, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100, we said: "The purpose of the constitutional provision under consideration is to prevent legislation being enacted of which the title gives no hint. The requirement is for the benefit of the members of the general assembly and of the people who are to be governed by such statutes."

The title of the Municipal Court Act gives no hint that the act contains any provision relating to the payment of moneys derived from fines and penalties to the city of Chicago for general corporate purposes or to certain boards of park commissioners. It follows that so much of § 58 of the Municipal Court act as amended in L.R.A.1917B.

1907, as provided for the payment to the city of Chicago of one half of all moneys collected upon judgments of the municipal court in cases for the violation of park ordinances, and for the payment of the remaining one half of such moneys to the board of park commissioners in whose favor such judgments were rendered, was not within the title of the act and was therefore void.

On May 31, 1911, the legislature passed an act entitled: "An Act to Provide for the Setting Apart, Formation, Administration, and Disbursement of a Park Police Pension Fund."

This act became effective July 1, 1911. Section 1 of the act provides that "whenever any persons have been or may be appointed or otherwise selected as commissioners or officers and constitute a board of park commissioners for any one or more towns, whether said towns have heretofore existed or now exists under and in pursuance of any act or acts of the general assembly of this state, for the purpose of locating, establishing, inclosing, improving or maintaining any public park, boulevard, driveway, highway or other public work or improvement, and such board of park commissioners shall have established a police force or department of police under the employ of such board of park commissioners, there shall be set apart the following moneys to constitute a police pension fund: . . . All fines and penalties collected for violations of any of the ordinances of such board of park commissioners or of any of the laws of the state of Illinois as now in force, within the territory under the control of such board of park commissioners, in all cases in which arrests for violation of such law shall be made by officers of such police department." Laws 1911, p. 445.

By the adoption of this act the right of the superintendent of schools to have the moneys collected from fines and penalties imposed for the violation of the ordinances passed by the boards of park commissioners specified in the Park Police Pension Fund Act ceased and determined, and as a necessary consequence it ceased to be the duty of the state's attorney of Cook county to collect such fines and penalties. He therefore had no right to a commission upon the moneys derived from fines and penalties imposed for the violation of park ordinances subsequent to July 1, 1911.

The Wayman estate contends that it has a prior right over all other claimants to so much of the fund in controversy as is required to satisfy the claim for uncollected fees of the state's attorney. Section 8 of the Fees and Salaries Act as amended in 1883 provided that the commission of 10 per cent upon all moneys (except revenue)

collected by the state's attorneys and paid over to the authorities entitled thereto, together with the fees provided for therein that should not be collected from the parties tried or examined, "shall be paid out of any fines and forfeited recognizances collected by them," and that "state's attorneys shall have a lien for their fees, on judgments for fines or forfeitures procured by them for their fees and earnings, until they are fully paid." [Rev. Stat. 1883, p. 684.] This provision, in substance, has been embodied in all of the subsequent amendments of said § 8, and it must therefore be regarded as having been continuously in force since 1883. *Hurds' Rev. Stat. 1913, chap. 131, § 2; Merlo v. Johnson City & B. M. Coal & Min. Co. 258 Ill. 328, 101 N. E. 525; People ex rel. Tarman v. Cairo, V. & C. R. Co. 285 Ill. 634, 197 N. E. 246.* The various statutes under which the claimants other than the Wayman estate and the county superintendent of schools claim portions of the fund were all passed subsequent to 1883; and in order to hold that their claims (except the claims of the trustees of the various police pension funds) take precedence over the claim of the Wayman estate, it would be necessary to hold that the acts under which they claim were so repugnant to the provisions of said § 8 that those acts could not operate together with said § 8. *Hoynes v. Danisch, 264 Ill. 467, 106 N. E. 341.* Such, however, was not the case. The interest of the state's attorney in the fines and penalties collected by him is in the nature of a lien, and it might not be necessary for him to divert to the payment of his fees and commissions any of the moneys derived from fines and penalties imposed under such subsequent acts. Section 8 can, therefore, operate together with the subsequent acts, and it will consequently not be presumed that the legislature, by adopting the subsequent acts, intended to repeal the provisions of § 8 of the Fees and Salaries Act, giving state's attorneys the right to apply any fines and penalties collected by them to the payment of their uncollected fees. Such, in effect, was our holding in *Galpin v. Chicago, supra*.

So far as the fines collected for the violation of park ordinances since July 1, 1911, are concerned, as it was not the duty of the state's attorney either to prosecute the cases in which such fines or penalties were imposed or to enforce the collection of such fines and penalties, he had no right, under said § 8, to have the moneys derived from such fines or penalties applied towards the payment of his uncollected fees, and his estate is not entitled to any portion of the fund derived from such fines or penalties.

After awarding to the city of Chicago

\$5,272.82 and to Hale Gossart \$75 of the fund, and to the boards of trustees of the various police pension funds all that portion of the fund collected since July 1, 1911, from fines or penalties imposed for the violation of park ordinances, and the interest received thereon by the clerk of the municipal court, the decree of the circuit court should have awarded to Elizabeth C. Wayman as administratrix of the estate of John E. W. Wayman, so much of the fund as is necessary to satisfy the claim for uncollected fees of John E. W. Wayman as state's attorney. Wayman had a vested interest in this fund at the time of his death, and upon his death the same passed to his personal representative. The case of *Galpin v. Chicago, supra*, controls with reference to the disposition of the remainder of the fund. The various claimants under the Truancy Act, the Motor Vehicle Act, the Pharmacy Act, the Dentistry Act, the Employment Offices and Agencies Act, and the Game Act have equal rights to the balance of the principal of the fund remaining after the claim of the Wayman estate has been satisfied; and as such balance will not be sufficient to satisfy their claims in full, it should be prorated among them in accordance with their respective claims.

A controversy exists between the city of Chicago and the superintendent of schools as to the validity of § 57 of the Municipal Court Act, which provides that all moneys collected upon judgments of the municipal court in criminal and quasi criminal cases shall be paid to the clerk, who shall first apply the same to the payment of the uncollected costs in criminal and quasi criminal cases. The claim of the city under this section of the Municipal Court Act is subordinate to that of all other claimants herein, except the superintendent of schools (*Galpin v. Chicago, supra*); and as the fund will be entirely consumed in satisfying the demands of claimants whose claims are superior to that of the city, there will be no portion of the fund upon which this section can operate. It will therefore not be necessary to consider the validity of said § 57 of the Municipal Court Act.

With reference to the interest which accumulated in the hands of the clerk of the municipal court upon the moneys derived from fines and penalties, it should be divided into parts proportionately the same as the principal, and distributed accordingly among those claimants found to be entitled to the principal. *Galpin v. Chicago, supra*.

The county of Cook urges that, if we determine that the Wayman estate is entitled to that portion of the fund necessary to

satisfy the claim of the state's attorney for uncollected fees, the \$38,400 paid to Wayman by the county as a salary during his term of office should be deducted from that portion of the fund awarded to the Wayman estate, and should be ordered repaid to the county. The Wayman estate contends that as Wayman during his term of office paid into the county treasury, from fees collected by him, a sum in excess of the amount paid him as salary, the county has no claim upon this fund or against the Wayman estate for any portion of the moneys paid Wayman as salary, and that in any event the question cannot be determined in this suit. If, as contended by the county, it has a valid claim against the Wayman estate for the salary paid to

Wayman under an invalid law, notwithstanding the fact that Wayman under the same law paid a larger sum to the county, it is strictly a legal claim, which can be enforced against his estate. The relief sought by the county in this respect cannot be awarded in this suit; the only question here being: "Who is entitled to the identical property brought into court?" *Dyas v. Dyas*, 231 Ill. 367, 83 N. E. 229.

The decree of the Circuit Court is reversed, and the cause is remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

Petition for rehearing denied October 7, 1915.

**Annotation—Agreement to accept less than amount of appropriation, salary, or fee.**

This note is supplementary to the note appended to *Lukens v. Nye*, 36 L.R.A. (N.S.) 244, in which the earlier cases are collected.

For the effect of a promise by a candidate for office to accept less than the compensation fixed by law as affecting his right to hold office, see *Prentiss v. Ditmer*, post, 191.

*GALPIN v. CHICAGO*, ante, 176, is in accord with the weight of authority in holding that an agreement by a candidate, in consideration of his election or appointment to a public office, that he will accept less than the compensation provided by law for such office, does not estop him from subsequently recovering the legal amount.

Thus, in *State ex rel. Kercheval v. Nashville* (1885) 15 Lea (Tenn.) 697, 54 Am. Rep. 427, it is held that, when an office has a salary attached, it is against public policy to permit agreements by a candidate for the office that he will serve without compensation or for a lesser compensation than that provided by law, and that, although such an agreement might be a ground for removal of the officer after election, it furnishes no legal reason to prevent him from receiving the salary of the office.

In *Purdy v. Independence* (1888) 75 Iowa, 356, 39 N. W. 641, it was held that a contract by a city treasurer to collect and disburse the proceeds of a bond issue for a fixed sum which was smaller than his legal fees for such collection and disbursement would have been, was in violation of a statutory provision that the emoluments of an officer should not be increased or diminished during the term for which he was elected or appointed L.R.A.1917B.

and he was entitled to retain his legal fees regardless of the contract.

In *Daniels v. Des Moines* (1899) 108 Iowa, 484, 79 N. W. 269, the court recognized the general principle that a contract by a public officer to accept a smaller compensation than that fixed by law is contrary to public policy and void, but held that in that particular case the appointment of plaintiff as temporary matron for the city jail was under and by virtue of a municipal ordinance, and was not the appointment of a police matron as provided for by statute.

In *Pittsburg v. Goshorn* (1911) 230 Pa. 212, 79 Atl. 505, it was held that a contract made by an appointee to the office of collector of delinquent taxes with the mayor who appointed him, that he would accept a certain sum as his compensation instead of the fees fixed by the council, was invalid, not only because in making it the mayor exceeded his powers, but also because it was in conflict with public policy as declared by a constitutional provision that every public officer, before entering upon the discharge of the duties of his office, shall be required to make oath that he has not paid or contributed or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure his nomination, election, or appointment.

In *Hoffman v. Chippewa County* (1890) 77 Wis. 214, 8 L.R.A. 781, 46 N. W. 1083, it is held that where a statute expressly declares that a printer shall receive a certain sum for certain printing, the compensation could not be diminished by any arrangement or contract which the county clerk might make in respect to it, and

the existence of such a contract did not prevent a printer from recovering the statutory amount.

In *Russell v. Cordwent* (1912) — *Tex.* Civ. App. —, 152 S. W. 239, the court held that a contract between the county commissioners and the county clerk providing for reindexing the county records for a stated sum as compensation, instead of the fees provided for such work, came within a statute making it a misdemeanor for certain officials to fail to charge the fees of their office, and sustained the lower court in enjoining the execution of the contract, saying: "A most excellent reason for the laws forbidding county officers in any county from remitting their fees or any part of them is apparent. It is unjust that a citizen of any county should be required to pay more for the performance of an official act than another citizen in another county is required to pay for precisely the same service. Moreover, such a practice if permitted might tend to favoritism amongst litigants and residents paying costs and fees, even in the same county."

The fact that an appointed officer accepts a smaller salary than that provided by law, and acquiesces in such reduction of salary for several years, does not preclude him from recovering the arrears due him. *Pitt v. Board of Education* (1915) 216 N. Y. 304, 110 N. E. 612.

So, one who is a municipal officer, and not a mere employee, is not estopped from recovering the full amount of salary provided by law for the office which he holds, by the fact that he has accepted a lesser amount and receipted therefor in full. *Grant v. Rochester* (1903) 79 App. Div. 460, 80 N. Y. Supp. 522, affirmed without opinion in (1903) 175 N. Y. 473, 67 N. E. 1083 (commissioner of public works); *Moore v. Board of Education* (1907) 121 App. Div. 862, 106 N. Y. Supp. 983, affirmed in (1909) 195 N. Y. 614, 89 N. E. 1105 (public school teacher); *McGrade v. New York* (1908) 126 App. Div. 362, 110 N. Y. Supp. 517 (clerk in fire department); *Golding v. New York* (1912) 140 N. Y. Supp. 1020 (draftsman); *Carman v. New York* (1912) 140 N. Y. Supp. 1023 (draftsman).

But one who does not hold an office to which his compensation attached as an incident, but was merely a per diem employee, could bind himself to accept a reduction of salary in order to avoid a possibility of loss of his position because of the exhaustion of the appropriation made for his services. *Downs v. New York* (1902) 75 App. Div. 423, 78 N. Y. L.R.A.1917B.

*Supp.* 442, affirmed without opinion in (1903) 173 N. Y. 651, 66 N. E. 1107; *Collins v. New York* (1912) 151 App. Div. 618, 136 N. Y. Supp. 648; *Robb v. New York* (1912) 151 App. Div. 621, 136 N. Y. Supp. 650; *Kirk v. New York* (1910) 136 N. Y. Supp. 1061.

And, in *O'Hara v. Park River* (1890) 1 N. D. 279, 47 N. W. 380, it was held that, while it is true that a party cannot, before election to office, bind himself by an agreement to receive less salary if elected for the performance of the duties of the office than the law fixes, he may, after the performance of the services, receive less compensation therefor than the legal salary; so, where one appointed marshal of a city agreed to accept less than the salary fixed for such office, he could not, after receiving and accepting such smaller salary for two months, recover the difference between the amount received and the legal salary, but he was not thereby estopped from recovering the legal salary thereafter. To the same effect is *De Boest v. Gambell* (1899) 35 Or. 368, 58 Pac. 72, 353.

Also in *Harvey v. Tama County* (1880) 53 Iowa, 228, 5 N. W. 130, it was held that a deputy county treasurer could not, in an action by him for compensation for his services as deputy, set up the invalidity of a release made by him and the treasurer and filed in the auditor's office, by which the treasurer agreed to pay the deputy out of his own compensation and relieve the county from such payment, on the ground that such release was made for the purpose of influencing the voters at an election at which the treasurer was a candidate for re-election, but that if at the time he executed the release he knew the purpose for which it was executed to be such as set forth by him as the ground for its invalidity, he was particeps criminis to an immoral and unlawful act, and could not set it up as a reason for relieving him from its effect.

R. L. S.

# OHIO SUPREME COURT.

P. C. PRENTISS, Plff. in Err.,  
v.  
H. R. DITTMER.

(93 Ohio St. 314, 112 N. E. 1021.)

Officer — offer to abate salary — effect.  
1. An offer by a candidate for common pleas judge, made for the purpose of effect-

Headnotes by the COURT.



ing his election to office, that in the event of his election he will accept for his judicial services only the stipulated salary payable by the state, and that he will accept nothing that may be due and payable to him from the local or county treasury, is against public policy, and an offense within the purview of § 5175-26, General Code, which, if proven, invalidates his election.

*For other cases, see Elections, III. d, in Dig. 1-52 N. S.*

**Election — contest — offer to abate salary.**

2. By virtue of that section, such an offense may be set forth as a ground of contest within the terms of § 5138, General Code, and it is not necessary to prove, in such election contest based on that sole ground, that a sufficient number of voters were so influenced by such offer as to change the election result.

*For other cases, see Elections, V. in Dig. 1-52 N. S.*

**Constitutional law — right to question validity of act.**

3. In a case where the law provides for the payment of the judicial salary, in part from the state treasury and in part from the local treasury, the candidate cannot, in an election contest based on the infringement of the above section of the Corrupt Practices Act, raise the question of the constitutionality of the Salary Act, concerning which such illegal offers were made.

*For other cases, see Statutes, I. c, 1, in Dig. 1-52 N. S.*

**Election — contest — conviction of offense.**

4. Elections and election contests are controlled by specific sections of the Ohio Constitution, the grant of legislative power for their control is absolute, and under such provisions the legislature had full power to, and did, impose conditions under which elections might be invalidated; and where the proceeding is one involving a contested election, a prior conviction of the offenses named in § 5175-26, General Code, is not required as a condition precedent to such invalidation.

*For other cases, see Elections, V. in Dig. 1-52 N. S.*

(January 11, 1916.)

**E**RROR to the Court of Appeals for Henry County to review a judgment in favor of contestant in a proceeding to contest the validity of an election. Affirmed.

**Statement by the Court:**

At the November 3, 1914, election, there were four candidates for the office of common pleas judge of Henry county. Prentiss received the highest number of votes there-

**Note.** — For promise to accept less than compensation fixed by law as affecting right to hold office, see annotation following this case, post, 196.

L.R.A.1917B.

at, the canvassing board certified his election to the secretary of state, and a certificate of his election to such office was transmitted to Prentiss. Before the induction of Prentiss into office, an appeal was taken from the finding and declaration of the result of the election to the court of appeals by the filing of a petition by Dittmer, under the provisions of the statute, contesting the validity of the election. The petition declared that Prentiss had received over Dittmer a plurality of forty-four votes; that there was submitted to the voters of Henry county, to be voted upon at that election, the question of combining the common pleas and probate courts of that county, resulting in a favorable vote thereon; that Prentiss, as such candidate and prior to the election, printed and widely published and circulated, by mail and otherwise, various circulars, promising to accept smaller salaries than would be legally due; that he would accept, in the event of his election, only the portion of the salary payable out of the state treasury; that he would perform his official duties for such sum, and would decline to accept any portion of the statutory portion of the salary payable out of the county treasury. Other statements in the circulars were in support of the combination of the common pleas court with the probate court at a saving of \$2,150 to the county by the abolishment of the latter court; and if the courts should not be combined by the popular vote at such election he agreed not to accept the \$625 lawfully payable out of the local treasury, nor the additional amount of \$1,000 payable from the same source in the event of combination, but to accept only the \$3,000 remuneration per annum payable out of the state treasury, and to perform, in the event of his election, his judicial duties for that sum.

There is no allegation that any or a sufficient number of voters were induced by these alleged promises to avoid the declared result, but the allegation is that these published statements "were used as an argument by said Prentiss and by his friends, at his request, for the purpose of inducing the electors" to vote for him for such office. These circulars were numerous, widely circulated, and contained vigorous attacks upon the judicial salary system, and repeated promises to decline all local salaries if the voters should elect him to this office. On November 12th, before Prentiss's induction into office, the petition for contest was filed. On the trial, the contestee admitted the authorship of the circulars and testified that he supplemented them by similar statements in his campaign speeches. No evidence was offered that any voter was

actually induced to vote by reason of the promises made. The court of appeals adjudged the election invalid, that Prentiss had no right and title to the office, and ousted him therefrom, and refused to order the induction of the contestor. This proceeding is to reverse that judgment.

Messrs. Smith W. Bennett, Brown, Hahn, & Sanger, Holland C. Webster, and James Donovan for plaintiff in error.

Messrs. Smith, Beckwith, & Ohlinger for defendant in error:

The facts set forth in the petition invalidate the election of Prentiss both at common law and under § 5175-26 of the Corrupt Practices Act.

State ex rel. Newell v. Purdy, 36 Wis. 213, 17 Am. Rep. 485; State ex rel. Bill v. Elting, 29 Kan. 397; State ex rel. Atty. Gen. v. Collier, 72 Mo. 13, 37 Am. Rep. 417; Carrothers v. Russell, 53 Iowa, 346, 36 Am. Rep. 222, 5 N. W. 499; Bush v. Head, 154 Cal. 277, 97 Pac. 512.

This proceeding is exactly appropriate to the nature of the case and is the proceeding provided for testing, or contesting, the validity of an election.

State ex rel. Grissell v. Marlow, 15 Ohio St. 114; State ex rel. Conrad v. Patterson, 84 Ohio St. 89, 95 N. E. 780; Dalton v. State, 43 Ohio St. 652, 3 N. E. 685; State ex rel. Wetmore v. Stewart, 26 Ohio St. 216.

Prentiss cannot question the constitutionality of judicial salary laws.

Newman v. People, 23 Colo. 300, 47 Pac. 278; State v. O'Brien, 94 Tenn. 79, 26 L.R.A. 252, 28 S. W. 311; Bishop, Crim. Law, § 367; Wilkinson v. Children's Guardians, 158 Ind. 1, 62 N. E. 481; State v. Nebraska Telephone Co. 127 Iowa, 194, 103 N. W. 120; Re Terrett, 34 Mont. 325, 86 Pac. 266; Cofer v. Riseling, 153 Mo. 633, 55 S. W. 235; 9 Cyc. 787; State v. Rouch, 47 Ohio St. 478, 25 N. E. 59; Cooley, Const. Lim. 6th ed. 196, 197; McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69.

Messrs. Bailey & Leasure also for defendant in error.

Jones, J., delivered the opinion of the court:

Section 26 of the Corrupt Practices Act (102 Ohio Laws p. 327), now § 5175-26, General Code, provides that any person is guilty of a corrupt practice if he, in connection with or in respect of any election, contributes, or offers to contribute, any money or valuable consideration for any other purpose than those detailed therein. It provides further that any offer to contribute or expend any money or thing of value for L.R.A.1917B.

any purpose whatever, except as therein provided, "is hereby declared to be corrupt practice and invalidates the election of any person guilty thereof." The acknowledged action of the plaintiff in error in connection with his campaign for common pleas judge of Henry county, in the distribution and circulation of the circulars in question, fell within the inhibition of that section of the Corrupt Practices Act of this state. In the event of his election to the office of common pleas judge, the law had made express provision for a stipulated salary, part of which was to be paid him by the state and part by the county. It is but little less reprehensible that, for the purpose of inducing election, he should promise to refund to the community as a whole that portion of the salary he should receive from the county, than to offer to contribute to the taxpayers individually their pro tanto proportion of the amount of salary forgiven. In the latter event the taxpayer is required to pay less taxes, irrespective of the personal fitness of the candidate. In States ex rel. Bill v. Elting, 29 Kan. 397, a keen analysis of promises of this character, made for the purpose of inducing election, was made by Judge Brewer, afterwards a member of the Supreme Court of the United States. He said: "The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power of personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is, in spirit, at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter."

There is a wide difference between a promise of this character and those multifarious pledges made by candidates in the interest of reform, economy, and a rigid and effective administration of office, in compliance with their official oaths. The latter are made in the public interest, and are consistent with personal fitness; the former savors of vicious tendencies, involving a personal pecuniary consideration offered by the candidate in order to accomplish his election, in which the test of fitness is not an element.

At common law, practices involving the sale or purchase of public office were condemned as subversive of government and against public policy. Our legislation, in the interest of purity of elections, has

stamped the common-law policy upon our election laws. Promises of a character similar to those made by the plaintiff in error have been held in other jurisdictions to be an offense invalidating the election of the promisor. *State ex rel. Bill v. Elting*, supra; *Carrothers v. Russell*, 53 Iowa, 346, 36 Am. Rep. 222, 5 N. W. 499; *State ex rel. Newell v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *Bush v. Head*, 154 Cal. 277, 97 Pac. 512.

Owing to the severe penalties imposed by the act, inflicting punishment by way of fines and imprisonment, the forfeiture of office, and invalidating the election of the person offending, the whole scope and intent of the act is to impose such penalties on those who wilfully commit the offenses named. If intention is absent, no offense has been committed. In the present case, the plaintiff in error did wilfully offend against the act, and rested his defense on the claim that he had a lawful right to do what he did.

2. It is insisted, however, by counsel for plaintiff in error, that the "ground" set forth in the petition for contest is not of such character as may be invoked under the election contest statutes of our state. Section 5137, General Code, provides for an appeal to the court of appeals from the decision of the canvassing board, "which finds and declares the result of the election." Section 5138, General Code, provides that the appeal shall be by petition, which shall set forth "upon what grounds the election is contested." Section 5143, General Code, provides that the courts shall determine the contest without the intervention of a jury, and may render such judgments and make such orders as the law and facts warrant, including judgment of ouster and induction. It will be observed that the statutes of this state do not enumerate any specific grounds upon which a contest may be undertaken. Many of the states provide in detail the nature and character of the grounds upon which the contest may be based, but it is not so in this state. However, under the statutes noted, any grounds may be set forth in the petition which have the effect of determining the actual result of the election, in order to determine who received the highest number of votes thereat. While no provisions have been made in our law as to the specific grounds of contest, their character may be gleaned from those employed in the case of *Howard v. Shields*, 16 Ohio St. 184. The contest act under consideration there (1 S. & C., p. 540, §§ 39-42), in its requirement to state the "points" of contest, was substantially similar to the one in this case, simply requiring generally the statement of the "grounds" of contest. L.R.A.1917B.

And in regard to the nature of the "points" or "grounds" on which the contest was based, Judge Welch, page 189, said: "We think the notice was sufficient. It contains all that the statute requires,—notice that the election will be contested, and a specification of the 'points' relied upon. . . . The 'points' to be specified are not required for the purpose of setting forth a 'good case,' not for the purpose of informing the contestee that the attack will be successful, but to advise him at what points the attack will be made, in order that he may fortify, and not be taken by surprise. . . . We think the points specified in this notice were stated with sufficient particularity and definiteness to subserve the object of the statute, which was to limit the evidence of the contestor and to apprise the contestee of the general nature of the objections to be made, so as to enable him to meet them without unnecessary expense and labor."

The rule is stated in the syllabus of *State ex rel. Ingerson v. Berry*, 14 Ohio St. 315, that "a contest, on appeal to the court of common pleas, is the specific remedy provided by statute for the correction of all errors, frauds, and mistakes which may occur in the process of ascertaining and declaring the public will as expressed through the ballot boxes."

The only adequate and specific remedy provided for this purpose is the contest statutes. Neither quo warranto nor mandamus can ordinarily be invoked to determine the issue involved in contested election cases, for the reason that such issues involve the validity of the election, and not the title to office. *State ex rel. Grisell v. Marlow*, 15 Ohio St. 114; *State ex rel. Wetmore v. Stewart*, 26 Ohio St. 216. It has been held, however, that if no adequate remedy is provided by law, quo warranto might be invoked in order to ascertain the legality or illegality of the election. *State ex rel. Conrad v. Patterson*, 84 Ohio St. 89, 95 N. E. 780. Section 5175—26, General Code, adds a specific ground upon which an election may be invalidated or contested. By the adoption of that section, the legislature, in effect, determined that an offense committed against the Corrupt Practices Act, as enumerated therein, was a ground for invalidating the election of the persons committing the offense, irrespective of the proof usually required, showing that officers actually induced a sufficient number of voters to change their votes so as to affect the result. And since the question was raised in a case involving the election itself, and not in a case wherein the title was involved after the induction into office, the proper remedy available would be by contest proceedings under the statutes.

3. The plaintiff in error seeks to avoid the consequences of his offense by a claim that the salary acts are unconstitutional. He does not attack the constitutionality of the Corrupt Practices Act itself. He cannot thus escape the punishment of an act which is not made dependent on the validity of the salary acts.

"It is a firmly established principle of law, that no one can be allowed to attack a statute as unconstitutional who has no interest in it and is not affected by its provisions." 8 Cyc. 787.

A law is assumed to be valid until set aside. Only those directly interested may question its validity, and such are not here before the court as parties in interest for that determination. The breach of the Corrupt Practices Act is made an offense, irrespective of the question whether the salary acts are valid or otherwise. The wrong sought to be corrected was one affecting the purity of elections, and the constitutional feature, if conceded, could not even remotely affect that question.

4. Finally, it is insisted that before the election can be invalidated, or the office forfeited, there must be a prior conviction of the offense committed under the Corrupt Practices Act; and in that behalf, counsel for plaintiff in error cite the case of *State ex rel. Atty. Gen. v. Ganson*, 58 Ohio St. 313, 50 N. E. 907, wherein it is held: "Where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie."

Section 13323—1, General Code (formerly § 32 of the Corrupt Practices Act), provides that "any person convicted of a corrupt practice under this act shall be fined . . . and if he shall have been elected to office, he shall, in addition thereto, forfeit such office."

Since this section of the statute has provided for punishment by fine and imprisonment and by forfeiture of office in case of election, it is claimed that a special method is provided by the act itself by which such office should become vacant, and that conviction by jury is a condition precedent to the forfeiture; and this seems to find support in § 4, art. 5, of the Constitution, which provides: "The general assembly shall have power to exclude from the privilege . . . of being eligible to office, any persons convicted of bribery, perjury, or other infamous crime."

An important distinction must be noted between the case of *State ex rel. Atty. Gen. v. Ganson*, supra, and the instant case, and that distinction is found in the different functions imposed by the Constitution upon

the judicial and legislative departments of the state. One who has been inducted into office and convicted of bribery or other infamous crime forfeits his office under the aforesaid section, and as a predicate to his removal, he must first be tried and convicted by a jury. By reason of this trial, the power is committed wholly to the judicial department; but it is otherwise where the election or election contest is concerned, for, by other provisions of the Constitution, elections and election contests are not committed to the courts eo nomine as courts, but to such tribunal as the legislature may see fit to provide. By those provisions, there has been granted to the legislature the sole power to determine all matters incidental to the procedure and validity of elections. Section 21, art. 2, of the Constitution provides: "The general assembly shall determine, by law, . . . in what manner, the trial of contested elections shall be conducted;"—and § 27 of art. 2, of that instrument provides: "The election . . . of all officers . . . not otherwise provided for by this Constitution, . . . shall be made in such manner as may be directed by law."

Under these provisions of the Constitution, the legislature undoubtedly had the right to impose, as a condition precedent to the validity of a candidate's election, that he should not commit any of the offenses named in § 5175-26, General Code, and that if the candidate did so offend, his election would be invalidated. This in no wise conflicts with § 32 of the act, because, on the one hand, the election is invalidated by a tribunal exercising quasi judicial functions, which invalidation may be accomplished without either conviction or trial by jury. The election only is involved. On the other hand, the title to office, and not the election itself, is in question, and in such case, where either bribery or other infamous crime has been committed, conviction must first be had before a forfeiture of office. In such cases, judicial functions of the court are invoked. As emphasizing the distinction between the *Ganson* Case and the present one, attention is called to the case of *Mason v. State*, 58 Ohio St. 30, 41 L.R.A. 291, 50 N. E. 6. In that case, which is very analogous to this, Chief Justice Spear, at page 52 used the following language: "A question much discussed is as to whether the statute should be treated as imposing a test of eligibility, or as providing a method of removal. The matter may not be free from doubt. Possibly the provision involves both characteristics. But the better conclusion, we think, is that the intent of the legislature was not to provide a method by which a person lawfully

elected to an office may be removed therefrom, but rather a method by which the title of one to an office, which he has obtained possession of in violation of the terms of the statute upon which his claimed right vests, may be inquired into. It is therefore a challenge of the title to the office, resting upon charges of misconduct in procuring it, rather than a process to remove, resting upon charges of misconduct in office."

This language is very pertinent to the case that we have. While there is little distinction between the invalidation of an office and the forfeiture of an office under the Corrupt Practices Act, since both have the effect of devesting the candidate of his office, one rests upon the provision of misconduct in its procurement and the other rests upon offenses committed prior to or after the election, and which are not involved in a contest proceeding.

However, it is easily assumed that if the legislature had intended to rely upon a prior conviction as a full and complete remedy for political misconduct, it would not have expressly provided for invalidation of office in a separate section of the same act, for forfeiture after conviction was specifically imposed in another section. Evidently the legislative intention was to

provide two distinct remedies, one affecting the election and the other the title to the office after induction.

We are therefore constrained to the view that the legislature has simply imposed upon the candidate a condition under which his election would be invalidated, and that, since no specific grounds are mentioned which are required to be stated and set forth in the contest petition, the commission of any of the offenses invalidating the election may be set forth in the petition and heard on appeal by the trial court, and judgment rendered and orders made as the law and facts warrant, under the provision of our Code relating to contests of election.

The refusal to induct the contestor was proper. The proceeding simply resulted in invalidating the election of the contestee. This did not invest the contestor with a majority of the legal votes cast. *Renner v. Bennett*, 21 Ohio St. 431; *State ex rel. Clawson v. Bell*, 169 Ind. 61, 13 L.R.A. (N.S.) 1013, 124 Am. St. Rep. 203, 82 N. E. 69.

Judgment affirmed.

*Johnson, Donahue, Wanamaker, and Newman, JJ., concur. Matthias, J., not participating.*

### **Annotation—Promise to accept less than compensation fixed by law as affecting right to hold office.**

For the validity of an agreement to accept less than the amounts of an appropriation, salary, or fee, see notes to *Lukens v. Nye*, 36 L.R.A. (N.S.) 244, and *Galpin v. Chicago*, ante, 176.

*PRENTISS v. DITTMER*, ante, 191, in holding that a candidate for office invalidates his election by a promise to the electors that if elected he will serve for a smaller compensation than that provided for by law, is in accord with the weight of authority.

Thus a promise to pay into the treasury the fees established by law as compensation for an office and to accept a less amount, was held in *Carrothers v. Russell* (1880) 53 Iowa, 346, 36 Am. Rep. 222, 5 N. W. 499, to constitute the offering of a bribe which would disqualify a candidate making such a promise from holding the office, under a statute providing that an election to an office may be contested "when the incumbent has given or offered to any elector . . . any bribe or reward in money, property, or thing of value for the purpose of procuring his election," the court saying: "It is true, an offer to pay money into

the public treasury is not, in one sense, an offer to pay money to an elector, the money in the treasury being public and not individual property. But nearly all electors are taxpayers, and an offer to pay money into the public treasury with the intent by such offer to influence the electors to elect to office the person making such offer has all the effect of the offer of a bribe."

So, in *Diehl v. Totten* (1915) 32 N. D. 131, 155 N. W. 74, it was held that the publication by a candidate, in a newspaper and by means of personal letters to voters, of a pledge that, if elected, he would turn back into the treasury all of the salary of the office above a certain amount, was a violation of the Corrupt Practice Act, which provided for the removal from office of an officer where it was made to appear that he was guilty of any corrupt practice, illegal act, or undue influence in or about his election.

And in *Bush v. Head* (1908) 154 Cal. 277, 97 Pac. 512, where an act of the legislature had provided for an additional judge of a court, it was held that a promise by a candidate for such judge-

ship, that if elected he would not qualify, and the office would thereby be left vacant, and the taxpayers would be relieved of the expense of maintaining it, amounted to an offer or promise to pay "any money or other valuable consideration" to induce voters to vote in a particular way which under the statute authorized a contest of the election.

But in *People ex rel. Bush v. Thornton* (1881) 25 Hun (N. Y.) 456, the contention, that an officer who promised to accept less than the legal salary for the office, if elected, was disqualified from holding the office, because of the requirement that he take an oath that he had not, directly or indirectly, paid, offered, or promised to pay any money or other valuable thing as a consideration or award for the giving or the withholding of a vote at the election, was not adopted by the court because, while the law required the taking of such an oath, it did not further declare that the office should be deemed vacant if the officer did not swear to the truth, or that he should in that case be disqualified from holding the office.

And in *State ex rel. Clements v. Humphries* (1889) 74 Tex. 466, 5 L.R.A. 217, 12 S. W. 99, which was a proceeding in the nature of quo warranto to oust respondent from office on the ground that he had, by circular sent to the voters, offered to perform the duties of the office for less than the legal compensation, the court held that, although the Constitution of the state required an oath similar to that shown in the preceding case, it did not warrant the removal of the respondent from office in the absence of some other constitutional or statutory provision making such a promise a ground for removal from office. These cases are not, however, necessarily in conflict with those first cited, in which it appears that some such provision was in force.

In some cases it is held that, in order to invalidate the election of an officer because of promises to accept a reduced salary, it must be shown that such promise affected enough votes to have changed the result of the election.

Thus, in *People ex rel. Bush v. Thornton* (N. Y.) *supra*, it was held that the fact that a candidate for office made promises to the electors, that, if elected, he would serve for less than the salary provided by law, would not invalidate his election in the absence of a showing that a sufficient number of votes were influenced thereby in his favor to have changed the result of the election.

L.R.A.1917B.

And in *State ex rel. Church v. Dustin* (1875) 5 Or. 375, 20 Am. Rep. 746, it was held that, while a promise by an officer that if elected he would turn part of the salary of the office back into the treasury was a violation of a statute providing that "every person shall be disqualified from holding office during the term for which he may have been elected who shall have given or offered a bribe, threat or reward to procure his election," a complaint making such a charge, and setting out the names of a sufficient number of voters who were influenced thereby in favor of the candidate to have changed the result of the election, was insufficient, in that it failed to allege that the voters named were taxpayers.

In *State ex rel. Dithmar v. Bunnell* (1907) 131 Wis. 198, 110 N. W. 177, 11 Ann. Cas. 560, a promise by a candidate for county judge to give advice and draw papers free of charge in probate cases which would come before him, such services not constituting part of the duties of the office, was disapproved, but was held to be insufficient to sustain an action of quo warranto to oust him from the office under a statute providing that "any person who shall obtain any office by bribery or shall have been elected to any office at any election at which election he shall have induced or procured any elector to vote for him for such office by bribery shall be disqualified," etc., where the record failed to show any proof that any voter was induced or procured to vote for him because of such promises.

In *State ex rel. Newell v. Purdy* (1874) 36 Wis. 213, 17 Am. Rep. 485, a contest for an office between the two candidates receiving the highest number of votes therefor, it was held that if the one receiving the second highest number of votes could show that a number of the electors, exceeding the majority of the successful candidate, were influenced to vote for him solely by reason of his offer that if elected he would serve for a smaller salary than that fixed by law, such votes should be rejected and the other party adjudged entitled to the office.

In *State ex rel. Atty. Gen. v. Collier* (1880) 72 Mo. 13, 37 Am. Rep. 417, an information in quo warranto to oust respondent from office, which alleged that respondent promised to the electors as a reason for his election that, if elected, he would take, as salary only a certain sum part of a larger aggregate of fees for the office, and that a sufficient

number of voters and taxpayers of the county were influenced thereby to vote for him to establish a majority over his rival for the office, and that but for such

offers and their acceptance by such electors respondent would not have been elected, was held to be good upon demurrer.

R. L. S.

## IOWA SUPREME COURT.

STATE OF IOWA, Appt.,  
v.  
HUTCHINSON ICE CREAM COMPANY  
et al.

SAME, Appt.,  
v.  
SANDERS ICE CREAM COMPANY et al.

(168 Iowa, 1, 147 N. W. 195.)

**Statute — sufficiency of title — amendment standardizing ice cream.**

1. Provisions of a statute fixing a standard for ice cream are covered by a title, An act to amend a specified section relating to food values.

*For other cases, see Statutes, I. c. 3, in Dig. 1-52 N. S.*

**Food — ice cream standard — constitutionality.**

2. To prevent fraud the police power extends to the fixing of a standard for ice cream without unconstitutional impairment of liberty or property rights.

*For other cases, see Constitutional Law, II. c. 4, d, in Dig. 1-52 N. S.*

**Same — forbidding the sale of mixture as ice cream — effect.**

2. The mere fact that a frozen mixture containing less than a certain percentage of butter fat cannot be sold as ice cream does not prevent its sale so as to deprive the owner of his property without due process of law.

*For other cases, see Constitutional Law, II. b, 4, d, in Dig. 1-52 N. S.*

**Same — reasonableness of regulation.**

4. Fixing the standard for ice cream at a mixture containing 12 per cent of butter fat for plain cream and 10 per cent for fruit or nut cream is not so unreasonable as to render the statute void.

*For other cases, see Food, in Dig. 1-52 N. S.*

(May 12, 1914.)

**APPEAL** by the state from a judgment of the District Court for Polk County sustaining demurrers to information charging defendants with selling, exchanging delivering, and having in possession with intent to sell, exchange, and expose and offer for sale and exchange, adulterated food, in violation of statute. Reversed.

**Note.**—As to regulations affecting ice cream, see annotation following this case, post, 207.  
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Statement by Preston, J.:

Two informations were filed by a state food and dairy commissioner before a justice of the peace in the two cases, one against the Hutchinson Ice Cream Company and C. J. Hutchinson, manager, and the other against the Sanders Ice Cream Company and L. R. Sanders, president.

The defendants were accused of the crime of selling, exchanging, delivering, and having in possession with intent to sell, exchange, and expose and offer for sale and exchange, adulterated food, in violation of chapter 166, Laws of the 31st General Assembly, as amended (Supp. to the Code, §§ 4999-a15 to 4999-a43), for that the defendants did have in possession, with intent to sell, exchange, and expose and offer for sale and exchange and did sell, exchange, and deliver a certain food product called ice cream, which was adulterated, in that it did not conform to the standards established by law, being deficient in butter fat, etc.

Demurrers were interposed by the defendants on the following grounds:

First. The acts charged as constituting the offense charged constitute no crime, under the statutes, upon which the prosecution is based; i. e., chapter 166, Laws of the Thirty-First General Assembly, §§ 4999-a15 to 4999-a43.

Second. If the prosecution is claimed to be based in any respect upon the provisions of chapter 175, Acts of the Thirty-Fourth General Assembly, said act of the thirty-fourth general assembly is unconstitutional and void, in view of § 29, article 3, of the Constitution of Iowa, which provides that every act shall embrace but one subject, which shall be expressed in its title; moreover, said act provides no penalty, and, being a separate act, is not included within the prohibition of §§ 4999-a15—4999-a43, Supplement to Code.

Third. The legislature had no power to fix the standard of butter fat in ice cream at 12 per cent, because: (a) Said standard and the statute fixing the same are unreasonable; (b) it invades the individual rights of defendant, and is not a mere police regulation, having no relation in fact to the comfort, safety, and welfare of the public; (c) said statute is in violation of § —, art. —, of the Constitution of the state of Iowa, in that it arbitrarily interferes with personal liberty and private property with-

out due process of law, having, in fact, no relation to the public health, comfort, or welfare; (d) that said statute is in violation of § 1, 14th Amendment to the Constitution of the United States, in that it arbitrarily interferes with personal liberty and private property without due process of law, having, in fact, no relation to the public health, comfort, or welfare.

The demurrers were overruled by the justice, evidence was taken, and the defendants were found guilty. An appeal was taken to the district court, where the demurrers were again interposed and sustained. The state appeals. The cases are submitted together.

Mr. George Osson, Attorney General, for the State:

The legislature under its police power may enact laws for the purpose of preventing fraud in the sale of food products.

*State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *State v. Snow*, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *State v. Crescent Creamery Co.* 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Board of Health v. Vandruens*, 77 N. J. L. 443, 72 Atl. 125; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489; *State v. Co-operative Store Co.* 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A. (N.S.) 634, 84 N. E. 913, 14 Ann. Cas. 700; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *Com. v. Crowl*, 245 Pa. 554, 91 Atl. 922; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

As to the authority of the legislature to fix standards and prohibit the sale of articles not complying with the standard, see—

*Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 53 L. ed. 1197, 32 Sup. Ct. Rep. 784; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Crossman v. Lurman*, 192 U. S. 190, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114.  
L.R.A.1917B.

If the act bears relation to the object to be accomplished, the method of its accomplishment is for the legislature.

*Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 295, 52 L. ed. 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270.

Laws enacted under the police power to promote the general welfare may be sustained although they interfere with the freedom of contract.

*Chicago, B. & Q. R. Co. v. McGuire*, 210 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *McLean v. Arkansas*, 211 U. S. 539, 550, 53 L. ed. 315, 320, 29 Sup. Ct. Rep. 206; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Barrett v. Indiana*, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692.

The title is sufficient even though the words "ice cream" are not specifically set forth in the title.

*State v. Fairmont Creamery Co.* 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895.

Messrs. John Fletcher, Assistant Attorney General, O. S. Thomas, Thomas J. Guthrie, and George A. Wilson also for the State.

Mr. R. L. Parrish, for appellees:

The statute on which the prosecution is based is unconstitutional in view of § 29, art. 3, Constitution of Iowa, in that the subject is not expressed in its title.

*State v. Bristow*, 131 Iowa, 664, 100 N. W. 199; *Fish v. Stockdale*, 111 Mich. 46, 69 N. W. 92; *West Point Water Power & Land Improv. Co. v. State*, 49 Neb. 223, 68 N. W. 507; *Rex Lumber Co. v. Reed*, 107 Iowa, 111, 77 N. W. 572; *Williamson v. Keokuk*, 44 Iowa, 88; *Iowa Sav. & L. Asso. v. Selby*, 111 Iowa, 402, 82 N. W. 968; *State v. Fairmont Creamery Co.* 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895.

Legislative acts passed in pursuance of the police power must have some relation to the ends sought to be accomplished. Where the ostensible object of an enactment is to secure the public comfort, safety, or welfare it must appear to be adapted to that end, and it is the province of the court to determine whether it is really adapted to that end.

*Freund, Pol. Power*, §§ 15, 20; *Tiedeman, Pol. Power*, §§ 1, 3, 85; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; 1 Kent, Com. 450; *Health Dept. v. Trinity Church*, 145 N. Y. 32, 27



L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Crawford v. Topeka, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Lake View v. Rosehill Cemetery, 70 Ill. 191, 22 Am. Rep. 71; Frost v. Chicago, 178 Ill. 250, 49 L.R.A. 657, 69 Am. St. Rep. 301, 52 N. E. 869.

Mr. Walter Jeffreys Carlin also for appellees.

Preston, J., delivered the opinion of the court:

1. One of the objections to the statute on which this prosecution is based is that the act is invalid for noncompliance with § 29, art. 3, of the Constitution of Iowa, in that its subject was not expressed in the title. This constitutional provision, or that part of it relating to the points raised in this case, is that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

Chapter 166, Acts of the 31st General Assembly (Code Supp. §§ 4999-a15 to 4999-a30), was an act to prevent the adulteration of foods, etc. This was amended by chapter 178, Acts of the 32d General Assembly, by adding at the end of chapter 166, § 18, now appearing as § 4999-a31 of the Supplement to the Code, relating to food standards, which establishes standards for certain articles therein enumerated. That § 4999-a31 was amended by chapter 175 of the 34th Session of the Legislature, the act in question, and fixes a standard for ice cream, in addition to the other articles for which the standard had been fixed in § 4999-a31. The title to chapter 175, just referred to, is: "An Act to Amend Section Four Thousand Nine Hundred and Nine-nine-a-thirty-one (4999-a31) of the Supplement to the Code, 1907, Relating to Food Standards."

The provisions of the act establishing an ice cream standard, after the enacting clause, are:

"1. Ice-cream. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than twelve per cent (12%) by weight of milk fat, and the acidity shall not exceed three-tenths ( $\frac{3}{10}$ ) of one per cent (1%).

"2. Fruit ice cream. Fruit ice cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition

of not to exceed one per cent (1%) by weight of a harmless thickener, and contains not less than ten per cent (10%) by weight of milk fat.

"3. Nut ice cream. Nut ice cream is the frozen product made from pure wholesome, sweet cream, sugar, and sound, nonrancid nuts, and, if desired, the addition of not to exceed one per cent (1%) by weight of harmless thickener, and contains not less than 10 per cent (10%) by weight of milk fat."

Some of the other provisions of these statutes which have some bearing upon the points argued will be here referred to. Section 4999-a20 provides in part that "no person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Section 4999-a21 provides in part: "The word 'food,' as herein used, shall include all articles used for food, drink, confectionery or condiment, by man or domestic animals, whether simple, mixed or compound."

Section 4999-a22 defines adulteration, and states in part that:—

"For the purpose of this act an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law."

The purpose of the constitutional provision contained in § 29, art 3, was, as stated in some of the cases, to prohibit the insertion in an act of incongruous matter having no connection or relation with the general subject as expressed in the title. It has been held that the title is sufficient, although confined to general terms, if it answers as a key to the subject matter of the act. *Sisson v. Buena Vista County*, 128 Iowa, 452, 70 L.R.A. 440, 104 N. W. 454; *State v. Fairmont Creamery Co.* 153 Iowa, 715, 42 L.R.A.(N.S.) 821, 133 N. W. 895.

It is not necessary that the details of the

subject matter or reasons which brought about the enactment by the legislature should be set out in the title. If it refers in a general way to the subject, and is reasonably germane, and calculated to advise the members of the legislature, and the people, of the nature of the pending legislation, or changes in the laws by amendment, it is sufficient. The requirement that the act shall embrace but one subject, and matters properly connected therewith, was intended to prevent the evils of omnibus bills, and surreptitious legislation. It is not claimed in this case that the act in question does contain more than one subject, but that the subject is not expressed in the title. This, of course, must be done, under the terms of the provision, at least to the extent already indicated.

The authorities seem to agree that such provisions are to be given a reasonable construction. As some of them state it, they should be construed liberally to uphold proper legislation, all parts of which are reasonably germane, on the one hand, and to prevent trickery on the other.

Appellees rely on *State v. Bristow*, 131 Iowa, 664, 109 N. W. 199. In the Fairmont Creamery Case, *supra*, it was shown that in the Bristow Case there was nothing in the title to indicate the contents of the act; that the title related only to the act which was repealed, and did not refer to the act which was a substitute for the act which was repealed.

Section 4999-a31 established standards of more than twenty articles. The essential subject was food standards. The act in question is amendatory to § 4999-a31, and the title recites that it is "an act relating to food standards."

The act in question adds ice cream to the list for which standards had already been established. In our opinion, it was germane, and the act does not offend against the constitutional provision quoted. The point is ruled by the holding in *McGuire v. Chicago, B. & Q. R. Co.* 181 Iowa, 340, 346, 33 L.R.A. (N.S.) 706, 108 N. W. 902, and the Fairmont Creamery Co. Case *supra*. See also *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State ex rel. Weir v. County Judge*, 2 Iowa, 280; *Morford v. Unger*, 8 Iowa, 82; *Davis v. Woolnough*, 9 Iowa, 104; *Porter v. Thomson*, 22 Iowa, 391; *Martin v. Blattner*, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; *Christie v. Life Indemnity & Invest. Co.* 82 Iowa, 360, 48 N. W. 94; *Iowa Sav. & L. Asso. v. Selby*, 111 Iowa, 402, 82 N. W. 968.

2. The principal point in the case is whether the act in question, fixing a standard for ice cream, is within the police power of the state. The contention of defendants, L.R.A.1917B.

as they state it, is substantially that the act is not within the police powers of the state, for that it, in fact, has no relation to the comfort, health, and welfare of the public, and hence violates both the state and Federal Constitutions by interfering with the personal liberty and private property of the citizen, without due process of law; that it is arbitrary, unreasonable, and an unwarranted interference with a lawful business, depriving manufacturers of ice cream of property rights of great value, and depriving both manufacturers of ice cream and the people of their liberty.

The contention of the state is, in substance, that the act is clearly within the police power of the state, and hence does not offend against the Federal or state Constitution, unless it has no reasonable relation to the purposes which it is designed to effect. It is conceded by the state that, to be a valid exercise of such power, the act must have relation to the comfort, safety, or welfare of the public, but that the welfare of the public involves or includes the right of the legislature to protect the public from fraud and deception; that the Constitution does not secure to anyone the privilege of defrauding the public; that it is impossible for consumers of ice cream to determine by any ordinary diligence the ingredients of the product; and that, without a standard, opportunity is afforded unscrupulous manufacturers of ice cream to palm off upon the public a much cheaper and inferior article for a higher quality, at the price of the better and more costly product.

There seems to be no serious controversy between counsel for either side in regard to many of the fundamental propositions of law involved, but they agree that the difficulty lies in their application. Defendants concede the validity of the police power in its fullest extent; admit that it is within the power of the legislature to enact laws for the purpose of preventing fraud in the sale of food products; that ordinarily the propriety of passing an act of this character is a question for the determination of the legislature; that there are many restraints to which every person is necessarily subject for the common good; and that laws enacted under the police power to promote such purpose may be sustained, although they interfere, to some extent, with the liberty of the citizen and the freedom of contract. On the other hand, it is conceded by the state that such laws, to be valid, and within the police power, must not be arbitrary or capricious, but reasonable, and have a reasonable relation to the object to be accomplished. Such concessions render it unnecessary for us to discuss at length

some of the points, or to review the many cases cited.

It is said by counsel for appellees that the only debatable ground in the case is whether this statute comes within the police power as a measure tending to prevent the liability to fraud and deception; that this is the real question. The wisdom or expediency of such a measure is not for the determination of the court.

The presumptions are in favor of the exercise of the power in the enactment. We are to overthrow the act, if at all, only when it violates the Constitution "clearly, palpably, plainly, and in such manner as to leave no reasonable doubt." The question is whether there is any reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law as that now in question. The courts have not attempted to accurately define the limit of the police power, nor is it advisable to do so, because of changing conditions. The power is broad, but subordinate to the Constitution. The courts may, and will, interfere in a proper case, where the legislature has clearly exceeded the constitutional limitations. It is not enough that the case is a doubtful one. Though we might be of the opinion that an 8 per cent or some other standard should have been established, still we ought not to interfere with the standard fixed by the legislature, unless such standard is clearly arbitrary and unreasonable. We shall not take the space to give definitions of police power. The question is discussed at length in the following, among other, of our own cases: *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, 354, 33 L.R.A. (N.S.) 706, 108 N. W. 902; *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *State v. Armour Packing Co.* 124 Iowa, 323, 100 N. W. 59, 2 Ann. Cas. 448.

It is not claimed by either side, as we understand it, that the act in question is a health law. The claim of the state is that the purpose of the legislature was to prevent the perpetration of fraud upon the public.

The public welfare embraces a variety of interests calling for public care and control. These are: "The primary social interests of safety, order, and morals, economic interests, and nonmaterial and political interests." Freund, *Pol. Power*, §§ 9, 15.

The claim here is that the act fixing a standard for ice cream deals with economic interests, the purpose being, as already stated, to prevent fraud. It was said in one of the milk cases (*State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698): "It is not enough to L.R.A.1917B.

show that defendant did not intend to defraud, or that the milk he sold was wholesome. . . . It is enough that adulteration such as prescribed by the statute may defraud or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices, and that it ought to be prohibited."

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts. *McLean v. Arkansas*, 211 U. S. 539, 550, 53 L. ed. 315, 320, 20 Sup. Ct. Rep. 206.

The Constitution does not secure to any one the privilege of defrauding the public. *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. ed. 223, 229, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

As bearing upon the question as to whether this statute, fixing a certain standard for ice cream, is so manifestly arbitrary and unreasonable as that the legislature was not justified, under the police power, in enacting it, and whether fraud might have been practised upon the public in the sale of ice cream, we should here refer to conditions and some of the facts which we ought to presume were known to the legislature when the statute was enacted. We say this because some of the facts and conditions called to our attention existed and were of more or less notoriety at the time of the passage of this law. We are asked to consider these facts and conditions for the purpose of determining whether the act is so manifestly arbitrary and unreasonable as to require us to hold it invalid.

If, under any possible state of facts, the act would be constitutional and valid, the court is found to presume that such conditions existed; whether a state of facts existed which called for the enactment of this legislation was for the determination of the legislature. *McGuire v. Chicago, B. & Q. R. Co. supra*.

An authority is cited to the effect that, when a question of fact is debated, or debatable, and the extent to which a constitutional limitation goes is affected by the truth in respect to that fact, the court will take judicial cognizance of all matters of general knowledge, and will consider expressions of opinion from other than judicial sources given by those qualified by their skill and experience to express such opinions. *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

Just how far we should go in regard to such matters, where, as in this case, the decision was on demurrer, we need not determine, for the reason that we are asked

by both sides, without objection from either, to consider depositions taken for use, had the case been tried on the merits, reports, trade journals, cookbooks containing a great many formulas for making ice cream, circulars, and the like. These have been abstracted and certified. We shall not attempt to set out all these matters, but enough to illustrate in a general way the points made.

It appears that in seventeen states the standard fixed for ice cream to be sold is 14 per cent; five states have fixed the standards at 12 per cent butter fat, the same as our own; but five states which have legislated have a lower standard than Iowa. The Federal government fixes the standard for ice cream at 14 per cent. It should be said, as to the 14 per cent standard fixed by the Federal government, that it is not claimed that such standard has been fixed by law, but by the United States Department of Agriculture. But, even though not law, it would be a circumstance proper to be considered as the opinion of that department. The legislature would not be bound entirely by the conflicting opinion of any of the persons we shall refer to. From these documents it appears that there is a difference of opinion as to the advisability of establishing a standard for ice cream, or, if it is established, the per cent of butter fat the product should contain. Some think a high standard of butter fat is injurious to health, especially for children and invalids; others object to high butter fat contents during the summer months on account of the shortage in the supply. It is contended by some that ice cream should be made from cream, sugar, and flavor solely. An article in a trade journal says: "Commissioners have agitated a high butter fat standard, and we have the significant controverting fact that nowhere is there a great ice cream business built up on a high butter fat formula. The ice cream manufacturers know what the public wants. It does not want an overrich product because it cannot eat enough of it."

The same article states: "The moral support of the dairyman, the creamery men, and the cheese manufacturer and the milk dealer in these matters will help greatly. They have only to remember that, when the ice cream man cuts his butter fat content, he adds condensed, and that one is about as valuable as the other, if anything, condensed is more valuable because it allows the use of all the milk."

Large manufacturers of ice cream from different parts of the country gave testimony, and gave their opinions from their standpoint. They state that they would not

attempt to define ice cream, because it covers a large number of frozen substances; that there is an unlimited number of formulas; cream should be a part of the mix, the same as sugar or flavor. When condensed milk is used, the purpose is to add solids, thereby giving the cream better body. The purpose of the cream is to add to the flavor and to add to the body. The largest dealers in the United States are not so-called high butter fat men; butter fat is not the best solid to provide body for ice cream; there are manufacturers who make a high butter fat ice cream, and cater only to exclusive trade, and get a long price for it.

One witness says: "Speaking in a commercial sense, I do not believe raising the standard to 12 per cent would materially affect the price of ice cream. It would diminish the amount of other solids which would be put in it; the milk producers' skim milk would go to waste. The use of condensed milk has very much increased during the last few years, because of the increased demand for ice cream, and the extensive use of milk solids in ice cream. Millions of gallons of skim milk used to be thrown away which is now converted into condensed milk, and there is a ready market for it. My experience is that the public prefers 8 per cent ice cream to 12 per cent. The 8 per cent standard was arrived at in Illinois by a commission which investigated the matter and arrived at the standard of 8 per cent. I do not think there should be any standard at all."

Other witnesses gave similar testimony. One manufacturer of many years' experience says that years ago ice cream would test so low in butter fat that you would not know how to find it; that it was then made out of milk, eggs, and cornstarch, but that later "we enlarged the butter fat in it." He says that the man who makes high butter fat ice cream will have to demand more money for it; that normal butter fat ice cream runs from 6 per cent to 10 per cent; that the per cent of butter fat has no relation to its wholesomeness.

Defendants show that consumers would eat a less quantity of ice cream which is rich in butter fat. This would decrease the consumption by the public, and the output and profits of the manufacturers. This would not, perhaps, be a reason for fixing a standard, but may bear on the motive of those who oppose it, and affect their claims as to whether the standard is unreasonable. As stated, there are many formulas for making ice cream. Here is one: "Vanilla ice cream without cream or milk. One vanilla bean, 8 gills of syrup at 20 degrees, 18 egg

yolks. (To be cooked and frozen.) Then work in a meringue made of 2 egg whites and  $\frac{1}{4}$  lb of sugar."

It is shown that the cost to manufacture ice cream containing 20 per cent butter fat is 45 cents per gallon; containing 7.7 per cent, 29 cents; and that, where condensed milk is used and the product contains 1.9 per cent butter fat, the cost is 15 $\frac{1}{2}$  cents per gallon.

We have set out these matters somewhat in detail for the purpose of showing that the consumer may be defrauded, and as showing the propriety or necessity for fixing a standard, or, rather, to show that the legislature might properly so determine. We quote at some length from one of the documents submitted:

"Ice cream is one of the delights of the food adulterator, for ice cream is a mixture of various things in which each one more or less loses its identity. The adulterator is able, therefore, to inject all manner of inferior, and often dangerous, cheapeners into his product, and to compete successfully with the honest manufacturer who makes clean, wholesome ice cream.

"The honest ice cream maker to-day is working at a decided disadvantage when he is obliged to compete with the dishonest one, since the dishonest one need not label his product so that the ingredients will be shown to the consumer, or even to the retailer. This fact was strikingly shown at a recent meeting of ice cream manufacturers in New York, at which one man present declared that it was impossible for a competitive ice cream maker to be honest. This man asserted, and with much reason, that there were three things that make manufacturers dishonest. These three things were the Federal government and the state and municipal departments of health, all of which encourage the dishonest manufacturer at the expense of the honest one. As a basis of his argument, this man presented three formulas for making commercial ice cream which speak for themselves. Here they are:

#### "Formula No. 1.

"Sells to retailer at \$1.25 per gallon.

11 quarts 40 per cent of cream at 45c	\$4.95
5 quarts grade B milk at 6 $\frac{1}{2}$ c	.33
4 quarts condensed milk at 20c	.80
9 pounds sugar	.45
4 ounces extract	.40

\$6.93

"When expanded by freezing, this quantity of ingredients produces forty quarts of ice cream, containing 20 per cent butter fat, at a cost of less than 80 cents per gallon. L.R.A.1917B.

#### "Formula No. 2.

"Sells to retailer at 90 cents per gallon.

3 quarts 40 per cent cream at 45c	\$1.35
13 quarts grade B milk at 6 $\frac{1}{2}$ c	.85
4 quarts condensed milk at 20c	.80
4 ounces gelatin at 24c per lb	.06
4 ounces extract	.40
7 $\frac{1}{2}$ pounds sugar	.38

\$3.84

"These ingredients, expanded by freezing, yield forty quarts of ice cream, containing 7 $\frac{1}{2}$  per cent butter fat, at a cost of 38 cents a gallon.

#### "Formula No. 3.

10 gallons of condensed milk	\$8.00
10 gallons grade B milk	2.60
60 gallons plain water	0.00
4 pounds gelatin at 20c	.80
Color	.01
Flavor	1.00
60 pounds sugar at 5c	3.00

\$15.41

"These ingredients, expanded by freezing, yield one hundred twenty gallons of ice cream, at a cost of 13 cents a gallon.

"What the ice cream makers, and consumers as well, need is the creation of ice cream standards and laws which would compel the manufacturers who make 'cheap' ice cream to correctly label their product. A law is needed in New York and other places which will state how much butter fat must be contained in ice cream before it can be called ice cream, and which will prevent the use of gelatin reeking with millions of bacteria and of coal tar dyes, unless these ingredients are labeled.

"Ice cream is a commercially manufactured commodity, and as such should be adequately regulated by the health authorities, both for the benefit of the honest manufacturers and the innocent consumers."

Notwithstanding these conflicting opinions, it was a question for the legislature to say whether this legislation was called for. The legislature was not compelled to take the view of either those who favor or oppose a standard. Taking one view of it, conditions were such as to clearly sustain the action of the legislature. We are not entirely satisfied that this would not be so if conditions were as claimed by the defendants. We are not to say, and do not, of course, determine, that these defendants, or the association appearing in argument, or any particular person, is or has been guilty of any fraud or deception. The question is whether, without a standard, dishonest or unscrupulous manufacturers may do so. It

is not practicable by any ordinary inspection for the purchaser to distinguish cheaper, low grade ice cream from the better quality. Because of this, it is apparent from the matters which we have detailed that an opportunity is afforded for deception by selling an inferior quality of ice cream at the price of a better or more expensive grade. This was the case in the sale of oleomargarin. *State v. Armour Packing Co.* 124 Iowa, 323, 100 N. W. 59, 2 Ann. Cas. 448. In this respect it differs from the case of *Frost v. Chicago*, 178 Ill. 250, 49 L.R.A. 657, 69 Am. St. Rep. 301, 52 N. E. 869, where it was held that a person who is ordinarily careful and intelligent could not be deceived by a netting covering for baskets of fruit. In such case the purchaser could still see and know what he was buying.

The purpose of the act in question was to prevent just such deception and fraud as would be possible without a standard, and it seems to us it cannot be seriously claimed that the statute will not accomplish the end sought.

It is said by defendants that they are deprived of the right to sell their product if it contains a less per cent of butter fat than that prescribed by the statute, and that the sale of such is entirely prohibited. This, we think, is an assumption not warranted. They may sell it for what it really is. Possibly it would sell as readily if it is named and sold as frozen skim milk; if not, this would be an additional argument for prohibiting the sale of so-called ice cream made from evaporated skim milk as ice cream.

The state contends that every point in this case is decided against the contentions of defendants in *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698, and *State v. Snow*, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777. They are very closely in point.

The only case called to our attention, in which the question of fixing a standard for ice cream was decided, is *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991. In that case, under an ordinance, the prohibition was not against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all. The provision of the ordinance is: "Ice cream sold or kept for sale must contain at least 10 per cent butter fats, for fruit ice cream, and 12 per cent for plain ice cream." Under this ordinance, ice cream could not be sold or kept for sale unless it contained the required per cent of butter fat. As already stated, our statute does not prohibit the sale of such product.

In the Georgia case the court said: "It might be permissible to say that the term L.R.A.1017B.

'ice cream' . . . should relate only to ice cream of a certain prescribed richness and that whoever sold ice cream of poorer quality should, either by calling it under some other name, or by indicating on the vessel in which it is delivered, or otherwise, disclose the inferiority of its quality,"—thus recognizing the distinction which we make between that ordinance and our statute, and holding that the sale of ice cream may be regulated by fixing a standard. Our statute fixes a standard for ice cream, and prohibits the sale of anything else as ice cream; but the sale of a product formerly known as ice cream, but containing a lower per cent of fat than that prescribed by the statute, is not prohibited. It may be sold for what it is. It may be sold under some other name, and the consumer will not be deceived, for he now knows that when he buys ice cream he is getting an article containing a certain per cent of butter fat, and that this may not be so if he buys something not as ice cream, but as something else.

Defendants say their case comes within the doctrine of *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29. This must be on the erroneous assumption that the Iowa statute prohibits absolutely the sale of their product if it contains less than the specified per cent of fat. The New York statute referred to in the Marx Case did prohibit the sale of oleomargarin, which was shown to be a wholesome article, and not injurious, and the statute was held invalid. That statute was amended so as to regulate the sale, and held valid in *People v. Arensberg*, 105 N. Y. 128, 59 Am. Rep. 483, 11 N. E. 277. As amended, the statute was entitled, "An Act to Prevent Deception in the Sale of Dairy Products," etc. It prohibited: (1) The manufacturer out of any animal fat, or animal or vegetable oils not produced from unadulterated milk, or cream from the same, of any product in imitation or semblance or designed to take the place of any natural butter produced from milk, etc.; (2) mixing, compounding with, or adding to milk, cream, or butter, any acids or other deleterious substances, or animal fats, etc., with design or intent to produce any article in imitation or semblance of natural butter; (3) selling, or keeping, or offering for sale, any article manufactured in violation of the provisions of the section.

The defendant was convicted of selling the article manufactured in violation of the provisions of the act. The court said: "Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious, and suitable for food as dairy butter, that it is composed of the same ele-

ments, and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter made from animal fats or oils have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive. If it possesses the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the employment of liberty in those respects, but they may legally be required to sell it for, and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other."

Re *Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, is cited. In that case the statute purported to be an act to improve the public health by prohibiting the manufacture of cigars in tenement houses. It was held that it was not a health law; that cigar making had no relation to the health of the public; and that the act was not intended to protect the health of the occupants of the tenement. In that case it was held, and the proposition is not disputed by the state, that the constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without physical taking of property for public or private use, and that any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

*People v. Biesecker*, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534, 61 N. E. 990, is also cited. It was there held that the statute under consideration could not be justified as an exercise of power to prevent fraud or imposition on buyers and consumers.

We have referred to these New York cases more fully than necessary, perhaps, but, because of the claim made for the *Marx* Case, we have thought it proper to refer L.R.A.1917B.

briefly to the others as well. The *Marx* Case is cited and distinguished in *State v. Snow*, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777.

In *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284, it was held that a city ordinance fixing the weight of the standard loaf of bread to be sold in the city, and prohibiting the making or selling of loaves not up to the weight of the standard loaf, is not such an unreasonable and arbitrary exercise of the police power as to render the ordinance void under the Constitution, prohibiting the taking of property without due process. It was shown in that case that there was a considerable demand for loaves of different size, and that so fixing the size produced some inconvenience. The ordinance was sustained, upon the theory that it tended to prevent fraud in the sale of bread. The court said: "Furthermore, laws and ordinances of the character of the one here under consideration and tending to prevent frauds, and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power." And that "this court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely, because of restrictions upon that right deemed necessary in the interest of general welfare." And that "so long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense."

That the legislatures of the states may in the exercise of the police power regulate a lawful business, see *Barrett v. Indiana*, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692.

The following cases may be cited as bearing upon the proposition that the legislature, under its police power, may enact laws for the purpose of preventing fraud in the sale of food products: *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Board of Health v. Vandruens*, 77 N. J. L. 443, 72 Atl. 125; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315;

State v. Crescent Creamery Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107.

All points raised by the demurrers have been noticed. We are of opinion that the statute is within the police power of the state, and is not unreasonable; that it has a reasonable relation to the object to be effected, and does not offend against either the Federal or state Constitution in any

of the particulars mentioned. It follows that the court erred in sustaining the demurrers.

Both cases are reversed and remanded.

The Justices all concur.

Affirmed by the Supreme Court of the United States, December 4, 1916, 242 U. S. 153, 61 L. ed. —, 37 Sup. Ct. Rep. 28.

### Annotation—Regulations affecting ice cream.

A case similar to STATE v. HUTCHINSON ICE CREAM Co. ante, 198, arose in Pennsylvania under a statute providing "no ice cream shall be sold within the state containing less than 8 per centum of butter fat, except where fruits or nuts are used for the purpose of flavoring when it shall not contain less than 6 per centum of butter fat," and the validity of the statute was sustained, although the court did not expressly hold, as did the court in STATE v. HUTCHINSON ICE CREAM Co., that the statute did not prohibit the sale, under some other name than ice cream of wholesome products formerly sold as ice cream, which did not come up to the required standard. In fact, in the Pennsylvania case the court said: "It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so, the courts would become the triers of the expediency of such legislation, and the authority which the people committed to the legislature would be transferred by judicial action to the courts." Com. v. Crowl (1914) 245 Pa. 554, 91 Atl. 922.

Both the HUTCHINSON CASE and the Crowl Case were appealed to the United States Supreme Court, and considered together in a single opinion, both being affirmed, the court taking the view of the Iowa court, that the acts do not arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name of ice cream, but that they merely prohibit the sale of such compounds as ice cream. The court calls attention to such interpretation, placed upon the Iowa statute by the courts of that state, and says that L.R.A.1917B.

it cannot assume, in the absence of a definite and authoritative ruling, that the supreme court of Pennsylvania would construe the law of that state otherwise, and points out that it is not called upon to determine whether a state may in the exercise of police power prohibit the sale even of a wholesome product. (1916) 242 U. S. 153, 61 L. ed. —, 37 Sup. Ct. Rep. 28.

The case of *Rigbers v. Atlanta* (1910) 7 Ga. App. 411, 66 S. E. 991, which is referred to in STATE v. HUTCHINSON ICE CREAM Co., arose under a statute which provided that "ice cream sold or kept for sale must contain at least 10 per cent butter fat for fruit ice cream and 12 per cent for plain ice cream;" this ordinance was held to be invalid, the court taking the view that it amounted to a prohibition, not only against selling ice cream of less than the prescribed percentage as ice cream, but against selling it at all, and recognizing that it might be permissible to say that the term "ice cream" should relate only to ice cream of a certain prescribed richness, and that whoever sold ice cream of a poorer quality should, "either by calling it under some other name, or by indicating on the vessel in which it is delivered," or by some other means, disclose the inferiority of its quality.

While the ordinance involved in the *Rigbers Case* differs in phraseology from the statutes involved in the other two cases considered by the Supreme Court, it does not appear that this is to any greater extent than those statutes a prohibition against the sale of products formerly sold as ice cream, but which do not come up to the standard required by the ordinance, under some other name; but such distinction seems to be, rather, a difference of interpretation, placed upon statutes essentially the same by different courts. R. L. S.



## OKLAHOMA SUPREME COURT.

JULIA A. FRIEND, Plff. in Err.,  
v.  
SOUTHERN STATES LIFE INSURANCE  
COMPANY.

(— Okla. —, 160 Pac. 457.)

**Pleading — policy attached.**

1. Where an action is brought on a policy of life insurance, and a copy of the policy is attached to the petition and made a part thereof, such copy should be considered as a part of the petition when construing the allegations thereof on demurrer.

*For other cases, see Pleading, I. a and h, in Dig. 1-52 N. S.*

**Insurance — life — duration of policy.**

2. A policy of life insurance, without any qualifying provisions, is not a contract of insurance for a single year, with a privilege of renewal from year to year by paying the annual premiums. It is an indivisible and continuous contract of insurance for life, subject, when so stipulated, to discontinuance and forfeiture for nonpayment of any instalment of premium. Such premium instalments are not intended as the consideration for the respective years for which they are paid, but each instalment is part consideration of the entire insurance for life. *For other cases, see Insurance, III. d, 2, in Dig. 1-52 N. S.*

**Same — default in premium — effect.**

3. The consequence of a default in payment of one annual premium, due under an indivisible and continuous contract of insurance, is determined by common-law principles where the contract does not otherwise provide.

*For other cases, see Insurance, III. h, in Dig. 1-52 N. S.*

**Same — premium — condition precedent.**

4. Ordinarily the payment of an annual premium on a policy of life insurance, after the policy has become effective by payment of the first year's premium, is not a condition precedent to the continuance of the policy, but, on the contrary, is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances. *For other cases, see Insurance, III. f, 2, in Dig. 1-52 N. S.*

**Same — provision of policy.**

5. A clause in a policy of life insurance which provides only that "this policy is incontestable after one year from date of the breach of any of the provisions thereof, except failure to pay premiums as required," and which further provides that upon pay-

ment of the policy the company may deduct any sum or sums due the company, does not forfeit the policy for failure to pay the annual premium when due; but the insurance continues in force, subject to the right of the company to terminate it, if after due notice the insured shall fail to pay the premium in arrears with interest, and the further right to retain out of any settlement arising under the policy the unpaid premium and interest thereon.

*For other cases, see Insurance, III. f, 2, in Dig. 1-52 N. S.*

**Same — forfeiture — construction.**

6. Forfeitures are looked upon by the courts with ill favor, and will be enforced only when the strict letter of the contract requires it. On the question of forfeiture of a life insurance policy, which is so framed as to be fairly open to construction, the view should be adopted, if possible, which will sustain rather than forfeit the contract of insurance.

*For other cases, see Insurance, III. f, 2, in Dig. 1-52 N. S.*

(October 10, 1916.)

**E**RROR to the District Court for Oklahoma County to review a judgment sustaining a demurrer to a petition filed to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Everest, Smith, & Campbell and Hunt C. Hill, for plaintiff in error:

Forfeitures are not favored, and where a policy is capable of two constructions, that one is to be adopted which gives validity to the policy.

Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Hamann v. Nebraska Underwriters Ins. Co. 82 Neb. 429, 118 N. W. 65; Kennedy v. Agricultural Ins. Co. 21 S. D. 145, 110 N. W. 116; Vance, Ins. p. 227; New York L. Ins. Co. v. Noble, 34 Okla. 103, 45 L.R.A. (N.S.) 391, 124 Pac. 612; Nielsen v. Providence Sav. Life Assur. Soc. 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168; Stark v. John Hancock Mut. L. Ins. Co. 176 Mo. App. 574, 159 S. W. 758; McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; Allen v. St. Louis Ins. Co. 85 N. Y. 473; Union Acci. Co. v. Willis, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812; Taylor v Insurance Co. of N. A. 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535; Standard Acci. Ins. Co. v. Hite, 37 Okla. 305, 46 L.R.A. (N.S.) 986, 132 Pac. 333.

The company, having agreed to give Mr. Friend extended insurance up to the amount of the loan value of his policy, cannot escape that agreement by reason of another clause inserted in the policy for regulating

Headnotes by SHARP, J.

Note.—For effect of failure to pay periodical premium on policy of life insurance to terminate the same in the absence of a provision for forfeiture, see annotation following this case, post, 214. L.R.A.1917B.

the terms under which a cash loan may be secured.

United States L. Ins. Co. v. Ross, 159 Ill. 476, 42 N. E. 859; Head v. New York L. Ins. Co. 241 Mo. 403, 147 S. W. 827; New York L. Ins. Co. v. Van Meter, 137 Ky. 4, 136 Am. St. Rep. 282, 121 S. W. 438; Mutual Ben. L. Ins. Co. v. O'Brien, — Ky. —, 116 S. W. 750.

Where the policy contains no provision for forfeiture of the insurance by reason of nonpayment of premium, such policy does not lapse on that account. It continues in force until the contract is terminated by some affirmative action; and if the insured dies while the policy is thus in force, notwithstanding the failure of the insured to pay one or more premiums, the company will be required to pay the face of the policy, less such credit as it may be entitled to for the lapsed premiums.

Woodfin v. Asheville Mut. Ins. Co. 51 N. C. (6 Jones, L.) 558; 25 Cyc. 850; 19 Am. & Eng. Enc. Law, p. 44; Perry v. Bankers' L. Ins. Co. 47 App. Div. 567, 62 N. Y. Supp. 553; McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; Haas v. Mutual L. Ins. Co. 84 Neb. 682, 26 L.R.A. (N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58; Equitable Life Assur. Soc. v. Golson, 159 Ala. 508, 48 So. 1034; Titlow v. Reliance L. Ins. Co. 246 Pa. 503, 92 Atl. 747; Union Cent. L. Ins. Co. v. Morrow, 7 Ohio S. & C. P. Dec. 118; Gruwell v. National Council, K. L. S. 126 Mo. App. 496, 104 S. W. 884; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512; Nederland L. Ins. Co. v. Meinert, 62 C. C. A. 377, 127 Fed. 651; Keeton v. National Union, — Mo. App. —, 182 S. W. 798; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 20 L.R.A. (N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552.

Where any form of notice is provided for by the contract from the company to the insured, that notice must be given before any forfeiture of the policy can be insisted upon.

Eddy v. Phoenix Mut. L. Ins. Co. 65 N. H. 27, 23 Am. St. Rep. 17, 18 Atl. 89; Meyer v. Knickerbocker L. Ins. Co. 73 N. Y. 516, 29 Am. Rep. 200; Nall v. Provident Sav. L. Assur. Soc. — Tenn. —, 54 S. W. 109; Merriman v. Keystone Mut. Ben. Asso. 138 N. Y. 116, 33 N. E. 738.

Messrs. Wilson, Tomerlin, & Buckholts, for defendant in error:

Time of payment of premium is of the essence of the contract.

2 Cooley, Briefs on Ins. p. 990; Worthington v. Charter Oak L. Ins. Co. 41 Conn. 372, 19 Am. Rep. 495.  
L.R.A.1917B.

Policies containing no forfeiture clause for failure to pay premiums are void.

Mutual L. Ins. Co. v. Hill, 193 U. S. 559, 48 L. ed. 794, 24 Sup. Ct. Rep. 538; Lone v. Mutual L. Ins. Co. 33 Wash. 577, 74 Pac. 689; Union Mut. L. Ins. Co. v. Adler, 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088.

The policy was suspended if not forfeited.

Washington Mut. F. Ins. Co. v. Rosenberger, 84 Pa. 373.

Sharp, J., delivered the opinion of the court:

This case presents error from the district court of Oklahoma county, and involves the sufficiency upon demurrer of plaintiff's petition, charging liability to her of the Southern States Life Insurance Company upon a policy of insurance issued by it on the life of Joseph A. Friend September 7, 1907. The policy provides that in consideration of \$483.90, and the annual payment of a like sum at or before noon on or before the 7th day of September in every year during its continuance, the company covenants to pay at its general office in the city of Atlanta, Georgia, \$10,000, less any sum or sums due it, to Julia A. Friend, wife of the insured, immediately upon receipt and approval of proofs of death of the insured, Joseph A. Friend, of Tulsa, Indian Territory, while said policy was in full force, provided, however, that if no beneficiary should survive the insured, then such payment should be made to the executors, administrators, or assigns of said insured. It was provided that the policy should be incontestable after one year from the date of the breach of any of the provisions thereof, except failure to pay premiums as required. A clause of the policy provided that it should be automatically nonforfeitable; that, if any premium thereon should not be paid when due, any withdrawable surplus should first be applied to pay the same, and the remainder of the premium, if any, should be charged against the policy as a loan if the respective loan value be sufficient to enable such advance after providing for the existing loans and accrued interest, provided that, if not sufficient to cover the entire remainder, a premium for a shorter period, but not less than a monthly premium, should be provided for, if the available loan value be sufficient; that notice of such application of surplus and advance should be mailed to the insured, and at any time while the policy was thus sustained in force the payment of premiums might be resumed. Another clause made the benefits, privileges, or provisions written or printed on other pages of the policy a part thereof. These benefits, privileges, and provisions

found on the additional pages of the policy concern different subjects pertaining to said insurance policy, under appropriate headings as follows: (1) Account with policy holder; (2) policy paid up by surplus; (3) policy matured as an endowment by surplus; (4) policy paid up with sum insured; (5) withdrawal of surplus; (6) change of beneficiary; (7) assignment of policy; (8) errors of age; (9) time and place of payment of premiums; (10) occupation, travel, residence, mode, and place of death; (11) authority of agents; (12) distribution of surplus; (13) loans and surrender privileges; (13a) surrender; (13b) table of cash loans, paid-up insurance, and periods of extensions, at different anniversaries of said policy, referred to in the policy and in sections 13 and 13a.

The petition charged that, notwithstanding the failure of the insured to pay the second year's premium, still the policy by its terms was in full force on March 1, 1909, the date of the death of the insured. A copy of the policy was attached to the petition as an exhibit, and made a part thereof by reference. The judgment of the trial court was that the petition failed to state facts sufficient to constitute a cause of action. The limit of our inquiry therefore is: Did the court err in sustaining the demurrer?

At the outset it may be said that, where suit is brought on an instrument in writing for the payment of money, and a copy of such instrument is attached to the petition and made a part thereof, such instrument should be considered as a part of the petition when construing the allegations thereof on demurrer. *Grimes v. Cullison*, 3 Okla. 268, 41 Pac. 355; *Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865; *Long v. Shepard*, 35 Okla. 489, 130 Pac. 131; *Davis v. Choctaw County*, — Okla. —, L.R.A.1916F, 873, 158 Pac. 294.

As the court's action in sustaining the demurrer is defended upon the ground that the nonpayment of the premium for the second year automatically worked a forfeiture of the policy, it is proper that we consider the nature and character of a policy of insurance made payable at the death of the insured, as is the policy before us. The leading case wherein the rule defining the character of a contract of insurance is stated is *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512, where the court said, speaking through Mr. Justice Bradley: "We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, L.R.A.1917B.

subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance."

The doctrine of the *Statham Case* was reaffirmed in *Thompson v. Knickerbocker, L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765, and *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10. In the former case it is announced that the court did not accept the position that the payment of the annual premium was a condition precedent to the continuance of the policy, but, on the contrary, said that the payment constituted a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is also said that, while prompt payment and regular interest constitute the life and soul of the life insurance business, and that the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquencies, more liberal views had obtained on this subject in recent years, and that a wise policy now often provides express modes for avoiding the odious result of forfeitures.

In the latter opinion, citing both of the earlier opinions, it was said: "The contracts were not assurances for a single year, with a privilege of renewal from year

to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the conditions subsequent of payment as provided."

The initial premium having been paid, and the policy therefore having become effective, and being for the life of the insured, it remains to inquire whether it has been forfeited. As there was at the time no statute controlling the rights of the parties, the policy has not been forfeited unless by virtue of some express provision contained in it, providing for forfeiture, for without a forfeiture clause the policy is not terminated merely for nonpayment of the premium when due. A well-considered case upon this question, and in which many authorities are reviewed, is *Haas v. Mutual L. Ins. Co.* 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58, where the rule is announced in the syllabus as follows: "A life insurance policy, when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. If the policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy. All that the company can demand in such case is the right to set off against the amount of indemnity it has bound itself to pay the amount of the premiums remaining unpaid, with interest thereon."

In the note to the above case it is said by the annotator that the rule that a failure to pay the premium on a life insurance policy does not of itself avoid the policy, unless the policy so provides, finds support in almost all of the authorities. Such has been the result of our own investigation.

In *Equitable Life Assur. Soc. v. Golsen*, 159 Ala. 508, 48 So. 1034, it was held that, while the policy may contain a valid condition that it may be terminated or forfeited upon a failure to pay any premium or installment at the time specified in the contract, which would be a condition subsequent, and the nonperformance of which would avoid the policy, unless waived by the insurer, yet such a condition, being for the benefit of the company, is to be strictly construed, and a forfeiture will be enforced only when it appears that such is the plain intent and meaning of the contract; and, if there are repugnant conditions, the court will enforce such as are in favor of the insured, and will prevent a forfeiture. *Titlow v. Reliance L. Ins. Co.* 246 Pa. 503, 92 Atl. 747, is another recent case in point. There it was said that, the contract of in-

surance having provided for no forfeiture, the law visited no such penalty; that, where the policy contained no such provision (forfeiture for nonpayment of premium), though the charter and by-laws required the payment of annual premiums, the failure to pay the annual premium when due did not work a forfeiture; that such a policy insured for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid. The syllabus reads: "A contract of life insurance providing for the payment of a definite sum to the insured at a definite period, or to his legal representatives at his decease before the end of the period, in consideration of certain annual premiums to be paid by the insured during the continuance of the policy, without qualifying provision of any kind whatever, is not a contract of insurance for one year in consideration of an advance payment with the right of the insured to continue it from year to year upon payment of the stipulated premium, but a contract indivisible and continuous, and the consequence of a default in the payment of one of the premiums is to be determined by common-law principles, parties themselves having failed to provide otherwise."

In *Union Central L. Ins. Co. v. Morrow*, 7 Ohio Dec. 118, it was said that, where a policy of life insurance contained no condition of forfeiture or lapse for nonpayment of premiums, the payment of the first premium was a condition precedent to the validity of the policy, but the payment of subsequent premiums was not, and that default did not forfeit the policy in the absence of notice by the company of the maturity of the notes, or demand of payment, or notice that upon nonpayment the company would elect to forfeit the policy. In *Sanford v. California Farmers' Mut. F. Ins. Asso.* 63 Cal. 547, it was held that a policy of insurance issued to a member of a mutual insurance company was not forfeited or suspended by failure of the insured to pay an assessment thus levied, unless such forfeiture or suspension was provided for as a part of the contract of insurance. Another well-considered case is *Nederland L. Ins. Co. v. Meinert*, 62 C. C. A. 377, 127 Fed. 661, where the conclusion was reached that the policy had not been forfeited unless it was by virtue of an express provision contained therein providing for forfeiture. It is said in the course of the opinion: "Without a clause providing for a forfeiture, the policy is not forfeited for nonpayment of the premium, any more than a land contract is forfeited by nonpayment of principal or interest when due. The rule is laid down in 19 Am. & Eng. Enc. Law, 2d ed. 44, as fol-

lows: 'Since forfeitures are odious in the eyes of the law, a default in the payment of a premium on life insurance does not forfeit the policy where there is no stipulation to that effect in the policy.' This is the well-settled rule. The reason why forfeitures are odious in the eyes of the law, and are said to be abhorred is that they are not equitable. Nevertheless, if a policy of insurance provides in express terms for forfeiture for nonpayment of the premium when due, the law will enforce it. But before the court will declare a forfeiture, the conditions of the policy upon which a forfeiture is founded must be strictly complied with."

See also *Woodfin v. Asheville Mut. Ins. Co.* 51 N. C. (6 Jones, L.) 558; *Perry v. Bankers' L. Ins. Co.* 47 App. Div. 567, 62 N. Y. Supp. 553; *Gruwell v. National Council K. & L. S.* 126 Mo. App. 496, 104 S. W. 884; *Keeton v. National Union*, — Mo. App. —, 182 S. W. 798.

In 25 Cyc. 824, the rule pertaining to the nonpayment of premiums or assessments and the effect thereof upon the policy is thus stated: "A condition in the policy that it shall terminate or be avoided on failure to pay any premium or instalment thereof at the time specified in the contract is valid, and constitutes a condition subsequent, the nonperformance of which avoids the policy, in the absence of waiver or estoppel on the part of the company. . . . But where there is in the policy no stipulation or condition for forfeiture on account of nonpayment of premiums, a default in payment will not operate in itself as a forfeiture, nor can it be insisted upon by the company as constituting a forfeiture in the absence of any notice."

Speaking of forfeitures in policies of life insurance, it is said in *May, Ins.* 4th ed. § 343: "If, however, the policy contains no such proviso, though the charter and by-laws require the payment of annual premiums, the nonpayment of the annual premium when due does not work a forfeiture. Such a policy of insurance is for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid."

Other authorities in point are *Cookey*, *Briefs on Ins.* 2259, 2260; *Vance*, *Ins. p.* 212; 19 Am. & Eng. Enc. Law, 44.

Turning to the policy, we fail to find any express provision of forfeiture for the nonpayment of the annual premium. There is, as already shown, the clause making the policy incontestable after one year, from the date of the breach thereof, except failure to pay premiums as required. There is the

further provision making the premiums payable either annually or in semiannual or quarterly instalments, according to the company's rule, with the right in the company, in the settlement of the policy, to deduct out of the sums due any unpaid portion of the year's premium, or any sum or sums due the company. Unless it be that the clause making the policy incontestable be held to constitute an express forfeiture, clearly the policy is without such a provision, for no other clause or part of the policy, except by possible inference, would authorize us in holding that the policy was forfeited on account of nonpayment of premiums. Forfeitures in law, not being favored will not be sustained upon mere inference. *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111, 20 Am. Rep. 35; *Meyer v. Knickerbocker L. Ins. Co.* 73 N. Y. 516, 29 Am. Rep. 200; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689. Being looked upon by the courts with ill favor, they will be enforced only where the strict letter of the contract requires it. Hence, even though the contract contains a stipulation of forfeiture, it will not be aided or given effect by construction, unless the plain meaning of the language used requires it. It has become a well-recognized rule in the construction of contracts of insurance that they will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. In *Ingersoll v. Mutual L. Ins. Co.* 156 Ill. App. 569, it was provided in the policy: "If this policy shall become void by nonpayment of premiums, all payments previously made shall be forfeited to the company, except as hereinafter provided."

The court, in referring to the common practice of insurance companies, in providing that policies shall be null and void, and all premiums forfeited, subject only to surrender rights or reinstatement if default be made in the payment of any premium, held that the provision was insufficient to cause a forfeiture, and said: "To sustain defendant's contention that the failure to pay the ninth premium absolutely and automatically nullified the insurance, subject only to the right to secure a paid-up policy, would compel us to hold, as the Nebraska court says [*Haas v. Mutual L. Ins. Co.* 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58], 'that a forfeiture of an insurance contract may be created by construction, and need not be provided for by the strict terms of the contract. Such is not the law.'"

In *Swander v. Northern Cent. L. Ins. Co.* 25 Ohio C. C. 3, 11, the policy contained no provision that if the payment of premium was not made when due the policy should become void and terminate. It was observed, however, that there were some expressions in the policy which, it was urged, indicated that the nonpayment of dues might be regarded as a forfeiture of the policy, and that the policy might under certain circumstances lapse; but there was no express provision of forfeiture, and it was said that, in view of the authorities holding that, where there is a provision of absolute forfeiture, it is to be construed strictly in favor of the insured, and may be waived by the insurance company by its conduct, it would seem as though a court ought not to import into an insurance policy a contract which does not there exist. And in *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L.R.A. 710, 53 Am. St. Rep. 658, 42 N. E. 546, it was held that provisions for forfeiture are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced. Another case of the same kind is *Hull v. Northwestern Mut. L. Ins. Co.* 39 Wis. 397, where it was said that forfeitures are only enforced when it appears that such is the plain intent and meaning of the contract, and that words of a policy must be construed most strongly against the insurer, and if the policy contains repugnant conditions, the court must enforce those which are in favor of the insured and will prevent a forfeiture. In *Ferguson v. Union Mut. L. Ins. Co.* 187 Mass. 8, 72 N. E. 358, it was held that a provision for forfeiture in a policy of life insurance, being inserted for the benefit of an insurer, is not to be extended by implication, and, if it is susceptible of more than one meaning, that which is most favorable to the insured should be adopted.

As the insurance company in its policy failed to specifically provide and declare that a failure to meet the annual payments when due should forfeit all claims under the policy, and as we cannot by construction create a forfeiture, even though such may have been intended, or may be inferred from the language used, it follows that the failure to pay the second year's premium at maturity, the policy not being a divisible contract, did not of itself end and terminate the policy.

What we have said is apart from any rights that may have attached under the provisions of the policy declaring it, in capital letters, to be automatically nonforfeitable. L.R.A.1917B.

able; for, if we are correct in our conclusion that the failure to pay the premium did not forfeit the policy, then it becomes immaterial whether in point of fact the policy at the end of the first year had either a withdrawable surplus or a cash loan value, within the meaning of said provisions of the policy. The automatically nonforfeitable provision of the policy would not serve to take the case out of the general rule respecting forfeitures, but must, on the other hand, be strictly construed against the insurer. Such was the holding of the court in *Chase v. Phoenix Mut. L. Ins. Co.* 67 Me. 85, in a case containing a "nonforfeiting" policy, where the insured neglected to surrender the policy and apply for a reduced paid-up policy, and where it was said: "Stipulations for a forfeiture in a policy thus labeled should be strictly construed." In *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7, as in the case at bar, at a prominent place in the policy, and in large type, were printed the words, "Nonforfeiting policy." In the opinion attention is called to this fact, and it is said that the contracting parties did not intend that the failure to pay premium note should work a total forfeiture, as was manifested by the statement that the policy was a nonforfeiting one.

The well-nigh universal rule that, if the wording of a policy of insurance is such as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract of insurance, has been accepted as a canon of construction in this branch of our jurisprudence, as evidenced by the opinions in *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 854; *Capital Fire Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & S. Co.* 30 Okla. 116, 120 Pac. 936; *Standard Accel. Ins. Co. v. Ilite*, 37 Okla. 305, 46 L.R.A. (N.S.) 986, 132 Pac. 333; *Union Accel. Co. v. Willis*, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812; *Oklahoma Nat. L. Ins. Co. v. Norton*, 44 Okla. 783, L.R.A.1915E, 695, 145 Pac. 1138.

From what has been said it is obvious that the learned trial court erred in sustaining the defendant's demurrer and dismissing plaintiff's cause of action, for which the judgment is reversed, and the cause remanded, with instructions to overrule the defendant's demurrer, and set aside the order of dismissal, with leave to defendant to answer.

All the Justices concur, except Kane, Ch. J., absent and not participating.

**Annotation—Effect of failure to pay periodical premium on policy of life insurance to terminate the same in the absence of a provision for forfeiture.**

The earlier cases on this question are discussed in the annotation to *Haas v. Mutual L. Ins. Co.* 26 L.R.A.(N.S.) 747. As to applicability of incontestable clause to nonpayment of premiums, see *Thompson v. Fidelity Mut. L. Ins. Co.* 6 L.R.A.(N.S.) 1039.

The general statement in the earlier annotation that a failure to pay the premium on a life insurance policy will not of itself avoid the policy unless the policy so provides is supported by subsequent decisions on the question.

This was the conclusion reached in *FRIEND v. SOUTHERN STATES L. INS. CO.* ante, 208, where the policy contained no provision for forfeiture in case of the nonpayment of premiums, although it provided that the policy should be incontestable after one year except for failure to pay premiums as required, and also provided that upon payment of the policy the company might deduct any sum or sums due to it.

The decision in *Haas v. Mutual L. Ins. Co.* (1909) 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58, was followed in *Ingersoll v. Mutual L. Ins. Co.* (1910) 156 Ill. App. 568, where a ten payment life policy on which eight of the annual payments had been made was held not to have been terminated by the nonpayment of the ninth and tenth annual premiums, there being no provision in the policy that it should become void for the nonpayment of premiums, but merely a provision that "if this policy shall become void by a nonpayment of a premium, all payments previously made shall be forfeited to the company except as hereinafter provided." The court said: "Many companies expressly provide, and this defendant company has, in many of its policies, as shown by reported cases, expressly provided, that the policy shall be null and void and all premiums forfeited, subject only to certain rights of reinstatement, if default be made in the payment of any premium. Such is not the language used in this policy. It provides that 'if this policy shall become void by nonpayment of a premium' payments made shall be forfeited: not 'that it shall become void in that event and thereupon the payments made shall become forfeited.' To sustain defendant's contention that the failure to pay the

ninth premium absolutely and automatically nullified the insurance, subject only to the right to secure a paid-up policy, would compel us to hold, as the Nebraska court says, 'that a forfeiture of an insurance contract may be created by construction, and need not be provided for by the strict terms of the contract. Such is not the law.' (*Haas Case* (Neb.) supra). The language of an insurance policy is to be construed strictly against the insurer. We are therefore of the opinion that in this case as in the Nebraska case mere nonpayment of a premium did not avoid the policy and forfeit the premiums paid; that the insurance continued in full force, subject to a lien for the unpaid premiums, and to a right on the part of the company to terminate the contract if after due notice the insured should fail to comply with the condition, that is, to pay the premium. In the event of such a termination, however, the right to a paid-up policy as provided for would arise."

The decision in *Gruwell v. National Council, K. L. S.* (1907) 126 Mo. App. 496, 104 S. W. 884 (set out in the prior annotation), was followed in *Keeton v. National Union* (1916) — Mo. App. —, 182 S. W. 798, where, in the absence of any provision in the by-laws, rules, or regulations of the insurer authorizing the declaration of a forfeiture for nonpayment of assessments, it was held that the failure to pay premiums or assessments allowed no other recourse to the insurer in a case where the insured died delinquent than to deduct the unpaid premiums from the amount of the insurance, and this conclusion was reached although the application provided that a suspension for nonpayment of assessments should forfeit the rights of the insured and his beneficiary.

And in the absence of a clause in a life insurance policy providing that it shall be void in the event the premium is not paid at the maturity of notes given for the premium, a default in the payment of the notes will not work a forfeiture of the policy. *United States L. Ins. Co. v. Ross* (1896) 159 Ill. 476, 42 N. E. 859; *Columbian Nat. L. Ins. Co. v. Mulkey* (1913) 13 Ga. App. 508, 79 S. E. 482; *Arnold v. Empire Mut. Annuity & L. Ins. Co.* (1907) 3 Ga. App.

685, 60 S. E. 470; *Fidelity Mut. L. Ins. Co. v. Goza* (1913) 13 Ga. App. 20, 78 S. E. 735.

In *Titlow v. Reliance L. Ins. Co.* (1914) 246 Pa. 503, 92 Atl. 747, a policy which agreed, in consideration of the payment in advance of a specified sum and the annual payment of a like sum on a certain date each year or until premiums for twenty-four years should have been paid, to pay a certain sum to the insured's executors, administrators, or assigns upon acceptance of proofs of death, or, if the insured should be living at a specified date, to the insured himself, and which contained no provision for the lapsing of the policy in consequence of a default in the payment of premiums, was held a contract indivisible and continuous; and it was held that, upon default in the payment of premiums, it was open to the insurer either to waive the breach and accept payment of the premiums or to regard the default as indicating a desire on the part of the insured to rescind the contract, in which case it could join in the rescission and thereby relieve itself from further liability upon refunding what it had received for premiums; but that no absolute forfeiture resulted from the nonpayment of premiums.

But in *Jackson v. Mutual L. Ins. Co.* (1911) 108 C. C. A. 369, 186 Fed. 447, where a life insurance policy provided for payment of the benefit upon condition that the annual premium should be paid in advance on the delivery of the policy and thereafter on specified dates in every year during the continuance of the contract, although the policy contained no provision for forfeiture upon

nonpayment of premium, it was held that a default in the payment of the premium defeated the right to recovery. The court denied the beneficiary's contention that the covenant to pay the premium was independent, and that its violation entitled the insurer to an action to recover the premium, or upon the maturity of the policy to deduct it from the amount paid, and with relation to the condition for the payment of the premium said: "It is thus seen the promise to pay is conditioned upon the premiums being paid as and when due. The fact that no express provision of forfeiture is made is of no importance; the obvious and necessary interpretation of the contract, if the business of insurance is to be conducted at all, is that the obligation of the company to pay the amount promised depended upon the payment of the premiums reserved; if the premiums were not paid the obligation, according to the plain import of the contract, ceased."

In *Pope v. New York L. Ins. Co.* (1916) 192 Mo. App. 383, 181 S. W. 1047, it was argued that because the policy stipulated that it was to be incontestable and there was no express provision of forfeiture it continued in force notwithstanding a default in the payment of premiums. The court stated that the case was not tried on such theory, but that where, as in the case before them, the payment of the amount of the policy was conditional on the payment premiums when due, such payments became conditions precedent, and the stipulation of incontestability did not apply to a failure to pay premiums.  
J. T. W.

#### SOUTH CAROLINA SUPREME COURT.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, et al., Appts.

v.

REUBEN GOSNELL, Resp't.

(— S. C. —, 90 S. E. 264.)

Commerce — Interstate — seizure of liquor in possession of carrier.

The state may seize, in possession of the

carrier, intoxicating liquor shipped from one state to another, consigned to the consignee, with directions to notify a particular person, who intends it for unlawful use, if it is left in possession of the carrier for an unreasonable time.

For other cases, see *Commerce*, IV. a, in Dig. 1-52 N. S.

(Watts, J., and Prince, Shipp, and De Vore, Circuit Judges, dissent.)

(October 14, 1916.)

Note. — The question as to what is sufficient to terminate interstate transportation of intoxicating liquor so as to subject it to the power of the state under the Wilson Act is discussed in the notes to *State v. Intoxicating Liquors*, 11 L.R.A.(N.S.) 550; *State v. Intoxicating Liquors*, 23 L.R.A.1917B.

L.R.A.(N.S.) 1020; and *State v. Intoxicating Liquors*, 29 L.R.A.(N.S.) 745. This question is of less importance than formerly, since the passage of the Webb-Kenyon Act, the operation of which is not dependent upon the termination of interstate transportation.



**A**PPEAL by plaintiff and certain defendants from a judgment of the Common Pleas Circuit Court for Greenville County in favor of defendant Gosnell in an action of claim and delivery brought to recover possession of certain liquors which were seized by him under regularly issued process. Affirmed.

**Statement by Gary, Ch. J.:**

This is an action of claim and delivery, and was commenced on the 14th day of December, 1914, to recover possession of certain liquors described in the complaint, which were seized by the defendant Reuben Gosnell. The complaint contains three causes of action, as the respective consignors and the parties to be notified of the shipments were different.

The defendant Gosnell denied that the seizure of the liquors was unlawful, and interposed two defenses, the first of which is as follows: "That on November 24, 1914, this defendant, being informed that the liquors described in the complaint were illegally stored in a car of plaintiff's after same had arrived at their destination, and a reasonable time for the delivery thereof had elapsed, and that deliveries were being illegally made from said car, from time to time, to consignees, who are all notorious violators of the liquor laws of the state, obtained from Samuel Stradley, Esq., a duly appointed magistrate for Greenville county, legal process, under and by virtue of which he made search of plaintiff's premises, and seized and took possession of the liquors described in the complaint, stored in said car as aforesaid, and that in so doing he acted under legal process, issued by a court of competent jurisdiction, and is entitled, under the laws of this state, to hold possession of said liquors."

The second defense is as follows: "That upon the arrival of the liquors described in the complaint, plaintiff, as the defendant is informed and believes, duly notified consignees thereof, and thereafter unloaded said shipments from the cars in which they had been transported, transferred them to a local car in plaintiff's railroad yard in the city of Greenville, placed on said car a local seal, and from time to time thereafter made delivery to consignees from shipments contained in said car; that said liquors had arrived at point of destination before seizure by this defendant; the consignees had been duly notified of their arrival, and, after such notification, permitted them to remain in car of carrier, who held them for an unreasonable length of time; that as to said shipments plaintiff, as this defendant is informed and believes, had, before the seizure of said liquors, ceased to L.R.A.1917B.

hold them as a carrier, and at such time held them as a warehouseman; that said liquors were purchased for an unlawful purpose, and that plaintiffs, by their conduct as above set forth, aided and abetted and assisted the various consignees in carrying out said unlawful purpose."

The following statement appears in the record, as to the shipment by the defendant Corning & Company to the defendant Tom Harrison: "On November 9, 1914, Corning & Company, at Peoria, Illinois, shipped 25 cases of whisky, consigned to themselves at Greenville, South Carolina, order notify Tom Harrison. The shipment was delivered to the Charleston & Western Carolina Railway Company by the Georgia Railroad Company, a connecting carrier, on November 17, 1914, and arrived at destination on November 20, 1914, four days before the seizure on November 24th. The party to be notified was mailed written notice that the shipment had arrived at the depot. The shippers drew a draft upon Tom Harrison for the invoice price of the liquor, \$153.25, and attached same to the bill of lading, forwarding through regular commercial channels for collection. Tom Harrison did not take up the draft with bill of lading, and did not pay the freight, \$15.50, which was 'Collect.' Between the arrival of the shipment at the depot and the seizure by the defendant Gosnell, the agent of the Charleston & Western Carolina Railway Company (acting upon the advice of the local counsel of that railway company at Greenville), as he states, for safe-keeping, stored the liquor in a box car standing upon a side track near the warehouse door, where it was seized by the defendant Gosnell under a search warrant issued by Magistrate Stradley on November 24, 1914, charging that the liquor was being stored in the car by 'Tom Harrison, consignee.'"

Similar statements appear in the record as to the shipments by the defendants Heyman & Baron and H. C. Myers Company to the defendants W. J. Goodlett and D. F. Belcher, respectively.

The following shipments were made by Heyman & Baron, of Augusta, Georgia, consigned to themselves, with instructions to notify W. J. Goodlett: (1) Five cases whisky shipped September 22, 1914, arrived September 28, 1914; (2) fifteen cases whisky shipped September 25, 1914, arrived September 28, 1914; (3) five cases whisky shipped September 29, 1914, arrived October 1, 1914; (4) five cases whisky shipped October 6, 1914, arrived October 7, 1914. These shipments were seized November 25, 1914.

The following shipments were made by H. C. Myers Company from New York, con-

signed to themselves, with instructions to notify D. F. Belcher: (1) One case whisky shipped July 9, 1914, arrived July 16, 1914; (2) one case whisky shipped July 9, 1914, arrived July 16, 1914. These shipments were seized August 13, 1914. All the bills of lading were marked, "For personal use."

H. C. Harvley testified as follows in behalf of the plaintiff:

Agent of Charleston & Western Carolina Railway Company at Greenville continuously since March 3, 1913. On November 24, 1914, Reuben Gosnell, chief of rural police, searched for liquor in the warehouse, and in a car standing on side track near warehouse. Seized 45 cases of whisky and 15 or 18 barrels of beer. The liquor was placed in the car for safe-keeping, to keep it from being stolen. Had had trouble with losing whisky; cases had been broken up, and sometimes an entire case would be stolen. The liquor was in the car with other freight.

#### Cross-examination:

We were using the car practically as a warehouse. Don't think there was any liquor in the warehouse. The car was under a local seal of the Charleston & Western Carolina Railway Company. Harrison and Goodlett received shipments probably every week on an average. Belcher not so often.

Q. What was the reputation of Harrison and Goodlett in reference to being engaged in the lawful sale of liquor?

A. Their general reputation was that they were engaged in the unlawful sale of liquor. Harrison and Goodlett frequently got several shipments, at the same time, from the same party, covered by separate bills of lading. When such shipments would come in that way, I would put them in the car. When they would pay a draft attached to a bill of lading, covering a particular shipment, I would deliver that shipment to them. It made no difference how often they came, or for how much they came, the liquor would be delivered to them, if they presented the bill of lading covering that particular shipment or those particular shipments. It frequently happened that Harrison or Goodlett would send a bill of lading by someone, with an order on me to deliver to them, which I would honor, and deliver the liquor accordingly. On all order notify shipments we promptly notify the party to be notified of the receipt by us of the shipment. This is done with both order notify and straight shipments. Storage would be charged on shipments not called for. I don't recollect an instance where we charged storage against Harrison, Goodlett, or Belcher. In the car there were boxes which had been broken into and some of the con-

tents abstracted. This was done before arrival here. It was not done by the intended consignees. They knew absolutely nothing about it.

On cross-examination Tom Harrison declined to answer questions as to his being engaged in the unlawful sale of liquor, upon the ground that the answers might incriminate him. And, on the cross-examination W. J. Goodlett testified:

Had agency for near beer for Augusta Brewing Company. Have been engaged in the liquor business in Greenville for several years. Was so engaged in November, 1914. I had a Federal license, up to July, 1915, wholesale and retail.

It was admitted as a fact that the storing of the liquor in the box car was in consequence of advice given by T. P. Cothran, Esq., local counsel of Charleston & Western Carolina Railway Company at Greenville, to the agent, to protect the same from theft in the warehouse.

Two motions were made for the direction of a verdict,—one by the plaintiff and the other by the defendant,—but both were refused.

The jury rendered a verdict in favor of the defendant Gosnell, and the plaintiff appealed.

Messrs. Cothran, Dean, & Cothran and Mauldin & Turner for appellants.

Messrs. McCullough, Martin, & Blythe, for respondent:

The liquor was not exempt from seizure because protected as interstate commerce.

Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; Jaro v. Holstein, 73 S. C. 111, 52 S. E. 870; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A. (N.S.) 349, 78 S. E. 516; Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167.

Gary, Ch. J., delivered the opinion of the court:

There are numerous exceptions, but it will not be necessary to consider them in detail, as the appellant's attorneys state that the main question raised by them may thus be formulated: "Is an 'order notify' shipment of liquor, interstate in character, intended by the party to be notified for unlawful use, subject to seizure under the laws of South Carolina, before actual or constructive delivery to the party for whom, upon certain conditions, it is designed?"

In the case of Smith v. Lafar, 67 S. C.

491, 46 S. E. 332, it is said: "Liquor purchased in another state and shipped to the purchaser in this state is not contraband, being protected as an article of interstate commerce until it is delivered to the purchaser. *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *State v. Holleyman*, 55 S. C. 244, 45 L.R.A. 567, 31 S. E. 362, 33 S. E. 366. The fact that the purchaser to whom it is consigned is engaged in the illicit sale of liquor, and purchases it for the purpose of resale, can make no difference; the liquor is none the less an article of interstate commerce, and cannot be legally seized until it is delivered to the consignee."

The carrier, however, cannot claim the protection of the interstate commerce laws if it aids and abets the shipper or the consignee in evading the laws of the state against the sale of intoxicating liquors. The court uses this language in the case of *Jaro v. Holstein*, 73 S. C. 111, 52 S. E. 870: "The prime object of the Federal commerce power is to protect the freedom of legitimate trade among the states. This great power is acknowledged to be paramount as to all matters not reserved to and inherent in the police power of the states, but it ought never to be so extended as to become an aid and shield for unlawful traffic. The police law of the state, which is designed to uproot illicit traffic in intoxicating liquors by seizure within the state of liquors intended for such traffic, does not materially or injuriously affect legitimate interstate commerce. . . . Interstate commerce will not protect intoxicating liquors imported into this state for an unlawful purpose, if the importation is in such a way as to make the carrier an aider and abettor in the scheme to violate state laws."

This proposition is also sustained by the case of *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606, in which the court says: "We do not mean to intimate that an express company may not also be engaged in selling liquor in a state, contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that

the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question."

In regard to the question of delivery, the court uses the following language in the case of *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130: "Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination, and after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered. We say we are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition."

Subsequently, however, the question was decided in the case of *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419, in which the court used this language: "The instant cause arose before passage of the act of Congress approved March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), known as the Webb-Kenyon Bill; consequently neither its construction or application is now involved; and what is said herein, of course, has reference to conditions existing prior to that enactment. Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one state to another and the act of doing so are interstate commerce, the regulation whereof has been submitted to Congress; and a state law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor, and prior thereto the provisions of the Act of Congress approved August 8, 1890 (26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738)—the Wilson Act,—have no application."

It is within the province of the court, and, indeed, it is its duty, to render such an interpretation of the laws as will best subserve the ends of justice and the protection of the public, in so far as this may

be done in accordance with well-established rules of construction. This may be accomplished at one time by a liberal and at another time by a strict interpretation. In construing the Wilson Act the Supreme Court of the United States ruled that liquors transported from one state into another did not lose their character as an interstate shipment, and become subject to the laws of the state, until arrival at their destination and delivery to the consignee. Many dealers in liquors took advantage of the opportunity to leave such shipments in the custody of the carrier for as long a time as they saw fit, whether reasonable or unreasonable, for the purpose of evading the laws of the state against the sale of intoxicating liquors. The Federal Supreme Court, recognizing that it was injurious to the morals, the health, and welfare of the public for liquors to remain in the hands of the carrier for a length of time limited only by the action of the dealer in supplying his customers, interpreted the word "delivery" to include not only an actual transfer of the liquors to the consignee, but likewise a constructive delivery, from the fact that they had remained in the custody of the carrier an unreasonable time after arrival at their destination. The proposition for which the appellant contends would defeat this construction. The liquors were consigned to the shipper, but it was never contemplated that they were to be delivered to him, but it was the expectation of the parties that the one who was to be notified would become the consignee. The consignor conferred upon him alone the power and authority of determining when the liquors should be delivered. He was the agent of the shipper to the extent of deciding when the liquors were to be removed, in so far as their delivery within a reasonable time was involved. The ruling that liquors were subject to the laws of the state, after they had remained a reasonable time in the hands of the carrier, was based upon public policy, which is paramount to the rights of private parties. *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Lanahan v. Bailey*, 53 S. C. 489, 42 L.R.A. 297, 69 Am. St. Rep. 884, 31 S. E. 332.

It would be against public policy for anyone, even the carrier, to enter into a contract that the liquors should not be subject to the laws of the state after arrival at their destination and the expiration of a reasonable time thereafter, as such a contract would be inconsistent with the ruling adopted by the Federal Supreme Court hereinbefore mentioned. The consignors are presumed to know the law, and that it is against public policy for liquors to remain

in the custody of the carrier after a reasonable time for their removal. The important fact to be determined in all these cases is whether the liquors were allowed to remain an unreasonable length of time, and not the fact as to which of the parties, as between themselves, was responsible for the failure to remove them. The question under consideration is not to be determined by principles regulating the relations between the consignor and consignee, but by the laws fixing the time within which the liquors shall become subject to the laws of the state. The exceptions raising this question are overruled.

There are two other exceptions, but they cannot be sustained, for the reason that, if there was error, it was not prejudicial; as there is no reasonable ground for supposing that the result would have been different if the error had not been committed.

**Affirmed.**

**Gage, J., and Moore, Sease, Rice, Bowman, Gary, Wilson, Peurifoy, and Smith, Circuit Judges, concur.**

**Watts, J., and Prince, Shipp, and DeVore, Circuit Judges, dissent.**

**Hydrick, J., concurring:**

Plaintiff brought this action of claim and delivery December 12, 1914, to recover from defendant Gosnell the possession of certain intoxicating liquors which had been seized by him under and by virtue of warrants duly issued by a magistrate and directed to him. The liquors seized were shipped in 1914, and were consigned by the several consignors to themselves, "order notify" the respective individuals named as defendants, for whom intended, and in each case a draft for the purchase price was drawn on the person to be notified, and forwarded with the bill of lading attached through regular commercial channels for collection, and plaintiff duly notified the intended consignees of the arrival of the respective shipments, which were as follows: Two by Myers & Company from New York, New York, for defendant Belcher, each a case of whisky at \$10, shipped July 9th, arrived July 16th, seized August 13th; five by Heyman & Baron from Augusta, Georgia, for defendant Goodlett, as follows: September 22d, five cases of whisky, \$36; September 23th, fifteen casks of beer, \$150; September 29th, five cases of whisky, \$36; October 6th, five cases of whisky, \$45; October 6th, five cases of whisky, \$49.50. These arrived from September 25th to October 7th; and one by Corning & Company from Peoria, Illinois, for defendant Harrison November 9th, twenty-five cases of whisky, \$153.25,

which arrived November 20th. The Goodlett and Harrison shipments were seized November 24th. Each shipment seized was marked, "For personal use," on bill of lading and box or cask containing the liquor, and the freight on each was prepaid, except that for Harrison, which was \$15.59, "Collect." The seizures were made while the liquor was in plaintiff's possession, having been stored in its warehouse awaiting delivery to the respective persons for whom it was intended.

The undisputed evidence shows that each of the individual defendants, Belcher, Goodlett, and Harrison, intended to use the liquor shipped to him in violation of the law of this state. Each had a license from the Federal government to sell intoxicating liquors, and by § 838 of the Criminal Code the possession of such license is made prima facie evidence that the holder thereof was engaged in selling such liquors in violation of the state's laws. There was no evidence to rebut the prima facie case so made against each of them, but much to corroborate it.

It will be observed that these liquors were all shipped from other states and transported into this state in 1914, after the passage of the Act of Congress of March 1, 1913, known as the Webb-Kenyon Act (Act March 1, 1913, chap. 90, 37 Stat. at L. 699, Comp. Stat. 1913, § 8739), which provides, in substance: That the shipment or transportation of any intoxicating liquor from one state into another, which said liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of such state, is prohibited.

As it conclusively appears that these liquors were intended to be received, possessed, sold, and used in violation of the law of this state, their shipment and transportation into this state were prohibited by the act of Congress above mentioned, which devastated them of their interstate character. They were not, therefore, entitled to the protection which, before the passage of that act, had been afforded to such liquors, as lawful subjects of commerce between the states, under the commerce clause of the Federal Constitution, giving Congress the power to regulate commerce. It follows that the transactions involved in this passage of the act of March 1, 1913, and also that the decisions of this court and those of the Supreme Court of the United States which interpreted and applied the law as it then stood to commerce in such liquors are not entirely applicable to the transactions now being considered; for, as they occurred after the Webb-Kenyon Act became effective, they are L.R.A.1917B.

subject to its provisions, and must be solved under it. Against this conclusion the decision of this court in *Atkinson v. Southern Exp. Co.* 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516, is invoked. There are some expressions in the opinion of the court in that case which favor the contention of appellant that state legislation after the passage of the Webb-Kenyon Act was necessary to make that act applicable to the shipment or transportation of liquor into the state subsequent to its passage. But there are several answers to that contention. The first is that the language quoted from the opinion in that case, which is relied upon by appellant, went further than was necessary to the decision of the question before the court. The passage quoted is as follows: "It was not the intention of the Webb Act to interfere with the policy of the state in regard to the importation of liquors, but merely to provide that the enforcement of a state statute would not be interfered with or hampered by the interstate commerce law. In other words, the act in this respect is passive, while it is incumbent on the states to enact legislation of an active nature if they are desirous of prohibiting the importation of liquors for personal use or other purposes. [*Italics added.*] But, even if Congress had undertaken to give validity to an unconstitutional state statute, it would have been beyond its powers. While the legislature cannot pass an act validating the provisions of the dispensary statute, which we have declared to be unconstitutional, so as to give it a retroactive effect, it nevertheless has the power to adopt a statute with similar provisions, having a prospective effect, prohibiting alcoholic liquors from being imported into this state."

The case then before the court involved nothing more than *Atkinson's* right to import liquor admittedly for his personal use. Hence the words "or other purposes" italicized in the excerpt above quoted were clearly obiter, for the right to import for an unlawful purpose was not involved. In using the words "or other purpose" the court evidently had in mind only a lawful purpose. Certainly the court did not intend to hold, nor is such intention reasonably inferable from the language used, that any person in the state had the right to import liquor for the purpose of selling it. If that were true, the numerous convictions for storing, transporting, and selling such liquors that have been sustained since that time were all wrong. Furthermore, it was not necessary in the *Atkinson* Case to decide anything relative to the necessity of subsequent state legislation to make the

Webb-Kenyon Act effective. For, as the opinion clearly shows, under the law as it stood prior to the Webb-Kenyon Act, it was lawful for any person in the state to import liquor for his personal use, because the Supreme Court of the United States has held, in the cases cited and quoted from in the opinion, that the provision of our dispensary law prohibiting importation for personal use was void and ineffective in so far as it was attempted to make it applicable to interstate commerce, on the ground that it was unlawful discrimination against the products of other states which were recognized by the law of this state as being subjects of lawful commerce, as the state itself was then engaged in the sale of them through the dispensaries for profit.

When the Atkinson Case was decided, in 1914, the state was still engaged in selling such liquors for profit through dispensaries; hence the same unlawful discrimination still existed, and that was all that was necessary to give Atkinson, or any other person in the state, the right to import such liquors for a purpose recognized by the state law to be lawful. And as the state, by virtue of the decisions of the Federal Supreme Court, was compelled to recognize the importation of such liquors for personal use to be lawful so long as it was engaged in selling them for profit, the Webb-Kenyon Act did not apply, because by its terms it prohibits shipment or transportation of such liquor only when it is to be received, possessed, sold, or used in violation of a law of the state. Of course, that means a valid law. It was not the intention of Congress to enable the state to enforce a law making an unlawful discrimination in what was recognized to be lawful subjects of interstate commerce. But the Supreme Court did not hold that liquors could be lawfully sold in the state otherwise than in conformity with the state law; that is, through the dispensaries. While it did hold, construing the Act of Congress of August, 1890, known as the Wilson Act (Act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, Comp. Stat. 1913, § 8738), that liquors imported even for unlawful purposes could not be interfered with by state authority until after delivery thereof to the consignee, it as distinctly held that after such delivery they were subject to the state law, and could not be lawfully sold by the consignee, even in the original packages. Therefore, when the Webb-Kenyon law became effective, it was unlawful to sell intoxicating liquor in this state, except through the dispensaries; and the shipment or transportation of such liquor into the state for sale by private individuals was prohibited by that act, be-

cause such sale was in violation of existing valid laws of the state. So that, even if full force and effect be given to the language of this court in the Atkinson Case upon this point, it would not control the decision of this case, because the facts are different. In Atkinson's Case the court was considering the necessity of re-enacting a state law that had been declared void as to interstate commerce, while in this case we are considering a state law that has been adjudged to be valid. So that our dictum that it was necessary to re-enact a state law that had been declared to be unconstitutional, after the constitutional objection was removed, was not only not necessary to the decision of Atkinson's Case, but it is not applicable to the facts of this case.

But there is another answer to appellant's contention that is conclusive in any event. For, even if it should be conceded that subsequent state legislation was necessary to give effect to the Webb-Kenyon law, we have had such legislation. At the session of 1914 the legislature passed several acts which distinctly recognized and directed the enforcement of the liquor laws of the state existing when the Webb-Kenyon law became effective. By the Act of February 14, 1914 (28 Stat. at L. 754), it is made the duty of the rural policeman of Greenville county, in which the city of Greenville, the destination of the liquors herein sued for, is situated, "to patrol and police the county, and to prevent or detect offenses against the criminal law, and prosecute all persons for violation of the criminal law of every kind, making arrests upon their own initiation, as well as upon complaint or information, and to seize without warrant, and hold all alcoholic liquors in possession of any person for unlawful use, and if no action to recover the same is begun within thirty days from such seizure, or if such action be begun and the judgment of the court be adverse to the plaintiff, then such liquors shall be destroyed publicly by the chief of rural police." (Italics added.)

The legislature evidently had in mind in the language above quoted all the criminal laws of the state, common and statutory, including the liquor laws, as set out in chap. 29 of the Criminal Code, in which special duties in respect to the enforcement thereof are imposed upon all constables and magistrates. The same observation is true of another act passed at the same session (28 Stat. at L. 546), amending the law relating to magistrates and their constables, which provides in the first section that the law as to magistrates and their constables, their powers, duties, etc., shall be as now

provided by law. Numerous sections of the liquor law then on the books required magistrates and their constables to enforce it upon pain of summary suspension for neglect to do so. The defendant Gosnell was chief of the rural policemen for Greenville county. It was therefore made his duty by the express language of the statutes to seize the liquors in question.

It follows that by the terms of the Webb-Kenyon Act the liquors here in question, being intended for use in violation of the state's laws, were devoted of their interstate character, and their shipment and transportation into the state were prohibited. They became subject to the law of the state upon their arrival within its borders, and were therefore subject to seizure before delivery thereof to the consignees. Gosnell was not only authorized, but required, by the valid laws of the state, to seize them, and therefore his act was justified by law. It follows that neither the plaintiff nor any of the defendants can recover the possession thereof from him. The judgment below is, therefore, right; in fact, Gosnell's motion for a directed verdict should have been granted. This conclusion makes it unnecessary to consider the assignments of error in the rulings and

charge, except, perhaps, those which make the point that the rights of the carrier and consignors, who are alleged to have been innocent of any intended violation of the state laws, should be protected.

The language of the Webb-Kenyon Act extends the prohibition thereof to the intention, with regard to such liquors, of any person interested therein. Therefore it is not necessary, to make the prohibition effective, that all persons interested therein shall have the unlawful intent; nor does it make any difference that there may be some person interested therein who has no such intent. The consignor may be innocent of it; but if the consignee has it, shipment and transportation are prohibited. Consignors and carriers of such liquors may protect themselves from loss by requiring payment of purchase price and freight charges before shipment and transportation thereof. Both are bound to know that they are dealing in and with an article which may be contraband, dependent upon the intention of the consignee, or any other person interested therein.

For these reasons, I think the judgment below should be affirmed.

Fraser, J., concurs.

**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

MABEL LE VETTE, Appt.,  
v.

HARDMAN ESTATE et al., Respts.

(77 Wash. 320, 137 Pac. 454.)

**Landlord and tenant — stipulations against liability.**

1. Stipulations in a lease exonerating the lessor from liability for damage from leaky pipes, etc., cannot be enlarged to include any damage not expressly waived.

For other cases, see *Landlord and Tenant*, III. c, 2, b, in *Dig. 1-52 N. S.*

**Same — act of trespassers.**

2. A stipulation in a lease that the lessee shall hold the lessor harmless from all damages occasioned by the bursting, leaking, or running of any washstand, etc., in, above, upon, or about the building in which the demised premises are situated, or by water coming in through the walls, will not include an injury occasioned by the tearing out of a washstand by trespassers upon a portion of the premises vacated by another tenant, causing a breakage of the water pipes.

For other cases, see *Landlord and Tenant*, III. c, 2, b, in *Dig. 1-52 N. S.*

Note. — For liability of landlord to tenant for damage by water, see annotation following this case, post, 225.  
L.R.A.1917B.

**Same — vacant upper story — landlord's duty.**

3. Although a landlord is under no obligation to repair the demised premises, it is his duty so to control and preserve the upper stories of a building, which have been vacated by a tenant, as to keep them in a condition of reasonable safety in so far as such a condition affects the tenant of the lower story, notwithstanding the tenant of the upper story has vacated within the term covered by his lease, so that, as between him and the landlord, the legal right of possession still remains in him.

For other cases, see *Landlord and Tenant*, III. c, 2, b, in *Dig. 1-52 N. S.*

**Trial — evidence of landlord's negligence — question for jury.**

4. Where it appears that the breaking of water pipes in the vacant upper story of a building, causing damage to the tenant on the floor below, was the act of evilly disposed persons breaking into the building through windows on an alley, that these windows had been broken on three previous occasions, that the landlord knew that the upper story and a dwelling in the rear of the premises were connected with the same service pipe, and permitted the water to be turned on for the purpose of supplying the dwelling without first investigating the condition of the pipes in the upper story, the question whether the landlord was negligent is for the jury.

For other cases, see *Trial*, II. c, 8, e, in *Dig. 1-52 N. S.*

**Principal and agent — action against principal.**

5. One who elects to proceed against a known principal as owner of leased property, for injury to his property through leaky water pipes upon premises in possession of the landlord, cannot also hold the agent.

*For other cases, see Election of Remedies, II. in Dig. 1-52 N. S.*

(January 8, 1914.)

**A**PPPEAL by plaintiff from an order of nonsuit and dismissal of the Superior Court for King County in an action brought to recover damages for injuries to goods caused by leakage of water from an upper story of a building a portion of which was leased by plaintiff. Affirmed in part.

The facts are stated in the opinion.

Messrs. McCafferty, Robinson, & Godfrey, for appellant:

The lease itself does not contain a clause or provision which waives any damages or which was ever intended to waive such damages, occasioned by the wrongful acts or the negligence of the owners of the premises from which the plaintiff leased.

1 Thomp. Neg. § 1143; Mitchell v. Plaut, 31 Ill. App. 148; Lathers v. Coates, 18 Misc. 231, 41 N. Y. Supp. 373.

The words of the contract are insufficient to relieve the Hardman estate or its agents from damages suffered by plaintiff by reason of its or their negligence or wrongful acts.

Railton v. Taylor, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; Jones v. Millsaps, 71 Miss. 10, 23 L.R.A. 155, 14 So. 440; Dollard v. Roberts, 130 N. Y. 260, 14 L.R.A. 239, 29 N. E. 104.

The law imposed no obligation on plaintiff to guard against or anticipate danger from some other part of the building not under her control, resulting from the negligent acts of the owner or its agent.

Jones v. Millsaps, 23 L.R.A. 155, note; Cooley, Torts, 2d ed. § 829.

If there was no negligence, the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in the answer will be of no value.

Roeaner v. Hermann, 10 Biss. 486, 8 Fed. 782; Hill v. Northern P. R. Co. 33 Wash. 697, 74 Pac. 1054, 15 Am. Neg. Rep. 729; Black v. Goodrich Transp. Co. 55 Wis. 310, 42 Am. Rep. 713, 13 N. W. 244; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Magnin v. Dinsmore, 56 N. Y. 168; Hull v. Chicago, St. P. M. & O. R. Co. 41 Minn. 510, 5 L.R.A. 587, 16 Am. St. Rep. 722, 43 N. W. 391; Shriver v. Sioux City & St. P. R. Co. 24 Minn. 506; 31 Am. Rep. 353; Liverpool & L.R.A.1917B.

L. & G. Ins. Co. v. McNeill, 32 C. C. A. 173, 59 U. S. App. 499, 89 Fed. 131; The Manitou, 116 Fed. 60.

Messrs. Reed & Hardman, for respondent Hardman Estate:

Plaintiff was bound by the terms of the written lease, in which she agreed to hold harmless the lessor "from any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewage, or the bursting, leaking, or running of any cistern, tank, washstand, water-closet, or waste pipe in, above, upon, or about said building or premises."

Fera v. Child, 115 Mass. 32; Taylor v. Bailey, 74 Ill. 178; Jones v. Millsaps, 71 Miss. 10, 23 L.R.A. 155, 14 So. 440.

The landlord cannot be charged with the result of acts committed by trespassers, even though in control of the hotel portion of the building.

Jones, Land. & T. ¶ 361; 24 Cyc. 1057; Talbott v. English, 156 Ind. 299, 59 N. E. 857; Branger v. Manciet, 30 Cal. 624; Goodrich v. Sanderson, 35 App. Div. 546, 55 N. Y. Supp. 881; Rosenfield v. Newman, 59 Minn. 156, 60 N. W. 1085; Bernhard v. Reeves, 6 Wash. 424, 33 Pac. 873.

Mr. Robert F. Booth for respondent Davis & Company.

Morris, J., delivered the opinion of the court:

Appeal from an order of nonsuit and dismissal, in an action brought by a tenant to recover damages for injuries to her goods caused by leakage of water from an upper story. The facts, so far as they are pertinent to our inquiry, are about these: The Hardman estate is the owner of a building on Yealer way in Seattle, the lower portion of which is divided into storerooms, and the upper is used as a hotel. Appellant, who was engaged in the millinery business, occupied one of the storerooms under a written lease. Some time in August, 1911, the lessee of the hotel portion, although his lease had not expired, vacated the upper stories, and they continued vacant until after the damage complained of. This lessee not having paid his water rent, the city turned off the water from the hotel portion of the building some time in September. This water service so turned off, it appears, did not affect the storeroom occupied by appellant. There was, however, a dwelling on the rear of the lot which was supplied with the same service pipe as the hotel and which had been vacated for some time. This vacant dwelling in the rear was rented on November 15th and orders given the city to turn on the water, which was done on November 16th. Soon after the water was turned on, it began to flow through the



ceiling and into the room occupied by appellant, causing the damage complained of. An examination of the premises disclosed the fact that, in one of the rooms over the storeroom occupied by appellant, a washstand had been torn from the wall and the water pipes broken, making quite a hole through which the water was escaping. It was also discovered that a large rear window opening on the alley had been broken, making an opening large enough for a person to enter the building. It was also shown that, on three other occasions during the vacancy of the hotel portion, the windows on the alley had been broken, supposedly by boys getting into the building. The lease contained the following clause: "That the said lessee shall hold harmless the said lessor and the said lessor's agents from all damages of every kind or nature whatsoever that may occur by reason of any accident on said premises, and from any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewerage; or the bursting, leaking, or running of any cistern, tank, washstand, or waste pipe in, above, upon, or about said building or premises; and from any damage occasioned by water, snow, or ice being upon or coming through the roof, skylight, wall, trapdoor, or otherwise, and from damages arising from acts of neglect of cotenants or other occupants of the same building, or of any owners or occupants of the adjacent or contiguous property." This stipulation, in the judgment of the lower court, exempted the respondents from any responsibility in the matter, and was the basis of the ruling complained of. Stipulations of this character cannot be enlarged upon to include any damage not expressly waived, and it is generally held that such a stipulation will not excuse an injury occasioned by the negligence of the landlord in the management and use of any part of the premises remaining under his control. *Levin v. Habicht*, 45 Misc. 381, 90 N. Y. Supp. 349; 1 *Thomp. Neg.* § 1143. It has also been held that such stipulations cover only ordinary wear and tear, or sudden action of the elements which could not be guarded against, or negligent acts of other tenants. *Randolph v. Feist*, 23 Misc. 650, 62 N. Y. Supp. 109; *Worthington v. Parker*, 11 Daly, 645.

It is clear from the facts that the damage to appellant was not caused by any breaking of water pipes on the premises leased to her, nor was it due to any negligence of cotenants nor of owners or occupants of adjacent property, but was due to the bursting or breaking of water pipes on premises not covered by the lease, but within the building, and falls within that L.R.A.1917B.

clause of the waiver exempting damage occasioned by bursting or leaking of washstands in, above, upon, or about the building, or by water coming through the walls. We think it also is clear that the cause of the damage was not an ordinary leak due to defective plumbing or usual wear, such as might be anticipated in any building, and thus be within the contemplation of the parties when entering into a stipulation of this character, but was an unusual and unexpected happening, due to other than natural and anticipated defects or lack of repair in any fixture forming part of the water system of the building. There was no evidence that the proximate cause of this damage was any act of the landlord, and, if appellant's cause must rest upon some positive act of the landlord, it must fail. Negligence, however, may be predicated upon the failure to act where the law imposes a duty, and as between the appellant and the landlord the occupancy and possession of the upper stories, with all the duties flowing from such a relation, were with the landlord. The landlord could not excuse itself from this duty to appellant because of the fact that, as between it and the lessee of the upper stories, the possession and occupancy was that of the latter. And this, we think, is so notwithstanding the tenant of the upper story had vacated within the term covered by the lease, and the legal right of possession still remained in him. This might be and doubtless was true as between the landlord and the upper tenant, and as between them the upper tenant was still bound under his lease. But, whatever may have been the legal fiction, the facts were the upper tenant had vacated the premises and thus occasioned an actual, if not a legal, vacancy. Possession and control must rest somewhere, and as between the landlord and appellant, who was no party to the lease held by the upper tenant and not bound by any contract between this tenant and the landlord, this possession and control was, we think, with the landlord. It therefore seems to us, conceding the rule to be that the landlord is under no legal obligation to repair the demised premises, that it was the duty of the landlord to so control and preserve the upper stories as to keep them in a condition of reasonable safety in so far as such a condition affected the tenant of the lower story; that, if it negligently suffered the upper story to be out of repair to such an extent as to damage the tenant of the lower story, it must respond in damages; and that the ordinary rule we have just referred to does not cover such condition as the facts here present. *Priest v. Nichols*, 116 Mass. 401.

So far as we can gather from the facts, the injury was caused by evilly disposed persons breaking into the building through the windows in the alley and outside of the premises covered by the lease to appellant. But the duty to guard the premises, so that such persons could not break into the building and injure the fixtures in the upper story, rested with the landlord, and not with the appellant; and as it also appeared that these rear windows had been broken on three previous occasions, thus affording entrance to the upper stories, the landlord is chargeable with knowledge of the fact, and having knowledge it was its duty to guard against any recurrence and the natural consequences of such a trespass by either protecting the premises from such a breaking or investigating as to any harm that might have been occasioned thereby. The landlord also knew that the hotel section and the house in the rear were connected with the same water service pipe, and, before the water was turned on, should have made an investigation of the upper floors to ascertain whether or not such an

act could be done with safety to the premises occupied by appellant. Such failure to properly exercise superintendence over the upper story might, it seems to us, within the facts of this case, be held negligence. *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. 1085. At least we are not so clear it was not negligence as to say the question should not have been submitted to the jury. This disposes of the dismissal as to the Hardman estate.

John Davis & Company was only the rental agent of the owner. Appellant, having dealt with a known owner and having sought to enforce her cause of action against the principal, cannot hold the agent, and as to this respondent the dismissal is sustained.

The judgment is affirmed as to John Davis & Company and reversed as to the Hardman estate.

Crow, Ch. J., and Parker, Fullerton, and Mount, JJ., concur.

Petition for rehearing denied.

### **Annotation—Liability of landlord to tenant for damage by water.**

This note includes cases involving the lessor's liability for injury to the goods or property of the lessee by escaping water, except cases where the injury is due to defective construction or to bursting pipes, which are covered respectively in *Levine v. McClenathan*, post, 235, and *Moroder v. Fox*, post, 238.

#### **General rule.**

As to the duty of the landlord to keep the plumbing in leased premises in proper repair, see note in 36 L.R.A.(N.S.) 907. And as to his duty with regard to sinks, water pipes, etc., see note in 14 L.R.A. 241. And as to water from the roof, etc., see notes in 23 L.R.A. 159, 160, and 4 L.R.A.(N.S.) 1142. And as to the duty and liability of a landlord who leases premises on which there has existed a contagious disease, see note in 6 L.R.A.(N.S.) 977.

#### **Where lessee is in possession.**

It is the general rule that, where there is no duty resting upon the landlord to keep the roof of the leased premises in repair, he is not liable for injury to the goods of a tenant caused by leakage of water through the roof due to its being out of repair. *Klausner v. Herter* (1902) 36 Misc. 869, 74 N. Y. Supp. 924.

In Georgia the lessor is required to keep the demised premises in repair, and in that state it has been held that, where a store is leased for the purpose of sell-

ing goods therein, it will be presumed, in the absence of the tenant's knowledge to the contrary, to be in a condition suitable for that purpose; and if it is not, and, because of the leaky condition of the roof either existing at the time of the lease or subsequently developing, the lessee's goods are damaged, the lessor is liable therefor, where he fails to repair the roof within a reasonable time after receiving notice of its defective condition. *Whittle v. Webster* (1875) 55 Ga. 180.

The important matter, of course, is to determine whether or not in a given case the duty rests upon the lessor to keep in repair the demised premises. While, as pointed out, the rule is different in Georgia, in most states, in the absence of fraud, concealment, or a special agreement to repair, the rule of caveat emptor applies to leases of property the possession of which is surrendered to the lessee. He takes it in the condition in which it is at the time of the letting, and the lessor is under no duty of making any repairs during the term of the lease, and hence cannot be held responsible for any damage to the lessee's property from escaping water due to defects in the roof, water pipes, and other appliances going with the premises for the use and benefit of the tenant.

*Chicago Teleph. Co. v. Commercial Union Assur. Co.* (1907) 131 Ill. App.

248, holding that, where a tenant is in the exclusive control and possession of a wash room in which an overflow occurs in consequence of the negligence of the tenant or his employees, who had free access to the wash room, such tenant, and not the landlord, is responsible for injuries thereby resulting to the property of other tenants;

*Fowler Cycle Works v. Fraser* (1903) 110 Ill. App. 126, holding that, where the lessee covenants that he receives the premises in good repair and that he will keep them in that condition, he cannot hold the lessor liable for an injury to his goods due to water leaking through the roof;

*Klausner v. Herter* (N. Y.) *supra*; *Margolius v. Muldberg* (1904) 88 N. Y. Supp. 1048, holding that, in the absence of an agreement to repair, the lessor is not liable for damage to the lessee's goods due to a leaky roof;

*Spicer v. Machette* (1915) 59 Colo. 214, 147 Pac. 657, holding that, in the absence of a special agreement of the lessor to repair, the tenant cannot recover for injury to his goods by rain coming through a defective skylight in the roof, where the defect developed some time after the tenant took possession of the leased premises.

So, where the roof of a building leased to different tenants was injured by fire, the lessor is not liable, in the absence of a covenant to repair, for injuries to goods of one of the tenants due to the leaking of the roof, owing to the lessor's delay in repairing it. *Doupe v. Genin* (1871) 45 N. Y. 119, 6 Am. Rep. 47.

**— where damage is due to some act of lessor.**

Where the lessor of a building deposited wet hair on the floor of the upper story and water therefrom leaked down upon the machinery of a tenant of the lower floor, damaging the machinery, he is liable for the damage thus resulting. *Hysore v. Quigley* (1872) 9 Houst. (Del.) 348, 32 Atl. 960.

**— agreement of lessor to pay loss.**

Even assuming that the owner of a building leased to different tenants is not liable to one of them for injury to his goods caused by the frequent leaking of water from other portions of the building, due to the negligence of other tenants, yet an agreement by the lessor to make good the damage thus caused is valid where the consideration was an agreement by the tenant not to vacate the premises, as he was threatening to

do. *Dunn v. Robins* (1892) 65 Hun, 625, 48 N. Y. S. R. 45, 20 N. Y. Supp. 341. And to the same effect, see *Beakes v. Holzman* (1905) 47 Misc. 384, 94 N. Y. Supp. 33.

**— agreement to repair.**

If the lessor covenants to keep in repair the demised premises, it is, of course, his duty to do so, and if he is negligent in this regard either in failing to repair or, as hereafter pointed out, in making the repairs he undertakes to make in compliance with his agreement in this respect, and as the proximate result of his negligence the tenant's property is damaged by escaping water, the lessor is liable for the loss resulting.

*Rife v. Reynolds* (1909) 137 Mo. App. 290, 117 S. W. 652, holding that, where the landlord contracts to keep the roof of the leased premises in repair, he is liable for damage to the tenant's goods by rain leaking through owing to his failure to make the repairs;

*Phillips v. Ehrmann* (1894) 8 Misc. 39, 28 N. Y. Supp. 519, holding that, where the lease contains a covenant on the part of the lessor to repair, he is liable for injury to the goods of the lessee due to a leaky roof which he promised to, but did not, repair;

*Levy v. Roosevelt* (1909) 131 App. Div. 8, 115 N. Y. Supp. 475, holding that the lessor is liable for damage to the tenant's goods due to the defective condition of the roof, which he had expressly agreed, but neglected, to repair.

**Where the lessor retains possession.**

The rule heretofore referred to, relieving the lessor of the duty of keeping in repair the demised premises, the possession of which he surrenders to the tenant, is generally limited and held applicable only where the lessee has the possession of the premises. Where the lessor expressly or impliedly reserves the possession and control of the leased premises or portions thereof, and through a defect in the portion reserved, due to his negligence, water escapes therefrom to the leased portion and injures the goods or property of the lessee, the lessor is answerable for the loss thus resulting.

*Pike v. Brittan* (1886) 71 Cal. 159, 60 Am. Rep. 527, 11 Pac. 890, holding that, where an overflow which caused the damage complained of by the tenant of a lower floor was due to the negligence of the janitor of the building employed by the lessor, in leaving open the basin cock and failing to remove the plug in

the bottom of the basin, the latter is liable for the injury resulting therefrom;

*Florence v. Northcutt*, (1916) — Ga. —, 88 S. E. 933, holding that the lessor is liable to the lessee of a lower floor for an injury to the latter's goods by the leaking of water from the upper floor due to a defective water-closet in a room occupied by the lessor's agent;

*Toole v. Beckett* (1878) 67 Mo. 544, 24 Am. Rep. 54, holding that, where the lessor of a block, who retains control of the roof for the benefit of himself and all his tenants, fails to exercise ordinary care and prudence in its oversight, and permits it to get out of repair so that it leaks and injures the goods of one of the tenants, he is liable for the damage thus resulting;

*Hidden v. Naylor* (1916) 223 Mass. 290, 111 N. E. 848, holding that, where the owner retained control of the roof of premises a portion of which was leased, he was liable for an injury to the goods of one of the lessees caused by the escape of water from the roof, if due to his negligence in permitting to get out of repair or obstructed the pipe intended to carry the water from the roof to the cellar;

*Priest v. Nichols* (1874) 116 Mass. 401, holding that, where the tenant's goods are injured through the escape of water from a pipe carrying waste water and material from a manufactory operated by the lessor in the upper portion of the leased premises, he is liable for the damage thus resulting;

*Sheridan v. Forsee* (1904) 106 Mo. App. 495, 81 S. W. 494, holding that, where the lessor of a building leased to different tenants was in control of the water-closets maintained on an upper floor for their common use, he is liable for an injury to the goods of a tenant of the lower floor due to the overflow of the bowls and closets, caused by a waste pipe being out of condition, which the lessor failed to repair after he was notified of the need thereof;

*Lorefice v. Sardella* (1915) 88 Misc. 522, 150 N. Y. Supp. 980, holding that, in order to render the landlord liable for injury to the goods of a tenant of the first floor of a building, caused by the leakage of water from a defective pipe in an upper floor which was vacant, it must be shown that he was the owner of the entire building or in possession of that portion of it in which the defective pipes were located;

*Levin v. Habicht* (1904) 45 Misc. 381, L.R.A.1917B.

90 N. Y. Supp. 349, holding that, where the owner of premises permitted waste pipes to become leaky and out of repair and to overflow, and these pipes are located in rooms in his possession, he is liable for damage to goods of the lessee of the lower floor due to water leaking from these pipes through the ceiling;

*Rubenstein v. Hudson* (1904) 86 N. Y. Supp. 750, holding that, where the lessor negligently failed to repair a water pipe under his control, which ran through the ceiling of a portion of the premises occupied by a tenant, he is liable for an injury to the goods of the latter cause by water escaping from the pipe;

*Levine v. Baldwin* (1903) 87 App. Div. 150, 84 N. Y. Supp. 92, holding that, where water on the roof of a building leased to different tenants was carried off by means of a pipe running to the cellar, and this pipe was under the control of the lessor, he is liable for an injury to the goods of a tenant due to the escape of water therefrom, owing to the defective condition of the pipe, which he had negligently failed to repair;

*Harris v. Boardman* (1902) 68 App. Div. 436, 73 N. Y. Supp. 963, 11 Am. Neg. Rep. 311, holding that, where a water-closet and its appurtenances were under the control of the lessor, he is responsible to the lessee of the lower floor for injury to the goods of the latter caused by a leakage therefrom which he negligently failed to prevent by making necessary repairs;

*Levy v. Korn* (1899) 30 Misc. 199, 61 N. Y. Supp. 1109, holding that, where the lessor was in possession and control of a portion of premises leased to different tenants, and negligently permitted a water-closet therein to get out of order, and a sink to become obstructed, causing water to overflow and leak down on the goods of a tenant of the lower floor, he is liable for the damage thus resulting. And to the same effect, see *Stapenhorst v. American Mfg. Co.* (1873) 15 Abb. Pr. N. S. (N. Y.) 355;

*Woodward v. Jones* (1895) 15 Misc. 1, 36 N. Y. Supp. 775, holding that, where the landlord reserves the roof to demised premises, he is liable for damage to the goods of the lessee due to its leaky condition, owing to his failure to keep it in repair;

*Kneeland v. Beare* (1902) 11 N. D. 233, 91 N. W. 56, 12 Am. Neg. Rep. 539, holding that, where the lessor negligently permitted to become obstructed a con-

ductor pipe which carried away the water falling on the roof, which was under his control, he is liable for injury to the goods of a tenant caused by water backing up during a storm and falling through a scuttle in the roof;

*Levinson v. Myers* (1904) 24 Pa. Super. Ct. 481, holding that, where an upper floor was under the exclusive control of the lessor, he is liable for injury to the goods of a tenant of the lower floor caused by water escaping from a defective boiler on the upper floor where the defect was due to the negligence of the defendant;

*Hargroves v. Hartopp* [1905] 1 K. B. (Eng.) 472, 92 L. T. N. S. 414, 74 L. J. K. B. N. S. 233, 53 Week. Rep. 262, 21 Times L. R. 226, holding that, where the owner of a building leased to different tenants, was in possession and control of the roof, and he failed and neglected to clean the rain water or gutter pipes within a reasonable time after receiving notice that they were filled up, and a tenant's goods were injured by the escape of water from the roof due to the stoppage of these pipes, the landlord is liable for the injury.

Where a portion of the premises where bath tubs were situated was in the joint possession of the lessor and lessee, the former is liable to the lessee of a lower floor for injury to his goods caused by the tubs overflowing, although due to the negligence of the lessee of that portion of the premises where the tubs were located. *Freidenburg v. Jones* (1879) 63 Ga. 612, s. c. subsequent appeal (1881) 66 Ga. 505, 42 Am. Rep. 86.

The lessor of an apartment house is liable to the lessee of an apartment for damage to the latter's goods due to steam escaping from radiators and pipes connected with the heating apparatus installed in the building, where the lessor had contracted to heat the apartments, and had reserved the right to enter the premises at any hour to make any necessary repairs to the heating apparatus. *Iowa Apartment House Co. v. Herschel* (1911) 36 App. D. C. 457, Ann. Cas. 1912C, 206. And where the rule of an apartment house provided that the lessor should examine the steam radiators in each apartment before starting the steam plant in the fall, and he started the plant without examining one of the apartments, and as a result the furniture therein was damaged by escaping steam, he is responsible therefor to the tenant, and the latter need not show at what

point the leak occurred or what the defect was. *Strong v. Woodrow Investing Co.* (1916) 158 N. Y. Supp. 513. And the lessor of an apartment is liable to the lessee for damage to furniture due to steam escaping from a radiator which the employee of the former had neglected to connect. *Le Pichard v. George N. Thurber Co.* (1913) 84 N. J. L. 193, 86 Atl. 953, 4 N. C. C. A. 606.

Where the control of a heating apparatus in a steam-heated apartment was in the landlord, and he had disconnected the radiator until repaired, and had notified the tenant not to open the valve, which prevented the steam from going into the disconnected pipe, but some third person, apparently someone calling upon the tenant, turned the valve after the radiator had been disconnected for some time, the landlord, having negligently delayed to repair and connect the radiator, is liable for the injury resulting from the escaping steam; but he is not liable if the valve was turned on by the tenant. *Isaacs v. New Haven & N. Y. Realty Corp.* (1913) 141 N. Y. Supp. 338.

#### Where the lessor makes repairs.

The general rule is that where it is the duty of the lessor to keep the leased premises in repair, and he undertakes to do so, and as a result of his or his employee's negligence in making the repairs the tenant's goods or property is injured by water escaping, the lessor is liable for the damage resulting.

*Mumby v. Bowden* (1899) 25 Fla. 454, 6 So. 453, holding that, where the lessor occupies the upper story of a building, the lower story of which is leased, and he contracts for the repair of the roof and the person employed negligently leaves an aperture therein through which water flows during a rainstorm, injuring the goods of the lessee of the lower floor, the lessor is liable for the damage thus caused;

*Dempsey v. Hertzfield* (1860) 30 Ga. 866, holding that the lessor is liable for injury to the goods of the lessee due to a leaky roof, if the lessor failed properly to repair it, although he attempted to make the repairs;

*Glickauf v. Maurer* (1874) 75 Ill. 289, 20 Am. Rep. 238, holding that, where a mechanic was employed by the lessor to put a skylight in the roof of a building, of which the latter occupied the upper and a tenant the lower floor, the lessor is liable for damage to the goods of the lessee caused by rain coming through the roof due to the negligence of the me-

chanic in leaving it exposed while putting in the skylight;

*Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491, holding that the lessor is liable for injury to the goods of a lessee due to the overflow of a water tank maintained on the leased premises, where the overflow was caused by the negligence of a plumber employed by the lessor to make repairs thereto;

*Sulzbacher v. Dickie* (1876) 51 How. Pr. (N. Y.) 500, 6 Daly, 469, holding that, where the landlord contracted with some third person to repair the roof on demised premises, he is liable for damage to the goods of the tenant due to the failure of the contractor to protect the unroofed portion of the house from rains during the time he was putting on a new roof;

*Ara v. Rutland* (1915) — *Tex. Civ. App.* —, 172 S. W. 993, holding that the lessor is liable for injury to the goods of a tenant of a portion of the building, where in reroofing the building he carelessly left unprotected the unroofed portions, and a heavy rain fell causing the damage complained of.

Where the possession and control of the roof of a building are in the landlord, he is liable for injury to the goods of a tenant of a lower floor due to water escaping from an opening in the pipe which carried off the water from the roof, the opening being caused by the failure of employees of the lessor properly to shift the pipe in making repairs and changes. *Worthington v. Parker* (1885) 11 Daly (N. Y.) 545. And it has been held that, where a fire made it necessary to repair the roof and the lessor agreed with the tenant to repair the same, but did not sufficiently protect the building against rain while he was having such repairs made, he is liable for injury to the latter's goods due to a heavy rain. *Ebersson v. Continental Invest. Co.* (1908) 130 Mo. App. 296, 109 S. W. 62, s. c. prior appeal (1906) 118 Mo. App. 67, 93 S. W. 297. And see *Tuller v. Davis* (1855) 4 Duer (N. Y.) 187, holding that, where the lessor agreed to finish in a designated manner the demised premises then in the course of construction, but did not finish the roof in the manner agreed upon, and as a result of its defective construction it leaked, damaging the lessee's goods, the lessor is liable for the loss thus resulting.

Although under no obligation to repair the leased premises, nevertheless where the landlord gratuitously under-

takes to repair the roof, he is liable for damage to the tenant's goods caused by the leaking of the roof due to the negligence of an independent contractor employed to make the repairs. *Dalkowitz Bros. v. Schreiner* (1908) — *Tex. Civ. App.* —, 110 S. W. 564. And see *Tarnogurski v. Rzepski* (1916) 252 Pa. 507, 97 Atl. 697, holding that, although the lessor is not bound to make repairs to the demised premises, nevertheless where he gratuitously undertakes and agrees to do so, he is liable for an injury to the goods of the lessee due to water escaping from pipes as a result of his negligence and carelessness in making the repairs.

Where the lessor is under no legal obligation to repair the roof to the demised premises, it is competent for him and the lessee to agree that the lessor employ an independent contractor to make such repairs for their mutual benefit and accommodation. In such case the lessor is not liable for damage to the lessee's goods due to the negligence of the contractor in repairing the roof. *Lasker Real-Estate Asso. v. Hatcher* (1894) — *Tex. Civ. App.* —, 28 S. W. 404.

— where lessor employed a competent workman.

As heretofore stated, the general rule is that a lessor who attempts to repair the leased premises is liable for defects therein due to his negligence or the negligence of his employee, where, by reason of such defects, water injures the goods of the lessee. In some cases, however, the character of repairs may be such that only a skilled artisan would be able to know whether or not the repairs had been properly made. In such case this rule apparently does not obtain. Thus, it has been held that, where the lessor is required to make repairs of a character requiring skilled labor, and because of the mechanical character of the work he has no way of knowing that it has not been properly performed, he is not liable for the negligence of the employee, if he exercised due care in securing a person skilled in the kind of work to be done. For example, a tenant of a lower floor who consented to water being kept in a cistern located on an upper floor, and used water therefrom, cannot hold the landlord liable for damage to his goods caused by an overflow from the cistern due to the negligence of a plumber employed by the landlord to remedy a leakage in the cistern, where the plumber employed was skilled in his

trade. *Blake v. Woolf* [1898] 2 Q. B. (Eng.) 426, 62 J. P. 659, 67 L. J. Q. B. N. S. 813, 79 L. T. N. S. 188, 47 Week. Rep. 8. To the same effect is *Meany v. Abbott* (1867) 6 Phila. (Pa.) 256, holding that, where the lessor employs competent workmen to construct a water-closet in an upper story of a house, he is not liable for damage to goods of the tenant of a lower floor due to the improper construction of the water tank.

**Necessity of showing that lessor was negligent.**

Even where it is the duty of the lessor to keep the demised premises in repair, his mere failure to do so, or the mere fact that water escapes and injures a tenant's goods or property, due to some defect in the roof, water pipes, or other appliances maintained for the use and benefit of the lessee, does not render the lessor liable for the damage resulting. To hold him responsible it must appear that the defect complained of was due to his negligence either in repairing or failing to repair.

*Squire, V. & Co. v. Ryerson* (1909) 150 Ill. App. 255, holding that the lessor of a building who installed a sprinkler system in it to protect the tenants from fire is not liable to a tenant for injury to his goods due to the opening of one of the sprinkler heads, which permitted water to escape, where in inspecting the system the lessor was not guilty of negligence and it was not claimed that the system was not properly constructed and installed.

*Mitchell v. Plaut* (1889) 31 Ill. App. 148, holding that, where the lessee's goods were injured by water leaking through a roof, the lessor is not liable therefor, unless this leakage was due to his negligence in obstructing water pipes when repairing the roof;

*Mendel v. Fink* (1881) 8 Ill. App. 378, holding that, in the absence of an express agreement, the lessor is not liable to the lessee of a lower floor for injury to his goods by water leaking from a water-closet located on the next floor above, unless the negligence of the lessor is shown either in the construction of the closet or in its use;

*S. W. Noggle Wholesale & Mfg. Co. v. Sellers & M. Roofing Co.* (1916) — Mo. App. —, 183 S. W. 659, holding that, where the lessee seeks to hold the owner of the building for damage to his goods by rain leaking through the roof, and alleges that the defendant is negligent with reference to certain matters relating to the roof, recovery cannot be had without proving such negligence; L.R.A. 1917B.

*Tennant v. Hall* (1888) 27 N. B. 499, holding that, where rain water was conducted from the roof to the cellar for the benefit of all the tenants of the building, the landlord is not liable for injury to the goods of one of the tenants due to the leaking of water through the roof, owing to the water pipes being of insufficient size to carry off the water during an unusually heavy rain storm, it, however, being found as a fact that the landlord was not guilty of negligence either in the plan of carrying off the water or in the construction of the pipe.

The mere fact of an overflow from water pipes and the injury to the goods of a tenant therefrom does not establish a cause of action against the lessor; but to be entitled to hold the latter responsible, the lessee must also show that the overflow was due to some negligence on the lessor's part. *Becker v. Bullowa* (1901) 36 Misc. 524, 73 N. Y. Supp. 944; *Tentzer v. Erlanger* (1909) 117 N. Y. Supp. 158.

Unless the lessor of a building was actually at fault in the construction of the drain connecting with the sewer, or in failing to repair it after notice that it was out of condition and permitted water from the sewer to backup and overflow the leased premises, he is not liable to a tenant for injury to goods of the latter caused by such overflow. *Scott v. Simons* (1874) 54 N. H. 426. And the owner of a building leased to different tenants is not liable for injury to the goods of one of the tenants caused by the overflow of water from a lavatory located on the top floor of the building and maintained for the use in common of the different tenants, where the overflow was not due to any negligence of the landlord, but to the malicious act of some third person in turning on the tap of the lavatory and stopping the drain pipes. *Rickards v. Lothian* [1913] A. C. (Eng.) 263, 82 L. J. P. C. N. S. 42, 108 L. T. N. S. 225, 57 Sol. Jo. 281, 29 Times L. R. 281, 50 Scot. L. R. 666, Ann. Cas. 1913D, 804. Nor is he liable for damage from the leakage of water from a water-closet, merely on the ground that he did not install the best known kind of closet when he installed the closet in question. *Bernhard v. Reeves* (1893) 6 Wash. 424, 33 Pac. 873. Neither is the lessor liable for an injury to the goods of the occupant of the lower floor of a building caused by water coming through the ceiling, where it does not appear that the water escaped

through the pipes running through the ceiling, and an investigation disclosed no leaks in such pipes, and it was possible for the water to come from a tub or lavatory on the next floor, although when examined the next day these floors were dry. *Narbonne v. Storer* (1913) 121 Minn. 505, 141 N. W. 835. And although the landlord retained control of the roof of the building, he is not liable for damage to the goods of the tenant of a lower floor caused by the escape of water from the roof, due to the act of rats making a hole in a box which received the water from the gutters, where the landlord exercised reasonable care in examining from time to time the gutters in this box, and found them in good condition only a few days before the time in question. *Carstairs v. Taylor* (1871) L. R. 6 Exch. (Eng.) 217, 40 L. J. Exch. N. S. 129, 19 Week. Rep. 723. And see *O'Connor v. Gouraud* (1886) 14 Daly, 64, 3 N. Y. S. R. 555, holding that, where the landlord used due care in making repairs to the roof, and made repairs whenever requested by the tenant, he cannot be held to have breached his covenant to repair, although it is claimed that his attention was called to the particular defect complained of; hence he is not liable for injuries to goods of the tenant due to the roof leaking during a severe rain some time after he had made repairs.

But where the landlord knew that water had been turned off from pipes in the demised premises until repairs could be made thereto, and before he made the repairs he turned on the water, he is liable to a tenant for injury resulting from water escaping from the defective pipes, if under the circumstances his conduct was not prudent and he was not justified in assuming that repairs had been made. *Tarnogurski v. Rzepaki* (1916) 252 Pa. 507, 97 Atl. 697. So, where, after the upper floor of a building was vacated by the tenant, it was broken into at different times and a washstand torn out, the water pipes connected therewith broken, and an opening left therein, it is a question for the jury whether or not the lessor was negligent in having the water turned on in these pipes without making an investigation of the upper floor, and hence liable for injury to the goods of the tenant of a lower floor due to the escaping water. *LE VETTE v. HARDMAN ESTATE*, ante, 222.

Where the only ground for holding the infant owner of a building liable for damage to goods of a tenant is the neg-

ligence of the janitor of the building, he cannot be held liable therefor, since he is without power to authorize agents or servants to act for him. *Robbins v. Mount* (1867) 4 Robt. (N. Y.) 553, 33 How. Pr. 24.

#### Necessity of notice.

In order to hold the landlord liable for damages by water escaping, due to his failure to make repairs which it was his duty to make, he must have received notice to repair, or the defect must have existed for a sufficient time to charge him with constructive notice.

*Brooks v. Schlernitzauer* (1908) 113 N. Y. Supp. 484; *Gutman v. Folsom* (1908) 61 Misc. 304, 113 N. Y. Supp. 691, holding that notice on Friday is not sufficient to make the landlord liable for injury from a storm on the following Sunday;

*Pratt, H. & Co. v. Tailor* (1909) 135 App. Div. 1, 119 N. Y. Supp. 803, holding that, where the lessor agreed to keep in repair the roof on the demised premises, in order to hold him liable for damage to goods of the lessee by the roof leaking, it requires notice from the lessee of the need therefor, unless the lessor had actual notice of the defective condition;

*Goldberg v. Besdine* (1902) 76 App. Div. 451, 78 N. Y. Supp. 776, holding that, where the leaky condition of the roof developed so recently as to preclude the landlord from being charged with notice of the defective condition, and he was without actual knowledge thereof, he is not liable for an injury resulting from the leakage;

*Cohen v. Cotheal* (1913) 156 App. Div. 784, 142 N. Y. Supp. 99, affirmed in (1915) 215 N. Y. 659, 109 N. E. 1070, holding that, where there is no evidence of actual notice to the landlord of a defect in the cylinder of a pump which cracked permitting the water to escape, constructive notice cannot be predicated without evidence of the existence of a defect discoverable by reasonable inspection for such a length of time that it would have been discovered by the exercise of reasonable care.

But where the lessor occupied rooms directly over the rooms leased, he is presumed to have better knowledge of the condition of the roof than the lessee; hence he is not entitled to notice from the latter to repair. *Guthman v. Castleberry* (1873) 49 Ga. 272. And where the lessee's goods were injured by water escaping through the roof during a storm, and the defect in the roof was due to



the negligence of the lessor in permitting its use for a purpose that would necessarily make holes in it, the latter is not entitled to notice to repair in order to be held responsible for the injury, and he cannot avoid liability under a provision in the lease relieving him from liability for any damage caused by the leakage of the roof, unless he neglects to make necessary repairs within a reasonable time after receiving written notice of such leakage. *Pratt, H. & Co. v. Tailer* (1906) 186 N. Y. 417, 79 N. E. 328, affirming (1906) 114 App. Div. 574, 100 N. Y. Supp. 16.

**Where damage is due to negligence of another tenant or third person.**

Where the injury complained of was due to the negligence of some other tenant, to whom the lessor had surrendered possession of that portion of the leased premises from which came the water that caused the injury, the lessor is not responsible for the loss resulting, if he has been free from negligence in the matter.

*Lebensburger v. Scofield* (1907) 12 L.R.A.(N.S.) 1025, 86 C. C. A. 105, 155 Fed. 85, holding that the owner of a block leased to different tenants is not responsible to a tenant of the lower floor for injury to his stock of goods caused by the overflow of a lavatory on the upper floor, which was under the control of another tenant, where it was in good repair when the premises were leased and the tenant was under obligation to keep the premises in repair;

*Haizlip v. Rosenberg* (1897) 63 Ark. 430, 39 S. W. 60, 1 Am. Neg. Rep. 399, holding that, in the absence of a statute or a covenant to repair, a person leasing the upper story of a building equipped with a water-closet and water fixtures properly constructed and in good condition when leased, and giving the tenant possession and control of the portion of the premises where such fixtures are located, is not liable to the tenant of a lower floor for injury to his goods due to the overflow of the pipes connecting with the closet;

*Friedenburg v. Jones* (1879) 63 Ga. 612, holding that, where bath fixtures are properly constructed and the lessee of a portion of the premises where they are situated is in control and possession of them, the lessor is not liable to the lessee of a lower floor for injury to his goods due to the overflow of the tubs;

*Allen v. Smith* (1884) 76 Me. 335, holding that a landlord is not responsible to one tenant for injuries resulting to L.R.A.1917B.

him from the negligence of another tenant in the use of such fixtures as stoves, furnaces, water-closets, and other water fixtures; hence, although damage results to the tenant of the lower floor by the overflow of water from a water-closet on an upper floor, due to the negligent act of a tenant of that floor in leaving the water running in the sink and permitting the water-closet to become clogged, the landlord is not liable therefor;

*Kenny v. Barns* (1887) 67 Mich. 336, 34 N. W. 587, holding that the lessor is not liable for an injury to the lessee's goods caused by the overflow of a water-closet under the general control of a tenant of an upper floor, to which the complaining tenant also had a key, the lessor, however, having no key, and the overflow being due to obstructions deposited in the closet by unknown persons, and not to any defect in its construction;

*Robbins v. Mount* (1867) 4 Robt. (N. Y.) 553, 33 How. Pr. 24, holding that, where the injury to the tenant's goods was due to the overflow of a water-closet in an upper apartment in the possession and control of another tenant, and the overflow was caused by tobacco leaves obstructing the waste pipe and the failure of someone using the flusher to turn off the stopcock, the lessor is not liable for the injury;

*Pembroke Stationery Co. v. Rogers* (1912) 41 Utah, 411, 125 Pac. 866, holding that the owner of premises leased to different persons is liable for an injury to the goods of an occupant of a lower floor caused by the overflow of a bath tub in rooms on the second floor, only on proof that a tub or the water system connected therewith was improperly constructed, or that at the time the premises were leased they were in such a defective condition as to render their ordinary use injurious to the possession and use of the premises by the complaining tenant; and the lessor is not liable if the injury was due to the negligence of the tenant of the upper floor in failing to maintain the tub in proper repair, or if such tenant was negligent in the use of the tub, or if the defects originated during the occupancy of such tenants.

Even where the lessor reserved possession, for the use and benefit of different tenants, of that portion of the leased premises from which came the water that caused the injury complained of, it has been held that he is not liable for an injury due to the negligence of

another tenant or a third person, and not to any negligence of the lessor.

*Rosenfield v. Newman* (1894) 59 Minn. 156, 60 N. W. 1085, holding that, where a water-closet and sink were reserved and maintained on an upper floor for the common use of the tenants of that floor, who each had a key thereto, the lessor is not liable for an injury to the goods of a tenant of a lower floor due to the overflow of the sink caused by some person negligently or wilfully obstructing the drainpipe from the sink and leaving open the faucet opening into it.

It has, however, been held that the owner of a three-story building is liable for injury to the goods of a tenant of the lower floor caused by the leaking of water from the roof, due to the accumulation of trash thrown on the roof by a tenant of the upper floor. *Center v. Davis* (1869) 39 Ga. 210. Compare with *White v. Montgomery* (1877) 58 Ga. 204, holding that the owner is not liable to the tenant of a lower floor for injury to his goods due to the overflow of a water-closet in that portion of the premises leased to another tenant, where the overflow was due to the tenant or his guests depositing obstructions in it. The court distinguished *Marshall v. Cohen* (1871) 44 Ga. 489, 9 Am. Rep. 170, on the ground that the lessor had notice of the defective condition of the closet and neglected to repair it, while in the case under consideration the lessor had no notice of its bad condition, and the proof showed that he examined the water-closet and kept it in repair. In the *Marshall* Case it was held that the lessor was liable to the lessee of a lower floor of a building for injury to the latter's goods caused by the overflow of a water-closet located on the third story and maintained for the benefit of all the tenants, although the overflow was not due to any defect in the construction or condition of the closet, but to the act of tenants or outsiders in throwing obstructions into it.

#### **Effect of limitation of liability provision.**

Stipulations exempting the lessor from liability for injuries of every kind or nature whatsoever that may occur by reason of any accident, or for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or the bursting, leaking, running of any cistern, tank, washstand, or waste pipe, etc., do not relieve the lessor of liability for damage from the es-

cape of water from a pipe, due to his negligence. *LE VETTE v. HARDMAN ESTATE*, ante, 222. So, where the leakage of pipes which caused the injury complained of was due to the negligent manner in which they had been put together upon readjusting them after the execution of the lease, and not to any act of the elements, the lessor cannot escape liability under a provision in the lease exempting him from liability for damage caused by the elements or by leakages in the roof or piping. *Worthington v. Parker* (1885) 11 Daly (N. Y.) 545. And where the lessor negligently repaired a manhole cover to a water tank located in the upper part of the building, and the water overflowed and injured the goods of a tenant, he is liable for the damage resulting, notwithstanding a provision in the lease exempting the lessor from liability for any damage or injury caused by leakage of gas, steam, or water pipes, or leakage or overflow of any other kind whatsoever. *Eugene C. Lewis Co. v. Metropolitan Realty Co.* (1906) 112 App. Div. 385, 98 N. Y. Supp. 391, affirmed in (1907) 189 N. Y. 534, 82 N. E. 1126. Compare with *Drescher Rothberg Co. v. Landeker* (1913) 140 N. Y. Supp. 1025, holding that under a provision in a lease exempting the lessor from liability for damage caused by bursting pipes, etc., or leakage about the building, he is liable for damage to goods of a tenant by the leaking of rain through the roof, due to its defective condition, if he retained control of the roof and had knowledge of such condition and neglected to make the necessary repairs; but he is not liable for failure merely to discover the defective condition during a period when he could not reasonably be expected to discover the same.

But where the lease contains a provision exempting the landlord from the duty of making repairs, he is not liable for damage to the lessee's goods due to a leaky roof. *Erikson v. Propp* (1908) 106 Minn. 238, 119 N. W. 390. And in an action to recover the rental of premises, the tenant cannot counterclaim for damage to his goods by water leaking from pipes, where the lease contains a provision that the landlord shall not be liable for any damage or injury to the tenant due to the breakage, leakage, or obstruction of water pipes in or about the building. *Sonn v. Weissmann* (1899) 29 Misc. 622, 61 N. Y. Supp. 78, affirming (1899) 27 Misc. 845, 58 N. Y. Supp. 1149.

And see *Chapman & S. Co. v. Crown Novelty Co.* (1912) 175 Ill. App. 397, holding that under a lease exempting the lessor from liability for any damage done or occasioned by leakage or the running of any cistern, tank, washstand, or drainpipe, the lessee cannot claim damage to his goods due to the alleged bursting, leaking, or running of any tank, washstand, or water pipe on or about the premises.

#### **Contributory negligence of lessee.**

Where a tenant with knowledge that the roof leaked permitted his goods to remain in the building, he took upon himself the risk of injury from such leakage, and cannot hold the lessor responsible for the damage suffered therefrom. *Klausner v. Herter* (1902) 36 Misc. 869, 74 N. Y. Supp. 924. Nor can the lessee hold the lessor responsible where he knew that his goods would be exposed to injury from an overflow of a water-closet which the lessor had negligently failed to repair, and he did not remove them. *Huber v. Ryan* (1901) 57 App. Div. 34, 67 N. Y. Supp. 972. Where, however, the landlord had made repairs to prevent further leakage and the pipes had ceased to leak for some time, the tenant is not guilty of negligence in placing goods where the leakage had formerly occurred. *Lamport v. Continental Art Glass & Brass Co.* (1911) 132 N. Y. Supp. 330.

Where the clothing of a tenant mildewed in a trunk kept in the basement after it had been flooded, no recovery for such damage can be had since it was due to the failure of the tenant to remove the goods. *Ordemann v. Manson* (1911) 127 N. Y. Supp. 1026. And it has been held that a tenant cannot stand quietly by and voluntarily allow his property to remain exposed to injury from rain, owing to the defective condition of a roof of the demised premises, but he should make the repairs himself and charge the expense to the landlord, unless prohibited from so doing by the latter. *Cantrell v. Fowler* (1890) 32 S. C. 589, 10 S. E. 934. So, where the tenant caused, or proximately contributed in causing, the roof of the demised premises to be repaired at an improper time, he cannot recover for damages thus brought upon himself. *Lasker Real-Estate Asso. v. Hatcher* (1894) — Tex. Civ. App. —, 28 S. W. 404. And see *Rudolph v. Fuchs* (1872) 44 How. Pr. (N. Y.) 155, holding that where the

cause of the overflow complained of was the negligence of the defendant in maintaining in a defective condition the packing box of a pump located on an upper floor, and also the failure of the plaintiff to turn off the water so as to prevent it rising and escaping through this box, as he was in the habit of doing, he cannot hold the defendant liable for the damage resulting, since the overflow was due to the negligence of both parties.

#### **Measure of damages.**

The measure of damages for injury to the goods of a tenant by escaping water is the difference between the market value of the goods just prior to the injury, and such value after the flooding complained of. *K. B. Koosa & Co. v. Warten* (1909) 158 Ala. 496, 48 So. 544. For a breach of covenant by the lessor to repair, the measure of damages is not what it would have cost the lessee to make the repairs or the difference in the rental value of the use of the premises caused by the neglect to repair, but it is the actual damage to the tenant's property as a result of the breach. *Woodward v. Jones* (1895) 15 Misc. 1, 36 N. Y. Supp. 775; *O'Hanlon v. Grubb* (1912) 38 App. D. C. 251, 37 L.R.A. (N.S.) 1213.

#### **Counterclaim of damages.**

It has been held that in an action for rent the tenant may counterclaim damages to his property caused by a leaky roof which the landlord had agreed but neglected to repair. *Cook v. Soule* (1874) 56 N. Y. 420. So, where the flow of water from other pipes in the building under the control of the lessor was such as to make the portion leased to the complaining tenant unfit for the purpose for which it was hired, and injurious to his goods, it justifies him in abandoning the premises, and, on the theory of a breach of covenant for quiet enjoyment, he may recoup his damage in an action against him to recover the rent. *Vann v. Rouse* (1884) 94 N. Y. 401. But where the lessee retains possession of the premises so that a leakage of water does not constitute an eviction, even though due to the wrongful act of the landlord, and it does not amount to a breach of the contract created by the lease, the injuries sustained by the tenant do not constitute a matter for counterclaim, within the Practice Code relative thereto, for they are not connected with the subject of the action by the lessor to recover the rent. *Edgerton v. Page* (1859) 20 N. Y. 281, affirming (1857) 1 Hilt. 320. A. G. S.

## PENNSYLVANIA SUPREME COURT.

MAX LEVINE, Appt.,  
v.

J. C. McCLENATHAN.

(246 Pa. 374, 92 Atl. 317.)

**Landlord and tenant — liability for faulty construction of building.**

A property owner is not, in the absence of covenant or warranty, liable for injury to his tenant's goods by a leak in the roof, due to faulty construction of the building.

*For other cases, see Landlord and Tenant, III. c, 2, b, in Dig. 1-52 N. S.*

(July 1, 1914.)

**A**PPEAL by plaintiff from a judgment of the Court of Common Pleas for Fayette County, overruling a motion to take off a nonsuit in an action to recover damages for injuries to a stock of merchandise, alleged to have been caused by a leak in the roof, due to faulty construction of the building. Affirmed.

The facts are stated in the opinion.

Messrs. E. C. Higbee, of Sterling, Higbee, & Matthews, and John Duggan, for appellant:

Even where an entire building is let and leased, the landlord is liable in an action of trespass to injured tenants, where he has constructed unskillfully and negligently.

*Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731, 26 Pa. 111, 67 Am. Dec. 404.

Where an owner of a building divides it up and rents it in different parts and parcels, he is liable to the tenants for his failure to maintain the parts and portions of the building which remain in his control and possession, in proper condition, so as not to injure them.

*Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Rauth v. Davenport*, 60 Hun, 70, 14 N. Y. Supp. 69; *Dollard v. Roberts*, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; *O'Hanlon v. Grubb*, 38 App. D. C. 251, 37 L.R.A.(N.S.) 1213; *Farley v. Byers*, 106 Minn. 260, 130 Am. St. Rep. 613, 118 N. W. 1023; *Sawyer v. McGillicuddy*, 81 Me. 318, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 124; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Railton v. Taylor*, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; *Stenberg v. Willcox*, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914, 100 Tenn. 538, 41

L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297.

Messrs. D. M. Hertzog and H. G. May for appellee.

Elkin, J., delivered the opinion of the court:

This is an action of trespass for damages to a stock of merchandise, caused by water leaking through the roof of the demised premises, or, as appellant contends, through the bottom of light wells which served to furnish light to the second and third stories of the same building. At the conclusion of the testimony introduced by appellant, the learned court below directed a compulsory nonsuit to be entered, and subsequently overruled the motion to take it off. The two assignments of error relate to these matters.

It is well settled in one state that no implied covenant arises, out of the relation of landlord and tenant, upon the part of the landlord to repair; nor is there any implied warranty that the leased premises are tenantable. In the absence of a covenant in the lease requiring the lessor to repair, no such duty rests upon the landlord; and, if damages result to the tenant by reason of failure to make repairs, there can be no recovery against the landlord. *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Barns v. Wilson*, 116 Pa. 303, 9 Atl. 437; *Reeves v. McComeskey*, 168 Pa. 571, 32 Atl. 96. There is a long line of cases to the same effect. These cases hold that the doctrine of caveat emptor applies to leases of real property. The tenant takes the property as it is, and he must be the judge of its tenantable condition. If the tenant wants the landlord to make repairs, he must require such a covenant to be inserted in the lease; and failure to so provide by a covenant in the lease relieves the landlord from any such duty. The landlord, having no duty to repair, cannot be charged with negligence in failing to make repairs; and hence, in an action for damages charging negligence, there can be no recovery against the landlord, if the damage resulted from failure to make repairs, or because of the untenable condition of the demised premises. The tenant took the premises as they were, and is bound by his bargain.

The negligence charged in the present case was "that the said building was defectively, imperfectly, and improperly constructed, and that, at the date of the making of the said lease, the storeroom and premises demised to the plaintiff had not yet been occupied, and, in consequence of the defective, improper, and negligent construction aforesaid the roof of said building, and

Note. — For liability of landlord to tenant for damage by water, due to faulty construction, see annotation following this case, post, 236.  
L.R.A.1917B.

the party wall and cornices around the sky-light, leaked," and in times of rain the water percolated into the demised premises and caused some damage to the stock of merchandise owned by appellant. In other paragraphs of the statement of claim the same character of negligence is charged, and the case is made to turn by the pleadings upon the question of faulty construction of the building. We know of no case in Pennsylvania, and none has been called to our attention, in which a tenant was permitted to recover damages against the landlord upon the ground that the demised premises had been defectively or improperly constructed. If a tenant could recover damages upon the ground that the demised premises had not been properly constructed, all that has been said in our cases about the rule of caveat emptor would be meaningless. Appellant is bound by his pleadings, and his right to recover, if any such right exists, depends upon proving the negligence charged; but even if he proves the negligence charged, there can be no recovery, if that negligence is not actionable under the law.

As we view the present record, this is a

sufficient answer to the very able argument of learned counsel for appellant, in which a number of cases from other jurisdictions are cited to support the contention that the negligence charged in the case at bar is actionable. It is not our purpose to discuss these cases, because most of them are based upon exceptional facts, which do not arise under the pleadings in the present case. It might very well be that a landlord would be held liable for negligent acts committed in and around the demised premises, and most of the cases from other jurisdictions cited here relate to acts of this character; but the negligence charged in the present case is the defective and improper construction of the building itself. No case decided in our state can be cited in support of the contention that there can be a recovery of damages by the tenant against the landlord, when the negligence charged was faulty construction of the original building. We might add that in the present case there was no covenant to repair, nor was there any warranty that the demised premises were tenantable.

Assignments of error overruled and judgment affirmed.

### **Annotation—Liability of landlord to tenant for damage by water, due to faulty construction.**

As to the liability of the landlord for injury to the tenant's property due to escaping water, see note to *Le Vette v. Hardman Estate*, ante, 222. And as to his liability where water or steam, escaped from bursting pipes, see note to *Moroder v. Fox*, post, 238. The present note deals only with the question of the lessor's liability where the escaping water was due to defective construction.

#### **Where tenant is in possession.**

In the absence of a covenant to repair, or a warranty that the demised premises are tenantable, or where there is no fraud or concealment, the rule of caveat emptor applies to leases of real property, and the lessee takes the property as it is, and no duty rests upon the landlord to repair defects therein. He is not liable to the tenant for damage to the goods of the latter, resulting either from his failure to repair, or from defects in the construction of the building; hence, where the premises were leased with defectively constructed skylights which permitted the water during rainstorms to leak through them, to the injury of the goods of the tenant, the landlord is not responsible therefor. *LEVINE v. McCLENATHAN*, ante, 235.  
L.R.A.1917B.

An action of tort cannot be maintained against the lessor for an injury to the goods of the lessee, alleged to be due to the imperfect and defective construction of the cellar, so that, as a result of a heavy rainstorm and a high tide in the bay nearby, water backed up in the main sewer in the street, and was forced under the sidewalk and into the cellar. *Loupe v. Wood* (1877) 51 Cal. 586.

And where defective water pipes are located outside of premises leased to the injured tenant, and water constantly escapes from them and flows upon the premises of the tenant, injuring his goods, and the defect in these pipes was due to their faulty construction, and the defective pipes were a part of the premises demised to the tenant, the liability of the lessor for the damage caused thereby is to be measured by the terms of the lease. *Ingwersen v. Rankin* (1885) 47 N. J. L. 18, 54 Am. Rep. 109.

It has, however, been held that where damage results to a tenant of a lower floor from the escape of water from bathtubs, due to their improper construction, the lessor is liable, although a tenant was in possession of the rooms where the bathtubs are located. *Freidenburg v. Jones* (1879) 63 Ga. 612.

—rule as to obvious defect.

It has been held that where the escape of the water is due to an obvious defect in the construction of the building, the landlord is not responsible for the damage to the goods of the tenant, due thereto. For example, where the goods of a tenant of a lower floor were injured by the fall of plaster from the ceiling, due to a leakage from the roof, caused by water entering an open fanlight,—an obvious defect, existing in the building at the time of the lease,—the landlord is not liable for the injury. *Rogers v. Sorell* (1903) 14 *Manitoba L. R.* 450.

Where lesser retains possession.

Where the owner has the possession and control of the roof of a building leased to different tenants, he is liable to the lessee of a lower floor for damage to the latter's goods, caused by water leaking from the roof, down the skylight, although this skylight was maintained for the benefit of the lessee, the lessor, however, being negligent in failing to provide proper and sufficient means for the escape of water from the roof during storms. *H. C. Capwell Co. v. Blake* (1908) 9 *Cal. App.* 101, 98 *Pac.* 51. So, where the lessor was in possession of that part of a building directly over the portion leased, and the plumbing and fittings in the part in his possession were so defectively constructed that water overflowed the sinks and closets and ran down into the leased portion, damaging the goods of the tenant, and the lessor refused to remedy the defect, it amounted to a constructive eviction, entitling the tenant to claim damages for the violation of the lease, which were properly set up by him in counterclaim in an action for the rent. *York v. Steward* (1898) 21 *Mont.* 515, 43 *L.R.A.* 125, 55 *Pac.* 29.

—necessity of use of ordinary appliances.

Where the defect in the construction was due to the failure of the lessor to make use of the ordinary and necessary appliances to prevent an overflow of water, he is liable for an injury to the property of a tenant, due to such an overflow. For example, the lessor is liable to the lessee for damage to the latter's goods caused by an overflow of water due to the defective construction and maintenance of a water tank on the leased premises, in that it was not provided with a valve cock which was necessary to control the flow of water, and which was customarily attached and used

for that purpose. *Citron v. Bayley* (1899) 36 *App. Div.* 130, 55 *N. Y. Supp.* 382. Where, however, the landlord did not construct the building, but acquired it after it had been constructed, he is not liable for loss caused by bursting pipes, due to their freezing, although they froze because not properly protected; this defect, however, not being obvious, as the unprotected portion was underneath the roof and above the ceiling. *Queeney v. Willi* (1916) 171 *App. Div.* 588, 157 *N. Y. Supp.* 642.

Where waterpipes are installed in a building for the benefit of different tenants, the landlord, with reference to the construction and condition of such pipes, owes to the tenants the duty merely of seeing that they are reasonably fit and proper for the purpose for which they are intended; and it is only where he fails in this regard that he can be charged with negligence and held liable to a tenant for injury resulting from the bursting of a pipe. *Anderson v. Oppenheimer* (1880) *L. R.* 5 *Q. B. Div. (Eng.)* 602, 49 *L. J. Q. B. N. S.* 708.

The mere fact that water leaks through the roof of a building, although due to the construction of the waste pipe to carry off the water falling thereon, does not necessarily establish the negligence of the landlord, or his liability for the resulting injury. Thus, it has been held that pipes placed in the building to carry off rain water from the roof are for the benefit of all the tenants of the building; and that, although these pipes failed to take care of the water during an unusually heavy storm, causing it to back up and leak through the roof, the landlord is not liable for injury resulting where the jury find, as a matter of fact, that he was not negligent, either in the plan for carrying off the water, or in the construction of the pipe. *Tenant v. Hall* (1888) 27 *N. B.* 499.

Where the landlord had no control over the supply of water to a tank on the leased premises, and it was fitted with an overflow pipe of the usual size, which proved adequate for a number of years, and there was no evidence to show that there were any appliances which would have been effective under existing conditions, the landlord is not liable for damage to the tenant's goods, caused by the overflow of the tank. *Bertsch v. Unterberg* (1904) 88 *N. Y. Supp.* 983. So, where the roof of a building was sufficient protection against ordinary storms, the lessor is not liable for injury to the goods of the lessee, caused

by the roof leaking, due to an extraordinary fall of snow. *Guthman v. Castleberry* (1873) 49 Ga. 272.

—negligence of another tenant.

Where the tenant of an upper floor negligently left open a water faucet and it overflowed the bowl into which it emptied and the water escaped and leaked

through to the lower floor, injuring the goods of the occupant, the lessor is not liable therefor, although the drain pipe was not of sufficient size to carry off water if permitted to run from the faucet under full pressure. *McCarthy v. York County Sav. Bank* (1883) 74 Me. 315, 43 Am. Rep. 591. A. G. S.

WISCONSIN SUPREME COURT.

ALPHONS J. MORODER, Appt.,

v.

ABRAHAM FOX, Respt.

(155 Wis. 503, 143 N. W. 1040.)

**Landlord and tenant — duty to care for water pipes — liability for injuries.**

1. A provision in a printed lease of the ground floor of a building, over which are tenements, requiring the lessee to use all necessary precautions to prevent damages to any water pipes upon said premises by frost or otherwise, and to pay all damages done to said premises by reason of bursting of water pipes, and to shut the water off of the premises whenever it shall be necessary to do so to prevent freezing, does not, where there is only one shut-off for the entire property, require the lessee to turn off water to prevent freezing on other floors, or prevent his holding the landlord liable in case, through his negligence, the pipes burst on an upper floor, to the injury of his property.

*For other cases, see Landlord and Tenant, III. c, 2, b, in Dig. 1-52 N. S.*

**Same — freezing of pipes — injury to tenant's property — liability.**

2. The owner of a tenement building who permits the water to remain in the pipes of a vacant tenement without precautions to prevent freezing when the temperature is such as to endanger it is liable to the tenant of a lower floor whose property is injured by the freezing and bursting of a water pipe.

*For other cases, see Landlord and Tenant, III. c, 2, b, in Dig. 1-52 N. S.*

(Timlin and Kerwin, JJ., dissent.)

(November 18, 1913.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County reversing a judgment of the Civil Court in his favor in an action brought to recover damages for injuries to plaintiff's property by the bursting of water pipes, alleged to have been caused by defendant's negligence. Reversed.

**Note.**—For liability of landlord to tenant for loss due to bursting water pipes, see annotation following this case, post, 244. L.R.A.1917B.

Statement by Vinje, J.:

Action to recover damages sustained by reason of the bursting of water pipes above plaintiff's premises, resulting in damage to goods contained therein. On the 18th day of June, 1911, the plaintiff leased from the defendant for a period of two years from May 1, 1911, the first floor and part of the basement of a three-story building situated in the city of Milwaukee. The printed portion of the lease contained this agreement on the part of the lessee: "To take and use all necessary precautions to prevent damages to any of the water pipes and waterworks upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of bursting of water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so to prevent it from freezing or injuring said pipes and property." Plaintiff occupied the first floor as a store and workshop, and directly above it were two flats, one in the second and one in the third story, which, at the time the lease was executed, were occupied by other tenants of the defendant. At the time the damages were sustained only the third floor of said building was occupied as a flat. There was but one water meter and one set of water pipes for the use of the first floor and the two flats above, and the turn-off was located in the basement, so that, if the water had been turned off there, the tenants on the other floors would have had their water supply shut off. In September the flat on the second floor was vacated, and remained so until the 5th day of January, 1912, when, owing to severe cold, the pipes in the second flat burst, large quantities of water escaped through the floor and ceiling of the premises occupied by the plaintiff and directly upon his stock of goods, a greater portion of which was water-soaked and damaged. At the time the pipes burst there was no heat in the second floor, and the pipes were not protected from frost in any way.

The case was first tried in the civil court, and the judge thereof held the defendant liable, and assessed plaintiff's damages in the sum of \$250, and entered judgment ac-

cordingly. An appeal was taken to the circuit court, which resulted in a reversal of the judgment, on the ground that plaintiff, by the provision of the lease quoted, had agreed to become responsible for any damage done by the freezing or bursting of the water pipes in question. From a judgment entered accordingly, the plaintiff appealed.

Messrs. Alexander & Burke, for appellant:

Defendant cannot escape liability because his act was one of misfeasance, and not malfeasance; he is liable for damage resulting from his failure to perform a known duty.

Jones v. Freidenburg, 66 Ga. 505, 42 Am. Rep. 86; Rosenfield v. Arrol, 44 Minn. 395, 20 Am. St. Rep. 584, 46 N. W. 768; Brunswick-Balke-Collender Co. v. Rees, 69 Wis. 442, 2 Am. St. Rep. 748, 34 N. W. 732; 2 Wait, Act. & Def. 745; Kneeland v. Beare, 11 N. D. 233, 91 N. W. 56, 12 Am. Neg. Rep. 539.

Plaintiff's lease, which imposed upon him the duty to protect the water pipe against freezing, should not be construed as extending to other than the room or rooms actually leased by him.

Conneaut Lake Ice Co. v. Quigley, 225 Pa. 605, 74 Atl. 648; Reinhardt v. Holmes, 143 Mo. App. 212, 127 S. W. 611; Levin v. Habicht, 45 Misc. 381, 90 N. Y. Supp. 349; Randolph v. Feist, 23 Misc. 650, 52 N. Y. Supp. 109; Worthington v. Parker, 11 Daly, 545; Goldberg v. Lloyd, 110 N. Y. Supp. 530; Levy v. Korn, 30 Misc. 199, 61 N. Y. Supp. 1109; Levine v. Baldwin, 87 App. Div. 160, 84 N. Y. Supp. 92.

Messrs. Houghton, Neelen, & Houghton, for respondent:

The defendant landlord was not guilty of negligence which proximately caused plaintiff's injury.

Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Kuhn v. Sol. Heavenrich Co. 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; Buckley v. Cunningham, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826.

In an action ex delicto, brought by a tenant against a landlord, the tenant cannot recover if the landlord is guilty of a nonfeasance.

Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871; Kuhn v. Sol. Heavenrich Co. 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; Buckley v. Cunningham, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826; 18 Am. & L.R.A. 1917B.

Eng. Enc. Law, 218, 219; 24 Cyc. 1072; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738.

The plaintiff was guilty of contributory negligence in failing to turn off the water.

24 Cyc. 1121; Taylor v. Bailey, 74 Ill. 178; Buckley v. Cunningham, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826; McGinn v. French, 107 Wis. 54, 82 N. W. 724.

The plaintiff assumed the risk of damage from bursting pipes.

24 Cyc. 1121; McGinn v. French, 107 Wis. 54, 82 N. W. 724; Buckley v. Cunningham, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826.

The express terms of the lease bar the right of the plaintiff to recover.

Taylor v. Bailey, 74 Ill. 178.

Vinje, J., delivered the opinion of the court:

It appears that plaintiff rented the first story and part of the basement of a three-story building, and that at the time the lease was executed the second and third stories were used as flats. His lease required him to "take and use all necessary precautions to prevent damages to any of the water pipes and waterworks upon said premises, or to any part of said demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of bursting of said water pipes, and to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so to prevent it from freezing or injuring said pipes and property." Do these provisions of the lease obligate the plaintiff to so care for the water pipes that they shall not burst in those portions of the building not leased or used by him?

The provisions are in the printed form of the lease, and we think it quite clear that they were intended to make the tenant responsible only for the pipes in the portion of the premises leased by him; that the words "said premises" refer to the premises leased, and not to the whole building in which they are situated. In the instant case there was a flat in the second story and one in the third story occupied by other tenants of the landlord. It could not have been the intention of the parties that the plaintiff should become responsible for the water pipes in those two flats, to which he had no access, and over which he could exercise no control. True, there was but one shut-off for the store occupied by the plaintiff and the two flats, which was located in the basement, and to which both the plaintiff and defendant had access. But plaintiff could not shut off the water for the second, or vacant, flat without at the same time shutting it off for the third



flat, which was occupied. The only way to prevent the pipes from freezing in the second flat was to heat it, or sufficiently wrap the pipes, as found by the civil court. However, that is immaterial, since, under the terms of the lease, as we construe it, he was chargeable with the condition of the water pipes only in the premises leased by him.

From the time the tenant of the flat on the second floor vacated the same in September up to and including the time the damage was done, the defendant was in possession of it, as was found by the civil court, and as the fact was. Being in possession thereof, irrespective of the relation of landlord and tenant between the parties, it became his duty to exercise ordinary care to so use the same as not to injure plaintiff in the enjoyment of his premises. Knowing that the premises were vacant and unheated, and that the water pipes running through the same to supply the flat on the third story with water were uncovered and unprotected from frost, it was negligence to allow them so to remain during the winter time. For such negligence he became liable to plaintiff, who sustained damage as a proximate result thereof. The case of *Priest v. Nichols*, 116 Mass. 401, is very much in point. The facts and ruling thereon are thus stated by the court: "The plaintiffs occupied as tenants the lower floor of a building belonging to the defendants. The defendants occupied the floor above. There was a pipe leading through the plaintiffs' premises which conveyed the waste water and material from the manufactory, sinks, and water-closet of the defendants to the sewer below. This pipe was alleged to be in charge of the defendants, and evidence was offered that they had so treated it, and had, from time to time, upon notice, made repairs upon it. But they negligently suffered it to be out of repair, whereby the water damaged the goods of the plaintiffs. It was a question of fact for the jury whether the pipe was in charge of the defendants, and was out of repair through their negligence. The rule that a landlord is not bound to keep the premises of his tenant in repair, and therefore cannot be held responsible for negligence, if out of repair, has no application to the facts presented in this case." It was held that plaintiff was entitled to recover. In *Buckley v. Cunningham*, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826, the contrary was held under somewhat similar facts. In the following cases recoveries have been had for the negligent escape of water by a tenant or owner, causing damage to another tenant: *Warren v. Kauffman*, 2 Phila. 259; *Rosenfield v. Arrol*, 44 Minn. 395, 20 Am. L.R.A. 1917B.

St. Rep. 584, 46 N. W. 768; *Killion v. Power*, 51 Pa. 429, 91 Am. Dec. 127; *Curran v. Weiss*, 6 Misc. 138, 26 N. Y. Supp. 8; *Greco v. Bernheimer*, 17 Misc. 592, 40 N. Y. Supp. 677; *Simon-Reigel Cigar Co. v. Gordon-Burnham Battery Co.* 20 Misc. 598, 46 N. Y. Supp. 416; *Miller v. Benoit*, 29 App. Div. 252, 51 N. Y. Supp. 368, affirmed in 164 N. Y. 590, 58 N. E. 1090; *Pike v. Brittan*, 71 Cal. 159, 60 Am. Rep. 527, 11 Pac. 890; *Freidenburg v. Jones*, 63 Ga. 612. See also valuable note in 15 L.R.A. (N.S.) 545 et seq., where most of these and other cases are collected. For additional cases, where it has been held that the landlord is liable to a tenant for the negligent use of part of the premises retained by him, see *Railton v. Taylor*, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; *Hysore v. Quigley*, 9 Houst. (Del.) 348, 32 Atl. 960; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L.R.A. 736, 44 N. E. 238; *Glickauf v. Maurer*, 75 Ill. 280, 20 Am. Rep. 238; *Jackson v. Eddy*, 12 Mo. 209; *Stapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 355.

Judgment reversed, and cause remanded, with directions to affirm the judgment of the Civil Court.

*Siebecker, J.*, took no part.

*Timlin, J.*, dissenting (November 21, 1913):

The civil court for Milwaukee county held the lessor liable to the lessee for damages caused to the goods of the latter by a water pipe freezing and bursting in the vacant apartments next above those of the lessee. This liability was predicated upon negligence of the lessor. The circuit court upon appeal, apparently without investigating the question of negligence, reversed this judgment, on the ground that a covenant in the lease imposed upon the lessee the duty to prevent this freezing. Neither the civil court nor the circuit court passed upon the real questions in the case, nor has this court done so in the majority opinion, whereby the judgment of the circuit court is reversed, and that of the civil court affirmed.

All will concede, I think, that, if the lessor was guilty of negligence which was the proximate cause of the lessee's damage, the lessor would be liable; also that, if the law imposed a duty upon the lessor to cover the water pipes in or heat the vacant apartment, and he failed in that duty, thus causing damage to the lessee, he would be liable, although on this latter proposition there is a distinction made and observed in the law between acts of misfeasance on the part of the lessor and mere nonfeasance on his part. In the latter case he would ordinarily not be liable. In this

state it seems well settled that there is no liability on the ground of implied contract, and that the lessor, if liable at all, must be held liable on the ground of negligence. *McGinn v. French*, 107 Wis. 54, 57, 82 N. W. 724; *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; *Fellows v. Gilhuber*, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307. The rule is the same whether the whole or only part of the premises is leased. *Fellows v. Gilhuber*, supra; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Dowling v. Neubling*, 97 Wis. 350, 72 N. W. 871. An exception to this rule is found where the defect is a concealed one, known to the landlord, and not known to the tenant, and not discoverable by the tenant in the exercise of that degree of care which the law demands of him. *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891, 5 Am. Neg. Rep. 504. The lessor is entitled to no immunity merely because he is lessor, and in all cases in which by law he owes a duty to the lessee, and negligently performs or negligently omits to perform that duty, he will be liable like other persons. Thus in the Georgia cases cited in the majority opinion there was a statute imposing upon the landlord the duty to repair, although this statute is not expressly referred to. (Ga. Code 1868, § 2258; Ga. Code 1883, § 2284; Ga. Code 1895, § 3123; also Ga. Code 1868, § 2949. Where there is no duty imposed by law, there can be no breach of duty, and, where there is no breach of duty, there can be no actionable negligence. *Goff v. Chippewa, River & M. R. Co.* 86 Wis. 237, 245, 56 N. W. 465; *Dowd v. Chicago, M. & St. P. R. Co.* 84 Wis. 105, 116, 20 L.R.A. 527, 36 Am. St. Rep. 917, 54 N. W. 24, 10 Am. Neg. Cas. 486; *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053.

"To constitute actionable negligence, the defendant must be guilty of some wrongful act or breach of positive duty to the plaintiff." *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279. The facts are established by admissions in the pleadings and by the uncontroverted evidence. The findings of the civil court are not important, because they cannot be invoked in support of the judgment appealed from. But, aside from conclusions, they contain nothing in conflict with the uncontroverted facts. The case was before the circuit court for review upon these facts. The testimony is not contained in the printed case, but is in the record, and was before the learned circuit court. There is no material controversy upon the facts. The leased premises were "the first floor and part of basement of the three-story brick-veneered build-

ing, No. 910, Third street, in the thirteenth ward of the city of Milwaukee, same to be used for manufacturing of church goods and retailing." There was a flat or apartment on the second floor, and another on the third floor. Each tenant did his own heating. The basement and first floor were heated by a furnace, fed and attended to by the plaintiff lessee; the second and third floors by stoves, apparently furnished and fed by the lessees of these apartments. There was a water pipe running up from the basement through the first floor and second floor premises, and supplying each of these and the third floor tenant with water. The water-closet mentioned in the lease was in the basement. The only place at which the water could be shut off was in the basement, and was accessible to all tenants; but the water could not be shut off from one tenant without shutting it off from all. The water pipes were everywhere in good condition, but not protected by any covering material. There is no evidence tending to show that the water pipe which burst was near a window or in any way unusually exposed. The tenants each claimed or held a separate part of the basement, and potatoes and other vegetables and coal were kept there; but the shut-off was near the back stairway entrance, and accessible to all. The plaintiff lessee had occupied the same premises at and before the time when the defendant became owner by purchase from Strauss, the former lessor of plaintiff. Upon the defendant's purchase the plaintiff surrendered the lease he had from Strauss, which had several months to run, and the lease in question was made by defendant to plaintiff for the same premises, but at a reduced rental, and the plaintiff had from defendant the key to the second floor apartment and other keys for the purpose of giving the keys to the prospective tenants who might call with a view to renting. The plaintiff lessee, therefore, knew the situation for a longer time than the lessor; he actually occupied the leased premises, while the lessor lived at some distance, but in the same city. Both the lessor and lessee knew when the lease was made that the upper apartments were occupied; both knew that the second floor became vacant some time in the fall, and continued vacant until after the damage occurred; both knew it was cold weather during the first days of January; and both had access to the vacant apartments while they were so vacant. The plaintiff testifies that he did not know where the water shut-off was in the basement; but he agreed in the covenants of his lease to close it for some purposes, and the evidence is entirely silent with reference to the lessor having

any knowledge that the tenant he found in the premises when he bought the property, and who agreed to shut off the water for some purposes, did not know where the shut-off was. The evidence is entirely silent with reference to whether the lessee kept his premises heated during the cold spell, or at what temperature he maintained the air in his first-floor store or room, and is also silent with reference to the knowledge of the lessor concerning the heat maintained by lessee with his furnace in the part of the building occupied by the lessee. But we must, I think, assume that both knew of the diffusion of heat, of the slow cooling of water, of the tendency of heated air and warm water to ascend, and the lessor, being absent, would probably have the right to presume that the lessee, by means of the furnace, maintained in his rooms a temperature of about 70 degrees Fahrenheit, and the upper apartment something about the same. Both knew that the water could not be shut off in the basement from one tenant without shutting it off from the first, second, and third floors, and the lessee knew that in his manufacturing he had occasion to use water 30 times a day, for so he testifies. The water froze in the pipe near the sink in the second floor apartment; but we do not know exactly when this happened. We do know that this caused the pipe to break, and allowed the water to escape upon the second floor on January 3d or January 5th (it makes no difference which), and from thence came through the ceiling upon the goods of the lessee on the first floor, and damaged them. The ceiling seems to have been one which would let water through, but not heat. This must have been some days or hours after the water froze in the pipe and burst it, because ice does not break a pipe until it forms solid in it, and the water escapes some time thereafter.

Now, where is the negligence on the part of the lessor? It seems to be held that he must set up and keep fire in a stove in the vacant second floor apartment in anticipation of the water freezing in the pipe, or that he must go further than to furnish a pipe in good repair and of good quality, and put some kind of a frost-proof cover thereon; and not only this, but he owed this duty to a tenant who, he had reason to believe, knew all about the physical condition and much more than he did about the temperature of the house, and who had it in his power to shut off the water, and to heat his own apartments, and to investigate conditions and temperature in the vacant apartments. Whether or not there was likelihood of the water freezing in and bursting the pipe was largely a matter of L.R.A.1917B.

judgment, depending upon the temperature of the rooms below and above, how long that temperature had been maintained, how cold it might become, and whether the pipes were emptied. He who lived at a distance could not be said to be careless in leaving these things to those in immediate contact with conditions as they existed, especially when he had in his lease the covenants hereinafter noticed. There was simply inaction—nonfeasance—on the part of the defendant, and in a particular in which he owed no duty of diligence to the tenant, unless such duty is imposed on him by a sort of judicial legislation. I think the case deserves the comment found in *Buckley v. Cunningham*, 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826: "To declare as matter of law, growing out of the relationship of landlord and tenant, independent of contractual obligation, that the landlord owed a duty to his tenants, in anticipation of a freeze, to see, for the protection of his tenants, that the water was cut off from the pipes, when the facts show that the tenants have equal authority and privilege to shut the water off, or cause it to be shut off at their request, as the landlord, would be to lay down a rule of law, unwarranted by any just principle, or any precedent which we have discovered."

I have found no case amongst the numerous cases cited in the majority opinion which tends to uphold liability of the lessor under the circumstances of the instant case; but the discerning lawyer will find, I think, most of the cited cases make against such liability. This lease, like other written instruments, must be construed with reference to the known physical condition of the property which is leased. It is quite a mistaken notion of law that we must look into this lease for some covenant on the part of the lessee to absolve the lessor from negligence. Negligence might exist or be absent independently of such covenant. We may consider the covenants of the lease in order to determine whether there was within contemplation of the parties thereunto any duty on the part of the lessor such as the majority opinion imposes upon him.

The lessee covenanted "to keep said premises, including the sewer, outhouse, or water-closet, sidewalk, street, and gutter, clean, and observe all the ordinances of the city," etc. The premises here expressly include more than the demised portion of the building. Immediately following this, and relating to it as the nearest antecedent, is the covenant "to take and use all necessary precautions to prevent damages to any of the water pipes and waterworks upon said premises." This must be taken to mean the premises just said. This view is:

strengthened by the next following part of the sentence, which has no office or meaning unless it refers to something different, "or to any part of said demised premises." So that a fair reading of this covenant is that the lessee shall take and use all necessary precautions to prevent damage to any of the water pipes and waterworks upon said premises, including the sewer, outhouse, or water-closet in the basement, and also to any part of the demised premises, by frost or otherwise, and to pay all damages done to said premises by reason of the bursting of said water pipes. This, as I understand it, casts the duty upon the lessee to protect and prevent damage to any and all water pipes or waterworks which are in the basement or in the first floor.

When we reflect that this shut-off was in the basement, and accessible to the lessee, and that necessary precautions must include shutting off the water when necessary, we have the duty cast upon the lessee of shutting off the water at least for the purpose of preventing certain damage to the pipe "by frost or otherwise." This is made more clear by the following words: "And to turn and let the water out of the pipes in said premises whenever it shall be necessary to do so to prevent it from freezing or injuring said pipes or property." The parties must be held to have known that these pipes of the demised premises could not have been emptied of water or the water shut off without shutting off the water from all above. Therefore, so far as the lessor could grant, and the lessee could undertake, the latter was authorized to shut off the water not only from his own premises, but from those premises on the second and third floor above his. This removes the objection of lack of authority to do so on the part of the lessee. But its most important bearing is upon the question of the diligence of the lessor. The latter knows that the lessee has so undertaken, and is also aware of the superior advantages of the lessee for determining when it might be prudent or necessary to shut off the water. Can it be said that under such circumstances there was contemplated by the parties to this lease any duty on the part of the lessor, living at a distance, to visit the place whenever there was prospect of a cold spell, ascertain the temperature of the lower rooms, estimate the probabilities of the water freezing in the pipes on the second floor, and shut the water off from all the tenants, including the plaintiff? I think not. Under such circumstances was there any duty resting upon the lessor to keep the vacant second floor apartments heated? This would require putting in a stove, furnishing coal, and employing someone to

keep up a fire. No known rule of diligence requires this. There was nothing to suggest the necessity of so doing in the instant case. I do not think it can be said there was any duty of diligence which called upon the lessor to visit the premises in order to ascertain the temperature, or to keep a fire in the vacant apartments, or to furnish frost-proof covering for the pipes. The mode of preventing damages to the pipe in the premises of the lessee was provided for; that is to say, to shut off the water to prevent freezing; and it was not contemplated that any other mode of protection was necessary. It was apparent that the lessee would always be in a better position to determine the chances of freezing than the lessor, because that must always depend in great measure upon whether the water was flowing, upon the temperature of lessee's rooms below, and upon the probability of a fall in temperature; and it would require the lessor not only to foresee these things, but to come a distance in order to perform a duty which the lessee, on the ground, in contact with the appliances in question, and as well able to judge of the probabilities of a fall in temperature, and better able to judge of its effect upon the pipes, undertook to do so far as the part demised to him was affected. The undisputed evidence shows it was not customary for lessors not residing in any part of the leased premises to do such things, and the rule that an ordinarily prudent person under like circumstances would have kept a fire in this vacant room, or covered the pipe passing through such room with some frost-proof covering, is wholly artificial, arbitrary, and unsound. *Buckley v. Cunningham*, supra; *Taylor v. Bailey*, 74 Ill. 178; *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *Cheeseborough v. Green*, 10 Conn. 318, 26 Am. Dec. 396; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; *Fellows v. Gilhuber*, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307; *Dowling v. Nuebling*, 97 Wis. 350, 72 N. W. 871. See also other cases cited in majority opinion.

Negligence cannot be inferred from the fact that the lessor did not put into the premises the latest or best known appliances. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873.

Then, upon the question of contributory negligence. It must be manifest, I think, from the foregoing résumé of the uncontroverted facts that it could not be held that the lessor was negligent without at the same time and upon the same evidence convicting the lessee of contributory negligence. Indeed, the negligence of the lessee

was much the greater of the two, if, we assume that there was negligence on the part of the lessor. The civil court seems to have got over this question of contributory negligence by finding that the covenants of the lease did not require the lessee to preserve that part of the continuous water pipe which extended in and through the second floor apartment. This is not a question of negligence, but a question of covenant. Also by ignoring the fact that the lessee had access to the vacant apartment on the second floor. Also the fact that the lessee knew them to be vacant, and by finding that the lessor had full knowledge that the weather was extremely cold and severe, and omitting to find that the lessee had also such knowledge, and by finding that the lessor knew that

the water pipes would freeze and burst if they were not so protected, and omitting to find that the lessee had the same opportunity for knowledge and greater familiarity and longer and more constant contact with the conditions existing in and about the leased premises. I presume it is intended that it shall become a rule of law in this state that the lessor owes such duty to the lessee under the circumstances herein detailed, and, if this is true, I think it furnishes a sufficient justification for this dissent.

I am authorized to say Mr. Justice Kerwin concurs in this dissent.

Petition for rehearing denied, February 3, 1914.

### **Annotation—Liability of landlord to tenant for loss due to bursting water-pipes.**

As to liability of the landlord for injury to tenant's property by escaping water, see note appended to *LeVette v. Hardman*, ante, 222. And as to his liability for escaping water, due to defective construction, see note to *Levine v. McClenathan*, ante, 235. The present note is confined to cases involving loss to a tenant's property by water or steam escaping from bursting pipes.

#### **Where lessee in possession.**

A tenant whose goods are injured by the bursting of water pipes in a portion of the premises leased by him cannot hold the landlord responsible merely on the ground that the bursting of the pipe was due to the latter's neglect to keep the plumbing in repair, where there is nothing alleged showing any duty on the part of the lessor to make such repairs. *Simons v. Seward* (1887) 22 Jones & S. 407, 7 N. Y. S. R. 55. And on the ground that the lessor was under no duty to repair, in the absence of a covenant to repair, or fraud or deceit, it has been held that the owner of a building is not liable to a tenant of a portion of it for injuries to the latter's stock of goods, caused by a water pipe bursting, due to the failure of the lessor to repair the same after notice of its defective condition. *Charlie's Transfer Co. v. Malone* (1909) 159 Ala. 325, 48 So. 705. Without reference to the question of negligence, the lessor is not liable for an injury to the property of the lessee, due to the bursting of a water pipe located in the lessee's portion of the premises, where there was no other use made of the pipe except to supply water to

him, and this is true although the landlord, at the request of the lessee, undertook to repair it, since such act was gratuitous on his part, and imposed upon him no liability. *McKeon v. Cutter* (1892) 156 Mass. 296, 31 N. E. 389.

As a matter of law the relation of landlord and tenant, independent of contractual obligation, does not impose upon the former the duty to see, for the protection of the tenant, that water is cut off from pipes running through the tenant's apartments to an upper floor, in order to prevent their freezing, where the tenant is equally authorized and privileged to shut the water off or cause it to be shut off. *Buckley v. Cunningham* (1893) 103 Ala. 449, 49 Am. St. Rep. 42, 15 So. 826. And it has been held that the lessee cannot recover for damage to his goods from a bursting water pipe, due to its freezing, although there was a provision in the lease that the lessor should do inside repairs, including plumbing. *Baldwin v. Cohen* (1909) 132 App. Div. 87, 116 N. Y. Supp. 510. Neither is the lessor liable for the freezing and consequent bursting of water pipes attached to a water-closet located in the rooms of a tenant of the upper floor where the escaping water injured the goods of the tenant of the lower floor, if the tenant of the upper floor was in the exclusive possession and control of the rooms wherein the pipe was located, except that the lessor had contracted to remove any obstructions to the pipes and repair the same if they froze and burst. *Dudley v. Lewis Shoe Co.* (1912) 113 Va. 41, 78 S. E. 433.

**Where lessor in possession.**

Where water pipes were installed in a building as a protection from fire, and not for the use of the tenants, and they were in the lessor's possession, he is liable for injury to the goods of a tenant through whose rooms the pipes run, due to their freezing and bursting, owing to his negligence in failing to take reasonable precautions to prevent such freezing. *Adams Grain & Provision Co. v. Chesapeake & O. R. Co.* (1916) 118 Va. 500, 88 S. E. 171. And it has been held that where the landlord has control of water pipes conducting water to different parts of the building for the use of different tenants, he is liable for injury to the goods of a tenant, caused by water escaping from a bursting pipe, where he negligently failed to cut off the water pipes on an unusually cold night, and the pipes froze and burst. *Keoughton Lodge v. Steiner* (1907) 106 Va. 589, 56 S. E. 569, 10 Ann. Cas. 256. So, where the landlord, having possession and control of a hall, negligently left open a door and transom, knowing of the danger of water pipes freezing, he is liable to a tenant of a portion of the premises whose property was damaged by the water escaping from a pipe which froze and burst. *Dreeves v. Schoenberg* (1912) 82 N. J. L. 335, 82 Atl. 530. And where the lessor was in possession of vacant flats on the second floor of a building, it was negligence on his part to leave waterpipes in an unprotected condition during freezing weather, and where, as a result thereof, they froze and burst and the escaping water injured the goods of a tenant of a lower floor, the lessor is liable for the loss resulting. *Morover v. Fox*, ante, 238.

The lessor of an apartment house is liable to the lessee of an apartment for an injury to his goods, caused by the bursting of a steam radiator, due to its defective condition, owing to the negligent failure of the former to keep it in repair, although the lease was silent as to the lessor heating the apartment. *O'Hanlon v. Grubb* (1912) 38 App. D. C. 251, 37 L.R.A.(N.S.) 1213.

**— necessity of showing negligence.**

Merely showing that water had escaped from a pipe which had burst does not show negligence on the part of the defendant, but it must also appear that the bursting of the pipe was due to some defect in it for which the defendant is answerable, or that it was through some neglect on his part that it

burst. *Rudolphy v. Fuchs* (1872) 44 How. Pr. (N. Y.) 155. Even where the landlord retains possession and control of the roof of the building, his duty to the tenants is merely to keep in a reasonably safe condition the appliances for carrying off rain water therefrom, and for an injury caused by the bursting, during a storm, of a drain pipe used to carry off the rain water, he is not liable, where there is no evidence to show a prior defective condition of the pipe, or any reasonable omission on his part to ascertain its condition. *Clifton v. Mackauf* (1914) 87 Misc. 105, 150 N. Y. Supp. 555. So, where, by means of a cistern located on an upper floor, water is stored for the benefit of the different tenants of the building, the landlord is not liable for damage to the goods of one of the tenants, caused by the bursting of a service pipe connecting with the cistern, where the pipe was reasonably fitted and proper for the purpose for which it was intended, and no negligence on the part of the landlord is shown. *Anderson v. Oppenheimer* (1880) L. R. 5 Q. B. Div. (Eng.) 602, 49 L. J. Q. B. N. S. 708.

The landlord, however, is liable for damage by water escaping from bursting pipes, which burst because of his negligence. And a count is sufficient to support a default judgment where it avers that the plaintiff is the lessee of the defendant, that his goods were injured by bursting water pipes maintained by the defendant, and that the latter knew of the defective condition of such pipes, and negligently failed to repair the same or cut off the water. *Werten v. K. B. Koosa & Co.* (1910) 169 Ala. 258, 53 So. 98. So, where the lessor of premises demised to different tenants, in calling to the attention of the tenant of an upper floor cut-off for water pipes, to be turned off in the winter time to prevent their freezing, neglected to call his attention to one of these cut-offs, and its existence was not suspected by the tenant, and in turning off the water he did not turn it off from this pipe, with the result that it froze and burst and the escaping water injured the goods of a tenant of the lower floor, the question of the negligence of the lessor is for the jury. *Martindale Clothing Co. v. Spokane & E. Trust Co.* (1914) 79 Wash. 643, 140 Pac. 909, 6 N. C. C. A. 993.

**— as affected by limitation-of-liability provision.**

Under a lease providing that all

merchandise, furniture, and property of every kind which may be on the premises during the continuance thereof is to be at the sole risk and hazard of the lessee, and if the whole or any part thereof shall be destroyed or damaged by fire, water, or by the leaking or bursting of water pipes, or in any other way or manner, no part of such loss or damage is to be charged to or borne by the lessor in any case whatsoever,—the lessee cannot hold the lessor responsible for damage resulting to him from the bursting of water pipes in that portion of the premises leased to another tenant. *Fera v. Child* (1874) 115 *Mass.* 32; *Henry H. Tuttle Co. v. Phipps* (1914) 219 *Mass.* 474, 107 N. E. 354. Compare with *MORODER v. Fox*, ante, 238, holding that a provision obligating the lessee of the first floor of a building to take all necessary precautions to prevent damage to any of the water pipes upon the said premises, or to any part of the demised premises by frost or otherwise, and to pay all damages done to the premises by bursting water pipes, and to let the water out of the pipes when necessary to prevent their freezing, did not impose upon the lessee the duty of turning the water off of pipes running through his portion of the premises to upper floors, although there was but the one set of pipes for the entire building; and that hence, where the pipes located in an upper flat in the possession of the lessor froze and burst, injuring the goods of the covenanting lessee, he could nevertheless hold the lessor responsible for the damage resulting where the latter negligently failed to protect these pipes against freezing while the flat was vacant and unheated.

#### **Negligence of another tenant.**

Where a water supply pipe was not

dangerous when the premises were demised, but it subsequently burst and water escaped therefrom, due to the failure of a tenant to keep the rooms sufficiently warm to prevent the pipe from freezing, the lessor is not liable to another tenant for injury to his goods, caused by the escaping water. *Leonard v. Gunther* (1900) 47 *App. Div.* 194, 62 *N. Y. Supp.* 99. So, where the injury to the goods of the lessee of a lower floor of a block was caused by a water pipe bursting, due to the negligence of a tenant of an upper floor, the lessor is not liable therefor. *Greene v. Hague* (1882) 10 *Ill. App.* 598.

#### **Contributory negligence.**

Where the lessee of a building neglected to turn off the water in pipes leading to a water-closet, and the pipes froze and burst, he cannot hold the lessor liable for the resulting injury to his goods. *Taylor v. Bailey* (1874) 74 *Ill.* 178. Compare with *MORODER v. Fox*, ante, 238.

The failure of the tenant of an apartment to have repaired a small leak in a steam radiator, or to turn off the steam when temporarily leaving the apartment, does not constitute contributory negligence. *O'Hanlon v. Grubb* (1912) 38 *App. D. C.* 251, 37 *L.R.A. (N.S.)* 1213.

#### **Counterclaim or set-off.**

When sued for rent, the lessee, who remains in possession of the premises, cannot set up as a defense that his goods were damaged by water pipes bursting in a portion of the leased premises under the control of the landlord, and which burst because not properly protected from freezing. *Dimmock v. Daly* (1880) 9 *Mo. App.* 354.

A. G. S.

### **MAINE SUPREME JUDICIAL COURT.**

RACHEL YORK

v.

HERBERT L. WYMAN.

(— Me. —, 98 *Atl.* 1024.)

#### **New trial — prejudicial statement in presence of juror.**

1. A new trial will be granted in case a relative of plaintiff states in the hearing of a juror that material witnesses for defend-

ant had lied and that plaintiff should get the case, whether the juror was influenced or not.

*For other cases, see New Trial, III. c, in Dig. 1-52 N. 8.*

#### **Same — prejudice of juror.**

2. Bias on the part of a juror sufficient to justify a new trial is shown where, in response to a statement in his hearing that material witnesses for defendant had lied and that plaintiff should have the case, he stated that he thought so to, and that so far as he was concerned he would.

*For other cases, see New Trial, III. d, in Dig. 1-52 N. 8.*

**Note.** — For attack out of court, in presence of jurymen, upon credibility of witness as ground for new trial, see annotation following this case, post, 248. *L.R.A.* 1917B.

(November 6, 1916.)

**ON MOTION** by defendant to set aside a verdict rendered in the Supreme Judicial Court for Somerset County in plaintiff's favor and to grant a new trial for misconduct of a juror. Motion granted.

The facts are stated in the opinion.

Mr. George W. Gower, for defendant:

If the juror prejudged the case, or if his conduct or that of Tuskin "might have influenced his mind," or "was of such a nature as to have any tendency to influence it,"—the verdict should be set aside; it not appearing "that there is no possibility that the juror was unaffected" by such misconduct.

*Driscoll v. Gatcomb*, 112 Me. 289, L.R.A. 1915B, 702, 92 Atl. 39; *Heffron v. Gallupe*, 55 Me. 563; *Belcher v. Estes*, 99 Me. 314, 59 Atl. 439; *Shepard v. Lewiston*, B. & B. Street R. Co. 101 Me. 591, 65 Atl. 20; *Harrington v. Worcester*, L. & S. Street R. Co. 157 Mass. 579, 32 N. E. 955; 29 Cyc. 799; 1913 Cyc. Ann. 3249; *Tomlinson v. Derby*, 41 Conn. 269; *Bennett v. Howard*, 3 Day, 219; *Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468; *Luttrell v. Maysville & L. R. Co.* 18 B. Mon. 291; *Norcross v. Willard*, 82 Vt. 185, 72 Atl. 320.

Messrs. Merrill & Merrill for plaintiff.

**Philbrook, J.**, delivered the opinion of the court:

This case comes to us upon a special motion by the defendant, who asks that the verdict against him be set aside, and a new trial granted, because of the misconduct of a member of the jury which rendered that verdict.

From the testimony presented in support of the motion it appears that while the case was still pending, and before the arguments of counsel had been made or the presiding justice had delivered his charge to the jury, a member of the panel was at a livery stable in the town where the trial was in progress, for the purpose of stabling his horse. While there, a man, related to the plaintiff by marriage, stated to or in the presence and hearing of this juror, according to the testimony of one witness, that the defendant and his wife, both being material witnesses, had "lied like hell and that he hoped the woman (meaning the plaintiff) would get the case." To which the juror replied "that he thought so too, and as far as he was concerned they would." According to the testimony of another witness the man stated "that Wyman and his wife had sworn to a lie, or to that effect, and that the case should be decided to the woman" (meaning the plaintiff); and that the juror replied, "I think so too."

This incident did not come to the knowledge of the defendant, or his attorney, until after the verdict had been rendered.

More than once, and in no uncertain language, we have placed the seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the court room, but also upon the indiscretion of their friends along the same line. And we have not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror. *Heffron v. Gallupe*, 55 Me. 563; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Belcher v. Estes*, 99 Me. 314, 59 Atl. 439; *Shepard v. Lewiston*, B. & B. Street R. Co. 101 Me. 591, 65 Atl. 20; *Driscoll v. Gatcomb*, 112 Me. 289, L.R.A. 1915B, 702, 92 Atl. 39. In a sister jurisdiction we find *Nesmith v. Clinton F. Ins. Co.* 8 Abb. Pr. 141, cited in *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449, where it was proved that during the trial of an action in which there was much conflicting evidence, a juror listened to the statements of a third party, attacking the credibility of the defendant's witnesses. The court held that when it appears that the jury have been approached in such a manner as might have influenced the verdict, it should be set aside, without reference to the source or the motive of the interference. This latter case bears strong resemblance to the one at bar. In *Cilley v. Bartlett*, 19 N. H. 312, one of the parties, in the presence and hearing of one or more of the jury, asserted in the most positive terms that the testimony of one of the most material witnesses for his opponent was utterly and absolutely false. He claimed that he did not know any one of the jury was present at the time, but the justice who announced the opinion of the court said: "Whether he knew this fact or not, is not a matter that can be readily proved. But there will be no security for the proper administration of justice, if a party, while his case is on trial, can be permitted to make statements denouncing his opponent's witnesses, during the adjournment, after the jury have separated, whether he is aware of the presence of a juror or not. . . . The presumption is that when jurors hear such statements they are more or less affected by them."

In that case new trial was granted for the reasons just given.

But we do not stop with the phase of the case already discussed. The testimony shows statements made by the juror which should not be overlooked. In *Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468, it was



stated as a well-known rule that where, during the progress of the trial, and before the submission of the case, a juror has made statements outside the jury room concerning the case, or evidence offered therein, indicating a fixed opinion unfavorable to the moving party, or ill will towards him, it is ground for a new trial. In *Tomlinson v. Derby*, 41 Conn. 268, a new trial was ordered because one of the jurors sitting on the case assented to a statement made to him outside the jury room, by a person other than a juror, to the effect that if the trial should continue fifteen or twenty days, and the plaintiff should recover \$5,000, he would have nothing left after paying the expenses of the suit. The same juror, at another period of the trial, said substantially to another person, not a juror, that if the plaintiff should recover \$5,000 there would be nothing left after paying

the expenses of the case. In *Wightman v. Butler County*, 83 Iowa, 691, 49 N. W. 1041, a juror informed one not connected with the case "that he had made up his mind how he should decide it, and that the lawyers could not change him." This statement was made before the evidence was closed, and the court ordered a new trial.

Many other authorities might be cited, but we deem it unnecessary to go farther. Either the possible influence upon the mind of the juror by the statements made in his hearing as to the credibility of the defendant and his wife, or his own statement indicating a fixed purpose on his part as to how he would vote when the verdict was under consideration, would afford grounds for sustaining the defendant's motion.

Motion granted.

New trial ordered.

### **Annotation—Attack out of court in presence of jurymen, upon credibility of witness as ground for new trial.**

*Cilley v. Bartlett* (1849) 19 N. H. 312, is set out with sufficient detail in *YORK v. WYMAN*, ante, 246, and fully supports the holding in that case.

And in *Nesmith v. Clinton F. Ins. Co.* (1858) 8 Abb. Pr. (N. Y.) 141, which is also cited in *YORK v. WYMAN*, a verdict was set aside and a new trial ordered where it appeared that a certain person made himself very active in the case, and had several conversations with one of the jurors during which he told the juror that he knew that some of the witnesses for one of the parties would swear to anything for a dollar, the court saying: "When a jury has been improperly approached, it is not easy to prove who or what moved the person to tamper with them. It is enough that they have been tampered with in such manner as might have influenced their verdict, and in every such case the court will set the verdict aside without hesitation."

These cases are also supported by cases in which an attack is made in the presence of a juror, upon one of the parties to a case, which tends to affect his credibility. Thus, in *Welch v. Taverner* (1889) 78 Iowa, 207, 42 N. W. 650, a new trial was ordered because one who was not a member of the jury slept in the room with the jurors and had conversations with one or two of them in which he made statements reflecting upon the character of the plaintiff and

tending to affect prejudicially his credibility.

And in *State v. Landry* (1903) 29 Mont. 218, 74 Pac. 418, it was held that the trial court did not abuse its discretion in granting a motion for a new trial on the ground that at a view by the jury of a mare which defendant was accused of stealing but which he claimed to own, persons present indicated to the jury by their actions, or by sounds of derision uttered, a belief as to the ownership of the mare, whether such persons intended their actions to influence the jury or not.

In *State v. Ayer* (1851) 23 N. H. 301, it appears in the statement of facts that a witness for the prosecution, while in the presence of one of the jury, said to others that he had come to testify against some of the lying scamps that defendant had for witnesses, and made other remarks derogatory to defendant; but in its opinion the court mentioned only the remarks derogatory to the defendant and refused to set aside the verdict, it appearing that the witness ceased speaking when he saw that the juror was present, and stated that he did not know that any juror was present when he made the remarks, and that the juror told him afterward that he did not take any notice of the conversation; and it further appeared that the witness was not attempting to influence the juror and that he was not employed to do so. R. L. S.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

ROLLO S. HEWITT, Employee.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Employer.

CASUALTY COMPANY OF AMERICA, Insurer, Appt.

(— Mass. —, 113 N. E. 572.)

**Master and servant — injury to insurance agent — arising out of employment.**

Injury to an insurance agent by the overturning of the automobile of a prospective customer, in which he had taken passage because of the opportunity afforded him of pressing the claims of the policy which he offered, does not arise out of his employment within the meaning of the Workmen's Compensation Act, where he was not acting under direct orders, but on his own initiative.

For other cases, see *Master and Servant, II*, a, 1, in Dig. 1-52 N. S.

(September 14, 1916.)

**A**PPEAL by the insurer from a judgment of the Superior Court for Suffolk County affirming an award of compensation by the Industrial Accident Board to an insurance agent in a proceeding under the Workmen's Compensation Act to recover compensation for personal injuries received by him. Reversed.

The facts are stated in the opinion.

Messrs. Peabody, Arnold, Batchelder, & Luther, for appellant:

The injury was not one arising "out of" Hewitt's employment.

Trim Joint Dist. School v. Kelly [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. L. T. 141, 7 B. W. C. C. 274, Ann. Cas. 1915A, 104; Weekes v. Stead [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398, 6 N. C. C. A. 1010; Mitchinson v. Day Bros. [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190; Clayton v. Hardwick Colliery Co. 7 B. W. C. C. 643; Milliken's Case, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; Fumiciello's Case, 219 Mass. 486, 107 N. E. 349; Slade

v. Taylor, 8 B. W. C. C. 65; Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 750, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495; Sheldon v. Needham, 111 L. T. N. S. 729, 30 Times L. R. 590, 58 Sol. Jo. 652, 7 B. W. C. C. 471; Williams v. Smith, 108 L. T. N. S. 200, 6 B. W. C. C. 102; Edwards v. Wingham Agri. Implement Co. [1913] 3 K. B. 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50, 6 B. W. C. C. 511; Kinghorn v. Guthrie [1913] S. C. 1155, 50 Scot. L. R. 863, 6 B. W. C. C. 887; Warner v. Couchman [1912] A. C. 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177; Craske v. Wigan [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35.

The injury was not one arising "in the course of" Hewitt's employment.

Jibb v. Chadwick [1915] 2 K. B. 94, [1914] W. N. 52, 84 L. J. K. B. N. S. 1241, 112 L. T. N. S. 878, 31 Times L. R. 185, 8 B. W. C. C. 152; Whitfield v. Lambert, 84 L. J. K. B. N. S. 1378, 112 L. T. N. S. 803, 138 L. T. Jo. 292, 8 B. W. C. C. 91; Lee v. The St. George, 7 B. W. C. C. 85; R. & J. McCrae v. Renfrew [1914] S. C. 539, 51 Scot. L. R. 467, 7 B. W. C. C. 898; Butt v. Provident Clothing & Supply Co. 6 B. W. C. C. 18; Everitt v. Eastaff, 6 B. W. C. C. 184.

Messrs. H. F. Hathaway and J. E. Warner for the employee.

Pierce, J., delivered the opinion of the court:

The findings of the Industrial Accident Board in substance are: That Rollo S. Hewitt was in the employ of the John Hancock Life Insurance Company as an insurance agent attached to its office in Taunton, Massachusetts, previously to and on September 23 and 24, 1913; that it is customary for insurance agents to see prospective customers whenever and wherever it is most convenient and agreeable for such persons to be seen by them; that Hewitt at different times had talked with one Pierce on life insurance; that Pierce, having occasion to go in his automobile to Providence, Rhode Island, and desiring further to discuss the policy, invited Hewitt to accom-

**Note.** — The American cases on the question as to what injuries are deemed to arise out of and in the course of the employment are discussed at pages 232 et seq. of the annotation in L.R.A.1916A, 23, covering the general subject of workmen's compensation acts; the English cases on the question being discussed at pages 40 et seq. Spe. L.R.A.1917B.

cifically, as to recovery of compensation for an injury to employee while on the street, see annotation following Hopkins v. Michigan Sugar Co. L.R.A.1916A, 314.

For later cases and annotation, consult the L.R.A. Digests and Indexes to Notes covering volumes subsequent to L.R.A.1916A, under the title "Workmen's Compensation."

pany him; that the trip, in the going and returning, was expected to be made in three hours; that Hewitt went, believing that he could further the interests of his employer and have another chance to close the contract of insurance; that as a result of the discussion had during the night of September 23, 1913, Pierce decided to take out a policy; that shortly before reaching Providence the machine broke down; that the machine was repaired during the forenoon of September 24, 1913; that after some slight delay they started back; that at about 1:15 A. M., just after passing the Taunton line, the machine "turned turtle," throwing out and injuring both Hewitt and Pierce. The only question is whether this accident was one arising out of and in the course of the employment of Hewitt.

The field of Hewitt's employment, measured and limited, not by material space, but by his ability to find, interest, and retain as customers, persons interested in providing for the whole or partial future independence of themselves and of those dear to them, in a sense was boundless. The time for work and the manner and method to be followed in its successful pursuit necessarily rested in the judgment of the agent, founded upon his experience and skill. In going to Providence, Rhode Island, the agent plainly did not leave the field within which he was authorized to work for his employer; nor, in availing himself of the opportunity for legitimate persuasion granted to him by Pierce, did he violate any express or implied condition of his employment.

In the prosecution of the business of soliciting insurance Hewitt was independent. While authorized and expected to go where there was any reasonable prospect of securing a customer, his time and his method of procedure were his own. He might travel on foot, on horseback, by trolley, train, or automobile. He might write, telephone, or telegraph. He was wholly free as to time, place, or weather. Under such circumstances, when one accepts an invitation to ride an injury received is not "occasioned by the nature of the employment."

The danger incident to the use of an automobile is not a "causative danger" "peculiar to the work," but is a risk which is common to all persons using one. The injury cannot be said reasonably to have been contemplated as the result of the exposure of the employment. *Sheldon v. Needham* [1914] W. C. & Ins. Rep. 274, 30 Times L. R. 590, 58 Sol. Jo. 652, 7 B. W. C. C. 471; *Slade v. Taylor* [1915] W. C. & Ins. Rep. 53, 8 B. W. C. C. 65; *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. Compare *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242.

It becomes unnecessary to decide whether Hewitt was an employee within the meaning of the Workmen's Compensation Act.

The decree of the Superior Court appealed from is reversed, and a decree must be entered declaring that the employee has no claim against the insurer.

So ordered.

#### MINNESOTA SUPREME COURT.

C. A. P. TURNER, Appt.,  
v.

FRANK A. RANDALL et al., Respts.

(— Minn. —, 159 N. W. 958.)

#### Witness — protection from suit.

1. A resident of another state who comes into this state as a witness in a cause pending in one of our courts, and who is entitled to protection from the service of process while attending, does not lose the protection by not departing from the state on the first train after the termination of his service as such witness.

*For other cases, see Writ and Process, II. d, 2, in Dig. 1-52 N. S.*

Headnotes by BROWN, Ch. J.

Note. — As to privilege of suitor or witness from service of process as affected by route taken or time consumed, see annotation following this case, post, 252. L.R.A.1917B.

#### Same — delay in leaving state.

2. Whether by taking a later train, within nine hours after the termination of his service, when other trains direct to the home of the witness left the state at an earlier hour, he unreasonably delayed his departure from the state, presented a question of fact, and it is held that the court below did not err in holding that the delay was not unreasonable.

*For other cases, see Appeal and Error, VII. l, in Dig. 1-52 N. S.*

(November 17, 1916.)

**A**PPEAL by plaintiff from an order of the District Court for Hennepin County setting aside the service of process on defendants in an action brought to recover damages for alleged conspiracy to defraud plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Booth & McDonald, for appellant:

Defendants delayed their departure from the state for an unreasonable time.

Woodruff v. Austin, 15 Misc. 450, 37 N. Y. Supp. 22; Chaffee v. Jones, 19 Pick. 260; Finucane v. Warner, 60 Misc. 336, 112 N. Y. Supp. 137; Linton v. Cooper, 54 Neb. 438, 69 Am. St. Rep. 727, 74 N. W. 842; Strong v. Dickinson, 1 Mees. & W. 487, 150 Eng. Reprint, 527, 5 Dowl. P. C. 86, 2 Gale, 83, 1 Tyrw. & G. 683, 5 L. J. Exch. N. C. 231; Mullen v. Sanborn, 79 Md. 364, 25 L.R.A. 72, 47 Am. St. Rep. 421, 29 Atl. 522.

**Messrs. Benton & Morley**, for respondent Jensen:

A witness need not take the first train in order to be exempt from service of process.

Barber v. Knowles, 77 Ohio St. 81, 14 L.R.A.(N.S.) 663, 82 N. E. 1065, 11 Ann. Cas. 1144; Wilbur v. Boyer, 1 W. N. C. 154; Tyrone Bank v. Doty, 2 Pa. Dist. R. 558; Hatch v. Blisset, Gilb. L. & Eq. Rep. 309, 93 Eng. Reprint, 338.

The holding of the lower court is in accord with sound public policy.

Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549.

**Mr. A. B. Darellus** for respondent Randall:

Taking all things into consideration, defendant Randall did not waive his exemption from service by staying in Minneapolis from 11 o'clock A. M. to 8 o'clock P. M. when he left for his home in Chicago by the usual route of travel.

Northwestern F. & M. Ins. Co. v. Connecticut F. Ins. Co. 105 Minn. 483, 117 N. W. 825; Cochran v. Toher, 14 Minn. 385, Gil. 293; Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308; Wilbur v. Boyer, 1 W. N. C. 154; Hayes v. Shields, 2 Yeates, 222; Tyrone Bank v. Doty, 2 Pa. Dist. R. 558; Kinne v. Lant, 68 Fed. 436; Ex parte Hall, 1 Tyler (Vt.) 274; Parker v. Marco, 136 N. Y. 585, 20 L.R.A. 45, 32 Am. St. Rep. 770, 32 N. E. 989; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; Pitt v. Coomes, 5 Barn. & Ad. 1078, 110 Eng. Reprint, 1091, 3 Nev. & M. 212; Lightfoot v. Cameron, 2 W. Bl. 1113, 96 Eng. Reprint, 658; Ex parte Clarke, 2 Deacon & C. Bankr. Cas. 99; Mahon v. Mahon, 2 Ir. Eq. Rep. 440; Hatch v. Blisset, Gilb. L. & Eq. Rep. 308, 93 Eng. Reprint, 338.

**Brown, Ch. J.**, delivered the opinion of the court:

Defendants both reside at Chicago, in the state of Illinois. They came to this state, one as a party and witness, the other solely as a witness, in attendance upon the trial of an action pending in the district court of Hennepin county. The trial of the ac-

tion ended by an order of dismissal on February 18, 1916, at 11 o'clock A. M. Immediately thereafter defendants proceeded directly to a railroad ticket office and purchased tickets for their return to Chicago, making reservations upon a train leaving Minneapolis at 8 o'clock in the evening of that day, upon which train they departed from the state. During the afternoon of the 18th, and subsequent to the dismissal of the action, defendants were both served with the summons in this action. Thereafter upon motion the service was set aside upon the ground that defendants were exempt therefrom by reason of the fact that their presence in the state was for the sole purpose to attend the trial as witnesses of the action referred to. Plaintiff appealed.

Plaintiff does not question the rule that the resident of another state who has in good faith come into this state as a witness in a cause pending in one of our courts is exempt from the service of process in a civil action brought against him, providing he acts reasonably and does not delay his departure from the state for an unreasonable time after the termination of his service as such witness. *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549. The claim is that the court below erred in not holding that defendants delayed their departure from the state for an unreasonable time. In this we do not concur. The claim of delay is predicated upon the fact that other trains upon the same and other railroads by regular schedule left for Chicago much earlier on the day the trial ended than the train selected by defendants, and that by not taking one of them defendants lost the protection of the rule. There were other trains over this and other roads, with leaving time all the way from 3 o'clock in the afternoon to 6:45 in the evening. But the rule requiring a departure from the state within a reasonable time is not so exacting as to impose upon the party the duty of making hot pursuit of the first train out of the state. No hard and fast requirements attend the rule, and no precise time for departure can be stated as applicable alike to all cases. Much necessarily depends upon the situation and surroundings of each case, and the question resolves itself into one of fact. *Linton v. Cooper*, 54 Neb. 440, 69 Am. St. Rep. 727, 74 N. W. 842. And though there were earlier trains which defendants in this case could have taken, we are clear that the court was not required to find that their failure to do so was unreasonable within the proper meaning and purpose of the rule. *Parker v. Marco*, 136 N. Y. 585, 20 L.R.A. 45, 32 Am. St. Rep. 770, 32 N. E. 989; *Barber v. Knowles*, 77

Ohio St. 81, 14 L.R.A.(N.S.) 663, 82 N. W. 1065, 11 Ann. Cas. 1144, and cases there cited.

The other question suggested by counsel

for plaintiff on the oral argument is not presented by the record, and is not therefore considered.

Order affirmed.

### **Annotation—Privilege of suitor or witness from service of process as affected by route taken or time consumed.**

This note is a continuation of the one to Barber v. Knowles, 14 L.R.A.(N.S.) 663.

As to exemption of suitor or witness from service while in an intermediate state en route to or from trial, see annotation following Sofge v. Lowe, L.R.A. 1916A, 734.

Generally as to exemption of nonresident party from service of civil process while in state in connection with case, see notes to Long v. Hawken, 42 L.R.A.(N.S.) 1101; Vaughn v. Boyd, L.R.A. 1915A, 694; and Burroughs v. Cocke, L.R.A.1916E, 1173.

As to right of nonresident to exemption from service of process while within a jurisdiction pursuant to condition of bail bond, see notes to Netograph Mfg. Co. v. Scrugham, 27 L.R.A.(N.S.) 333, and Ex parte Hendersen, 51 L.R.A.(N.S.) 328.

As to privilege of suitor or witness in Federal court from arrest or service of summons issued out of state court, see note to Chanler v. Sherman, 22 L.R.A.(N.S.) 992.

The rule, set out in the earlier note, that the amount of time which a witness or suitor may consume and still retain the benefit of his privilege, covers a reasonable time for both going to and returning from the place of trial, is sustained by the following later cases, which show what constitutes a reasonable time:

#### **After necessity for presence of party or witness has ceased.**

Supplementing note in 14 L.R.A.(N.S.) 664.

In TURNER v. RANDALL, ante, 250, it was held that a delay by a nonresident witness of nine hours after the termination of the trial in leaving the state was not unreasonable, although a number of trains direct to his home left before the one which he took.

The service of an order of arrest in a civil action upon a nonresident very shortly after the close of a hearing at which he testified before a referee in involuntary bankruptcy proceedings against him, and while he was proceed-

ing from the office of the referee to that of his attorney, will be vacated upon the ground that he was entitled to a reasonable time to return to the place from which he came, and that the delay to consult with his attorney was not unreasonable. Goldsmith v. Haskell (1907) 120 App. Div. 403, 105 N. Y. Supp. 327, appeal dismissed without opinion in (1907) 189 N. Y. 536, 82 N. E. 1126.

In Gibbons v. Tuttle, Newfoundl. Rep. (1906) 186, where a member of a United States firm doing business in Canada went to the latter place to testify in insolvency proceedings against the firm, and, upon the dismissal of the petition after the giving of his testimony, booked his passage for New York by a steamer scheduled to leave the place of trial nine days later, and before the steamer sailed was arrested upon civil process, the order for his arrest was discharged upon the ground that his delay in the city was not unreasonable or sufficient to deprive him of his privilege as a witness.

In Bunce v. Humphrey (1915) 214 N. Y. 21, 108 N. E. 95, where one voluntarily came from a foreign country for the purpose of being a witness in a prosecution by the United States, and after arrival within the jurisdiction of the court was served with a subpoena requiring him to remain in attendance until dismissed by the court or the attorney general, and, after the submission of the case to the jury, but before the rendition of a verdict, was served with a summons, it was held, upon the reversal of an order denying a motion to set aside the service of the summons, that in view of the fact that the case had not been terminated by a verdict, there was nothing in the contention of the respondent that any grace which the witness might have enjoyed during the pendency of the trial had expired, and that he should have left the state before the service was made.

But where a nonresident came from his home to redeem his property from a foreclosure sale, and exchanged his equity of redemption for other land, it

was held that he lost his immunity from service of process by a delay of one day, after the consummation of the exchange, in taking the regular evening train to his home, assuming that such exchange constituted a redemption, that the immunity of a nonresident redemptioner would cover all of the time necessary to make the redemption, and that a proceeding to redeem was such a proceeding as to entitle a nonresident redemptioner to immunity from service of process while actually engaged in redeeming and for a reasonable time in coming from and returning to the state of his domicile. *Groundwater v. Town* (1916) — Wash. —, 160 Pac. 1055.

And in *Burroughs v. Coeke* (1916) — Okla. —, L.R.A.1916E, 1170, 156 Pac. 196, where a nonresident who came into a state to attend upon the taking of depositions to be used in the trial of an action instituted by him in his own state was held to have forfeited his privilege because he transacted other business than that connected with the taking of the depositions, the appellate court said that in leaving on the same day that the taking of the depositions was completed, it would ordinarily appear that he left within a reasonable time, but the trial court found to the contrary, and as it understood all of the surrounding facts and circumstances, heard all of the evidence introduced upon both sides, and doubtless knew the train schedule, they were not disposed to disturb such finding.

**Before presence of party or witness has become necessary.**

Supplementing note in 14 L.R.A. (N.S.) 666.

In *State ex rel. Wolcott v. Biedler* (1916) — Del. —, 99 Atl. 278, directors who came from another state to testify in an action against their corporation and were served with process before their presence became necessary, were held not to have been at the place of trial an unreasonable time before the taking of testimony was commenced, where it appeared that they arrived on the 1st and 2d of February, and were served on the latter day at 9.30 o'clock A. M., and that at 11 o'clock on that day the taking of the testimony was begun and they were called as witnesses on the 8th, 10th, and 14th of February.

**During adjournment.**

Supplementing note in 14 L.R.A. (N.S.) 667.

A nonresident attending before a referee in involuntary bankruptcy proceedings against him does not lose his privilege from arrest in a civil action by remaining during a three-day adjournment, where he is required to be in attendance on the adjourned day either for such cross-examination as may be desired, or to sign the testimony which has been already given on the prior hearing. *Goldsmith v. Haskell* (1907) 120 App. Div. 403, 105 N. Y. Supp. 327, appeal dismissed without opinion in (1907) 189 N. Y. 536, 82 N. E. 1126.

G. V. I.

**MISSISSIPPI SUPREME COURT.**  
(Division B.)

**ÆTNA INSURANCE COMPANY, Appt.,**  
v.

**S. L. HEIDELBERG.**

(— Miss. —, 72 So. 852.)

**Insurance — interest of conditional vendor — illegal use of property.**

1. Insurance on the interest of a conditional vendor in household furniture is not vitiated by the fact that the vendee uses it for conducting a house of ill fame; at least, if, at the time of loss, such business had been discontinued and the furniture was in charge of a watchman.

For other cases, see *Contracts*, III. c, 1, in Dig. 1-52 N. S.

Note. — As to insurance on bawdyhouse or furniture therein, see annotation following this case, post, 257.  
L.R.A.1917B.

Same — classification — valued policy.

2. Furniture sold under conditional sale and put in use by the vendee is classed as household furniture within the meaning of a valued-policy law, and not as part of the seller's stock in trade.

For other cases, see *Insurance*, VI. c, 1, in Dig. 1-52 N. S.

Same — property of vendee.

3. A policy covering the interest of a conditional vendor in household furniture does not include property sold for cash after the execution of the policy, although it is mingled with that covered by the policy.

For other cases, see *Insurance*, III. d, 1, in Dig. 1-52 N. S.

(November 13, 1916.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Forrest County in plaintiff's favor in an action brought to recover the amount alleged to be due

on a fire insurance policy. Modified on suggestion of error.

The facts are stated in the opinion.

Messrs. McLaurin & Armistead, for appellant:

Neither party to an illegal contract or to a contract made in reference to conducting an illegal business can enforce it, whether that business is *malum in se* or *malum prohibitum*.

Woodson v. Hopkins, 85 Miss. 171, 70 L.R.A. 645, 107 Am. St. Rep. 275, 37 So. 1000, 38 So. 298; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 263, 53 L. ed. 505, 29 Sup. Ct. Rep. 280; Conithan v. Royal Ins. Co. 91 Miss. 396, 18 L.R.A. (N.S.) 214, 124 Am. St. Rep. 701, 45 So. 361, 15 Ann. Cas. 539; Dominion F. Ins. Co. v. Nakata, 52 Can. S. C. 204, Ann. Cas. 1916C, 1063; Bruneau v. Laliberte, Rap. Jud. Quebec, 19 C. S. 425.

Section 2592 of the Code of 1906, and the Act of 1912, amendatory thereof, were not enacted by the legislature for the purpose of protecting merchants in their title to merchandise, although the merchandise in question may perchance be furniture and household goods.

4 Cooley, Briefs on Ins. p. 3485; 1 Clement, Fire Ins. 96; Standard Sewing Mach. Co. v. Royal Ins. Co. 201 Pa. 645, 51 Atl. 354; Chippewa Lumber Co. v. Phenix Ins. Co. 80 Mich. 116, 44 N. W. 1055; German Ins. Co. v. Everett, — Tex. Civ. App. —, 36 S. W. 125; Germier v. Springfield F. & M. Ins. Co. 109 La. 341, 33 So. 361.

The contract of sale made by the plaintiff to Marie Warwick, or to Nettie Wilson, was not an enforceable contract at law.

Anheuser-Busch Brewing Asso. v. Mason, 44 Minn. 318, 9 L.R.A. 506, 20 Am. St. Rep. 580, 46 N. W. 558; Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 145; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 220, 18 Pac. 758; State v. Wilson, 73 Kan. 334, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737; Sun Mut. Ins. Co. v. Searles, 73 Miss. 62, 18 So. 544.

Messrs. Sullivan, Conner, & Sullivan, for appellee:

A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful.

Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105; Phenix Ins. Co. v. Clay, 101 Ga. 331, 65 Am. St. Rep. 307, 28 S. E. 853; National F. Ins. Co. v. United States Bldg. & L. Asso. 21 Ky. L. Rep. L.R.A.1917B.

1207, 54 S. W. 714; Mechanics' Ins. Co. v. C. A. Hoover Distilling Co. 31 L.R.A. (N.S.) 873, 105 C. C. A. 128, 182 Fed. 590; Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 421; Jefferson v. Burhans, 29 C. C. A. 481, 58 U. S. App. 586, 85 Fed. 949; Kansas City Hydraulic Press Brick Co. v. National Surety Co. 93 C. C. A. 132, 167 Fed. 496.

It is no defense to a contract that has been performed by the promisee that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation.

Jenson v. Toltec Ranch Co. 98 C. C. A. 60, 174 Fed. 86; Wald's Pollock, Contr 3d ed. 485; Armstrong v. Toler, 11 Wheat. 258, 273, 6 L. ed. 468; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 421; Waterbury v. McKinnon, 77 C. C. A. 294, 146 Fed. 737; Ingraham v. National Salt Co. 65 C. C. A. 54, 130 Fed. 676; Taylor v. North Star Gold Min. Co. 79 Cal. 285, 21 Pac. 753; Illinois Trust & Sav. Bank v. Pacific R. Co. 117 Cal. 332, 49 Pac. 197; Holman v. Johnson, Cowp. pt. 1, p. 341, 98 Eng. Reprint, 1120; Faikney v. Reynous, 4 Burr. 2069, 98 Eng. Reprint, 79; Pellecat v. Angell, 2 Crompt. M. & R. 311, 150 Eng. Reprint, 135, 1 Gale, 187, 5 Tyrw. 945, 4 L. J. Exch. N. S. 326; Hodgson v. Temple, 5 Taunt. 181, 128 Eng. Reprint, 656, 1 Marsh. 5, 14 Revised Rep. 738; Marion Trust Co. v. Crescent Loan & Invest. Co. 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 691; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; First Nat. Bank v. Dove-tail Body & Gear Co. 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Thompson v. Lambert, 44 Iowa, 239.

Defendant is bound by the contract as written, and the valued-policy law applies to it.

Hartford F. Ins. Co. v. Schlenker, 80 Miss. 680, 32 So. 155; Western Assur. Co. v. Phelps, 77 Miss. 658, 27 So. 745.

Stevens, J., delivered the opinion of the court:

This case was affirmed without opinion, but in view of the earnestness and confidence with which counsel for appellant press the suggestion of error that was filed in due time, we are stating briefly the reasons that induced us to affirm the case. The appellee in this case, a retail furniture dealer,

entered into a contract of insurance with appellant, whereby appellant insured appellee against all loss or damage by fire to an amount not exceeding \$2,400 "on their interest in the household furniture of every description, useful and ornamental, while contained in the two-story, frame, shingle building occupied by Marie Warwick as a female boarding house, situate on the east side of Dewey street of Hattiesburg, Mississippi. It is understood that this property is under contract of sale to Marie Warwick, title being retained by the assured until all deferred payments are made, and this policy covers only on any interest that the assured may have in the property at the time of any loss or damage by fire."

Mr. Heidelberg had, in due course of business, on June 14, 1913, sold and delivered the articles covered by this policy to the said Marie Warwick, for a total consideration of \$2,630.75, and the numerous articles so sold had been delivered to and were under the control of Marie Warwick when the contract of insurance was entered into. On or about April 8, 1914, Marie Warwick having failed to pay for the goods in question, they were turned over to Heidelberg under his retained title contract, and appear to have been under Heidelberg's control from that date until about the 13th day of April, following, when they passed into the possession and under the control of one Nettie Wilson. The latter left the property in the house formerly occupied by Marie Warwick, and the house was in the care of a servant or watchman until the 18th day of April, when the property so insured was totally destroyed by fire. The proof shows that Marie Warwick was a keeper of a house of ill fame at the time she purchased the furniture. She made certain payments on the property, reducing the amount to \$2,175.65. On April 13th the day that appellee resold the property to Nettie Wilson, he notified Mr. King, the agent of appellant, of the change of ownership, and also advised Mr. King that he had sold a few additional articles of household furniture and furnishings to Nettie Wilson, the total purchase price of which was \$74.35, thereby making the total balance claimed against Nettie Wilson of \$2,250. Appellee requested the agent to make the necessary notation on his records, and to this request Mr. King replied: "All right, I will take care of that. I will fix it all right." Mr. King is the regular local agent of the company at Hattiesburg, with authority to countersign policies, and, in fact, wrote the policy of insurance in this case. Appellant, defendant in the court below, filed several pleas. A demurrer was interposed and sustained to the third plea, in L.R.A.1917B.

which appellant submitted that "the plaintiff says that the defendant ought not to be entitled to recover anything on this contract because the purchaser or purchasers of the property in question, the subject of the insurance, and the owner of it at the time the contract of sale was made, and practically continuously thereafter until the fire, was engaged in an illegal and immoral business, to wit, she or they were the proprietresses or keepers of a house of ill fame," of which appellee had notice, etc.

This is the main point of law relied upon by counsel for a reversal of this case. Upon this question the fact must be kept in mind that the subject of this insurance, that is, the household furniture and furnishings, were purchased by Marie Warwick on credit, some fifteen days prior to the issuance of the policy in question, and at the time the contract of insurance was written the furniture no longer constituted a part of appellee's stock of merchandise, but had been set up by Marie Warwick in her dwelling house and was being used for the purposes for which the property was adapted and purchased. It therefore constituted household furniture when Mr. Heidelberg protected his insurable interest therein. This case does not involve the right of Mr. Heidelberg to collect the purchase price of the property either from Marie Warwick or Nettie Wilson. They purchased the property and were the equitable owners thereof, while Heidelberg, in the eyes of the law, simply held the contract that gave him, not the rights of an absolute owner, but security for his debt. In obtaining the insurance, Heidelberg paid the premium of \$60, and the contract is one directly between Heidelberg and the insurance company. In our judgment, the illegal and immoral business conducted by the purchaser of this property cannot and does not vitiate the contract of insurance, which indemnifies the merchant, and not the keeper of the house of ill fame. It is said by the Supreme Court of the United States, speaking through Chief Justice Marshall, in *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468: "If the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act."

And: "A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful."

The case of *Ocean Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. ed. 105, involved a contract



of insurance upon a schooner owned by Polleys and sailing under a false and fraudulent certificate of registry, in violation of the laws of the United States. It was contended that the contract of insurance was void. The Supreme Court, speaking through Mr. Justice Story, overruled this contention "upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist, or advance any such illegal purpose. We all know that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote."

The case of *Phoenix Ins. Co. v. Clay*, 101 Ga. 331, 65 Am. St. Rep. 307, 28 S. E. 853, involved a policy of insurance on a house leased by the owner to a woman of ill fame, and with knowledge that the house was being used for purposes of prostitution. The court says: "The policy was for a valuable and legal consideration and for what appears on its face to be a good and lawful purpose. It was made not to protect the business of keeping a lewd house, but to protect the property of the owner of the building. Even were the owner the person conducting this illegal business, the policy would be issued to him, not as one engaged in such business, but as the owner of the property insured; not to protect him against the consequences of the illegal business, but against accident to his property. . . . A consequence so negative in its character, so remote in its effect, is one which cannot be said in law to promote or to tend to promote the maintenance of these houses. Such policy of insurance can be said to promote the illegal business only by failing to discourage it; to aid it only by declining to throw obstacles in its way," etc.

Our own court held in the case of *Conithan v. Royal Ins. Co.* 91 Miss. 386, 18 L.R.A. (N.S.) 214, 124 Am. St. Rep. 701, 45 So. 361, 15 Ann. Cas. 539, that "a policy of fire insurance issued to the keeper of a bawdyhouse upon furniture used therein is not void because of the unlawful business conducted there."

The court, in its opinion, observes: "She could have conducted and carried on her bawdyhouse as well without the insurance policy as she could with it. The only effect of the insurance policy was that, in case her property was lost by fire, she should have an indemnity for the loss of the property; but the contract did not even remotely aid or assist her in the conduct of this business. . . . The keeping of the bawdyhouse was an independent, illegal transac-

tion, which the insurance policy in no way aided or promoted."

If the keeper of a bawdyhouse can herself obtain a valid contract of insurance, then certainly the merchant who has a lien upon the same property should be accorded the right to protect his insurable interest. Furthermore, the proof does not show that Nettie Wilson was using the property for immoral purposes, but, on the contrary, the house in which the furniture was situated was not being occupied by Nettie Wilson at all, but was in the care of a watchman at night, and this with the full knowledge and assent of appellant's agent.

There is no merit in the contention that the property insured should not be classed as household furniture, but should be regarded as a part of appellee's stock of merchandise. The contract expressly insured the property as household furniture; the various articles had been severed from the stock, delivered to the purchaser, put in order, and were actually being used as household furniture, and must in fact be so classed. Our valued-policy law therefore applied, and appellant was not justified in attempting to show the actual cash value of the property, or its depreciation, or the amount it would cost to replace it. Appellant had the right of inspection at the time the insurance was written, and by writing the policy in question it is concluded, under the terms of our statute, on all questions of valuation, and cannot now be heard to say that the property was or is not worth the amount at which it is insured.

This record shows, however, that certain lace curtains, bedspreads, cuspidors, and other specified articles were, on April 13th, sold by appellee directly to Nettie Wilson, and constituted, therefore, no part of the subject of the insurance at the time the policy was executed. While the agent was requested to embrace these articles in the policy, no indorsement to this effect was in fact made, and the policy does not in terms cover these articles. Their value is shown to be \$74.35. They were not originally subject to the retained-title contract entered into between appellant and Marie Warwick. In affirming this case without an opinion we were, as to this item, led into error by assuming that the amount of recovery did not exceed the face of the policy, and therefore appellant has no complaint. We now think, however, that inasmuch as the proof clearly shows that these articles were sold long after the policy was written, and sold not to Marie Warwick, but to Nettie Wilson, they do not come within its protection. It is our judgment that the suggestion of error should be sustained to the extent of

reducing the judgment \$74.35, the allowance of which constituted error on the part of the court below. We also think the costs

of the appeal should be taxed against appellee.

Suggestion of error sustained in part.

### Annotation—Insurance on bawdyhouse or furniture therein.

This note is supplementary to the note appended to *Conithan v. Royal Ins. Co.* 18 L.R.A.(N.S.) 214, where the earlier cases are collected.

*ÆTNA INS. CO. v. HEIDELBERG*, ante, 253, in taking the view that fire insurance placed upon property which is being used in conducting a bawdyhouse is not so connected with the carrying on of the illegal or immoral business as to be void on the grounds of public policy, is in accord with the weight of authority passing upon that specific question.

In *Morin v. Anglo-American Ins. Co.* (1910) 3 *Alberta L. R.* 121, the court sustained the right to recover from an insurance company on a policy of fire insurance issued in favor of the owner of a house which, at the time the policy was written, was used as a bawdyhouse, and was described in the policy as a "sporting house," the court saying: "I cannot see that the question of insurance or no insurance upon the building could have any bearing by way of encouragement or otherwise upon the business—that of a bawdyhouse—carried on in the building insured. To my mind the insurance was wholly collateral and independent of the immoral business."

In *Trites-Wood Co. v. Western Assur. Co.* (1910) 15 *B. C.* 405, it was held that a fire insurance policy in favor of a lien holder in a building which was used as a bawdyhouse, and was described in the insurance policy as a "sporting-house," and insured at a special rate provided for such buildings, in excess of the rate for ordinary dwellings, was enforceable against the insurance company after loss sustained by fire, such policy not being considered opposed to public policy, *Macdonald, C. J. A.*,—saying: "The insurance of property is one of the things useful for the ordinary purposes of life. Such protection is no more contributory to the immoral trade carried on by the owner of these premises than are the necessities of life. A policy of insurance is not one of those things which would appear not to be required except for an immoral purpose. It was not an inducement to the assured to build and furnish a house for immoral purposes. It was to protect their property from those risks of destruction against which those in every walk of life protect themselves. It was contended in the case L.R.A.1917B.

that the charging of a higher rate by the insurance company because of the nature of the risk amounted to a division of profits of the immoral business; but this argument was answered by *Macdonald, C. J. A.*, upon the ground that it did not appear by the evidence that the assured was aware that she was being charged a higher rate on account of the character of her house, but that, for all that appeared from the evidence, she may have thought she was making the ordinary contract of insurance and paying the ordinary risk payable by respectable householders, and therefore the higher rate could not be urged against her; and it was further answered by *Martin, J. A.*, with whom concurred *Gallagher, J. A.*, who said: "I see no good reason why a higher rate should not, if necessary, be charged on a bawdyhouse solely because of an increased hazard in the risk. The owner of such property is entitled to protect herself from loss by means of a fire policy just as well as by other means, and who shall say that it would be against public policy for a shopkeeper to enter into a contract with her to supply a dozen ordinary fire extinguishers, or for a carpenter to put a row of water barrels on the roof, or for a plumber to put in water pipes or hose attachments, even though they knew what the house was being used for. Common sense dictates that such bald business transactions necessary for the protection of property and life must be upheld."

In writing his opinion in the above case, *Martin, J. A.*, discussed the case of *Morin v. Anglo-American Ins. Co.* (*Alberta*) supra, and pointed out as differences between the two cases that while, in the case under discussion, the insurance was effected on a building "while occupied as a sporting house," and that the word "while" was absent in the *Morin* Case, and also in the *Morin* Case the unlawful use of the premises had ceased before the fire, whereas in the case under consideration it had continued until that event, stated that he did not think such differences altered the principle, but that the use of the word "while" is nothing more than a descriptive addition, and that so long as there was nothing more than a mere knowledge on the part of the insurers of the purposes

for which the building was used, as distinguished from an active intent that it should be so used, the contract was valid.

In *Electrova Co. v. Spring Garden Ins. Co.* (1911) 156 N. O. 232, 35 L.R.A. (N.S.) 1216, 72 S. E. 306, it was held that a mechanical piano placed in a house of ill fame by a dealer with the hope of selling it to the proprietress was covered by a floating policy of insurance upon all the pianos in certain towns, belonging to the insured, which policy would cease to cover the particular piano in question in case a sale was made to the proprietress of the house, and was enforceable against the insurance company, the public interest, un-

der the facts, being entirely too remote to justify a court in refusing its aid to plaintiffs to enforce such payment.

The only case since the publication of the earlier note which takes a view contrary to that held in *ÆTNA Ins. Co. v. HEIDELBERG*, ante, 253, is *Dominion F. Ins. Co. v. Nakata* (1915) 52 Can. S. C. 294, Ann. Cas. 1916C, 1063, in which a majority of the court held that a policy of fire insurance upon a house and the furniture therein, which was used as a bawdyhouse, and was described in the policy as a "sporting house," was invalid as opposed to public policy, the court being divided three to two upon the question. R. L. S.

#### NEBRASKA SUPREME COURT.

SAMUEL J. COFFMAN

v.

MATT MALONE, Appt.

(98 Neb. 819, 154 N. W. 726.)

**Evidence** — that contract was not to be enforced.

Parol evidence is admissible to show that the parties to the suit had mutually agreed that a written contract which plaintiff is seeking to enforce was never to be performed, but was a mere sham, executed for the purpose of influencing the conduct of a third person.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

(October 30, 1915.)

**A**PPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover an amount alleged to be due under a written contract for the sale of plaintiff's interest in a live stock commission business. Reversed.

The facts are stated in the opinion.

Messrs. Murphy & Winters, for appellant:

Parol testimony is admissible to show the purpose for which a written instrument apparently binding on its face was executed, even though it may add to, vary, or contradict the terms of the written instrument.

Headnote by MORRISSEY, Ch. J.

**Note.** — For competency of parol evidence to show that a writing was not intended to create legal relations, but was executed as a sham, see annotation following this case, post, 263.  
L.R.A.1917B.

*Collingwood v. Merchants' Bank*, 15 Neb. 121, 17 N. W. 359; *Norman v. Waite*, 30 Neb. 302, 46 N. W. 639; *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050; *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37; *Franklin State Bank v. Chaney*, 94 Neb. 1, 142 N. W. 537; *Franklin State Bank v. Gettle*, 96 Neb. 60, 146 N. W. 1017; *Exchange Bank v. Clay Center State Bank*, 91 Neb. 835, 137 N. W. 845; *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Donisthorpe v. Fremont, E. & M. Valley R. Co.* 30 Neb. 142, 27 Am. St. Rep. 387, 46 N. W. 240; *Williams v. First Nat. Bank*, 45 App. Div. 239, 60 N. Y. Supp. 1105, affirmed in 167 N. Y. 594, 60 N. E. 1122; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Burke v. Dulahey*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; *Miller v. Henderson*, 10 Serg. & R. 290; *Grierson v. Mason*, 60 N. Y. 394; *Pym v. Campbell*, 6 El. & Bl. 370, 119 Eng. Reprint, 903, 25 L. J. Q. B. N. S. 277; *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860; *Cake v. Pottsville Bank*, 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302.

Parol testimony is admissible to show that the written instrument does not contain the full contract, but is part of a larger agreement.

*Dodd v. Kemnitz*, 74 Neb. 634, 104 N. W. 1069; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Wehnes v. Roberts*, 92 Neb. 696, 139 N. W. 212, Ann. Cas. 1914A, 452; *Collingwood v. Merchants' Bank*, 15 Neb. 121, 17 N. W. 359; *Ferguson v. Rafferty*, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484, approved in *Wehnes v. Roberts*, 92 Neb. 696, 139 N. W. 212, Ann. Cas. 1914A, 452; *Barnett v. Pratt*, 37 Neb. 352,

55 N. W. 1050; *Reiner v. Crawford*, 23 Wash. 669, 83 Am. St. Rep. 848, 63 Pac. 516; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775; *Oakland Cemetery Asso. v. Lakins*, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559; *Golden v. Meier*, 129 Wis. 14, 116 Am. St. Rep. 935, 101 N. W. 27; *Holmes v. First Nat. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. 1011; *Jasper v. Currie*, 69 Neb. 4, 94 N. W. 995.

It would be a fraud to allow a party who induced another to sign a contract for a certain purpose, to insist on the contract as written, when it was not intended to be of binding force.

*Miller v. Henderson*, 10 Serg. & R. 290; *Gandy v. Weckerly*, 18 L.R.A.(N.S.) 434, note, 220 Pa. 285, 123 Am. St. Rep. 691, 69 Atl. 858; *Ferguson v. Rafferty*, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484.

A contract will be treated as abandoned where the acts of one party, inconsistent with its existence, are acquiesced in by the other.

*Hall v. Eccles*, 46 Neb. 880, 65 N. W. 1058; *Schultz v. Hastings Lodge*, 90 Neb. 454, 133 N. W. 846; *Herpolshelmer v. Christopher*, 74 Neb. 352, 9 L.R.A.(N.S.) 1127, 107 N. W. 382, 111 N. W. 359, 14 Ann. Cas. 399.

Subsequent agreement or modification of a written instrument may be proved by parol testimony.

*Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860; *Morrissey v. Schindler*, 18 Neb. 672, 26 N. W. 476; *Delaney v. Linder*, 22 Neb. 274, 34 N. W. 630; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775.

*Messers. Smyth, Smith, & Schall* for appellee.

*Morrissey, Ch. J.*, delivered the opinion of the court:

Amos Snyder, Matt Malone, and Samuel J. Coffman owned all of the capital stock in a corporation called the Snyder-Malone-Coffman Company, which was doing a live stock commission business in South Omaha. During the fall of 1912, slight differences as to the conduct of the business arose, and December 12th the following writing was drawn up and signed by the parties:

South Omaha, Neb., Dec. 12, 1912.

We, Amos Snyder, and S. J. Coffman, have this day sold our interest in the Snyder-Malone-Coffman Company to Matt Malone. The said Amos Snyder to receive \$1,500 for his interest, and said S. J. Coffman is to receive \$1,000 for his interest, and said business is to be turned over to Matt Malone on December 31st, at 6 o'clock p. m., and all bills to be paid up to that time, that is, owed by the firm of Snyder-L.R.A.1917B.

Malone-Coffman Company, and after the bills are all paid, each Snyder and Coffman can draw out the balance they have to their credit. Amos Snyder has received on this contract \$200, two hundred dollars, and S. J. Coffman has received \$100, one hundred dollars. This contract made and signed by Amos Snyder, S. J. Coffman, and Matt Malone, this 12th day of December, 1912.

Amos Snyder.

S. J. Coffman.

Matt Malone.

December 31, 1912, Snyder delivered his stock, tendered his resignation as president of the corporation, and received from Malone the balance due. Four or five days thereafter, the articles of incorporation were redrafted and Coffman and Malone signed the same. Coffman made no assignment of his stock, and neither made nor tendered his resignation as an officer of the corporation until January 15, 1913, when he made an assignment of his stock and tendered the same, together with his resignation, to Malone, and demanded the amount stipulated in this writing. Malone refused to receive the stock or resignation or to pay over the money, and Coffman brought suit upon the contract. Malone by answer alleged that the writing was executed for the sole purpose of purchasing the interest of Amos Snyder, but it was drawn in the form set out because they wanted Snyder to believe that Coffman was also retiring from the business; that there was a contemporaneous oral agreement between him and Coffman that, as between them, it was not to be performed; that there was no delivery of the writing to Coffman, and that the check which was delivered was not to be cashed, but was to be returned again by Coffman to Malone. There is an allegation, also, that after Snyder retired from the business, and after the expiration of the time fixed by this writing for the transfer of Coffman's stock, Coffman participated in the election of himself as secretary of the company, and that he continued to act for and in behalf of the company until January 15, 1913; that under their oral agreement Malone was to transfer certain of Snyder's shares of stock to Coffman, which Malone was ready and willing to do, but Coffman did not have the money to pay therefor, and upon Malone's refusal to accept Coffman's note in lieu of cash, Coffman attempted to repudiate the oral agreement and to enforce this writing. A jury was waived and the cause tried to the court. Oral testimony was admitted in support of the allegations of the answer. But at the conclusion of the trial, on motion of the plaintiff, the court struck from

the record the testimony which had been received in proof of the oral agreement, and entered judgment for plaintiff for the amount due under the writing.

There are three assignments of error; but, as the one directed against the ruling of the court in striking this evidence goes to the merits of the whole controversy, it is the only one we will consider. If the ruling in that regard is correct, the judgment is warranted by the pleadings and the proof. No doubt the court relied upon the general rule laid down in *Mattison v. Chicago, R. I. & P. R. Co.* 42 Neb. 545, 60 N. W. 925, and quoted as authority in *Nebraska Land & Feeding Co. v. Trauerman*, 70 Neb. 795, 98 N. W. 37, wherein it is held: "Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract, and the result of which would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms,"—while the appellant contends that the rule invoked does not apply, and that a party who has been induced to sign a written contract for a certain purpose is entitled to offer oral testimony, not for the purpose of varying its terms, but for the purpose of showing that it was never intended to be a contract, or to be of binding force between the parties. It is not contended that the contract is ambiguous or incomplete, but that plaintiff and defendant were working together for a common purpose; that in furtherance of this common purpose it was executed in its present form; that they were not dealing one with the other, but were jointly dealing with Snyder; that in the very nature of things the writing could not contain the agreement between Coffman and Malone because that would defeat its purpose. If there was no intention on the part of either party to observe the terms of this writing, as between them, this writing was not the contract. This evidence was not offered with the view of contradicting, varying, or explaining the language employed in the written instrument, but to establish a fact or circumstance collateral to the original writing, which would control its effect or operation as a binding engagement. On either theory the writing is precisely what both parties intended it to be. If there was an express agreement between Coffman and Malone that it was not to be carried out, Malone in signing was acting not alone for himself, but also for the plaintiff, and in that event, it never became a binding obligation.

"The existence of a written contract or  
L.R.A.1917B.

instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite*, 30 Neb. 302, 46 N. W. 630.

In *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050, in discussing a somewhat similar question, the court said: "It is settled by a considerable line of authority that, where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument."

The doctrine laid down in *Norman v. Waite*, supra, has been reiterated in *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37, and *Exchange Bank v. Clay Center State Bank*, 91 Neb. 835, 137 N. W. 845, and is the settled rule in this state. This evidence having been erroneously stricken from the record, it follows that the judgment of the District Court must be reversed and the cause remanded.

Fawcett and Hamer, JJ., not sitting.

Rose, J., concurring:

The question presented by the record seems to be: Is parol evidence admissible to show that the parties to the suit had mutually agreed that a written contract which plaintiff is seeking to enforce was never to be performed, but was a mere sham, executed for the purpose of influencing the conduct of a third person? The question is a sensitive one, because an error in its solution may result either in a departure from the rule which forbids the use of parol evidence to vary a written instrument, or in rewarding a wrong by closing the door to judicial scrutiny. The supreme court of Vermont has answered the question in the negative. *Conner v. Carpenter*, 28 Vt. 237; *Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130. The better reasoning, however, and the weight of authority, seem to be to the contrary. In 4 *Wigmore on Evidence*, § 2406, it is said: "Conduct which is to be given legal effects must be jural in its subject; . . . i. e., must concern legal relations, not relations of friendship or other nonlegal relations. . . . In all such cases, therefore, the

conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was understood by the parties not to have legal effect. Ordinarily, the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a member of the family, and to a writing representing merely a family understanding. It is, of course, also applicable to the signature of an attesting witness. When the document is to serve the purpose of a mere sham, this principle in strictness exonerates the makers; but a just policy would seem to concede this only when the pretense is a morally justifiable one (as, to calm a lunatic or to console a dying person), and not when it is morally beyond sanction."

In *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.* 91 Md. 61, 46 Atl. 513, a suit upon an advertising contract, defendant pleaded that the "paper writing was not intended to create, and did not create, any legal relationship whatsoever; that said paper was signed by the defendant upon the request of the plaintiff's agent, in order that the plaintiff or its agents might show the same to other persons dealing with the plaintiff, in order to induce such other persons to pay the rates for advertising mentioned in the contract, and that it was distinctly understood that the paper writing was not a contract between the parties thereto, and that the bringing of a suit thereon is a fraud upon the defendant."

The court said: "The rule against parol evidence to vary or contradict the terms of an agreement in writing is well settled by the courts. It is earnestly insisted upon the part of the appellee that this rule has no application to this case, because the testimony was offered not for the purpose of varying or contradicting the contract, but to show that the parties to the writing never intended it to be a contract or as the binding record of a contract. We think the court below was right in admitting the evidence. . . . We come then to the evidence as set forth in the bills of exception, and we think it is clear that it was competent for the purposes offered, that is, not to vary or contradict the terms of the written instrument by parol, but to show that such contract had no force, efficacy, or effect, because it was not intended to operate as the record of a binding contract between the parties."

In *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275, the court approved and followed the preceding case, saying: "Although parol evidence is inadmissible to L.R.A.1917B.

vary or contradict the terms of a written agreement, it is well settled that such evidence is admissible to show that a particular written paper 'was never intended as a contract or as the binding record of a contract between the parties.' And this has been held to be true even though the paper writing in question be in the form of a contract and bear the signatures of those named in it as the contracting parties. We distinctly held this to be the law upon the authority of many cases, both English and American, cited by us in *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.* supra. The Supreme Court of the United States in *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816, upon a review of the cases upon this subject, reached the conclusion there stated in its opinion, that 'the rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such an agreement at the time the suit is brought. But the rule has no application if the writing was not delivered as a present contract, and parol evidence was admissible to show that there never was any concluded binding contract entitling the party who claimed the benefit of it to enforce its stipulations.'" See also *Birely v. Dodson*, 107 Md. 229, 68 Atl. 488.

In *Humphrey v. Timken Carriage Co.* 12 Okla. 413, 75 Pac. 528, "the defendant offered evidence to show that the order for the goods, which is made the basis of plaintiff's action, was given at the solicitation of the plaintiff's agent, Slusser, who represented that he had sold a carload of goods to B. F. Berkey, but that Berkey was involved financially, and it was feared that a shipment to Berkey would involve the Timken Carriage Company with other creditors; that if he, Humphrey, would sign the order for the goods, he would not be held liable for them; that it would be used only for the specific purpose of enabling the Timken Carriage Company to sell and ship goods to Berkey without danger of having them attached by other creditors; and that the order was signed for this and for no other purpose."

The court sustained the defense, saying: "Admitting that the order so signed was a contract in writing, was it not competent to prove that it was not intended as such, and was in fact executed and delivered for an entirely different and specific purpose? Under the law as generally accepted and enforced in this country, parol evidence is not competent to change or vary a written agreement; but when does a writing become an agreement? Certainly not until it is assented to in the sense that its tenor purports. As between the parties, a written

instrument which is understood to have a particular import and meaning cannot, by one of the parties thereto, without the knowledge or consent of the other, be so diverted from the purpose of its execution as to fix other and new liabilities not contemplated when made. Such a construction of the law wholly destroys the definition which time-honored customs and rules have given to contracts, to wit, that two minds must meet and consent."

In *Grierson v. Mason*, 60 N. Y. 394, defendant offered proof that a contract relied upon by plaintiff was not intended to be a contract between the parties, but was executed to enable defendant to procure advances upon goods, and that the contract was delivered to the parties making the advances. The court said: "The object of the testimony was to show that the instrument was executed for a specific purpose, and that purpose, being accomplished, was of no effect in changing the contract previously made with the defendant. I think that it was competent evidence for this purpose. The defendant had made out a contract. The plaintiff proved an instrument which altered the contract, and the defendant had a right to prove that the instrument introduced was not intended as an alteration of the contract, but with a view of accomplishing a particular purpose. Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy, or effect; that it was not intended to be a contract, but merely a writing to be used in inducing Woods to make advancements upon the goods. This is in avoidance of the instrument, and not to change it, and I do not see why the testimony was not as competent in this case as it would be to show that a written instrument was obtained fraudulently, by duress, or in an improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony, but tends to explain the circumstances under which such an instrument was executed and delivered, or to show that it was canceled or surrendered."

In *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 Atl. 827, the defendant to the bill in equity answered that the contract to purchase the lands was entered into merely for "selling purposes." The court said: "He rests his defense upon the ground that the agreement, while signed by his client, was to have no binding effect upon him. I think his position is well taken, and I agree with his view of the case. In *O'Brien v. Paterson Brewing & Malting Co.* 69 N. J. Eq. 117, 61 Atl. 437, practically all the questions involved in this issue are thor-

oughly and exhaustively discussed by the learned vice chancellor. This case, it seems to me, establishes the rule that if the parties to an agreement stipulated at the time that it was made that it was to have no binding effect upon them, then, notwithstanding their execution of the agreement, such a contract is of no force and effect at law or in equity. The rule, now so well established in equity, admitting parol evidence to show for what purpose the written agreement was executed, was properly invoked by the defendant. The evidence leaves no doubt in the court's mind that in this issue the agreement between the complainant and the defendant was made for the purpose as stated by the latter and his witnesses. It is inequitable and unjust, therefore, for the complainant to enforce the agreement of April 13th."

*Western Mfg. Co. v. Rogers*, 54 Neb. 456, 74 N. W. 849, appears to hold that the evidence is inadmissible, but is distinguishable. This case is cited and followed in *State Bank v. Belk*, 56 Neb. 710, 77 N. W. 58, where *Burke v. Dulaney*, supra, quoted in the Maryland decisions, is distinguished on the ground that there "never was any complete, final delivery of the writing as the promissory note of the makers, payable at all events and according to its terms."

The distinction between the Nebraska cases cited and the present case is pointed out in 4 *Wigmore on Evidence*, § 2435, where it is said: "An extrinsic agreement, providing a condition qualifying the operation of a written obligation is, of course, equally ineffective; for an obligation absolute is plainly exclusive of a condition. So far as the present principle is concerned, there is no doubt. But by the general principle of delivery (ante, § 2410), no conduct becomes effective as a legal act if its consummation is suspended until the happening of a condition precedent; and hence such a condition precedent to the existence of the obligation may always be established, and has the effect of destroying the apparent obligation of the writing embodying the draft of the act. The difficulty is to distinguish whether, in a given case, the condition is such a precedent one, or whether it is a subsequent one, such as the present principle forbids recognizing. Here some subtlety of construction may be required."

In a note the author says: "Sometimes the illustrations of this principle, that a transaction which is a sham is without the scope of legal acts, are hard to distinguish from those cases where the transaction is in substance a legal one, but the understanding is that it shall be merely nominal; here, in effect, one party agrees to

hold the other party harmless, and this involves rather the rule about varying a document's terms." 4 Wigmore, Ev. § 2406.

The opinion delivered by the Chief Jus-

tice is supported by the weight of authority, and is in harmony with the holding in *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672. I therefore concur.

**Annotation—Competency of parol evidence to show that a writing was not intended to create legal relations, but was executed as a sham.**

Evidence tending to show that a writing was not intended to effect or create legal relations, but was executed as a sham, shades almost imperceptibly into evidence of other character; for example, evidence that a written agreement was delivered upon condition,<sup>1</sup> or with the understanding that the obligor was not to be held liable.<sup>2</sup> The latter situation appears very frequently in cases involving promissory notes, a note being given with the understanding that the maker or indorser is not to be held liable thereon. Again a writing may

be executed with the understanding that it does not embody the final agreement,<sup>3</sup> but is to be rewritten, or is to be delivered up, if not satisfactory to one of the parties upon rereading. Parol evidence of such fact bears some resemblance to the evidence considered herein. It may be sought to show by parol evidence that a writing which purports to be a contract was not so intended, but was intended as a receipt or evidence of an advancement.<sup>4</sup> The questions connected with the admissibility of parol evidence of such facts have

<sup>1</sup> The admissibility of parol evidence to show that a bill or note was delivered upon condition is discussed in *Beach v. Nevins*, 18 L.R.A. (N.S.) 288.

As to the admissibility of parol evidence that a written instrument for the payment of money was executed in reliance upon a parol promise that payment was subject to a condition not incorporated therein, see note to *Gandy v. Weckerly*, 18 L.R.A. (N.S.) 434.

<sup>2</sup> The difficulty of distinguishing is illustrated in the case of *Humphrey v. Timken Carriage Co.* (1904) 12 Okla. 413, 75 Pac. 528, where parol evidence was admitted in an action upon a writing to show circumstances which are set forth in the opinion in *COFFMAN v. MALONE*, ante, 258. After citing a number of authorities, the court concludes: "From these authorities it would seem clear that Humphrey had a right to show that the order was not given as a purchase or proposal for a purchase, but for the purpose stated." The situation presented in *Humphrey v. Timken Carriage Co.* is practically the same as that presented in a case in which a person signs a note or other contract upon the promise of the obligee that he shall not be holden thereon.

<sup>3</sup> Of this class is *Colonial Park Estates v. Massart* (1910) 112 Md. 648, 77 Atl. 276, in which an informal writing signed by a purchaser of land was held not to be a binding memorandum of a contract of sale, where the purchaser was shown a form of contract required by the vendor, and it was the understanding of the parties that a contract upon the same terms was to be furnished him for execution on the following day. See citation from the opinion in this case in the opinion in *COFFMAN v. MALONE*.

<sup>4</sup> The following cases illustrate this class:  
L.R.A.1917B.

A note and receipt given by a remainderman to the life tenant, who is the mother of the remainderman, to evidence an advancement on his interest in the estate, with no intention of ever calling on the remainderman to refund the same or any part thereof, but with the understanding and agreement that the same should be an advancement, as before stated, do not create a valid obligation, and the facts may be shown by parol in an attempt to enforce it. *Norman v. Norman* (1858) 11 Ind. 288.

*Brook v. Latimer* (1890) 44 Kan. 431, 11 L.R.A. 805, 21 Am. St. Rep. 292, 24 Pac. 946 (note intended as evidence of an advancement).

Parol evidence is admissible in an action on a writing to show that it was given by a bankrupt for the purpose of enabling the creditor to prove his debt in bankruptcy, and not as an acknowledgment of the debt. *Atwood v. Gillett* (1846) 2 Dougl. (Mich.) 206.

In an action on a promissory note it is competent for the maker to show that it was given for the purpose of showing the interest of the payee in a joint purchase of land and personal property by the maker and payee. *Davis v. Sterns* (1909) 85 Neb. 121, 122 N. W. 672. This case was distinguished from *State Bank v. Belk* (1898) 58 Neb. 710, 77 N. W. 58, where parol evidence was held incompetent in an action on a note to show the purpose for which it was given, on the theory that in that case the note sued on in direct terms stated the purpose and the consideration for which it was given, an element that was lacking in the note sued on in the *Davis* case. The note involved in *Western Mfg. Co. v. Rogers* (1898) 54 Neb. 456, 74 N. W. 849, where parol evidence was held inadmissible, also stated the purpose for which the note was given.



been excluded, and the note has been confined to the subject indicated; i. e., the admissibility of evidence to show that a writing was intended as a sham and was not intended to create legal relations.<sup>5</sup>

The majority of decisions passing upon the point under annotation hold that parol evidence is admissible to show that the writing was not intended to create any legal obligation, but was executed as a sham.<sup>6</sup> In the case of *COFFMAN v. MALONE*, ante, 258, there was no oral agreement between the parties relating to a sale of the stock, the only oral agreement being that the writing

should not be binding.<sup>7</sup> But the rule has been applied, and parol evidence held admissible to show that the writing was a sham, and not intended to create legal relations, where the writing relates to the same subject matter as an oral agreement admitted to exist between the parties, but fixes different terms. Such evidence does not contradict or vary the terms of the written contract so as to be objectionable under the parol evidence rule. This is true whether the action is on the writing and the parol evidence is offered as a defense,<sup>8</sup> or whether the action is upon the oral agreement and the parol evidence is

<sup>5</sup> As to the applicability of the rule excluding parol evidence to vary a written contract in favor of or against a stranger to the contract, see note in L.R.A.1916A, 592.

See notes to *Galena Nat. Bank v. Ripley*, 26 L.R.A.(N.S.) 993; *Lyons v. Benney*, 34 L.R.A.(N.S.) 105, and *Skagit State Bank v. Moody*, L.R.A.1916A, 1215, as to the validity of obligations given a bank as affected by concealment of illegal transactions.

<sup>6</sup> Cases cited in notes 7-12, infra.

A written agreement between husband and wife that the wife's lands may be sold and the proceeds paid to trustees upon certain trusts may be shown to have been executed with the understanding that it was not legally binding and that it was nothing more than a moral or honorary obligation. *Earle v. Rice* (1892) 111 Mass. 17. It was accordingly held that the wife had done nothing to affect her rights in the lands, and therefore was entitled to the proceeds in the hands of the trustees.

It may be shown by parol that a writing purporting to be a will was executed as a fake, by the testator named therein, for the purpose of influencing the action of a legatee. *Fleming v. Morrison* (1904) 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

<sup>7</sup> In *Hendrickson v. Evans* (1855) 25 Pa. 441, infra, there was no other agreement between the parties than the written one and the oral one that the written one should not be binding.

<sup>8</sup> In an action on a sealed written agreement of apprenticeship, the master may show that the contract was never intended to be operative, but was executed only to overcome certain objections of a trades union. *Robinson v. Nessel* (1899) 86 Ill. App. 212. It is accordingly held that the master may show that the real contract between the parties was an oral contract and that the servant was paid in full for all services under the oral contract.

Parol evidence may be introduced in an action on a written advertising contract to show that the writing was not intended to create, and did not create, any legal relationship whatsoever, but was signed in L.R.A.1917B.

order that the advertising company or its agents might show the same to other persons dealing with it in order to induce them to pay the rates for advertising mentioned in the contract. *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.* (1900) 91 Md. 61, 46 Atl. 513. A stipulation in the written contract that "no verbal conditions made by agents will be recognized; every condition must be specified on the face of the contract," was held not available to the plaintiff, since, the contract being itself void and nugatory, the provision can have no effect. The real agreement between the parties was one upon terms other than those stated in the writing.

So parol evidence may be introduced in an action on a written contract for the sale of goods, to show that the vendor desired a writing showing a higher price than that actually agreed upon, as he did not wish the trust from which he purchased the goods to know that he was selling below certain rates fixed by it, and that he desired a writing showing a purchase of more goods than were actually sold for the purpose of swelling his apparent sales. *Birely v. Dodson* (1908) 107 Md. 229, 68 Atl. 488. The action in this case was to recover the purchase price of goods sold and delivered. The correctness of the plaintiff's itemized account was admitted, but the defendant claimed that it was entitled to a rebate and a discount upon the purchase. This was denied by the vendor, who stood upon the written contract. The evidence sought to be introduced by the purchaser was that the actual contract between the parties was made by parol and that subsequently the writing was signed by them, but that neither of the parties intended it to be the real contract between them, and that it did not in fact constitute the real contract, but was signed for the purposes stated above.

Parol evidence is admissible upon an agreement by a vendor whose title to part of the land conveyed was defective, to perfect the title within a certain time or buy back the land at a stated price, to show that the agreement was signed by the parties for "selling purposes only," and was

introduced by the complainant to obviate the effect of the writing introduced by way of defense.<sup>9</sup>

The parol evidence has likewise been held admissible in an action to enjoin the enforcement of a written agreement.<sup>10</sup>

So, in an action by a grantor to cancel a deed appearing of record and purporting to have been executed by the plaintiff to the defendant, conveying to her certain lands, parol evidence was held admissible to show that the deed had never been delivered by the grantor and was never intended to take effect, but was merely signed, acknowledged, and read to the defendant when she was insane and was laboring under the delusion that she and her children were to be left destitute, in order to allay her fears and soothe her mind, and had

been retained by plaintiff until it was taken from his possession by some other person and placed upon record without his knowledge or consent.<sup>11</sup>

In an action *ex delicto* by a shipper against a carrier, in which the carrier pleaded and proved the existence of a written contract between the parties, the shipper was held not precluded from proving that the shipment in question was not carried under the terms of the written contract introduced in evidence, but that the mutual intention of the parties was to treat the written contract as nugatory, as a mere form to justify the carrier in carrying the shipment on a fast train, which otherwise it would not have done. This being proven, the written instrument was held void for want of a consideration.<sup>12</sup> The shipment in question was intended for a

not to be enforced against the vendor. *Oak Ridge Co. v. Toole* (1913) 82 N. J. Eq. 541, 88 Atl. 827. Accordingly specific performance of the agreement was refused. The court in this case relied upon the holding in an earlier case in the same jurisdiction as to the admissibility of parol evidence that debt was not to be enforced except upon a contingency.

In an action by a firm against its agent to collect the proceeds of a sale claimed to be due it, parol evidence is competent to show that a written agreement relied upon by the firm as evidence of the contract was executed not as a contract between the parties, but at the request of one who required it as a condition of advancing money on the goods to the firm, and for the sole purpose of inducing the advancement of such money, and was delivered to the person making the advances. *Grierson v. Mason* (1875) 60 N. Y. 394. It does not appear that the action was brought upon the written agreement, but no point was made of this in the opinion.

In the subsequent case of *Nightingale v. J. H. & C. K. Eagle* (1910) 141 App. Div. 386, 126 N. Y. Supp. 339, Ingraham, P. J., dissenting from the majority opinion, states with reference to the case of *Grierson v. Mason*, that "the plaintiff sought to prove the contract by an instrument signed by him alone, and it was perfectly competent for the defendant, who had not signed the instrument, to prove that the instrument was not a contract and was never intended to be such."

In reliance upon *Grierson v. Mason*, it is held in *O'Leary v. McDonough* (1893) 2 Misc. 219, 23 N. Y. Supp. 665, that parol evidence is competent to show that a written contract complete in all its respects, executed and delivered by the person sought to be charged, is not in fact a contract between the parties, and thereby an action upon the written contract can be defeated.

<sup>9</sup>In an action by an employee for wages according to an oral agreement, a written

agreement introduced by the employer limiting the wages to a certain amount may be shown by parol evidence to have been executed by the employee for the purpose of inducing another employee to sign a contract thinking that the plaintiff received no more than he. *Nightingale v. J. H. & C. K. Eagle* (N. Y.) *supra*. The parol evidence showed that the written contract was executed some time after the oral agreement sued upon, and at the time of signing the writing the employee was informed by the employer that the writing would have no effect whatever on their previous parol agreement by which the employee was guaranteed a higher salary than that stipulated in the writing.

Parol evidence may be introduced to show that a written contract for the sale of land upon a stated consideration was executed to avoid jealousy on the part of vendor's own children, and thereby avoid trouble to himself. *Woodard v. Walker* (1916) — Mich. —, 158 N. W. 846. The action in this case was by a purchaser to enforce an oral agreement by the terms of which the land was given to him by the vendor in the written agreement. The vendor relied upon the written contract and insisted that it should prevail instead of the alleged oral agreement.

<sup>10</sup>Parol evidence may be introduced to show that a mortgage was simply a form, and was executed to satisfy members of the family of the mortgagee, who had given the land mortgaged to the mortgagor for the support of the mortgagee's sister, the mother of mortgagor. *Church v. Case* (1896) 110 Mich. 621, 68 N. W. 424.

<sup>11</sup>*McCartney v. McCartney* (1900) 93 Tex. 359, 55 S. W. 310. There is an obscure statement in the opinion that indicates that the grantor had the deed recorded, but this is contradictory of other statements in the opinion that it was recorded without his knowledge or consent.

<sup>12</sup>*Deierling v. Wabash R. Co.* (1912) 163 Mo. App. 292, 146 S. W. 814.

point intermediate between the place of shipment and the destination of a fast freight train, and was so billed by the railroad company and the freight was paid in accord with the actual agreement, but in order to make the shipment on the fast train it had been the custom of the carrier to require the shipper to sign a written contract which on its face designated the destination

of the fast train as the destination of the shipment.

On the contrary, it has been held that the parol evidence rule applies and prevents the introduction of parol evidence in such a situation.<sup>13</sup> The court in one case<sup>14</sup> makes the point that the purpose of the writing involved in that case "was to deceive and potentially to defraud." After referring to this fact, the court

<sup>13</sup> A writing between a corporation and an agent for the sale of its stock cannot be shown to have been executed to show the other stock salesmen that the agent in question was drawing no more than they were. *Graham v. Savage* (1910) 110 Minn. 510, 136 Am. St. Rep. 527, 126 N. W. 394, 19 Ann. Cas. 1022. The employer introduced the writing in defense to an action for compensation according to the oral agreement. This case approves and follows *McCormick Harvesting Mach. Co. v. Wilson* (1888) 39 Minn. 467, 140 N. W. 571, in which it was held that the parol evidence rule applies and prevents the introduction of parol evidence to show that notes that had been delivered were delivered with the understanding that they should not be operative. The purpose for which the notes involved in the latter case were executed is not stated. The court, after referring to the cases passing upon the effect of delivering a writing to become operative as a contract only on the happening of a future contingent event, continued: "But we find no case holding such [parol] evidence competent to prove that the delivered written contract was to be operative or inoperative at the will of one of the parties, or, where nothing remains to its complete execution, that the parties intended it should not be operative according to its terms. In this case it is not claimed that the notes were not as fully and completely executed as the parties intended, or that anything further was required to give them all the operation that they intended them to have. All that is claimed is that, though the execution was completed by delivery, the parties did not intend them to be operative according to their terms. A rule admitting oral evidence of such intention in such cases would go far to undermine all written contracts, and would be an invitation to fraud and perjury."

In *Conner v. Carpenter* (1856) 28 Vt. 237, parol evidence was held incompetent to show that a writing was agreed and understood to be a sham, and was given only to keep off creditors of one of the parties. In this case the plaintiff, desiring to purchase a span of mares, applied to the defendant to sign a note as his surety for the purchase price. It was finally agreed between the parties that the plaintiff should transfer to the vendor a horse owned by him, and the vendor should thereupon transfer the horse and the span of mares to the defendant, who thereupon should give his note for the purchase price and hold the horses

as security for the payment by the plaintiff to the vendor of the note given by the defendant. The transfers were made as agreed, and thereupon the horse and mares were delivered by the defendant to the plaintiff and at the same time the plaintiff gave to the defendant the writing in question, showing that the transaction was a loan to the plaintiff and giving the plaintiff possession of the horses so long as the defendant should see fit and no longer. Subsequently, the defendant took the horse and the action was for trover to recover it.

An obligation entered into by the residents of the town to pay a certain sum of money to the town for the purpose of enabling it to enter into a contract for the construction of a bridge cannot be shown by parol evidence to have been given solely to enable the town to get the necessary certificate of the state engineer, as this is a contradiction of the plain import of the instrument. The court concludes: "In short, it is no more than an offer to show that the instrument was a sham or a cunning device to be used for the sole purpose of deceiving the state engineer." *Grand Isle v. Kinney* (1898) 70 Vt. 381, 41 Atl. 130.

Parol evidence cannot be introduced in an action upon a bond under seal, to show that those who signed the agreement did so merely for the purpose of inducing the wife of the obligee to join in his deed to a third person on the belief that the land was bringing what was indicated in the bond, together with the cash payment, and that at the time the agreement was entered into the obligee expressly agreed that he would not hold the defendant responsible on the same, but would deliver it up or destroy it as soon as the deed should be signed. *Hendrickson v. Evans* (1855) 25 Pa. 441; *Evans v. Dravo* (1854) 24 Pa. 62, 62 Am. Dec. 359, action on same bond. See comment on the first of these cases *supra*, note 7, and see *Phillips v. Melly*, *infra*, note 15.

In *Blodgett v. Morrill* (1848) 20 Vt. 509, one who had signed a subscription contract on an agreement that he should never be called on to pay, but that his signature was wanted to influence others to sign, was held not to be relieved thereby upon an action on his contract. While the question arose as to the admissibility of evidence of this agreement, it does not appear to have been argued upon the ground of the parol evidence rule, but rather as one of substantive law.

<sup>14</sup> *Graham v. Savage* (Minn.) *supra*.

concludes: "We think it is clear that the court should not vary the general rule as to the exclusion of evidence by making an exception in aid of such an illegitimate purpose and in violation of common honesty." In another case,<sup>15</sup> in which an action was brought upon the writing and in which the defendant attempted to show that the writing was not intended to operate as a contract, the court stated that the defendant alleged an equity which ought to restrain the action, but to make it out he was obliged to show a fraudulent transaction. The maxim that, where the parties were at equal fault, the condition of the possessor or defendant is the better, was urged upon the court as requiring the admission of this evidence on the part of the defendant, but this was answered by stating that the defendant, in order to make out his defense, was obliged to show the fraudulent transaction, and in respect to that matter he

was the actor; that the maxim applied to him in the circumstances of the case, and not to the plaintiff on the record. While the element of fraud is not discussed in the cases adhering to the opposite rule, the writing was executed in those cases, with but few exceptions, for the purpose of influencing the act of a third person in the same way as was true in the cases which adhere to the rule now under discussion. Wigmore states in his *Treatise on Evidence*, vol. 4, § 2406, that, where a writing is to serve the purpose of a mere sham, the principle that parol evidence may be introduced to show that the writing was understood by the parties not to have legal effect "in strictness exonerates the makers; but a just policy would seem to concede this only when the pretense is a morally justifiable one (as, to calm a lunatic or to console a dying person), and not when it is morally beyond sanction."

<sup>15</sup> *Hendrickson v. Evans* (Pa.) *supra*.

The parol evidence rule, however, as ordinarily understood, does not prevail in Pennsylvania. *Phillips v. Meily* (1884) 106 Pa. 536. It is stated in this case that parol evidence has been allowed to contradict or vary written instruments, "first, where there was fraud, accident, or mistake in the creation of the instrument itself; and, second, where there has been an attempt to make a fraudulent use of the instrument in

violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed." In disapproving this rule, Wigmore states in his *Treatise on Evidence*, § 4231 (c), that "it would seem that every attempt knowingly to invoke the letter of a writing against the actual oral understanding of the parties (however different from the written terms) could properly be considered as fraudulent." W. A. E.

## NEW MEXICO SUPREME COURT.

SEON LOCKE, Appt.,

v.

H. S. MURDOCH.

(20 N. M. 522, 151 Pac. 298.)

### Evidence — parol to vary contract.

1. Parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written contract.

*For other cases, see Evidence, VI. in Dig. 1-52 N. S.*

### Contract — written — effect on negotiations.

2. A valid written contract merges all prior and contemporaneous oral negotiations concerning the subject matter embraced within the terms of the writing.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

### Headnotes by PARKER, J.

Note. — As to competency of parol evidence of an agreement by the vendor of a business not to re-engage therein, where some part of the agreement had been reduced to writing, see annotation following this case, post, 276.  
L.R.A.1917B.

### Evidence — of parol contract collateral to writing.

3. Parol evidence of a distinct valid parol agreement, although prior to or contemporaneous with a written contract, is admissible unless it contradicts or varies the terms of the writing.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

### Same — conditions of proof.

4. Where the terms of a written contract are silent as to the subject matter of a parol contemporaneous agreement, and the latter does not contradict the terms of the former and was the inducing cause for the execution of the written contract, proof of the contents of the parol contemporaneous agreement is admissible.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

### Injunction — against violation of restrictive contract.

5. Courts of equity entertain jurisdiction of injunction cases, where one party to a contract seeks to restrain the other from carrying on a business or profession for a stated length of time which the party agreed not to carry on, on the ground that the parties cannot be placed in statu quo and

that damages at law afford no adequate compensation to the injured party.

*For other cases, see Injunction, I. b, in Dig. 1-52 N. S.*

#### Appeal — findings of fact.

6. The findings of a trial court will not be disturbed where there is substantial evidence to support them.

*For other cases, see Appeal and Error, VII. I, 3, in Dig. 1-52 N. S.*

#### Laches — what constitutes.

7. A delay of ten months in asserting rights in a court of equity, under the circumstances of this case, does not constitute laches of such a nature as to deprive the party of equitable relief, especially where the trial court entertained jurisdiction of the cause in the first instance.

*For other cases, see Limitation of Actions, I. b, in Dig. 1-52 N. S.*

#### Evidence — of parol contract.

8. Admission of letters, their contents, and of conversations, written and had prior to the making of a written contract, introduced and received for the purpose of supporting the truth of a contemporaneous oral agreement, and not contradicting the terms of the written contract, is proper.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

(July 16, 1915.)

**A**PPEAL by defendant from a judgment of the District Court for Colfax County in plaintiff's favor in an action brought to enjoin defendant from opening or maintaining an office for the practice of dentistry in violation of an agreement between them. Modified.

#### Statement by Parker, J.:

This is an action brought in the district court for Colfax county by appellee against appellant. The complaint alleged, substantially, that the parties hereto entered into a written contract on September 23, 1910, whereby appellant agreed to sell, and appellee to purchase, appellant's dental practice and certain office furniture in the town of Springer, in consideration of \$300, payable in certain monthly instalments; that at the same time appellant orally agreed that as a further consideration the appellant would execute a written contract not to open a dental office in the town of Springer for the purpose of practising dentistry for a period of five years therefrom, when appellee had paid one half of the purchase price for the sale of the said dental practice and office furniture; that, in pursuance thereof, appellee paid said one half of the purchase price, and appellant thereupon executed, in writing, the agreement not to open an office in Springer for five years for the purpose of practising dentistry therein; that appellee performed all the conditions of the L.R.A.1917B.

last-mentioned contract on his part to be performed, but that appellant, in violation of said agreement, on April 23, 1912, opened a dental office for the purpose of practising dentistry in Springer, and has continually since held himself out to the public as ready and willing to practise dentistry in Springer and is now actually engaged in such practice at said place and threatens to continue therein, to the damage of appellee; that appellee has suffered irreparable injury which cannot be measured by a money judgment; that a multiplicity of suits will be necessary to protect the rights of appellee unless the court interferes by injunction; and that appellee has been damaged on account of said acts in the sum of \$1,000. Appellant interposed a demurrer to the complaint. The grounds were that the alleged contract of March 23, 1911, was nudum pactum, unilateral, void, and without any consideration. The demurrer also alleged that the cause of action set out in the complaint was ambiguous and uncertain, in that three distinct contracts are therein referred to, and that appellee was not entitled to the relief demanded, or any other relief in equity. The demurrer was overruled. Thereupon appellant answered, denying the alleged oral agreement, admitting the execution of the contract of March 23, 1911, but setting up that the same was without consideration, and alleging by way of new matter that appellant performed all the conditions of his part agreed to be performed, but that appellee, after the making of the alleged contract of March 23, 1911, agreed, in consideration of the promise of appellant to cease making professional visits to the town of Wagon Mound, that the appellant might practise dentistry in Springer in so far as the same concerned persons desiring treatment from appellant. The case came on for trial before the court without a jury, and judgment making the temporary injunction permanent and awarding damages in the sum of \$250 for appellee was rendered by the court. This is an appeal from that judgment.

The record discloses that appellee proved the case made by the pleadings. Appellee was a resident of Fredericktown, Missouri, and came to Springer for the purpose of negotiating with appellant for the purchase of the latter's dental practice. An advertisement inserted by appellant in a dental magazine brought appellee and appellant together. Correspondence was had between the parties which contained representations by appellant that he had labored for twelve years over the dental chair, and that he desired to leave Springer, after selling his practice and office furniture, but retain certain instruments used in his profession, but

not for the purpose of practising dentistry in Springer. Ultimately, a written contract was drawn by appellant and presented to appellee. But it contained no stipulation as to appellant ceasing the practice in Springer, and this fact was called to the attention of appellant by appellee. Thereupon appellant and appellee agreed that the appellant would execute in writing a stipulation to the effect that he would not practise dentistry in Springer for five years or words to that practical effect, when appellant had been secured in the sale of his business and furniture by the payment of one half of the purchase price. The contract of sale and purchase was then executed by the parties, the appellee relying upon the oral promise of appellant to execute the second contract. The first contract would not have been executed by appellee except for the said promise. Subsequently, half of the contract price was paid by appellee and the written agreement agreed to be executed by appellant was executed. But this agreement contained no recitation of a consideration. About April 27, 1912, appellant opened an office in Springer for the purpose of practising dentistry therein, and has since that time practised dentistry in Springer. Circular letters and advertisements were introduced showing the fact that appellant was practising dentistry in Springer in an office maintained by him, and that he was holding himself out to the public generally as a dentist of Springer. There are other facts of some importance, but we deem it unnecessary to make a further statement of them.

**Mr. Francis O. Wilson, for appellant:**

The complaint fails to state facts sufficient to constitute a cause of action.

*La Mesa Community Ditch v. Appelzoeller*, 19 N. M. 75, 140 Pac. 1051; *Mead v. Stirling*, 62 Conn. 586, 23 L.R.A. 227, 27 Atl. 591; *Schurmeier v. St. Paul & P. R. Co.* 8 Minn. 113, Gil. 88, 83 Am. Dec. 770; *De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352; 2 *Joyce, Inj.* § 39; *Harkinson's Appeal*, 78 Pa. 196, 21 Am. Rep. 9; *Bonaparte v. Camden & A. R. Co.* 1 Baldw. 218, Fed. Cas. No. 1,617; *Hart v. Hildebrandt*, 30 Ind. App. 415, 66 N. E. 173; *Miller v. Mutual Reserve Fund Life Assn.* 109 Fed. 278; *Ryan v. Seaboard & R. R. Co.* 89 Fed. 385; *California Nav. Co. v. Union Transp. Co.* 122 Cal. 641, 55 Pac. 591; *Crevier v. New York*, 12 Abb. Pr. N. S. 340.

The agreement to refrain from doing business in Springer, New Mexico, was without consideration.

*Cleaver v. Lenhart*, 182 Pa. 285, 37 Atl. 811; 1 *Parsons, Contr.* 451; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Hill v. Staples*, 85 Ga. 863, 11 S. E. 967; *Carruth* L.R.A.1917B.

*ers v. McMurray*, 75 Iowa, 173, 39 N. W. 255; *Leverone v. Hildreth*, 80 Cal. 139, 22 Pac. 72; *Dwelle v. Dwelle*, 1 Kan. App. 473, 40 Pac. 825; *Dexter Sav. Bank v. Copeland*, 77 Me. 263; *Morse v. Mason*, 103 Mass. 560; *Shoemaker v. Munn*, 20 Colo. App. 1, 76 Pac. 924; *Howard v. McNeil*, 25 Ky. L. Rep. 1394, 78 S. W. 142; *Savage v. Burns*, 3 Mont. 527; *Swearingen v. Hartford Ins. Co.* 52 S. C. 309, 29 S. E. 722; *Page, Contr.* § 319, p. 480; *Joseph v. Catron*, 13 N. M. 202, 1 L.R.A.(N.S.) 1120, 81 Pac. 439.

The alleged promise of defendant, made at the time of entering into the first contract, to execute a further agreement not to engage in the practice of dentistry, violates the parol-evidence rule and cannot be proved.

2 *Page, Contr.* §§ 1189, 1356; *Diven v. Johnson*, 117 Ind. 512, 3 L.R.A. 308, 20 N. E. 428; *Jones, Ev.* 2d ed. § 434, p. 543, note 4, p. 546; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.

If there is any doubt as to the law or the facts the court will not grant an injunction.

*Thayer v. Younge*, 86 Ind. 259; *Gallup Electric Light Co. v. Pacific Improv. Co.* 18 N. M. 86, 113 Pac. 848; *Caswell v. Gibbs*, 33 Mich. 331; *Spelling, Inj.* 2d ed. § 481; *American Preservers' Co. v. Norris*, 43 Fed. 711; *Joyce, Inj.* § 445; *American Cereal Co. v. Eli Pettijohn Cereal Co.* 22 C. C. A. 236, 46 U. S. App. 188, 76 Fed. 372; *Standard Elevator Co. v. Crane Elevator Co.* 6 C. C. A. 100, 9 U. S. App. 556, 56 Fed. 718; *High, Inj.* § 1106; *Healy v. Allen*, 38 La. Ann. 867; 22 *Cyc.* 850, note 57; *Joyce, Inj.* § 448; *Wood v. Dickey*, 90 Va. 160, 17 S. E. 818; *High, Inj.* § 1109, p. 1097; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 511; *Welty v. Jacobs*, 171 Ill. 624, 40 L.R.A. 98, 49 N. E. 723; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; *Jones v. Williams*, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353.

To justify an injunction to restrain the violation of a contract, the proof must be clear and definite and the party seeking such relief must act promptly.

*Pfeifer v. Rahiser*, 2 Pa. Super. Ct. 355; *Sanders v. Brown*, 145 Ala. 665, 30 So. 732; *High, Inj.* § 1178; *Bank of Commerce v. McAfee*, 110 Ga. 302, 34 S. E. 1037; *Hollis v. Shaffer*, 38 Kan. 492, 17 Pac. 86; *Smith v. Brown*, 164 Mass. 585, 42 N. E. 101; *High, Inj.* § 1119, p. 1103; *Spelling, Inj.* 2d ed. § 486; *Joyce, Inj.* § 42; *Holt v. Parsons*, 118 Ga. 895, 45 S. E. 690; *Barnard v. Sherley*, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; *Ocean City Assn. v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914; *Island Heights Assn.*

v. Island Heights Water, Power, Gas & Sewer Co. — N. J. Eq. —, 62 Atl. 773; Levi v. Schoenthal, 57 N. J. Eq. 244, 41 Atl. 106.

Mr. H. L. Bickley for appellee.

Parker, J., delivered the opinion of the court:

We discuss the questions presented by appellant according to their relative importance. The first and controlling question presented concerns the admission of certain evidence which appellant claims violates the rule that oral testimony cannot be admitted for the purpose of altering or changing the terms of a written instrument. The appellant contends, as we understand his brief, that the alleged promise of appellant to execute a written contract not to engage in the practice of dentistry in Springer for five years therefrom, made at the time of the execution of the contract of September 23, 1910, resting in parol in the first instance, cannot be proved, because such proof would tend to alter the terms of the contract of September 23, 1910. The appellee contends that the promise was collateral and independent of the written contract, and constituted the inducement for the execution of the written contract, and, being such, is not violative of the rule contended for by appellant.

The contract of September 23, 1910, contains stipulations concerning the sale of appellant's practice and office furniture in Springer, but is silent as to the stipulation contained in the oral agreement.

The courts seem to agree that the question at bar presents a recurring difficulty, not because of the rule itself, but because of the application of the exceptions which appellee invokes.

The existence of the general rule cannot be controverted. Reynolds, Trial Ev. § 74; 2 Page Contr. § 1189; 2 Elliott, Contr. § 1671; Jones, Ev. 2d ed. § 434; and 4 Wigmore, Ev. §§ 2425 et seq.

The exception to the rule which is invoked by appellee is equally well settled.

"The general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement. The exception is thus stated somewhat more guardedly by [Mr.] Stephen: The parties may prove 'the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to

be a complete and final statement of the whole of the transaction between them.'" 3 Jones, Ev. 2d ed. § 439.

"The rule that a written contract merges all prior and contemporaneous oral negotiations applies only to such oral negotiations as concern the subject matter embraced within the written contract." 2 Page, Contr. § 1219.

"Parol evidence of a distinct, valid, parol agreement between the parties, although prior to or contemporaneous with a written contract, is not excluded by the rule in question where it does not in any way vary or contradict the writing, and there are cases in which this is true, although the parol agreement may be collateral to the written contract and relate in some way to the same subject matter, at least where the writing is silent upon the subject and the parol agreement does not seem to be so closely connected with the matter of the written contract that it should be deemed to have entered into the negotiations or formed a part of the transaction or matter of which the writing was intended to be a complete and final statement. But a complete, valid, written contract merges all prior and contemporaneous negotiations and agreements within its purview, and if the parol agreement is not really collateral, but is an element of the written contract, or tends to vary or contradict the same, either in its express provisions or its legal import, it is inadmissible. The question usually is as to whether the parol evidence sought to be introduced contradicts or alters the written contract, or leaves it to stand unchanged, and simply tends to establish an additional collateral agreement. It is often difficult to determine this question, and there is much conflict among the authorities." 2 Elliott, Contr. § 1633.

"The most usual controversy arises in cases of partial integration, i. e., where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder." 4 Wigmore, Ev. § 2430.

An examination of numerous cases involving the rule and its exceptions is of no special benefit, but simply illustrates how the courts have applied the rule and its exceptions under the particular facts of each case. Whether the exception invoked by appellee is applicable depends entirely on whether the evidence clearly establishes that in fact the parol agreement is collateral to and independent of the written contract, and does not vary the terms thereof. If

it is, the court will apply the exception; if not, the general rule controls and the complaint must then be dismissed.

An examination of the following cases will be found interesting, as illustrating the difference in the application by the various courts of the rule and the exception involved in this case: *Allen v. Herrick Hardware Co.* 55 Tex. Civ. App. 249, 118 S. W. 1159; *Love v. Hamel*, 59 App. Div. 360, 69 N. Y. Supp. 252; *Gordon v. Parke & L. Machinery Co.* 10 Wash. 18, 38 Pac. 756; *Costello v. Eddy*, 128 N. Y. 650, 29 N. E. 146; *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11; *Schoen v. Sunderland*, 39 Kan. 758, 18 Pac. 913; *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 738; *Indelli v. Lester*, 130 App. Div. 548, 115 N. Y. Supp. 48; *Holmboe v. Morgan*, 69 Or. 395, 138 Pac. 1085; *Marianna Hotel Co. v. Livermore Foundry & Mach. Co.* 107 Ark. 245, 154 S. W. 955; *New York L. Ins. Co. v. Thomas*, 47 Tex. Civ. App. 149, 104 S. W. 1075; *Nebraska Land & Feeding Co. v. Trauerman*, 70 Neb. 795, 98 N. W. 37, 39; *Wessell v. Havens*, 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Canfield Lumber Co. v. Kint Lumber Co.* 148 Iowa, 207, 127 N. W. 72; *De Rue v. McIntosh*, 26 S. D. 42, 127 N. W. 532; *Ashby v. McNary*, — Iowa, —, 134 N. W. 554; *Milich v. Armour Packing Co.* 60 Kan. 229, 56 Pac. 3; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 498; *Welz v. Rhodius*, 87 Ind. 1, 6, 44 Am. Rep. 747; *Durham v. Lathrop*, 95 Ill. App. 429; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; *Fusting v. Sullivan*, 41 Md. 162, 170; *Pierce v. Woodward*, 6 Pick. 206-208; *Brintnall v. Briggs*, 87 Iowa, 538, 54 N. W. 531; *Cleaver v. Lenhart*, 182 Pa. 285, 292, 37 Atl. 811; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 545; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Carruthers v. McMurray*, 75 Iowa, 173, 177, 39 N. W. 255; *Hall's Appeal*, 60 Pa. 458, 100 Am. Dec. 584.

In *Allen v. Herrick Hardware Co.* 55 Tex. Civ. App. 249, 118 S. W. 1159, the court said: "It is the rule that, when parties reduce their contracts to writing, such writing is to be taken as embodying all the previous negotiations and understandings about its terms, and they cannot be varied by parol; but the rule does not apply where it can be made to appear that the instrument was not intended to be a complete and final settlement of the whole transaction. . . . 'A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence.'"

In *Schoen v. Sunderland*, 39 Kan. 758, 18 Pac. 913, the court speaking with reference L.R.A.1917B.

to parol evidence of a stipulation not contained within the contract, said: "It was outside of the contract and memorandum; contemporaneous with it, to be sure, but in no way conflicting with, altering, or changing it."

In *New York L. Ins. Co. v. Thomas*, 47 Tex. Civ. App. 149, 104 S. W. 1075, the court said: "It is a settled rule of law that one contract may be the consideration of another, the inducement to the execution thereof, and, where an independent parol agreement has been made as an inducement to the making of a written contract, the former may be proved and enforced, though not referred to in the latter."

In *Wessell v. Havens*, 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377, the principal thing which controlled the decision of the court, that the parol agreement could not be enforced, was the fact that the written contract was made with much care and detail and the parol agreement was not attempted to be enforced by plaintiff until a year and a half after the execution thereof and after the plaintiff had sold the business.

The test of the question applied by the court in *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873, is thus stated by the court: "The only remaining inquiry, then, is: Was the promise to employ plaintiff as local manager one of the essential terms of the oral contract itself, or was it only a collateral agreement made by the defendants as an inducement to the plaintiff to dispose of his property?"

In *Canfield Lumber Co. v. Kint Lumber Co.* 148 Iowa, 207, 127 N. W. 72, the court remarked: "The main contention is over the right of defendants to prove the parol agreement relied upon by them, to the effect that plaintiff was to take and pay for lumber ordered. We are constrained to hold that this testimony does not vary the contract or change any of the terms of the original agreement, and that it was admissible. A contract may be partly in writing and partly in parol, and unless there be a conflict between them, or they cover the same subject matter, parol evidence is admissible to show the entire agreement."

In *De Rue v. McIntosh*, 26 S. D. 42, 127 N. W. 532, the court said: "And one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract upon



the faith of the parol contract or representations, such evidence is admissible."

In *Welz v. Rhodius*, 87 Ind. 1, 6, 44 Am. Rep. 747, the court said: "The contract made, the promise given by either party, as expressed in the writing, cannot be modified; but further or additional consideration may be shown, even though it consist of a promise of one party to the other, if it be to do something outside of and so far distinct from the written promise or contract as that the latter is not varied or modified."

In *Durham v. Lathrop*, 95 Ill. App. 429, the court said: "We do not regard this oral transaction as merged in the writings. No one of the writings, nor all of them, purport to be a complete contract, embodying all the terms of the agreement. The oral agreement not to interfere with the business to which his former partner was to succeed, and for which he, Lathrop, was to be paid, is in no way inconsistent with any of the terms of any of the writings, nor does it vary them."

In *Fusting v. Sullivan*, 41 Md. 162, 170, the court said: "Although the good will of the store and the agreement not to set up another were, according to the statement of Shipley, material elements of the consideration to be given for the purchase of the property, yet they were not necessarily involved in the purchase, nor referred to in the contract, and were in fact incidental and collateral."

In *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199, the court held that the parol agreement involved therein, to the effect that defendants would not re-engage in the same business, was not within the Statute of Frauds, but that proof of the parol agreement contradicted the terms of the writing.

These cases and the quotations therefrom are set out principally for the purpose of showing how the courts have applied the general rule and the exceptions involved in this case under the peculiar facts of each case.

Mr. Wigmore, in his work on Evidence, makes the following commentary on the subject under discussion:

"But in those instances in which a negotiation concerns one general subject—such as the purchase of a single lot of land having buildings on it—and yet several more or less separable features of bargain, the relation between the writing and the whole bargain is usually difficult to ascertain, and forms a perpetually recurring controversy. To say that the question is whether the parties intended to embody 'the whole of the transaction,' or only a part, is therefore hardly correct; because by hypothesis the writing does represent the whole of what was finally done on the subject covered by L.R.A.1917B.

it, and because to assume that the subject not covered was a 'part' of the transaction covered would be inconsistent, and would involve holding that the writing which embodies the transaction does not embody that 'part' of it. More correctly, the inquiry is whether the writing was intended to cover a certain subject of negotiation; for, if it was not, then the writing does not embody the transaction on that subject, and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing. . . . The intent must be sought where always intent must be sought, . . . namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known until we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth, the facts well be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears evidence on both sides; his decision here, pro or con, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that if they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that, if they did, they are legally effective, and he then leaves to the jury the determination of facts whether they did take place. . . . In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of

the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges, and is in contrast with the looser and incorrect inquiry . . . whether the alleged extrinsic negotiation contradicts the terms of the writing." 4 Wigmore, Ev. § 2430.

The rule announced by Mr. Wigmore appears to us to be the proper one and the one which will follow in this case. In the case at bar it will be seen that the contract of September 23, 1910, was in reference to the sale of appellant's practice and certain of his office furniture, and was entirely silent as to the subject matter contained within the parol agreement, which was subsequently put in writing. We therefore are constrained to hold that the general rule contended for by appellant has no application to the facts of this case, and that the court did not err in admitting evidence of the parol agreement made contemporaneous with the execution of the written contract, and not varying any of the terms thereof.

2. Appellant also contends that the agreement to refrain from doing business in Springer was without consideration. We take it that the point is presented on the theory that the parties expressed their entire contract in the agreement of September 23, 1910, and that when the second agreement was executed there was no obligation resting upon appellant to agree not to re-engage in the business or practise the profession in Springer, and therefore the agreement on the part of appellant was voluntary and without consideration. The complaint is rather indefinite on the question of consideration for the execution of the second contract. It alleges that as a further consideration the second agreement was made by parol at the time of the execution of the first agreement. The proof tends to establish that the consideration for the execution of the second agreement was the promise by the appellant at the time of the execution of the first contract, and that that promise was the inducing cause for the execution of the first agreement by appellee. Being such, we cannot say that it was not a "further consideration" for the execution of the first contract, but are constrained to hold that it was a further consideration therefor. The theory of appellant's argument is that at the time of the execution of the second contract the first had been performed, and that no valuable consideration moved from one to the other party for the execution of the second contract. The second written contract was executed in pursuance of the former parol agreement by the parties, so that the real question concern-

ing the consideration would be determined by the existing facts at the time of the making of the parol agreement, if it were necessary to determine that question under this point. The cases cited by appellant bear out what we have said is his theory in this court, i. e., that the consideration for the second contract is what is termed a "past consideration." Those cases are clearly distinguished from the one at bar. There the alleged parol agreements were apparently afterthoughts, and were not a part of the original transaction either in writing or by parol. Nor do we find any merit in the appellant's contention that to permit appellee to sustain his right of recovery in this court on the theory that the consideration of the second contract was the parol inducing promise heretofore referred to would be to permit him to change the theory of his case.

3. The appellant also urges that the trial court erred in sustaining the demurrer, because it appears upon the face of the complaint that the plaintiff was not entitled to the relief he demanded nor any relief in equity. Appellant argues that the complaint does not show the amount of practice done by each of the parties, nor that the business of appellee was less remunerative by reason of the breach of the agreement, but shows a doubt as to the law and the facts sufficient to justify equitable relief. The complaint alleges the making of a contract whereby appellant agreed not to open an office in Springer for five years for the purpose of practising dentistry, its breach and injury which cannot be measured in money, together with an allegation that a multiplicity of suits will follow in the event equity does not take jurisdiction of the cause, in order to recover losses suffered by appellee by way of damages.

High on Injunctions, vol. 2, § 1168, states the theory upon which courts of equity take cognizance of this class of cases: "The jurisdiction in cases of this nature is based upon the ground that the parties cannot be placed in statu quo, and that damages at law can afford no adequate compensation; the injury being a continuing one and irreparable by the ordinary process of courts of law."

We are of the opinion that, while the complaint might well have been more definite and certain in some respects, it is sufficient to warrant the action of the trial court in entertaining jurisdiction of the cause.

4. In this connection, the appellant contends that the question is whether the defendant violated his agreement or was doing that which he had a right to do when practising dentistry in Springer. The complaint

clearly alleges that appellant agreed not to open an office in Springer for the purpose of practising dentistry for five years, and a breach thereof. The allegation was established by substantial evidence. The court found that appellant made such an agreement and violated it, and we will not disregard the findings of the trial court in this regard; there being substantial evidence to warrant the finding. While the second contract may have permitted appellant to treat certain patients of appellee when the latter was absent from the town of Springer, it did not permit him to open an office in Springer for the purpose of practising his profession therein.

5. Appellant also urges that the provision in the second contract as to appellant treating patients during appellee's absence from Springer could not have been specifically enforced as against the appellant, and therefore the agreement lacked mutuality, and the negative covenant not to practise in Springer for five years cannot, under such circumstances, be enforced by injunction. The consideration for the covenant not to engage in the practice in Springer, or open an office for the purpose of practising dentistry in Springer, was the inducement for the execution of the first contract. Therefore, whether the provision in the second contract concerning the appellant treating patients of appellee when the latter was absent from Springer could be specifically enforced or not is entirely immaterial in a consideration of the merits of this case, and of the point made by appellant. The covenant not to engage in the practice in Springer, or not to open an office in Springer for the purpose of practising dentistry, did not lack mutuality. There was no attempt in this case to enforce the covenant concerning appellant treating patients of appellee.

6. Appellant argues and cites authority that to support an injunction from engaging in business the proof of the contract to do so must be clear and indubitable, and, if the evidence is conflicting, an injunction is properly denied. The rule adopted by this court and followed in a great number of cases is that this court will not disturb the verdict of a jury nor the findings of the trial court where there is substantial evidence to support the same.

7. The proof in this case is substantial. Under the same heading it is claimed by appellant that it must be shown that appellee used reasonable diligence in asserting his rights and in demanding their protection, and that the evidence in this case shows that appellee delayed eleven months in asking a court of equity for relief, which constituted inexcusable delay. We assume that the

question was presented to the trial court by the demurrer, though we fail to find that the question was raised during the trial of the cause.

It is a general rule of equity that he who seeks the aid of equity must show that he has used reasonable diligence in asserting his rights and demanding their protection, and unreasonable delay in seeking the aid of a court of equity will generally prove a bar to the exercise of the jurisdiction. 2 High, Inj. § 1119. The proposition is primarily addressed to the trial court, whose equitable jurisdiction is first invoked. What constitutes reasonable diligence can be determined by no established rule, for the question must be determined upon the circumstances of each case. The complaint alleges the making of the contract on September 23, 1910, and putting it in writing on March 23, 1911. It also alleges that the contractual obligation of appellant was violated on April 23, 1912, when appellant is alleged to have opened an office in Springer for the purpose of practising dentistry. This action was commenced on March 12, 1913, more than ten months after the alleged breach of the contract. The evidence also disclosed these facts. The trial court entertained jurisdiction of the cause, knowing that appellee had waited more than ten months before attempting to protect his rights; and we are not prepared to say that such time, under the circumstances of this case, constituted laches on the part of appellee sufficient to deprive him of resort to a court of equity.

8. The appellant says that the second contract, if it is a contract within the meaning of the law, "prohibited defendant from opening an office in Springer for the purpose of practising dentistry in Springer for a period of five years, except it be with the consent of the plaintiff," but did not "prohibit plaintiff from opening an office in Springer for practising dentistry for persons outside of Springer." If that be correct, the conclusion we are left to draw is that the evidence does not show that the appellant violated his contractual obligation, because it does not appear that appellant treated persons residing in Springer. It must be admitted that appellant was allowed to treat patients of appellee when appellee was absent from Springer, for such are the terms of one of the covenants in the second contract. But the distinction drawn by appellant's counsel is without any substantial foundation. The contract must be construed as it is written. It prohibits appellant from opening an office in Springer for the purpose of practising dentistry in Springer, not prohibiting appellant from opening an office in Springer for the purpose of practising dentistry among people of Springer. The literal

interpretation of the words of the contract does not permit of the fine-spun distinction drawn by appellant.

9. The appellant contends that it is essential that the complaint should state facts showing a necessity for the extraordinary remedy of injunction, and that the complaint in the case at bar fails to show "in what way and for what reason plaintiff will suffer irreparable injury from the alleged violation of the written agreement." The appellant demurred to the complaint, and one of the grounds therefor was that the complaint failed to state facts sufficient to constitute a cause of action, in that it did not show that the plaintiff was entitled to any equitable relief. The demurrer was overruled and defendant pleaded over. The appellee does not raise any question as to the effect of thus pleading over, but contends that the question now urged was not raised in the trial court, and therefore cannot be raised here for the first time. It is unnecessary to decide whether the matter contained within the demurrer is too general to raise the question. The Code (Comp. Laws 1897, subsec. 36, § 2685), provides that "the demurrer shall distinctly specify the grounds of objection to the pleading; unless it does so, it may be disregarded."

Prior to statehood, it was necessary, by supreme court rule, to specify the ground of demurrer as well as the reason therefor; but this particular rule no longer exists as a rule made by the supreme court. The appellant attacks the complaint before this court on the ground that equitable jurisdiction is not shown therein because the allegation of irreparable injury is alleged as a conclusion, and not as a fact. The complaint alleges that the injury cannot be measured by a money judgment, and also contains an additional allegation as to multiplicity of suits. We deem it amply sufficient to withstand the attack now made upon its sufficiency in these regards.

10. Appellant insists that the court erred in admitting evidence of certain letters and conversations written and had prior to the making of the first contract, and in admitting secondary proof in reference to the letters.

The introduction of the letters and part of their contents by secondary evidence were directed to support the oral agreement made by the parties with reference to the appellant thereafter opening an office in Springer for the purpose of practising dentistry in Springer. The appellant argues that such letters and conversations tended to vary the terms of the first written contract. The first letter to which objection was made contained statements of appellant to the effect that he did not intend to practise dentistry

in Springer after the sale to appellee was perfected. The letter also contained matters concerning the sale. But the purpose of the introduction of the letter was to support the theory that the oral agreement had been actually entered into by the parties. The second letter to which appellant objects contained matters concerning the sale of the business, as well as matters pertaining to the parol agreement. The contents were proved by secondary evidence. The first objection as to the contents of the letter was that the same was secondary evidence,—not that a proper foundation for secondary evidence had not been laid. The court required further proof of facts laying the foundation for secondary evidence, and the witness testified that the letter was left in Missouri, and that the relatives of the witness had searched for it, but had been unable to find it, and that the witness has diligently searched among his papers in New Mexico and has been unable to find it. The appellant then objected to stating the contents of the letter on the ground that such proof was secondary evidence, and for other reasons not necessary to state in this particular. The objection can hardly be said to raise the question as to the proper foundation for the admission of secondary evidence. Appellant's objections to certain conversation related by the witness, occurring at a time prior to the execution of the first contract, are based upon the theory that such conversations altered the terms of the first written contract. The court has held in this opinion that oral testimony tending to prove the parol agreement was not obnoxious to the general rule upon which appellant relies, and this evidence was directed to that end. Other questions discussed in the briefs, but not specifically referred to herein, we deem are without merit.

11. Appellant says that the evidence is insufficient to support the judgment for damages, and in this he is correct. While the evidence in the case shows inferentially that the appellee was damaged by the fact that the appellant opened a dental office in Springer and did considerable business, the proof fails to show the amount of damage which the appellee suffered. Just how the district court assessed the amount of damages at \$250 is difficult to determine from the evidence, there being no showing whatever as to the amount of injury to the appellee.

The judgment in this case will, consequently, have to be modified by eliminating therefrom the judgment for damages, and as so modified the judgment of the lower court will be affirmed, and it is so ordered.

Roberts, Ch. J., and Hanna, J., concur.

**Annotation—Competency of parol evidence of an agreement by the vendor of a business not to re-engage therein, where some part of the agreement has been reduced to writing.**

The parol-evidence rule, excluding parol evidence to contradict or vary the terms of a valid written instrument, does not apply, where the entire agreement of the parties has not been reduced to writing, to exclude parol evidence of the part not in writing. This exception has been stated in various ways. Greenleaf, after referring to certain other exceptions to the parol-evidence rule, says in vol. 1, § 284a: "Nor does the rule apply in cases where the original contract was verbal and entire and a part only of it was reduced to writing." Chamberlayne in his discussion in the "Modern Law of Evidence" says in vol. 5, § 3553, that "evidence of a prior or contemporaneous parol agreement or understanding is frequently received where it is consistent with the writing in question, and it is apparent that the instrument was not intended as a complete embodiment of the undertaking." See statements of the rule by other authorities in opinion in *LOCKE v. MURDOCH*, ante, 267.

Discussing the question farther, Greenleaf states in vol. 1, § 305f, that "even though there has been an integration, i. e., a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions, and not another, or may integrate one part of a transaction, and not another part, it is of course always open to show that the integration was partial only, and in such case the terms of the remainder not covered by the written memorial may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far [as] the parties have intended it."

It thus appears that the abstract principle applied in *LOCKE v. MURDOCH*, is well settled; the difficulty arises, as recognized therein, from the application of the rule to a specific state of facts.<sup>1</sup>

Contrary to the conclusion therein reached, the majority of courts have held parol evidence of an agreement by the vendor of a business not to re-engage therein inadmissible where a part of the agreement between the parties has been reduced to writing. Different courts have taken different views as to the factors determinative of the admissibility of such evidence, and these are discussed in detail. The usual writing involved in the case is a bill of sale, but the question has arisen where other writings were involved. It is of course apparent that the character of the writing is an important factor in determining the admissibility of the evidence.

In discussing the application of the rules above mentioned Greenleaf states in vol. 1, § 305f, that "since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case,—including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation. No detailed rules can be formulated, and the working of the principle can best be understood by noticing its application in particular instances." And Wigmore, in the citation given in *LOCKE v. MURDOCH*, takes practically the same position. It is there expressly stated that "the document alone will not suffice" to show the intent of the parties; and again, in § 2431, this author states that the doctrine that "the writing is the sole criterion" is "untenable, both on principle and in practice."

It has been held, however, that the only evidence of the completeness of a written contract as a full expression of the terms of the agreement of the parties is the contract itself; that where parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance, and consequently all parol testimony of conversations held between

<sup>1</sup> The right to show a parol warranty in connection with the contract of sale of personality is discussed in the note to *Electric L.R.A.* 1917B.

*Storage Battery Co. v. Waterloo; C. F. & N. R. Co.* 19 L.R.A.(N.S.) 1183.

Contemporaneous agreements and their

them or declarations made by either of them before, or at the time of the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or contradict its terms is not admissible.<sup>2</sup> It cannot be assumed from the mere fact that the

written memorial contains nothing on the subject to which the parol evidence is directed, that the writing was designed as an imperfect expression of the agreement between the parties.<sup>3</sup> According to this theory if the writing appears to be a complete contract parol evidence is inadmissible.<sup>4</sup> If it does not purport to be the complete agreement of the parties, parol evidence is admissible.<sup>5</sup>

breach as a defense to a promissory note is discussed in the note to *American Gas & Ventilating Mach. Co. v. Wood*, 43 L.R.A. 449.

As to the validity of an agreement by an employee not to engage in business in competition with an employer, see note to *Turner v. Abbott*, 6 L.R.A.(N.S.) 892, and see the other point in this case as to admissibility of parol evidence of an agreement on the part of the employee not to engage in business in competition with his employer, where the contract for employment is in writing.

<sup>2</sup> *Osgood v. Skinner* (1904) 211 Ill. 229, 71 N. E. 869; *Durham v. Lathrop* (1901) 95 Ill. App. 429; *Slaughter v. Smither* (1899) 97 Va. 202, 33 S. E. 544; *Gordon v. Parke & L. Machinery Co.* (1894) 10 Wash. 18, 38 Pac. 755.

<sup>3</sup> *Slaughter v. Smither* (1899) 97 Va. 202, 33 S. E. 544.

<sup>4</sup> In *Osgood v. Skinner* (1904) 211 Ill. 229, 71 N. E. 869, holding parol evidence of an agreement by the vendors of a coal mine not to re-engage in business inadmissible, the evidence was to the effect that the purchaser did not understand or intend to make a legal or binding agreement to the effect that the vendors should not re-engage in the business, but that he asked for their word of honor as business men that they would not engage in the business, and this promise was intentionally omitted from the written contract. In the opinion of the lower court it is stated that the purchaser testified that the promise of the vendors not to re-engage in the business was omitted from the written contract because of the belief that it was illegal and opposed to public policy. (1904) 111 Ill. App. 606. The court in this case apparently considers circumstances other than the writing.

In *Slaughter v. Smither* (Va.) *supra*, the purchaser, under the terms of the agreement, was to take charge of the business, and run it for the vendor. The agreement provided for the manner of refurnishing the stock, and for the keeping of accounts and sales, and then provided that when the purchaser had paid in all a certain sum he was to "receive a clear bill of sale for the business."

The agreement involved in *Gordon v. Parke & L. Machinery Co.* (1894) 10 Wash. 18, 38 Pac. 755, was that the vendor, his successors, and assigns "will cause to be executed by its duly authorized officers, an assignment and transfer and conveyance to the said party of the second part [the

purchaser], of all its right title, and interest in and to the following named property owned by the party of the first part and now situated and being in . . . and will within ten days from the date thereof deliver the same to the second party." Then followed a description of the property and numerous details; and it was declared: "The intention and object of this agreement being to sell and deliver an aggregate value of \$29,000, the foregoing amounts being subject to alteration and increase or decrease after ascertainment by inventory; total amount of said variation not to exceed \$500." The court states that the contract was one of great detail, and entered minutely in all the matters undertaken by both parties and was executed by both. It covered the sale of the stock, accounts, and lease of the place of business of the vendor, with its furniture, fixtures, and books. Answering the objection that the promise not to re-engage in business was a collateral agreement not connected with the subject matter of the principal contract, and not to be performed until after the full execution of the principal contract, the court states: "The complaint says that the respondent's purpose in making the purchase was to continue business in the same line theretofore followed by appellant in Spokane with the merchandise to be sold to him, and that the object of the agreement that appellant would no longer carry on business at that place was to prevent competition with him in the disposal of the goods acquired by him. If so, then to the extent that the agreement referred to the goods which were the subject of the contract, it was certainly not collateral or independent, and we should expect to find some mention of the arrangement in a contract so precise in its terms and so formally drawn as this one. Not finding it there, the law concludes that the agreement alleged was not made, however much the appellant may have intended not to reopen business in Spokane."

<sup>5</sup> In *Durham v. Lathrop* (1901) 95 Ill. App. 429, the purchase and sale was here made between partners. The writings evidencing the sale were as follows: First, "I have this day sold to . . . all of my interests in the firm of. . . . Receipt of money is hereby acknowledged." Second, a receipt for the money in words, "Received of . . . \$3,300 in full of all demands to date." These instruments were both dated and both signed by the

Where the promise of the vendor to discontinue the business, if made at all, is a part of the contract of sale, agreed upon at the time the agreement is reduced to writing, it cannot be contended that the promise is a distinct collateral agreement forming no part of the contract which is reduced to writing.<sup>6</sup>

It is apparently the theory of one case<sup>7</sup> that the rule admitting parol evidence when the writing on its face does not purport to contain the entire agreement of the parties, or where the matter sought to be proved by parol is independent of and collateral to the writing, has no application to the admissibility of evidence of an agreement not to re-engage in business where the agreement of sale has been reduced to writing.

In a case<sup>8</sup> in which the purchaser sought the reformation of the contract so as to include the agreement not to re-engage in business and damages for the breach of such agreement, the court in denying the relief cites from Greenleaf on Evidence, vol. 1, § 275, to the effect that "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties,

and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.'"

Some cases do not consider the manner of determining the intention of the parties; in fact the intention of the parties is not considered as a determinative factor; but the attention of the court is directed to the abstract question of the relation of an agreement not to re-engage in business to the agreement of sale. The courts are not agreed on the admissibility of the evidence when determined from this standpoint. Some cases have considered such an agreement, founded upon the same consideration and entered into at the same time with the written contract between the parties, "an additional oral stipulation," and parol evidence thereof inadmissible.<sup>9</sup> In excluding evidence of a

retiring partner. Another writing was executed on the same day and signed by both of the partners as follows: "The firm of . . . is this day dissolved by mutual consent. . . . will assume all liabilities and collect all accounts, and will succeed the firm of. . . ." The oral agreement not to re-engage in business is stated to be in no way inconsistent with any of the terms of any of the writings, nor does it vary them.

See *Pierce v. Woodward*, *infra*, note 13.

<sup>6</sup> *Slaughter v. Smither* (Va.) *supra*. See *Costello v. Eddy* (N. Y.) *infra*.

But see *Fusting v. Sullivan*, *infra*, note 12.

<sup>7</sup> At least this seems to be the meaning of the court in *Costello v. Eddy* (1890) 34 N. Y. S. R. 565, 12 N. Y. Supp. 236, affirmed without opinion (1891) 128 N. Y. 650, 29 N. E. 146, where, after referring to these rules, the court states that the rule is not applicable in the case at bar. No explanation of why the rule is not applicable is made, and the meaning of the court is not clear.

<sup>8</sup> *Brintnall v. Briggs* (1893) 87 Iowa, 538, 54 N. W. 531. At the time of the execution of the written agreement the purchaser knew that there was no stipulation as to re-engaging in business in the writing, and requested it to be inserted. The vendor refused to have it inserted, but L.R.A.1917B.

orally agreed that the same should be binding upon him the same as if inserted in the written contract.

<sup>9</sup> In reliance upon *Costello v. Eddy*, *infra*, it was held in *Love v. Hamel* (1901) 59 App. Div. 360, 69 N. Y. Supp. 251, that parol evidence of an agreement not to re-engage in business could not be shown, where such agreement was not contained in the writing in which the vendor "hereby sells, transfers, and delivers to the parties of the second part, one Cornell Cafe, situated on Eddy street in said city . . . together with all of the fixtures and appurtenances thereto belonging and owned by said party of the first part." In this case at the time of drawing the writing, when it was read over to the parties, the purchaser mentioned the omission of the clause in regard to the agreement not to re-engage in business. It was then stated by the lawyer who drew the contract that he would draw a new contract or interline such provision. The vendor thereupon said it was not necessary, that he was in a hurry, that the purchasers had always done as they had agreed by him, and he certainly would do so by them, whereupon it was omitted; the court stating: "The statements made by the parties to this action, and advice of counsel given when the writing was being prepared, shows that the parol agreement was considered by all as one entire agree-

parol agreement not to re-engage in business where the written contract signed by the parties did not show any such agreement, one court,<sup>10</sup> after remarking upon the difficulty of determining any definite boundary line between the cases in which parol evidence is admissible and those in which it is inadmissible, where the parties have made a written contract in reference to the general subject of agreement between them, states: "We are of opinion that the evidence here offered was properly excluded, inasmuch as the defendant must take the position that the sale of the fish stand and the personal property attached to it, and the stipulation that the defendant would not engage in the business within the limits of Springfield for the term of one year, were part of or formed the original consideration."

ment, all of which to be binding upon the parties should be incorporated into the written agreement."

Parol evidence of an agreement by a vendor not to re-engage in business was held inadmissible in *Ordelheide v. Traube* (1914) 183 Mo. App. 363, 166 S. W. 1108, where there was no issue whatever in the case touching this matter, the suit proceeding alone for damages occasioned through the breach of the vendor's contract to sign a lease. The court adds, however, that this evidence "was incompetent because it tended to vary by parol the written contract of sale, in which no such stipulation appears, by showing an additional term of the agreement contemporaneously entered into."

<sup>10</sup> *Wilson v. Sherburne* (1850) 6 Cush. (Mass.) 68.

In following this case in *Doyle v. Dixon* (1866) 12 Allen (Mass.) 576, the court states that "the alleged oral contract of the defendant was identical with the writing in every particular except that it specified the amount of rent, and added an agreement not to engage in the grocery business, or sell goods of the same description as the stock purchased by the plaintiff within five years in. . . . The evidence offered can be considered in no other light than as an attempt to ingraft upon the written instrument an additional oral stipulation founded upon the same consideration and entered into at the same time with the written contract between the parties."

<sup>11</sup> In *Walther v. Stampfli* (1901) 91 Mo. App. 398, the term "good will" is treated as synonymous with an agreement not to re-engage in the business. The written agreement is not set forth in the report of this case, but apparently the various items were mentioned as indicated from the above citation. See *Hebert v. Dupaty* (1890) 42 La. Ann. 343, 7 So. 580, *infra*, note 15.

Practically the same line of reasoning is adopted in *Costello v. Eddy* (1890) 34 N. Y. S. R. 565, 12 N. Y. Supp. 236, affirmed L.R.A.1917B.

In another case<sup>11</sup> in which the evidence was held inadmissible in an action by the purchaser for breach of the vendor's contract, the court states that the purchaser "bought at a certain price the defendant's merchandise, his business as a furniture dealer and undertaker, with other personal property mentioned [therein], and in addition, as she claims, his good will. His good will was one of the subject matters of the contract as much so as the horse and wagon or any other article mentioned in the writing. In buying his good will she was buying property. It should have been included in the written instrument. It was as necessary to have had it inserted in the writing as the furniture."

Other cases have held the evidence admissible on the theory that the agreement not to re-engage in business is not

without opinion in (1891) 128 N. Y. 650, 29 N. E. 146, where in an action to recover damages for an alleged breach of the contract not to re-engage in business, parol evidence of such agreement was held not admissible where neither the written contract nor bill of sale contained any express agreement that the vendor would not again engage in the business in the town where located. The purchaser sought to separate this agreement from the agreement of sale and treat it as collateral to the sale of the business. In denying this contention the court states: "Suppose that in drawing the contract all other articles, rights, and privileges intended to be transferred by the parties had been specified in the contract except the horses and harness, could the plaintiff in an action at law for damages for a failure to deliver the horses and harness prove, notwithstanding the writing, that they were embraced in the sale and paid for by the \$2,000? We think not." After stating that such a mistake might be corrected in equity, the court continues: "In an action at law the terms of the writing would prevail, and the legal rule would apply, that all the agreement of the parties as to what the defendant sold, and what was purchased by the plaintiff, was merged in the writing, and that would control."

The written contract of sale involved in *Costello v. Eddy* (N. Y.) *supra*, provided that the vendor had sold "the lease and business carried on by said Eddy as a bakery business on Broadway and Philadelphia streets, Saratoga Springs; also the horses, wagons, tools, apparatus, furniture, fixtures, stock, goods on hand (excepting bank accounts); also all the leases covering premises on Philadelphia street, the bakery on Broadway, the lease of Dr. Ford's barn in the alley, and also all the interest of said George B. Eddy of, in, and to the house on Bullard street." The writing contained covenants of warranty to warrant



necessarily involved in a contract of purchase, but is merely incidental and collateral.<sup>12</sup>

In some cases the writing is of such a character as to clearly determine the question. For example, an agreement not to re-engage in business is not inconsistent with a deed of the land on which the business is conducted, nor does it affect a conveyance of real estate, hence evidence thereof is admissible.<sup>13</sup> So, parol evidence is admissible in an action for breach of the agreement, to show an agreement by the owner of a hotel, upon the sale of the furniture therein, and an agreement by the purchaser to take a lease of the building, to remain at the hotel and use her influence to aid in retaining the

guests of the house and their patronage, where the only writing was a lease of the premises; since the agreement not to re-engage in business is a separate contract collateral to the lease, in no manner intending to modify or affect any stipulation in the lease or right of obligation created by it.<sup>14</sup> On the contrary, where the writing enumerates every item sold, and fixes a valuation thereon, the evidence has been stated to be inadmissible.<sup>15</sup>

Where the written contract of sale transfers the good will of the business, parol evidence of the oral agreement not to re-engage in business is inadmissible.<sup>16</sup> "Good will" is regarded in some cases as relating to the same subject matter as an agreement not to re-engage

and defend the sale of the property and interest.

<sup>12</sup> *Fusting v. Sullivan* (1874) 41 Md. 162. The written contract provided that the vendor "has agreed to sell to the parties of the second part his store, house, lumber yards, barn, and barnyards as it now is inclosed, for the sum of — dollars." The terms of payment were then provided, purchasers agreeing to "take all the stock in trade in the store and in the lumber yard at cost on its market value, adding hauling for lumber and coal as agreed upon," the agreement being signed and dated. The court states that, "although the good will of the store, and the agreement not to set up another, were, according to the statement of [the purchaser] material elements of the consideration to be given for the purchase of the property, yet they were not necessarily involved in the purchase nor referred to in the contract, and were in fact incidental and collateral."

It is stated obiter in *Webber v. Smith* (1914) 24 Cal. App. 51, 140 Pac. 37, that parol evidence of an agreement by the purchaser of the tangible property of a milk route to purchase the good will of the business is admissible, in an action by the vendor to recover for the purchase price agreed to be paid therefor. The written bill of sale specified and covered the tangible property on the route, and it is stated that the subjects dealt with in the bill of sale were distinct and separate from the good will of the business.

See *Slaughter v. Smither*, supra, note 4.

<sup>13</sup> *Pierce v. Woodward* (1828) 6 Pick. (Mass.) 206. In order to induce the purchase, the owner of the store and land agreed not to engage in the same business within certain limits. The action was one for a violation of his oral agreement.

See *Durham v. Lathrop*, supra, note 5.

<sup>14</sup> *Welz v. Rhodius* (1882) 87 Ind. 1, 44 Am. Rep. 747.

<sup>15</sup> *Hebert v. Dupaty* (1890) 42 La. Ann. 343, 7 So. 580, stating that where the act of sale of a livery business enumerates L.R.A.1917B.

every item sold with a valuation, parol evidence is inadmissible to show that the "good will" of the business was also sold to the purchasers. Such evidence is stated to add to and contradict the written act of sale in which there is no ambiguity or uncertainty. The action here was one for damages for conducting a competing business; it was not shown that the vendor had conducted a competing business, and the court states that, admitting the good will of the business was sold, it could have no bearing on the case.

See *Walther v. Stampfli*, 91 Mo. App. 398, supra, note 11.

<sup>16</sup> *Drake v. Dodsworth* (1867) 4 Kan. 159; *Wessel v. Havens* (1912) 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377; *Smith v. Gibbs* (1862) 44 N. H. 335; *Zanturjian v. Boornazian* (R. L.) infra.

After holding that the evidence was insufficient to show an agreement on the part of a vendor not to re-engage in business, the court in *Hall's Appeal* (1869) 60 Pa. 458, 100 Am. Dec. 584, states: "Here the parties have put their contract in writing, and it must be allowed to speak for itself unless it is clearly shown that the stipulation in question was omitted through fraud or mistake."

The parol evidence that was sought to be introduced in *Bassett v. Percival* (1862) 5 Allen (Mass.) 345, was not that a vendor of a business would not re-engage in the business, but that he agreed "that the plaintiffs had bought his trade, and to influence his former customers to patronize the plaintiffs at store No. 763."

The good will of the business was valued separate from the stock of goods, and upon the vendor re-entering business the action was brought to recover the entire amount paid for the good will. After pointing out that the entire amount paid for the good will could not be recovered since the vendor had not re-engaged in business for over a year after the sale, the court passes to the other objection, that the written contract cannot be varied by parol evidence, and

in the business,<sup>17</sup> although not necessarily synonymous.<sup>18</sup> It necessarily follows from this view that the parties having reduced this particular branch of the agreement to writing, it cannot be varied by parol evidence. But in other cases<sup>19</sup> the decision is put upon the broad ground that the law presumes the written agreement to be the contract of the parties, and to embrace all the terms and stipulations deemed material by either at the time of its execution, and not upon the theory that the term "good will" relates to the same subject matter

as the agreement not to re-engage in business. The court expressly states that, when the parties to the agreement "had a bill of sale drawn up, and formally executed, which, while it did expressly specify that the good will of the business was included in the sale, made no mention of the restriction in question, to now permit the complainant to prove that the contract was something different from that contained in the bill of sale would be to permit a written agreement to be added to or varied by parol, which the law will not allow."

states: "The parties having reduced their contract to writing, their rights under it must depend on the true interpretation of its terms irrespective of any parol evidence of what took place previously to or at the time of the making of the agreement."

<sup>17</sup> *Drake v. Dodsworth* (1867) 4 Kan. 159. The court here states that "the parties have not only reduced their contract to writing, but have included in its terms that very branch of it which the plaintiff seeks to enlarge by parol testimony. The defendant not only sold the stock, fixtures, tools, and machinery, but also the good will of the same. Now this good will gave the plaintiff some rights, and to the exact extent of those rights the sale thereof was a restraint of the defendant's right to use them . . . to enlarge that restraint by parol testimony would be extending the right of varying a written contract by oral testimony that would be really dangerous in itself, and going farther than any well-considered case will authorize."

In a bill by the purchaser of a printing business and newspaper to enjoin the vendor from publishing another paper, the court in *Smith v. Gibbs* (1862) 44 N. H. 335, states that parol evidence cannot be received to show that at the time of the sale or during the prior negotiations a verbal agreement was made by the defendant that "he would not establish a competing business, if such be the fact; for the contract is not silent upon this point, but contains in effect an agreement by the defendant not to continue the particular business sold to the plaintiffs; and to allow such proof would

be to receive parol evidence to change a written agreement not to continue a particular newspaper and a designated printing business into a general contract not to set up any rival newspaper or engage in any competing business."

In *Dixon v. Witte* (1877) 4 W. N. C. (Pa.) 213, the written agreement of sale witnessed that the purchaser purchased of the vendor "his stock, good will, and fixtures and horse and wagon in store." The vendor subsequently re-engaged in business within a few squares of the old business. A verdict for the purchaser against the vendor for breach of the written agreement was sustained. The only objection to parol evidence seems to have been that it was admitted to explain the meaning of the term "good will." There is no opinion.

<sup>18</sup> The question of substantive law as to the sale of a business and good will as a limitation upon the right of the vendor to engage in competing business is discussed in note to *Gordon v. Knott*, 19 L.R.A. (N.S.) 762.

<sup>19</sup> *Zanturjian v. Boornazian* (1903) 25 R. I. 151, 55 Atl. 199. The purchase of a business, in the action to enjoin the vendors from re-engaging in business, offered to show that, subsequent to the making of the bill of sale, the vendors agreed to make another writing if and whenever the complainant desire the same, in which they would set forth the agreement not to re-engage in business. The court states that, even if this position were sustained by evidence, such contract was without consideration and hence unenforceable. W. A. E.

# NORTH DAKOTA SUPREME COURT.

E. O. HAGEN, Appt.,

v.

NELS O. GRESBY, Resp't.

(— N. D. —, 159 N. W. 3.)

Writ — typewritten signature — effect.

A summons is not a nullity to which the name of the attorney for the plaintiff, to-

gether with his address, is printed by the clerk on the typewriter at his request and instruction and in accordance with a general custom of the office, and such signing is a sufficient compliance with § 8944 of the Compiled Laws of 1913, which provides that the summons "shall be subscribed by the plaintiff or his attorney, who must add to

Note. — As to typewritten, printed, or stamped signature of legal process or other legal papers, see annotation following this case, post, 285.

his signature his address, specifying a place within the state where there is a postoffice." *For other cases, see Writ and Process, I. in Dig. 1-52 N. S.*

(June 13, 1916.)

**A**PPEAL by plaintiff from a judgment of the County Court for Ward County setting aside and declaring null and void a judgment entered by default. Reversed.

The facts are stated in the opinion.

Mr. F. B. Lambert for appellant.

Mr. Halvor L. Halvorson for respondent.

Bruce, J., delivered the opinion of the court:

This is an appeal from a judgment of the county court of Ward county, setting aside and declaring null and void a judgment entered and obtained by default. Two questions are presented: Whether the summons to which the name of the plaintiff's attorney was printed with a typewriter, and which was not subscribed by said attorney in his own handwriting, was a nullity; and whether, if a nullity, the defendant entered a general appearance in his motion to set aside the judgment. The summons was in the regular statutory form. At the bottom there was written in typewriting.

"F. B. Lambert, Attorney for Plaintiff, P. O. Address, Minot, North Dakota."

The order setting aside the judgment was as follows: "That said judgment be opened up and vacated and set aside, and that all proceedings had thereunder be likewise vacated, annulled, and set aside, and that said judgment is void, a nullity, and of no force or effect whatsoever, the same having been entered by default in an action wherein no summons had been issued as provided by law."

On the hearing on this motion the plaintiff produced the affidavit of F. B. Lambert, his attorney, which, among other things, stated: "That both the summons and complaint in this action were properly subscribed by affiant in the usual and ordinary way; that the signature of affiant made to said summons and complaint was made in typewriting by Wade A. Beardsley, the clerk and associate of affiant at affiant's request and instruction; and the same was adopted by this affiant as his signature and acted upon as such, and was acted upon also by the defendant; that this affiant has been an active practitioner in this court, and in all the courts of the state, both state and Federal, since April, 1896, and has never during said twenty years ever signed a summons with pen and ink; that previous to that time, this affiant was employed as

stenographer and clerk for the law firm of Messrs. McCumber & Bogart, at Wahpeton, North Dakota, for a number of years, and during all said time signed with a typewriter every single summons issued out of said office in the name of said firm of McCumber & Bogart; that in all proceedings in the supreme court of this state the affiant has invariably caused his name to be signed by his then clerk or stenographer in affiant's name; that numerous judgments, both default and in contested cases, have been entered in this court and in the district courts of this state on summons signed in this way by the name of this affiant; that to open up the judgment entered in this case and allow the defendant to answer would be a great injustice to the plaintiff, not only in expense, but in time and delay."

The summons was not nullity. Section 8944 of the Compiled Laws of 1913 provides that "the summons must contain the title of the action, specifying the court in which the action is brought, the name of the parties to the action, and shall be subscribed by the plaintiff or his attorney, who must add to his signature his address, specifying a place within the state where there is a postoffice. The summons shall be substantially in the following form, the blanks being properly filled."

This is the section which is applicable to procedure in the county court. The requirements in regard to the summons, however, in the district court are identically the same save for the days given in which to answer. See §§ 7421, 7422, 7423 of the Compiled Laws of 1913 and which, now, under the amendment made by chapter 102 of the Laws of 1915, are the same, even as to the days in which to answer. Under all these statutes it is required that the summons "shall be subscribed by the plaintiff or his attorney, who must add to his signature his address."

The question, therefore, is whether this statute is complied with when the name of the attorney is attached by his clerk at said attorney's request and instruction and in accordance with a general custom which prevails in such office.

We can see much in the argument that the subscription should be made in the actual handwriting of the plaintiff or his attorney, and yet the general practice which prevails in this state, the injury to business and to land titles that would follow such a holding, as well as the wording of the several statutes, must lead us, as it has lead practically all of the courts of the country that have passed upon the question, to a different conclusion. Section 10366 of the Compiled Laws of 1913 provides that "the term 'signature' [as used in the Penal

Code] includes any name, mark or sign, written with intent to authenticate any instrument or writing," while § 10367 provides that "the term [writing] includes printing and typewriting." Forgery, therefore, can be committed of a printed signature as well as a written one, or by printing a signature as well as by writing it. In the case of *Ligare v. California Southern R. Co.* 76 Cal. 610, 18 Pac. 777, the court says: "It is said that the summons was not signed by the clerk. The statute requires that it should be so signed. Code Civ. Proc. § 407. But we think the affixing by the clerk of the seal of the court to a form to which was appended his printed name was an adoption of the printed signature, which for the purpose in hand was sufficient."

In the case of *Williams v. McDonald*, 58 Cal. 529, the court says: "This is an appeal from a judgment and order denying a motion for a new trial in a street assessment case. The appellant, Quackenbush, presents three points for our consideration, viz.: The resolution of intention was not signed by the clerk. Upon this point the testimony of the clerk of the board of supervisors was: 'I have adopted a form for my signature; there is a printed signature adopted by me for all resolutions and orders. The name John A. Russell is, as you see, printed at the bottom of the paper. I never actually signed it, but I adopted the printed signature. I always kept blanks for resolutions in my office with my signature printed at the bottom for convenience.' He further testified that when the resolution in question was adopted by the board he filled in the date and placed it in the proper place, and caused it to be published in the proper papers. The act in question says, 'Signed by the clerk.' We see no objection to the clerk adopting a printed signature."

In the case of *Hancock v. Bowman*, 49 Cal. 413, the court held without discussion that a judgment was not void or erroneous because the name of the plaintiff's attorney attached to the complaint was printed instead of being written. See also *Dreutzer v. Smith*, 56 Wis. 292, 14 N. W. 465.

In the case of *Hamilton v. State*, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299, the court said: "Section 1699, Rev. Stat. 1881, provides that after an indictment has been found by a grand jury, 'it must be signed by the prosecuting attorney,' and where an indictment is returned without his signature, § 1670 makes it the duty of the court to require the prosecuting attorney to sign it. L.R.A.1917B.

Section 240 of the same revision of statutes which prescribes certain rules for the construction of the statutes of this state declares that "the words 'written' and 'in writing' shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the written signature of any person is required, the proper handwriting of such person, or his mark, shall be intended." The word 'sign' as a 'verb' has several shades of meaning, and hence a statutory requirement that an instrument in writing, or a pleading, shall be 'signed' by some person or officer to make it complete is much more general and comprehensive than a similar requirement that such an instrument or pleading must be 'subscribed' by the person or officer. . . . On the same principle, the 'signing' of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his 'written signature' to it implies. When a person attaches his name, or causes it to be attached, to a writing, by any of the known modes of impressing his name upon paper, with the intention of signing it, he is regarded as having 'signed' the writing. . . . As the prosecuting attorney is required to sign an indictment as a matter of verification merely, there is no reason for enforcing a more rigid rule as to the validity of his signature than in cases of ordinary business transactions, to which the authorities above cited mainly have reference. . . . If, therefore, the name of the prosecuting attorney be legibly attached to an indictment by his consent, whether express or implied, it is a sufficient 'signing' by him within the meaning of the statute, and when the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority."

In the case of *Mezchen v. More*, 54 Wis. 214, 11 N. W. 534, the court said: "The learned circuit court held the proceedings were void because the summons in the action was not subscribed in the handwriting of the attorney who issued the same. The statute Rev. Stat. §§ 2629, 2630, provides that a civil action shall be commenced by the service of a summons, and, after describing what it shall contain, says: 'It shall be subscribed by the plaintiff or his attorney, with the addition of his postoffice address, at which papers in the action may be served on him by mail.' It is insisted by the learned counsel for the respondent, and was held by the circuit court, that this provision of the statute requires the sum-

mons to be subscribed by the party or his attorney in his own proper handwriting, and that if not so signed, it is absolutely void. We think the learned counsel and the court erred in giving the statute this restricted construction. The summons is not a writ or process of the court, but is simply a notice to the defendant that an action has been commenced against him, and that he is required to answer to the complaint which is either attached thereto or is or will be filed in the proper clerk's office. *Porter v. Vandercreek*, 11 Wis. 70; *Rahn v. Gunnison*, 12 Wis. 528; *Johnston v. Hamburger*, 13 Wis. 175. It is substantially the same method of commencing an action which was long practised in the state of New York before the adoption of the Code, viz., by filing a declaration with the clerk of the court in which the action was commenced, and entering a rule requiring him to plead, and then serving upon the defendant a copy of the complaint and a notice of such rule. The summons is, in fact, a notice to the defendant that an action is commenced against him, and that he must answer the complaint within a certain time or judgment will be taken against him. The only object of requiring it to show the name of the attorney, or party who commences the action, and his postoffice address, is that the defendant may know upon whom and at what place he may serve his answer and other papers in the action. 'That this is the object is apparent from the fact that the same section provides that the summons shall state the title of the cause, the court in which the action is brought, the county where the action is to be tried, and the names of the parties.' These facts give the defendant all the knowledge necessary to enable him to plead to the action, except the knowledge of the person upon whom and the place where his answer and other papers must be served. This object is certainly as well accomplished when the name of the party or attorney is printed at the end of the summons as when it is written there; and, unless the statute is imperative in requiring the signature in the handwriting of the attorney or party, there does not appear to be any reason for giving it that construction."

We are not unmindful of the statement made by this court in the case of *Mills v. Howland*, 2 N. D. 30, 49 N. W. 413, that "a signature means a person's name as set down by himself." In that case, however, no question was raised as to how the signature should be made.  
L.R.A.1917B.

Nor are we unmindful of the force of the argument that such signatures, if authorized in the case before us, might be inoperative as a justification for the payment of checks by banks. We have no question, however, that if a depositor authorized his name to be signed to a check by a clerk on a typewriter, a bank would be protected in paying the same when so signed. We do not, however, pass upon this question, nor is it necessary. Deeds and checks differ from summonses. A deed or a check serves to convey or assign property. A summons does not. A summons is merely a notice. It conveys nothing. It is merely a notice that at a certain time and place a judgment will be asked of a court against the defendant. If the defendant is properly informed of such hearing and has an opportunity to attend, why should he complain of the nature of the signature. *Mezchen v. More*, supra.

Nor does the fact that the statute of North Dakota uses the word "signature," as well as the word "subscribed," make any difference. The word "subscribed" is more restricted than the word "signature." The word "signature" in its origin involves merely a sign. The word "subscribed" involves a writing. If, therefore, we construe the word "subscribed" to include a writing by means of a typewriter as well as by the pen, we decide the whole case. The distinction indeed is clearly between a statute which provides that a notice shall be signed or subscribed and one which provides that it shall be subscribed in the personal handwriting of the party in person. *Hamilton v. State*, supra.

We are not unmindful of § 7311 of the Compiled Laws of 1913, which provides that the words "write" and "written" include "printing" and "printed," except in the case of signatures and when the words are used in the way of contrast to printing, and on which emphasis is laid by counsel for respondent. We do not see, however, that this statute is controlling in the case before us. The words "write" and "written" are not used in § 8944, which relates to summonses. All that that section provides is that the summons "shall be subscribed by the plaintiff or his attorney, who must add to the signature his address." See *Hamilton v. State*, supra. The section clearly only applies where a signature is required to be in writing.

The judgment of the County Court is reversed, and the cause is remanded for further proceedings according to law.

**Annotation—Typewritten, printed, or stamped signature of legal process or other legal papers.**

As to sufficiency of printed or stamped signature under Statute of Frauds, see note to *Lee v. Vaughan Seed Store*, 37 L.R.A.(N.S.) 352.

**In civil actions.**

The great majority of the cases sustain the rule that a typewritten, printed, or stamped signature of a legal process or paper is a sufficient compliance with a statute requiring such a paper to be signed or subscribed, and are therefore in harmony with the holding of *HAGEN v. GRESBY*, ante, 281, that a summons is not a nullity to which the name of the attorney for the plaintiff is printed by the clerk on the typewriter at his request and instruction, and in accordance with a general custom of the office, and that such signing is a sufficient compliance with a statute providing that a summons shall be subscribed by the plaintiff or his attorney.

In *Littleton v. Marshall* (1897) 8 Ohio S. & C. P. Dec. 672, 6 Ohio N. P. 509, it is stated that even a strict construction of the law requiring a summons to be signed by the clerk would permit the clerk's name to be written, printed, or stamped at the end of the summons.

The affixing by the clerk of the seal of the court to a summons to which is appended his printed name is an adoption of the printed signature, which is a sufficient compliance with the statutory requirement that the summons be signed by him. *Ligare v. California Southern R. Co.* (1888) 76 Cal. 610, 18 Pac. 777.

The signing of a summons by the clerk's deputy with his own name after the printed signature of the clerk, with a "per," proves the adoption of the printed signature by the clerk through his deputy, and further verification is afforded by the seal of the clerk. *Littleton v. Marshall* (Ohio) supra.

The provision of a statute that a summons shall be subscribed by the plaintiff's attorney does not require it to be subscribed by him in his own proper handwriting, but his name may be printed thereon. *Mezchen v. More* (1882) 54 Wis. 214, 11 N. W. 534; *New York v. Eisler* (1882) 2 N. Y. Civ. Proc. Rep. (Browne) 125.

But, in *Ames v. Schurmeier* (1864) 9 Minn. 221, Gil. 206, it was held that the written signature of the plaintiff or his attorney was required by a statute L.R.A.1917B.

requiring a summons to be subscribed by one of them, and that a printed signature did not fulfil such statutory requirement, because the statutory construction act provided that where the written signature of any person was required by law, it should always be the proper handwriting of such person.

This case was overruled, however, by *Herrick v. Morrill* (1887) 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849, which held the contrary.

A printed subscription of a summons is a substantial compliance with such a statute, and an objection thereto is technical; if it is a defect it is immaterial. *Mutual L. Ins. Co. v. Ross* (1860) 10 Abb. Pr. (N. Y.) 260, note.

But such a subscription was held in *Farmers' Loan & T. Co. v. Dickson* (1859) 9 Abb. Pr. (N. Y.) 61, 17 How. Pr. 477, to be a nullity, without giving the reason for such holding. The court, however, stated that the copy served being properly signed, the defect might be cured by filing such a copy nunc pro tunc.

In *Barnard v. Heydrick* (1866) 49 Barb. (N. Y.) 62, 2 Abb. Pr. N. S. 47, 32 How. Pr. 97, the judge discussed the preceding case, but disagreed therewith, holding that a summons issued by an attorney, with his name printed at the end thereof, was subscribed by him, within the meaning of the Code.

By a statute requiring that an original notice be signed by the plaintiff or his attorney, no more is exacted than that the name of the plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service. A printed signature was held sufficient in *Cummings v. Landes* (1908) 140 Iowa, 80, 117 N. W. 22.

A stencil signature of a justice of the peace to an original notice complies with the statute providing that such a notice must be subscribed by the justice before whom it is returnable. Such signature is sufficient to confer jurisdiction upon the justice. Even if irregular, the notice would be merely voidable, and not subject to collateral attack. *Loughren v. Bonniwell* (1904) 125 Iowa, 518, 106 Am. St. Rep. 319, 101 N. W. 287.

A declaration may be signed by an impression thereon of the names of the plaintiff's attorneys, made by a rubber stamp, as it is ordinarily the act of making a paper one's own that is important, rather than the manner of so doing. *Streff v. Colteaux* (1896) 64 Ill. App. 179.

The judgment roll in an action to enforce a lien for a street assessment will not be stricken out because the name of the plaintiff's attorney is printed at the bottom of the complaint instead of being written. *Hancock v. Bowman* (1874) 49 Cal. 413.

The signing by a member of the law firm representing the plaintiff, of the affidavit verifying a petition, is sufficient to identify the typewritten signature of the firm attached to the petition. The court in the syllabus stated this point as follows: "Where a petition is brought for the recovery of land, and the typewritten names of plaintiff's attorneys are attached thereto, the signing of the verification of the petition by one of the attorneys is a sufficient signature to the petition itself." *McTyer v. Stearns* (1914) 142 Ga. 850, 83 S. E. 955.

But the printed signature of counsel to a bill in equity was held insufficient in *Eveland v. Stephenson* (1881) 45 Mich. 394, 8 N. W. 62.

And in *Nightingale v. Oregon C. R. Co.* (1873) 2 Sawy. 338, Fed. Cas. No. 10,264, upon a motion to vacate an order of continuance upon the ground that the stipulation therefor was signed by counsel without authority, where it appeared that the names of such counsel were printed at the end of the complaint, the court, on allowing the motion upon the ground that the order admitting them, as a matter of comity, to appear as counsel in the case, did not authorize them to sign the stipulation, said: "Nor does the fact that their names are printed on the complaint as 'of counsel for the complainant' affect the matter one way or the other. These printed names are not their signatures. Besides, not being counsellors of this court, they were not authorized to sign the complaint as counsel."

And the lithographed signature of the plaintiff's solicitor to the particulars was held not a sufficient signing thereof to entitle the plaintiff, in an action in a county court, to the costs of entering a plaint by a solicitor. The master of the rolls dissented from this holding, however, stating that the whole object of the rule requiring the solicitor's sig-

nature seemed to him to be to get the document authenticated as coming from a solicitor's office, and that if the solicitor authorized the issue of the lithograph form, that object was attained. *Reg. v. Cowper* (1890) L. R. 24 Q. B. Div. (Eng.) 533, 59 L. J. Q. B. N. S. 265, 62 L. T. N. S. 583, 38 Week. Rep. 408.

A writ to which a slip of paper bearing the name of the justice is affixed by the plaintiff's attorney is duly signed by the justice, where he authorized such act, and adopts such signature. *Richardson v. Bachelder* (1841) 19 Me. 82.

The signature of the clerk to a writ made by an attorney, with the former's permission, by cutting the clerk's name from another original writ and annexing it by wagers to the writ in question, is good. *Stevens v. Ewer* (1840) 2 Met. (Mass.) 74.

But a writ of execution, required by the Code to be subscribed by the clerk, is void where it bears the printed signature of the former clerk, followed by the name of the deputy of the clerk in office at the date of the writ. *O'Donnell v. Merguire* (1901) 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847.

The typewritten names of the appellant's attorneys to an assignment of error is a sufficient signing by them to withstand an attack by the appellee upon the ground that such assignment is defective because not signed. *Boes v. Grand Rapids & I. R. Co.* (1915) 59 Ind. App. 271, 108 N. E. 174. Upon a denial of a rehearing of this case in (1915) 59 Ind. App. 278, 109 N. E. 411, this point was not touched upon.

In determining whether a notary's name was appended to a jurat with a rubber stamp, or written with pen and ink, the trial court, in a suit in equity, is not compelled to disregard the appearance of the name itself and accept as conclusive indefinite testimony that the name was printed with a rubber stamp. *Burr v. Finch* (1912) 91 Neb. 417, 136 N. W. 72.

A municipal lien on a printed form, at the bottom of which is printed the name of the city solicitor, with the words, "city solicitor, per," followed by the written signature of one who is, though not shown by the paper, in charge of the lien bureau in the city solicitor's office, is signed by the city solicitor within the meaning of an act requiring his signature to liens. *Philadelphia v. Meighan* (1905) 15 Pa. Dist. R. 10.

A typewritten signature to an attach-

ment bond, if adopted by the party whose name is so signed, is good. *Bridges v. First Nat. Bank* (1907) 47 Tex. Civ. App. 454, 105 S. W. 1018.

The judge's signature to an order made at chambers may be affixed by the clerk by means of a stamp. *Blades v. Lawrence* (1874) L. R. 9 Q. B. (Eng.) 374, 43 L. J. Q. B. N. S. 133, 30 L. T. N. S. 378, 22 Week. Rep. 643.

A notice of objection to the retention of a name on a list of voters, to which the objector has affixed his name by means of a stamp, is signed by him within the meaning of a statute providing that such a notice shall be signed by the person objecting. *Bennett v. Brumfit* (1867) L. R. 3 C. P. (Eng.) 28, 37 L. J. C. P. N. S. 25, 17 L. T. N. S. 213, 16 Week. Rep. 131, Hopw. & P. 407.

The printing of the trustees' names on the notice of a school-bond issue election is a sufficient compliance with the statute requiring that such notice be signed by them, where they authorized the printing of their names and adopted them as their signature. *Lamaster v. Wilkerson* (1911) 143 Ky. 226, 136 S. W. 217.

The adoption by the clerk of a printed signature at the bottom of a blank resolution of intention in a street assessment foreclosure is a sufficient signing thereof. *Williams v. McDonald* (1881) 58 Cal. 527.

**In criminal prosecutions.**

A statute requiring the name of the district attorney to be subscribed to an information, by himself or by his deputy, is complied with by the writing of the name of the district attorney with a typewriter, followed by the signing by the deputy of his own name with pen and ink. *Almond v. People* (1913) 55 Colo. 425, 135 Pac. 783.

The objection to an information, that

the name or signature of the district attorney is printed, and not written, relates merely to a matter of form and procedure, which is amendable. *District of Columbia v. Washington Gaslight Co.* (1884) 3 Mackay (D. C.) 343.

The fact that the name of the prosecuting attorney to an indictment is typewritten, and not signed with pen and ink, is no ground of objection. *Miller v. State* (1896) 36 Tex. Crim. Rep. 47, 35 S. W. 391.

The attaching of the prosecuting attorney's name in print at the bottom of an indictment is his signature within the meaning of a statute requiring that an indictment shall be signed by him. *Hamilton v. State* (1885) 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299.

The fact that an indictment bears the printed signature of the predecessor in office of the commonwealth's attorney does not invalidate it, because the Code does not require him to sign it. *Brown v. Com.* (1909) 135 Ky. 635, 135 Am. St. Rep. 471, 117 S. W. 281, 21 Ann. Cas. 672.

A plea in abatement alleging that the name of the foreman of the grand jury was merely printed on the indictment is demurrable. *Coburn v. State* (1907) 151 Ala. 100, 44 So. 58, 15 Ann. Cas. 249.

A facsimile of the signature of the proper officer of the tenement-house department, made with a rubber stamp, is a sufficient signing of an order of such department respecting an alleged violation of the Tenement House Law, which does not provide for the form of the order, or the manner in which it shall be signed, but requires merely that it shall be a notice or order of the department. *Tenement House Dept. v. Weil* (1912) 76 Misc. 273, 134 N. Y. Supp. 1062.

G. V. I.

**OKLAHOMA SUPREME COURT.**

JACK COPELAND, Plff. in Err.,  
v.

OBIE COPELAND.

(— Okla. —, 159 Pac. 1122.)

**Divorce — changing custody of child.**

When, in an action for divorce, a decree

Headnote by HARDY, J.

**Note.** — As to remedy for refusal to permit access to or visitation of children, as provided by decree of divorce, see annotation following this case, post, 290.  
L.R.A.1917B.

has been rendered granting the husband a divorce and awarding him the exclusive care, custody, and education of their minor son, and directing that the actual custody of said child be placed with the husband's parents, and according the wife the privilege of visiting said child twice each month without the hearing of and without interference from any person, and directing the husband's parents to treat her as a guest during the period of her visits, and when the right of visitation has not been accorded the wife according to the spirit and intent of the decree, the court has the authority to modify its order and place said child a portion of the time with the parents of the wife, they being in every way suitable,



so that her right of visitation may be enforced.

*For other cases, see Divorce and Separation, VII. in Dig. 1-52 N. S.*

(September 12, 1916.)

**E**RROR to the Superior Court for Pottawatomie County to review an order modifying a judgment in plaintiff's favor in a suit for a divorce. Affirmed.

The facts are stated in the opinion.

Messrs. S. F. Bailey and Edward Howell, for plaintiff in error:

The maternal grandparents are not entitled to the custody of the child as against its father, he being in every way a suitable and fit person for the care and custody of the child, and there being no evidence in the record to show that any interest of the child would be subserved by permitting its maternal grandparents to have its custody.

Stanfield v. Stanfield, 22 Okla. 574, 98 Pac. 334; Snow v. Smith, 44 Okla. 312, 144 Pac. 578; Re Cross, 41 Okla. 629, 137 Pac. 673; Jamison v. Gilbert, 38 Okla. 751, 47 L.R.A.(N.S.) 1133, 135 Pac. 342; 29 Cyc. 1594, 1595; Eckhard v. Eckhard, 29 Neb. 457, 45 N. W. 466; Morrison v. Miller, — Tex. Civ. App. —, 128 S. W. 480.

Mr. H. H. Smith for defendant in error.

Hardy, J., delivered the opinion of the court:

Plaintiff in error was granted a decree of divorce from defendant in error in the district court of Pottawatomie county on the 26th day of October, 1914, and was awarded the exclusive care, custody, and education of their minor child, Darrell Gaston, with directions that the actual personal custody of said child should be with the father and mother of plaintiff in error, Mr. and Mrs. J. B. Copeland, granting to defendant in error the privilege of visiting said child at their home twice each month without the hearing or presence of anyone, and without interference, and directing the said Mr. and Mrs. Copeland to treat defendant in error kindly and as a guest during the period of her visits.

On March 29, 1915, there was filed in the trial court a motion to modify the order theretofore made so as to place the custody of said child one half the time with the parents of defendant. Much testimony was taken at the hearing, at the conclusion of which the court modified the order theretofore made, and awarded the custody of said child during the months of June and December to the parents of defendant, and for the remainder of the year the custody of said child was to continue as before. It is from this order that error is prosecuted.

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The entire case is presented in this court upon the theory that, the custody of this child having been placed with the father and mother of plaintiff, and no change having been shown in the condition of plaintiff or his parents, the court was without authority to modify the decree, under the rule announced in *Stanfield v. Stanfield*, 22 Okla. 574, 98 Pac. 334. This contention requires a review of the evidence taken at the hearing. No attempt was made to show that plaintiff was an unfit person, or that there had been any change in his condition, nor that the paternal grandparents were unsuitable, except as hereinafter pointed out. Evidence was introduced to show that Mr. and Mrs. R. L. Bristow, the father and mother of defendant, were in every way suitable; that they were peaceable, moral, industrious, law-abiding citizens; that Mr. Bristow was engaged in the mercantile business, and enjoyed the confidence and respect of those who knew him. Mr. Copeland was about seventy years of age and his wife was about sixty-five. All their children were grown and were married, and they were rearing a girl about fourteen years old. Mr. Bristow was forty-seven and his wife forty-four, and they had a family of seven children of various ages. Plaintiff was earning \$45 per month as a clerk in a grocery, while Mr. Bristow was paying defendant as a clerk in his store \$50 per month. After the litigation was commenced and the custody of the child was awarded to plaintiff with the privilege to defendant of visiting it, said child was taken to the home of Mr. and Mrs. Copeland. There is some controversy as to whether this was before or after the rendition of the final judgment. The trial court evidently took the view that this was after the former decree, and while the child was thus at the home of the Copelands, defendant, in company with her mother, Mrs. Bristow, visited the home of the Copelands for the purpose of being with her child. While there Mr. Copeland remained in her presence, not permitting her to visit the child alone, and, according to the evidence of defendant, was mad during the entire time, treating her discourteously, swearing and using vile language, and stating to her in the presence and hearing of the child and of her mother that she (defendant) ought not to have married his son, that she was not worthy of him, did not have any friends, and ought not to be allowed to see the child, and that this course of conduct and manner of talking was continued during the period of the visit. When they first arrived at the home of the Copelands Mrs. Bristow remained sitting in the buggy and asked defendant to bring the child to the buggy so she

could see it, and Mr. Copeland refused to permit this to be done. At another time when defendant visited their home she stayed all night, and while at the evening meal requested the child to sit in her lap during the meal. Mr. Copeland interfered and forbade the child doing so, and when she attempted to take the child in her lap told her if she could not behave to leave the house. The child told defendant in the hearing of Mrs. Bristow that Mr. and Mrs. Copeland had told it not to like its mother. The third time she attempted to visit the child she arrived at the Copeland's late one evening and was refused permission to stay that night. Upon this occasion she left with the child, going to various places, and was finally found in California. There was evidence tending to show that she was accompanied by a man named Campbell with whom she occupied the same room at a rooming house for as many as two nights. While there she became sick and underwent an operation. Plaintiff, learning of her whereabouts, caused her to be arrested upon a charge of kidnapping. She then returned to Oklahoma without requisition papers and presented to the court her motion to modify the final order theretofore made, with the result stated.

The authority of the court to modify the order did not depend solely upon whether there has been any change in the circumstances of the person to whom the custody of the child had previously been awarded, but the court was authorized to inquire into the conditions existing and determine whether its order as to the right of visitation accorded the mother had been complied with, and, if not, to enforce said order by placing the child where such right could be enjoyed in accordance with the spirit of the order. The welfare of the child is an element which may always be considered in determining the right to its custody. Rev. Laws 1910, § 3331; Jamison v. Gilbert, 38 Okla. 757, 47 L.R.A.(N.S.) 1133, 135 Pac. 342.

In Allison v. Byran, 26 Okla. 529, 36 L.R.A.(N.S.) 146, 138 Am. St. Rep. 988, 109 Pac. 934, the custody of an illegitimate child had been awarded to the father without the privilege of visitation being accorded to the mother. Thereafter, upon application to the court, the father was required to produce the child twice each month at the town of Norman, in order that the mother might see the child alone and in the absence of any other person. Allison refused to comply with this order, and was adjudged guilty of contempt and appealed. In the discussion of the case, this court, after reviewing a number of authorities, said: "From the foregoing it L.R.A.1917B.

will be seen that under practically every and all conditions the parent, in some instances the father, and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation. It is true the foregoing cases, other than the opinion of this court, present those only in which the question arose between parents of legitimate children, but the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interests of the child that it should not forget and be estranged."

The court quotes the language used in Allison v. Bryan, 21 Okla. 557, 18 L.R.A.(N.S.) 931, 97 Pac. 282, 17 Ann. Cas. 468, which was a case where habeas corpus had been sued out for the same child, and the custody held properly to belong to the father, where it was said: "We would not have it understood, however, that in thus declaring the law we hold he should not see his mother, be with her, or be permitted to enjoy her society, nor she his. Not at all. Under the judgment rendered in this cause in the lower court provision was made for the father to visit the child, and the successful respondents should not be deaf to those common promptings of humanity which dictate that the child and the mother be granted the utmost possible latitude for social communion consistent with the new duties placed upon all. In case of sickness or accident the mother should be promptly notified, and, if she desires, permitted to attend, care for, and nurse."

The trial court evidently entertained the view that its order permitting the mother to visit the child had not been complied with, and that the grandparents with whom the child was living were attempting to poison its mind against her, and were depriving her of the privilege of enjoying communion with the child according to the spirit and purpose of the original decree. Counsel say that by her conduct she forfeited her right to the custody of the child, and because no change has been shown in the condition existing at the time of the first order the modification thereof was void. This is saying, in effect, that the affection of this mother for her child counts for naught, and that its welfare depends upon the financial condition of the person in whose custody it was placed, and will not be affected by being deprived of association with its mother and of the love which she entertains for and yearns to bestow upon it, but will be best subserved by permitting a continuance

of the conduct of its grandparents, who, according to defendant's claim, insult and taunt her in the presence of the child, and teach it not to like her.

The original decree directed that defendant be given the privilege twice each month of visiting the child and having it with her during the entire day, out of the presence of and without interference from any person, and that she be treated as a guest during such visit. That this order has not been obeyed is manifest, in that during her visit the grandparents have not permitted her communion with the child to be out of their presence and without interference by them, as directed, and the court, looking to the best interest of the child in making provision for communion with the mother so that its love for her might not be estranged, and that she should not become an object of aversion and hatred, had the right to modify its order and give such further direction as was necessary to effect its purpose. The child was the legitimate offspring of a lawful marriage between the parties and was of tender years, and, though the mother may have erred, her sin did not dry up the wellsprings of mother love and forfeit all right upon her part to visit with and enjoy the association of her own offspring. Neither does the law so declare, but recognizes this right, so long as the welfare of the child will not be endangered thereby. It was said in *Allison v. Bryan*, 26 Okla. 520, 30 L.R.A. (N.S.) 146, 138 Am. St. Rep. 988, 109 Pac. 934, that "it was in accord with humanity and right living and the best interests of the child that it" be not estranged; and, according to the language used in *Allison v. Bryan*, 21 Okla. 557, 18 L.R.A. (N.S.) 931, 97 Pac. 282, 17 Ann. Cas. 468, the common promptings of humanity "dictate that the child and the mother be granted the utmost possible latitude for

social communion consistent with the new duties placed upon all."

There is nothing in the evidence that makes it apparent the moral or physical welfare of the child will be endangered by a compliance with the modified order. The maternal grandparents are morally fit and financially able to do as well by the child as the paternal grandparents, and entertain an affection for the child similar to that possessed for their own, and the defendant may there enjoy that association with the child without interruption, which is her right by nature, and is dictated by the common promptings of humanity, and was accorded her by the original decree, but denied her by the acts of the paternal grandparents. Neither can the fact, as already stated, that she was adjudged not suitable to have the exclusive custody of the child, prevent the court from making the modification. In *Haley v. Haley*, 44 Ark. 429, the supreme court of Arkansas said: "The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hardworking woman, and a good woman, by all the witnesses, except the defendant. But had it been otherwise the permission to visit would not be necessarily erroneous. The court should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it does not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity, the freest from selfishness or impurity, and often the last hope of redemption for fallen natures."

There was ample evidence to warrant the court in modifying the original decree, and the order appealed from is affirmed.

### **Annotation—Remedy for refusal to permit access to or visitation of children as provided by decree of divorce.**

The question as to denial of custody of child to parent for its well being is treated in note to *Re Pryse*, 41 L.R.A. (N.S.) 564, and later case, *Jamison v. Gilbert* (1913) 38 Okla. 757, 47 L.R.A. (N.S.) 1133, 135 Pac. 342. For other annotations, consult Index to L.R.A. Notes, under Divorce and Separation.

The cases in this note establish the rule that a parent who has been denied the right to visit a child, as provided in a decree of divorce, may apply to the court of first instance for a modification of the decree, or for a rule on the L.R.A. 1917B.

parent failing to comply with the decree, to show cause why he or she should not be punished as for a contempt.

In the following cases as in *COPELAND v. COPELAND*, ante, 287, a parent who had been denied the right of visitation sought relief by a modification of the decree.

Where a husband, after obtaining a divorce from his wife, died, and his sister, the testamentary guardian of the child, refused the wife access, as provided in the decree which committed the custody of the child to the husband, it

was held in *Hill v. Hill* (1878) 49 Md. 450, 33 Am. Rep. 271, that the wife could maintain a bill of revivor, the court stating that though she was a defendant in the cause and the decree was against her, it was evident that she had rights and interests under the decree which entitled her to have the same reviewed. "The terms and provisions of the decree above recited secured to her the most precious and important right and privilege of having access to and visiting her child. This right, being now denied, can be secured to her and enforced only by a proceeding of this kind, whereby the decree in this respect may be executed in her favor."

Where a husband who had been granted a divorce and the right to visit the child when in the custody of the mother, sought a modification of the decree on the ground that the wife, in violation thereof, was keeping the child from him, the court, in *Arne v. Holland* (1902) 85 Minn. 401, 89 N. W. 3, stated that "the proper practice in securing a modification of an order or decree in divorce proceedings, under Gen. Stat. 1894, §§ 4801-4803, is by application in the original action, and not by the commencement of an independent suit upon a new complaint. Upon a hearing for such modification it is discretionary with the trial court whether the evidence bearing upon the question shall be in the nature of affidavits, or duly sworn and examined witnesses. In this character of proceedings the court is not limited strictly to rules applicable to the introduction of evidence in ordinary cases, and its rulings and orders are not subject to the same legal exactness. The legal test required is that the court shall not abuse its discretion." In this case it was held that, in modifying a preceding decree as to the custody and control of the child, the court did not abuse its discretion.

Where, in a divorce suit, a wife was awarded custody of an infant child, and the husband was given the privilege of paying it reasonable visits, it was stated, on motion for a rehearing in *Dimmitt v. Dimmitt* (1912) 167 Mo. App. 94, 150 S. W. 1107, that the wife would have the child taken from her if she should attempt to discourage the husband's proper visits by making them difficult and disagreeable; that the husband would lose the privilege accorded him by attempting to make it the instrument of torture or fear to the child; and that, should it appear in the future that the welfare of the child will permit

a division between the parents of the right of custody, the circuit court, on application of the father, and on finding that he has conducted himself in a deserving manner, should modify the order to the extent of allowing him to have the custody of the child for such period and in such manner as not to interfere with its proper nurture and education.

Where a wife, domiciled in Connecticut, was by a divorce decree awarded the custody of children subject to the right of the husband to have them visit him at least six weeks during each year, and she removed to Germany with the children, it was held in *Morrill v. Morrill* (1910) 83 Conn. 479, 77 Atl. 1, that the court, by power of a continued jurisdiction conferred by statute, could so modify the decree as to direct that the wife send the children to the father at a suitable place in Connecticut or New York, at a certain time of the year, under proper escort and at her expense, and that the father, after the visit, should return them to the mother in Germany under proper escort and at his expense, the court not thereby having abused its discretion.

It is held in *State ex rel. Nipp v. District Ct.* (1912) 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256, that where a foreign state grants a divorce and awards the custody of one child to the father and one to the mother, each party being accorded the right to visit at all times the child awarded to the custody of the other, and each being enjoined from interposing any obstacle or hindrance in the way of the other, the court retains jurisdiction notwithstanding the removal of a child from the state; that where a father violates the decree by such a removal, the court may amend it so as to enable the mother to enforce the right thereby accorded to her.

In affirming an order denying a husband's motion for leave to modify a judgment of divorce against him, the court, in *Newman v. Newman* (1905) 105 App. Div. 63, 93 N. Y. Supp. 847, said that the supreme court, by virtue of the provisions of § 1771 of the Code of Civil Procedure, now possesses the power to modify the directions contained in a final judgment of divorce for the custody, care, education, and maintenance of any of the children of the marriage, upon the application of either party to the action, upon due notice to the other. But no such application shall be made by a defendant unless leave to make the same shall have been previous-

ly granted by the court by order made upon or without notice, as the court, in its discretion, may deem proper, after presentation to the court of satisfactory proof that such an application should be entertained. The final judgment of divorce in the present action awarded the custody of the child to the mother, with the privilege to the father of knowing her whereabouts at all times and of calling on her and seeing her at all reasonable and proper hours. The father asked leave to move to modify the directions in the judgment providing for the custody, care, education, and maintenance of the child by providing for her residence or custody within the jurisdiction or at such other place beyond its jurisdiction as would enable the father to visit and care for her. In upholding a refusal to grant the desired leave, the court said that the papers read upon the application showed that the mother had taken the child to reside with her in the state of Virginia; and if it had appeared that the father was still a resident of New York state, the court could not properly have refused to entertain the motion which he wished to make, to modify the decree so as to require the child to be kept within the jurisdiction of the New York state supreme court, or at all events at a place conveniently accessible from New York. It was shown, however, that the father himself had become a resident of Virginia; that he had described himself as a resident of that state in a proceeding which he instituted in a Virginia court to obtain custody of the child; and hence it was evident that the modification of the divorce judgment for which he proposed to move ought not, in any event, to be granted, for it could not possibly conduce to his convenience in visiting the child that she should be kept in or near New York while he resided in Virginia.

Where a divorce decree gave the custody of the child to the mother, who thereafter refused to let the father see or visit it, although the decree provided that the husband should "have the right to see the child at proper and reasonable times and places until the further order of the court," the court, in *Oliver v. Oliver* (1890) 151 *Mass.* 349, 24 *N. E.* 51, stated that though the evidence in words did not show grounds for a modification, yet the trial court could, by observation, see many things in the character, appearance, and manners of the parents testifying which could not be presented in print, and thereupon re-

lused to hold that there was no evidence on which to base a modification of the decree so as to permit the offending father to see his child. In this case, a statute provided that upon a decree of divorce, the court may make such decree as it may deem expedient concerning the care, custody, and maintenance of the minor children of the parties, and may afterwards, from time to time, on petition of either of the parents, revise and alter such decree, or make a new decree, as the circumstances of the parents and the benefit of the children may require. Consequently, the court observed that "if the experience of the parties enables them at any time to show to the court any better way of accomplishing this purpose than that now pursued, or if, from any other change of circumstances, there seems to be occasion to modify the decree, it is in the power of either party to apply for a modification of it."

The decree in *Burge v. Burge* (1878) 88 *Ill.* 164, awarding a mother the custody of children, did not make any provision for the father to see or visit them. The court, in holding the decree not erroneous on this account, said that the father had a legal right to visit his children, at convenient and proper times, in a decent and respectful manner, and without using improper influences to dissatisfy them with their mother, or to influence them to go with him. "He, of course, in visiting them must be governed by the rules of propriety, and has no right, in any manner, to abuse the right, and if he should, he might properly be debarred the privilege. If he should be refused the right to thus see them, under the 18th section of the Divorce Act he can apply to the court for a modification of the decree, so as to secure the reasonable exercise of the right."

Where a husband applied for a rule against his wife to show cause why she should not comply with the decree of divorce permitting him to visit the child, and in response to the rule she stated that she was constrained to so act because of the husband's drunken and debauched habits, it was held, in *Shallcross v. Shallcross* (1909) 135 *Ky.* 418, 122 *S. W.* 223, that, under the circumstances, the court, after granting the decree and after the expiration of the term, could, upon its own motion and without any action upon the part of the parent, modify the decree in so far as it granted the father the right to visit the child, notwithstanding the statute

provided that the court in divorce proceedings may make an order for the care, custody, and maintenance of minor children, and at any time afterward, on the petition of either parent, may revise the same, having in all cases the welfare of the children principally in view. The court says: "Exercise of the power possessed by a court of equity with respect to the custody of an infant in such a case is not, therefore, dependent upon action upon the part of either of the divorced parents, or upon a reservation in the judgment of authority to subsequently change or modify it. The court need not have waited for either parent to take the initiative, but possessed the power to modify upon its own motion and previous judgment as to the custody of the infant upon the state of facts appearing in the response and established by the proof. We do not mean to say that the circuit court should at any time enter a judgment or change one rendered at a previous term, as to the custody of a child, without notice to the parents. In this case, however, both had notice. It does not lie in the mouth of appellant [husband] to complain that he was not served with a written notice of the proceedings resulting in the modification of the original judgment as to the custody of his son; for he instituted the proceeding by taking the rule against appellee [wife] and thereby gave cause and opportunity for the filing of her response, the statements of which, together with the evidence introduced to support them, convinced the court of the necessity for modifying the first judgment to the extent that would prevent appellant from having the custody of his son at all. In this view of the matter we think appellant is estopped to complain of the want of previous formal notice of the action of the court in modifying the judgment, and likewise estopped to complain that the modification resulted without the filing of a petition therefor by appellee or himself."

No violation of a decree permitting a mother to visit her child was involved in the decision of *Haley v. Haley* (1884) 44 Ark. 429, discussed in *COPELAND v. COPELAND*, ante, 287, but there being charges of immorality against the mother, the propriety of making such a provision was questioned.

In *Phipps v. Phipps* (1913) 168 Mo. App. 697, 154 S. W. 825, the court upheld a modification of a decree so as to give the mother the privilege of having the child visit her during certain hours L.R.A.1917B.

on each Saturday. The husband, who had been granted the divorce and awarded the custody of the child, opposed the order on the ground that the evidence did not show any new facts upon which a change in the custody of the child could be made; that the court was powerless to act unless the motion contained averments and the evidence disclosed facts showing that, since the decree, a change of condition, circumstances, or situation or character of the parties had occurred to justify a modification. The court stated that there were facts showing a sufficient change in the mother's situation and character to justify the court in modifying the decree, not so as to take the custody of the child from the father and give it to the mother, but so that the child could visit its mother, and not be entirely deprived of her society and affection, nor she of its. If the mother's right to visit the child were denied her by the father, her only remedy would seem to be to apply to the court in which the decree was granted, for an order requiring him to allow her that privilege. And in such case the father's refusal to let her visit the child would be a new fact on which the court could modify the decree so as to permit such visits. To hold otherwise would put it in the power of one parent to deny, without reason, the other parent the privilege of seeing the offspring which both had brought into the world. Although the court is without power to change the custody of the child, in the absence of new facts to justify such change, this ought not to prevent the court giving the mother a right to visit the child under proper regulations and on certain conditions based merely on the new fact of the father's refusal to let her see it. The court further observed that if, at any time in the future, circumstances should so change as to make it necessary that this modifying order should be changed or revoked altogether, it is within the power of the father or of either parent, for that matter, to apply to the court for such modification or revocation, since the divorce suit on this phase remains open, and will stay open until the child becomes of age.

In *Bedolfe v. Bedolfe* (1912) 71 Wash. 60, 127 Pac. 594, it is stated that where a divorce decree awards the custody of a child to the husband, and gives the wife the right to visit it, if the husband or any member of his household treats her with such incivility, when she is visiting the child, as to deter her from

continuing her visits, she may either apply to the court of first instance for a modification of the decree, or for a rule on the husband to show cause why he should not be punished as for a contempt.

So, in the following cases the latter remedy, suggested in the above case, was involved;

Thus, where a father had been adjudged in contempt and remanded to jail until he should pay the fine imposed for violating a divorce decree by removing a child from the jurisdiction of the court and preventing the mother visiting it, it was held, in *Ex parte Ellerd* (1912) 71 *Tex. Crim. Rep.* 285, 158 S. W. 1145, Ann. Cas. 1916D, 361 (Davidson, P. J., dissenting), on habeas corpus, that the commitment for contempt was proper, and that; although the fine was excessive, the applicant should not be released until he had paid so much thereof as could lawfully be imposed.

The case of *Allison v. Bryan* (1910) 26 *Okl. 520*, 30 *L.R.A.(N.S.) 146*, 138 *Am. St. Rep.* 988, 109 *Pac.* 934, discussed in *COPELAND v. COPELAND*, ante,

287, holds that the mother of an illegitimate, unmarried minor child which has been legitimated by its father under the provisions of § 4931 of the Compiled Laws of Oklahoma 1909, does not, by reason of such legitimation, where same will not conflict with the best interests of the child, forfeit the right to visit the child or to have it visit her; and failure and neglect, without sufficient cause, on the part of the father, to observe a valid order of a court, enforcing such right, is punishable as a contempt; and in such a case it is no defense that his wife objected or refused to consent to his obedience to the same.

A party, however, cannot remain in contempt in an equity proceeding, and at the same time ask the court to grant him privileges which are conferred upon him by the decree which he has refused to obey. Consequently, it is held in *Smith v. Smith* (1897) 18 *Wash.* 158, 51 *Pac.* 355, that the court will not enforce a decree giving him a right to visit his children where he has failed to comply with the decree by the payment of alimony.

J. D. C.

#### OKLAHOMA SUPREME COURT.

##### RE ASSESSMENT OF FIRST NATIONAL BANK OF CHICKASHA.

COUNTY BOARD OF EQUALIZATION  
et al., Appts.

(— *Okl.* —, 160 *Pac.* 469.)

##### Tax — power to exempt.

1. The power to exempt from taxation, as well as that of taxation, is an essential attribute of sovereignty. Generally, the power to make exemptions is included or involved in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden by constitutional limitation.

For other cases, see *Taxes*, I. f, in *Dig.* 1-52 N. S.

##### Same — state bonds.

2. Section 50, art. 5, of the Constitution, prohibiting the legislature from passing laws exempting any property within the state from taxation, except such as is named in § 6, art. 10, was not intended to prohibit the legislature from exempting from tax-

ation the bonds of the state, issued in aid of its governmental functions. Such bonds being instrumentalities of government, do not constitute property within the meaning of the constitutional limitation against exempting property from taxation.

For other cases, see *Taxes*, I. f, 1, in *Dig.* 1-52 N. S.

##### Same — constitutionality.

3. There being no constitutional obstruction forbidding the legislature from exempting from taxation the bonded indebtedness of the state, in the form of the state public building bonds, it follows, necessarily, that the act exempting said bonds from taxation is not, in that respect, unconstitutional.

For other cases, see *Taxes*, I. f, 1, in *Dig.* 1-52 N. S.

##### Same — national bank stock.

4. The taxation of shares of stock in national banks is permitted by Act of Congress, June 3, 1864, chap. 106, as amended by Act of February 10, 1868, chap. 7, provided they are taxed in the city or town where the bank is located, and at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.

For other cases, see *Taxes*, I. b, in *Dig.* 1-52 N. S.

##### Same — discrimination — prohibition — effect.

5. The statutory rule that the rate of taxation upon the shares in a national bank should be the same or not greater than upon the moneyed capital of the individual

Headnotes by SHARP, J.

Note. — For constitutional limitation of the power to exempt property from taxation as affecting public obligations or property, see annotation following this case, post, 300.

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citizen which is liable to taxation was not intended to cut off the power of the legislature to exempt bonds of the state from taxation.

*For other cases, see Taxes, I, f, 1, in Dig. 1-52 N. S.*

**Same — state bonds.**

6. The issuance and sale of state public building bonds, authorized by chapter 89 of the act of the legislature approved March 15, 1911, by which the state was enabled to raise money to accomplish and carry out a governmental purpose, and to the payment of which the good faith of the state was solemnly pledged, was an exercise of sovereignty, of the borrowing power, a use of the state's credit. And the bonds issued to enable the state to discharge its public functions are instrumentalities of government. They constitute the means resorted to by the state to effectuate the powers of government.

*For other cases, see Bonds, IV. in Dig. 1-52 N. S.*

**Same — exemption — effect.**

7. The intention of the legislature to exempt the bonds from taxation being indubitable, the right to tax such bonds, whether directly or in legal effect, can be exercised under no circumstances, and is not therefore dependent upon the character of the owner or the statute under which the tax is assessed.

*For other cases, see Taxes, I, e, 1, in Dig. 1-52 N. S.*

**Contract — tax exemption — protection.**

8. State public building bonds issued and sold pursuant to the Act of March 15, 1911, and which, by the terms of the act, as well as by express recital in the bonds, are made nontaxable, constitute a binding contract between the holder of such bonds and the state, which the latter, under the guise of taxation, may not constitutionally impair.

*For other cases, see Constitutional Law, II, g, in Dig. 1-52 N. S.*

**Constitutional law — limitation — taxing power.**

9. The constitutional inhibitions, both state and Federal, against impairing contract obligations, is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume.

*For other cases, see Constitutional Law, II, g, in Dig. 1-52 N. S.*

**Tax — contract exemption — scope.**

10. The contract between the state and the bank in respect to the exemption of the bonds from taxation extends to its shares of stock in the hands of individual shareholders, and entitles them to the right to deduct from the value of their shares that proportion of the value invested in the bonds.

*For other cases, see Taxes, I, f, 1, in Dig. 1-52 N. S.*

**Same — bank stock — allowance.**

11. The bonds being nontaxable for any purpose, and the state not having the power to tax the capital and surplus of a national L.R.A.1917B.

bank, the shareholders, taxable on their shares, are entitled to proper reductions on account of the bank's ownership of said bonds, as any other view would ignore the covenant making the bonds nontaxable, and permit the state, in effect, to do that which it had contracted not to do.

*For other cases, see Taxes, I, f, 1; III, b, 2, in Dig. 1-52 N. S.*

(October 10, 1916.)

**A**PPPEAL by the County Board of Equalization et al., from an order of the District Court for Grady County, reversing the action of the board raising the assessed valuation of the First National Bank of Chickasha, and directing the board to deduct from the valuation of the bank the amount invested by it in public building bonds. Affirmed.

The facts are stated in the opinion.

Messrs. S. P. Freeling, Attorney General, Smith C. Matson, Assistant Attorney General, John H. Venable, and Allen K. Swan, for appellants:

The shares of stock in national banks are taxable for the year 1915 under chapter 107, Session Laws 1915, § 4, art. 1.

Scobee v. Bean, 109 Ky. 526, 59 S. W. 860; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Van Slyke v. Wisconsin, 154 U. S. 581 and 20 L. ed. 240, 14 Sup. Ct. Rep. 1168; Primghar State Bank v. Rerick, 96 Iowa, 238, 64 N. W. 801; German American Sav. Bank v. Burlington, 118 Iowa, 84, 91 N. W. 829; Anderson v. Ritterbusch, 22 Okla. 761, 98 Pac. 1002; Heilig v. Puyallup, 7 Wash. 29, 34 Pac. 164; Fristoe v. Blum, 92 Tex. 80, 45 S. W. 998; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 584, 18 L. ed. 234; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; Brown v. First Nat. Bank, — Tex. Civ. App. —, 175 S. W. 1122.

If the Constitution expressly forbids the exemption of property from taxation, or provides that all property, or all property of certain kinds, shall be subject to taxation, or if the legislature attempts to exempt property not within the classes or kinds enumerated in the Constitution, in either



case its action is invalid, and the statutory grant of exemption is of no effect.

37 Cyc. 887; *Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 312; *People v. Latham*, 52 Cal. 598; *Campbell County v. Newport & C. Bridge Co.* 112 Ky. 659, 66 S. W. 526; *Gate City Guard v. Atlanta*, 113 Ga. 883, 54 L.R.A. 806, 39 S. E. 394; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; *Iron City Bank v. Pittsburgh*, 37 Pa. 340; *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664; *Westport v. McGea*, 128 Mo. 152, 30 S. W. 523; *Wells v. Hyattsville*, 77 Md. 125, 20 L.R.A. 89, 26 Atl. 357; *State ex rel. Richards v. Armstrong*, 17 Utah, 166, 41 L.R.A. 407, 53 Pac. 981; *State Nat. Bank v. Memphis*, 116 Tenn. 641, 7 L.R.A.(N.S.) 663, 94 S. W. 606, 8 Ann. Cas. 22; *Keith v. Funding Board*, 127 Tenn. 441, 155 S. W. 142, Ann. Cas. 1914B, 1145; *Penick v. Foster*, 129 Ga. 217, 12 L.R.A.(N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346.

The county board of equalization and county assessor not only had jurisdiction to increase this assessment, as provided by the assessment made by the state board of equalization, but it was their duty so to do.

*Carrico v. Crocker*, 38 Okla. 440, 133 Pac. 181.

Messrs. **Bond, Melton, & Melton**, for appellee:

State bonds are instrumentalities of government, and, as such, are not subject to taxation unless the power to tax is expressly declared.

*Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *State ex rel. Louisiana Improv. Co. v. Board of Assessors*, 111 La. 982, 36 So. 91; *Murray v. Charleston*, 90 U. S. 432, 24 L. ed. 760; *Peacock v. Superior Ct.* 163 Cal. 701, 126 Pac. 976; *Penick v. Foster*, 129 Ga. 217, 12 L.R.A.(N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346; 12 Am. & Eng. Enc. Law, 2d ed. 367; 37 Cyc. 883; *Re Indian Territory Illuminating Oil Co.* 43 Okla. 307, 142 Pac. 997.

If the legislature had authority to declare that the state building bonds should be nontaxable for any purpose, and if the statutes of the state tax the bank on its capital, surplus, and undivided profits, or upon the shares of stock in the bank, then the bank is entitled to deduct from the valuation so ascertained the amount of the bonds held by it.

*Home Sav. Bank v. Des Moines*, 205 U. S. 515, 518, 51 L. ed. 909, 910, 27 Sup. Ct. Rep. 571.

The taxing power having been expressly L.R.A.1917B.

declared not to extend to the state public building bonds, the attempt to subject such property to a tax directly or indirectly would impair the obligations of such contract.

*State v. King*, 64 W. Va. 546, 63 S. E. 468; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; 3 Elliott, Contr. § 2757; *Wright v. Georgia R. & Bkg. Co.* 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242; *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545, *Woodruff v. Trapnall*, 10 How. 180, 13 L. ed. 383.

Messrs. **Stuart, Cruce, & Cruce and Hatchett & Ferguson**, amici curiæ.

**Sharp, J.**, delivered the opinion of the court:

February 18, 1910, the legislature passed an act providing for the creation and management of what was designated the "Public Building Fund" Chapter 16, Sess. Laws 1910, pp. 21-25. Said act was by act of the legislature amended March 15, 1911 (Sess. Laws 1910-11, pp. 194-199). The latter act provided that all moneys theretofore or thereafter received from the sale or rentals of section 33 of the public lands of the state, and lands granted in lieu thereof, the same being lands granted to the state of Oklahoma for charitable and penal institutions and public buildings, should constitute and be known as "The Public Building Fund;" that bonds of different denominations bearing interest at the rate of 5 per centum per annum, payable semiannually, should be issued against said fund, and that the state auditor should, on or before the 1st day of April, 1911, issue public building bonds to the amount of \$750,000, made payable to bearer, and place them in the hands of the state treasurer for sale. The aggregate amount of bonds authorized was not to exceed the sum of \$3,000,000, of which sum \$2,451,500 was actually issued. The act provided that all outstanding warrants issued under the provisions of chap. 16 of the Session Laws of 1910 should become a valid lien against said building fund, and that the state treasurer should receive sealed bids for the purchase of said bonds, or any part thereof at a time fixed, but that none of the bonds should be sold for less than par and accrued interest. The act further provided that the officers of the state, or of any municipality thereof, having charge of any sinking fund, could purchase said bonds from the state treasurer at par. The proceeds of the sale of all bonds authorized

were to be paid into the state treasury and used for the payment of the construction of charitable and penal institutions and public buildings. It was provided in § 7 that "any bank, trust or insurance company, organized under the laws of this state, may invest its capital and surplus in bonds issued under the provisions of this act. The officers having charge of any sinking fund of the state or of any county, city, town, township or school district thereof, may invest the sinking fund of the state or of such county, town, township or school district in bonds issued under the provisions of this act, maturing prior to the date of the bonded indebtedness for the payment of which any such sinking fund is created. Said bonds shall also be approved collateral as security for the deposit of any public funds and for the investment of trust funds. Said bonds shall be nontaxable for any purpose."

By § 9 it was provided that "all bonds and interest thereon, when issued as provided for in this act, shall become payable out of the public building fund, arising from the sale or rental of section 33, and lands granted to the state in lieu thereof, until all of said bonds and interest thereon are fully paid. And the good faith of the state is solemnly pledged to administer the trust created by the terms of the Enabling Act and the Constitution of Oklahoma, to apportion and dispose of all lands granted to the state for charitable and penal institutions and public buildings, as the legislature may prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply same to the payment of the bonds authorized by this act, and the interest thereon, as the same falls due, and to use such funds, constituting the Public Building Fund, for no other purpose or purposes."

July 19, 1913, the First National Bank of Chickasha purchased of the state treasurer, with the approval and consent of the comptroller of the currency, public building bonds of the par value of \$200,000. Said bank afterwards sold to the First National Bank of Minco, out of its purchase from the state treasurer, bonds of the par value of \$20,000. In the month of May, 1915, said bank made a return to the county assessor of its property subject to taxation for the year 1915, from which it deducted the assessed valuation of its real estate in the state of Oklahoma, separately listed in the name of the bank, and the public building bonds owned by it. The return as made by said bank was accepted by the county assessor, and was afterwards approved by the county board of equalization. July 20, 1915, the state board of equalization raised the valuation of national banks in Grady county,

having state building bonds deducted from their assessment, in the sum of \$200,000; and the assessment of Grady county was referred back to the county assessor and board of equalization of Grady county for the purpose of correction, equalization, and adjustment. On August 16, 1915, the county board of equalization, together with the county assessor, pursuant to the order and direction of the state board of equalization, met, and after hearing the protest of said bank and others affected, raised the assessed valuation of said bank in a sum equal to the par value of said public building bonds, namely, \$180,000, and ordered the county assessor to extend such raise upon the tax rolls for the year 1915. From said order, under authority of § 2 of subdiv. B, chap. 107, Sess. Laws, 1915, the bank prosecuted its appeal to the district court of Grady county, where the action of the county board was reversed, and said board was directed to deduct from the valuation of the bank the amount invested by it in public building bonds. From the order and judgment of the district court, the county board of equalization, and the board of county commissioners of Grady county, and the state of Oklahoma, have appealed to this court.

Primarily, the controversy involves the taxability of the public building bonds of the state, issued under the act of March 16, 1911. If said bonds are taxable, then the controversy is at an end. If not, the further inquiry is involved: That of the right of the shareholders in a national bank, whose capital and surplus is invested in nontaxable state bonds, to a deduction upon the valuation of their shares, on account of the nontaxable bonds owned by the bank. The question is one in which the state, the banks, both national and state, trust and insurance companies organized under the laws of the state, and public officers having charge of any sinking fund of the state, or of any county, city, town, township, or school district thereof, as well as the public generally, are vitally interested. For these reasons, and because of the fact that numerous suits are pending in the various courts of the state, involving the power of the state taxing authorities to assess for taxation the public building bonds of the state, it is important that our opinion should go to the merits of the controversy, laying aside all questions of the regularity of the proceedings, not of a jurisdictional character, had before the taxing authorities or in the trial court.

The statute, pursuant to which the bonds were issued, in terms provides that "said bonds shall be nontaxable for any purpose." It is urged by the state and its affected

subdivisions that the act is in conflict with § 50, art. 5, of the Constitution, providing that "the legislature shall pass no law exempting any property within this state from taxation, except as otherwise provided in this Constitution."

And that as § 6 of art. 10 of the Constitution, prescribing what is exempt from taxation, does not include state and municipal bonds, or either; and as such bonds in the hands of the owner constitute property, it follows that the bonds are taxable.

The sovereignty of a state, it was said by Chief Justice Marshall, extends to everything which exists by its own authority, or is introduced by its permission. *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607. While in § 36, art. 5, of our Constitution, it is broadly stated that "the authority of the legislature shall extend to all rightful subjects of legislation."

The taxing power is one of the highest attributes of sovereignty, and its authority to tax all subjects over which its sovereign power extends, is undeniable. In *Re Wolverine Oil Co.* — Okla. —, L.R.A.1916F, 441, 154 Pac. 362. The power to tax rests on necessity, and is inherent in sovereignty. It is vital to our form of government. With equal force it may be said that the power of exemption, as well as the power of taxation, is an essential attribute of sovereignty: that the power to tax includes the power to exempt, unless specially denied by the Constitution. The general right to make exemptions is involved in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden. Of this right it is said by an eminent authority: "The general rule on the subject is familiar and has been too often declared to be open to question. The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power, wherever it has not in terms been taken away. . . . Exemptions, when properly made, must be determined in the legislative discretion, which is not, however, arbitrary; there must underlie its exercise some principle of public policy that can support a presumption that the public interest will be subserved by the exemptions allowed." *Cooley, Taxn.* 342, 343.

Section 7318, Rev. Laws 1910, as amended by the act of March 11, 1915, pp. 172, 173, in respect to the taxation of shares of stock in a national bank, conforms, it seems, to the requirements of § 5219 of the Revised Statutes of the United States, Comp. Stat. 1913, § 9784, authorizing the assessment for taxation of the shares of national banking

associations located within the state. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629. While it is true that the old section of the statute appears at the beginning of the amended section, changed only in respect to date of taxation, said former statute is followed immediately, and in the same section, by the amendment, which sufficiently directs the taxation of the shares as distinguished from the net value of their "moneyed capital, surplus and undivided profits," attempted to be taxed under the old statute. The right of the state to tax the shares of stock in a national bank rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation, and that the tax on an individual in respect to his shares in a national bank is not regarded as a tax upon the corporation itself. This distinction, now settled beyond dispute, was mentioned in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, where in the opinion, declaring a tax upon a branch bank of the United States beyond the power of the state of Maryland, it was said: "That the opinion did not extend 'to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.'"

The distinction appears, however, to have first been made the basis of decision in *Van Allen v. Assessors* (*Churchill v. Utica*) 3 Wall. 573, 18 L. ed. 229, in which, under the act of 1864, as originally enacted, it was held that the tax on the shares was not a tax on the capital stock of the bank, but upon a distinct, independent interest or property held by the shareholder. The *Van Allen* Case, followed by a long line of decisions of the Supreme Court of the United States, has settled the law that a tax may be assessed by the state upon the owners of shares of stock in a national bank located therein. The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as a debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid for their shareholders, either under some express statutory authority for their recovery, or under the general principles of law that one who pays the debt of another, at his request, can recover the amount from him. *First Nat. Bank v. Kentucky*; and, *First Nat. Bank v. Chehalis County*, supra; *Merchants' & N. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Cleveland Trust Co. v. Lander*,

184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394. Hence we say that whatever may have been the law in this state respecting the taxation of national banks prior to 1915, and regardless of its validity, the act of March 11th of that year, in so far as the right to tax is concerned, is sufficient to authorize an assessment of the shares of stock of a national bank located within the state. The act of Congress Rev. Stat. § 5219, was not intended to curtail the power of the state on the subject of taxation. It simply required that the capital invested in national banks should not be taxed at a greater rate than like property similarly invested, and that the shares of any national banking association, owned by nonresidents of the state, should be taxed in the city or town where the bank is located, and not elsewhere. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. The discretionary power of the legislature remained as it was before the act. *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369. The assessment list meets the greater part, if not all, the requirements of the amended statute, particularly in respect to furnishing the list of names and residences of all stockholders of the bank, with the number and assessed value of the shares held by each of the stockholders. It is not claimed that the bank should not pay on account of its stockholders taxes on their shares of stock, but that proper deductions on account of interest in nontaxable bonds should be allowed. For the purposes of the case we shall therefore consider the shares of stock of bank to have been properly assessed.

The proceeds of the sale of the bonds, authorized by the act, were to be used by the state for the payment of the construction of needed charitable and penal institutions, and public buildings. Such was the governmental object sought to be effected by the issuance and sale of said bonds. To its accomplishment the good faith of the state was solemnly pledged to safely keep and preserve the proceeds of the sale and rental of the public lands of the state, named in the act, and to apply said proceeds to the payment of the bonds issued, with interest thereon, as the same matured. It was necessary, or at least so considered, that the credit of the state be employed in order that it might promptly and faithfully discharge the obligations assumed by and resting upon it. The issuance of bonds secured in the manner provided for was a method usual and ordinary of using the state's credit. When a state issues its bonds in conformity to law in order to raise money

to accomplish and carry out a governmental purpose, the instruments issued by it for that purpose are instrumentalities of government. Such obligations constitute the means resorted to by the state to effectuate the powers of government. In the hands of the purchasers such credits may be the subject of taxation, unless because of some superior intervening right, providing the intention to tax is manifest. Cases involving the liability of state or municipal bonds to taxation very generally hold that laws providing for the imposition of taxes will not be construed to authorize the collection of a tax upon such bonds, unless there is in the law clear language that such was the legislative intent. The statute authorizing the issuance of the bonds, it must be remembered, in terms provided that they should be nontaxable. The pledged immunity on the part of the state attached in the act, so that at no period of time were the bonds subject to taxation. Not only was such the case, but the very act under which the present assessment was made exempts the bonds of the state from taxation. Originally, it was provided by § 7302, Rev. Laws 1910, that "all property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

This section of the statute was amended by the act of March 11, 1915, by inserting therein the words: "Except bonds of this state, and its counties, cities, towns, school districts and other municipalities of this state."

It is a rule firmly established in our jurisprudence that the bonds of the United States government cannot be taxed by the states, and that bonds of the states cannot be taxed by the United States government, for the reason that such bonds are but instrumentalities of government; that the power of the Federal government to tax the bonds of the state, as well as the power of the state government to tax the bonds of the general government, would be a power to embarrass each sovereignty in the exercise of its governmental functions. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Buffington v. Day*, 11 Wall. 118, 20 L. ed. 122. A sovereign state may, at its election, when not restrained by its Constitution, permit its own property to be taxed, as well as its agencies of government, including evidences of indebtedness issued on the basis of the credit of the state, in the exercise of its power to borrow money. *State v. Elizabeth*, 65 N. J. L. 479, 47 Atl. 454; *People*

v. Home Ins. Co. 29 Cal. 533; Norfolk v. J. W. Perry Co. 108 Va. 28, 35 L.R.A. (N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

While it is true the obligations of the state, in the form of its bonds, are not specifically named in the Constitution as exempt from taxation, we do not believe that the framers of the Constitution, fully cognizant of the many necessities of the state upon its admission into the Union, intended, by denying to the legislature the power to discriminate between taxpayers, to thereby curtail its power to provide in the most efficient way possible, and in such method as its judgment and patriotism might suggest, for the preservation of the credit and good faith of the people of the state. Fairly construed, the Constitution, denying the legislature the right to exempt property from taxation, reflects the wisdom of the times. By this limitation an effectual curb was placed upon abuses that had crept into the legislation of many of the sister states. Favoritism, involving exemption from taxation, was thereby made impossible, or at least unenforceable, save in the limited and exceptional instances provided for in § 6, art. 10, of the Constitution. By the provision against exemption from taxation, it was not intended to deny to the state an exercise of sovereignty so necessary and essential to the due and orderly administration of its affairs. It was not intended thereby to deny to the state the power to go upon the open money markets of the world and compete for money upon equal terms with other sovereign states; or to deny to the state the power to provide a security of equal attractiveness to its own citizens, with that of other state governments of no better credit. Neither was it the purpose to place the state in the ungenerous attitude of asking the public to advance money upon its securities, which it was thereafter bound to render unprofitable by enforced taxation. Thus interpreted, the state building bonds, constituting as they do obligations of the state for the payment of money, and being an exercise of the borrowing power, and a use of the state's credit, do not constitute property within the meaning of § 50, art. 5, of the Constitution; and hence the statutes exempting such bonds from taxation do not contravene the constitutional limitation against exemption from taxation. Our conclusions we believe to be supported both by sound principle and the weight of authority. Discussing the subject of taxation of agencies and instrumentalities of state governments, 37 Cyc. 883, announces the following rule: "Nor, as in the case of public

property generally, will the state itself impose taxes upon its own public or governmental agencies or instrumentalities, or those of its municipal corporations, or a municipality tax such agencies or instrumentalities of a state. The bonds and other securities of a state, or of its municipalities, are generally exempt from all taxation by the state itself and its municipal corporations, either by express provisions of law or by implication."

In the well-considered opinion of State ex rel. Da Ponte v. Board of Assessors, 35 La. Ann. 651, the supreme court of Louisiana held that a law directing the taxation of all property would not, for that reason, include public property, or any of the means, appliances, or instruments of government; that municipal bonds or contracts for the payment of money was an exercise of the borrowing power and the use of the public credit; and that the taxation of such bonds in the hands of a private person was a taxation of the public credit, and a burden on the borrowing power. Again, in the later case of State ex rel. Louisiana Improv. Co. v. Board of Assessors, 111 La. 982, 36 So. 91, it was held that a general law, in terms directing that all property be taxed, including "bonds," "credits," did not include public property, as property to be taxed, nor "public securities," due by the municipality by which they were issued; nor did it include within its terms public credits of the municipality by which the tax was demanded.

In Miller v. Wilson, 60 Ga. 505, it was said that, in the absence of explicit language clearly expressing the will of the legislature to tax the bonds of the state, the general assembly will not be presumed to have passed on so grave a question of public policy, from the use of general words, especially when like words had been employed in former acts, and the executive department has never construed them to embrace state bonds. In Penick v. Foster, 129 Ga. 217, 12 L.R.A. (N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346, after declaring that nothing was better settled than that securities issued by the government are as much the instrumentalities of the government as other means adopted by it to perform its functions, and that it was immaterial whether the security be issued by the state, or by a county, or by a municipality, as it was in all cases an instrumentality, issued for the purpose of effectuating those objects for which government exists, the rule was announced that bonds issued by a municipal corporation, as evidence of a loan made to it, were instrumentalities of the government which created the municipal corporation, and that laws providing for

the collection of taxes will not be so construed as to authorize the collection of a tax upon such instrumentalities of the government, unless there is in the law clear language declaring that such was the intention of the lawmaking power. Also that the word "property," in that clause of the Constitution of the state of Georgia (art. 7, § 2, ¶ 1) which declares, "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," correctly construed, did not require the taxing of public property, or any of the lawful instrumentalities of government. That there was not, in the tax law of that state, any terms which expressly declared that the bonds of the state, or its various political subdivisions, were subject to tax, nor any language in such laws which clearly indicated that it was the intention of the general assembly to subject those instrumentalities of government to taxation, either by the state or any county thereof.

To the foregoing authorities we may add that of *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826, in which it was said: "The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation; not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the state of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares."

Keeping in mind the close relation that ever exists between the right to tax and the power to exempt from taxation, the principle upon which the foregoing cases rest is the same as in the case under consideration. There being nothing in the Constitution that expressly forbids the legislature to exempt the bonded indebtedness of the state from taxation, the consequence is that the power to do so exists, and may be called into action at the legislative will.

The power of the legislature to exempt the bonds from taxation being, we think, clearly established, was it the purpose and intent so to do? The language of the stat-

ute is broad and comprehensive. The intention was indubitable. As plainly expressed, the bonds were made nontaxable for any purpose. Not only did the statute authorizing the issuance of the bonds provide for their nontaxability, but printed in the face of the bonds was the provision, "This bond is nontaxable under the laws of the state of Oklahoma." And to which was added the usual certificate of the attorney general and ex officio bond commissioner of the state. From the foregoing, as well as from the subsequent acts of the legislature, there is no room to doubt that the legislature intended to exempt the bonds from all form of taxation, on any account, or for any purpose.

While the bonds of a state, held by the residents of the state by which they are issued, may be taxed by the state or by its lawful authority, such may not be done if there be a valid contract with the holder exempting them from taxation. *Dill. Mun. Corp.* ¶¶ 1399, 1401; *Gray, Limitations of Taxing Power*, ¶¶ 1049, 1051. As stated by *Cooley on Taxation*, pp. 355, 356: "A state sometimes makes the bonds or other evidences of indebtedness issued by itself nontaxable. When this is done before the indebtedness is incurred, a contract is established between the state and those who become its creditors, which precludes withdrawing the exemption."

It is a rule well supported by authority that a legislature has the power, when not restricted by some constitutional provision, to contract with a corporation for its immunity from taxation. *State v. Baltimore & O. R. Co.* 48 Md. 49; *Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509; *Com. v. Richmond & P. R. Co.* 81 Va. 355.

The petition of the bank alleges, and the uncontradicted evidence shows, that the bank, through its officers and directors, and representing its stockholders, purchased the bonds upon the advice and under the belief that they were nontaxable; and that such was the construction placed upon the law by the then attorney general, governor, state treasurer, and the state taxing authorities. The transaction between the state and the purchasers of its bonds amounted to a contract that the bonds should be nontaxable. *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Gray, Limitations of Taxing Power*, ¶¶ 998, 998a.

It has been said that a compact lies at the foundation of all national life; that contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stabil-

ity to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-men. They are springs of business, trade, and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun, and the lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts, so is the aggregated mass. Under the monarchy or aristocracy order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation other than the virtue of its citizens. When that is largely impaired, all is imperiled. *Trist v. Child* (Burke v. Child), 21 Wall. 441, 22 L. ed. 623; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; 1 Montesquieu, *Spirit of Laws*, 17-25.

By the statute any bank, trust, or insurance company, organized under the laws of this state, was authorized and invited to invest its capital and surplus in said bonds. By the sale of the bonds the state was enabled to discharge a great public duty in the erection and furnishing of charitable and penal institutions and public buildings of the state. Inducements in the way of making the bonds approved collateral as security for the deposit of any public funds, and for the investment of trust funds, were offered investors; and the good faith of the state was solemnly pledged to administer the trust created by the terms of the Enabling Act and the Constitution of Oklahoma, to apportion and dispose of all lands granted to the state for charitable and penal institutions and public buildings, as the legislature might prescribe, and safely keep and preserve the proceeds of the rental and sale thereof, and apply the same to the payment of the bonds authorized by the statute, and the interest thereon, as the same fell due at maturity, and to use such funds constituting the public building funds for no other purpose or purposes.

As the capital and surplus of a national bank cannot be taxed by a state, but the shareholders, both resident and nonresident, may, no benefit could accrue either to the bank or its shareholders if deductions on account of the ownership of said bonds are not allowed the latter. This, it is claimed by the attorney general, cannot be done, on the authority of *Van Allen v. Assessors* (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; *New York v. Tax. & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Home Sav. Bank v. Des Moines*, 205 L.R.A.1917B.

U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571.

But the question decided in the foregoing cases is not decisive of that at hand. We are concerned, not alone in the power of the state to tax the shareholder, or his right to exemptions on account of ownership by the bank of nontaxable government bonds, but in a proper application of the local statute, making certain of the bonds of the state nontaxable for any purpose, and the rights of the shareholders in a national bank, arising out of a contract between the state and the officers and directors of the bank in the purchase of its bonds. It is not, as already seen, a question of power in the legislature, but of the rights of the shareholders springing out of the purchase of the bonds under the circumstances appearing from the record, and of which we may take notice. It is said in *Gray on Limitations of Taxing Power*, § 997, that the cases where a state has made a direct contract for exemption or commutation of taxes, not contained in the corporate charter, are few compared to the number of those where corporate charters have contained the corporate contract. Among the former class is *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282, where it seems that the state of Missouri, which had previously chartered the Pacific Railroad Company, granted to it by legislative act certain lands owned by the state, and provided for the issuance of bonds for which the state had a lien on the road. The lands and the proceeds of the bonds were to be used in the construction of a new branch road, and the railroad was to pay the principal and interest of the bonds, and to secure subscriptions to them. The act also provided for an acceptance by the company of the grant, and contained an exemption from taxation until the road should be completed, in operation, and should declare a dividend. The company accepted the act. Both the state and the road defaulted in the interest on the bonds, and after a device in the nature of a legislative receivership had been tried, the state levied a "tax" and the proceeds of which it enacted should be devoted to the payment of the bonds and the interest, which were the common obligations of the state and the company. The stipulated event had not occurred, upon which the property of the company should become taxable. It was held that the circumstances constituted a contract between the state and the company, and the tax was void.

In *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352, the language of the act, which it was held constituted a contract between the railroad company and the state, in respect to its taxation, provided: "Which tax (one half of 1 per cent) shall be in lieu and satisfaction of all other taxation

or imposition whatsoever by or under the authority of this state, or any law thereof."

And it was said, in denying the right of the state to levy a further tax: "Is there here to be implied 'except such laws as may hereinafter be enacted?' Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or how can it be said to be in satisfaction of all taxes whatsoever under authority of the state, if the state could immediately impose another and more burdensome tax?"

Full force was given by the court to the doctrine that when it is asserted that a state has bargained away her right of taxation in a given case. The contract must be clear and cannot be made out by dubious implications. And it was said that of the existence of a contract, there was no doubt. That its meaning and terms were clear enough, and, taken alone, constituted a contract which would be protected by the Constitution of the United States.

In *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, it was held that a municipality of a state could not by its ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly promised to its creditors. It was argued on behalf of the defendant that the state of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made; that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. It was said that the power of a state to impose taxes upon subjects within its jurisdiction was unlimited (with some few exceptions), and that it extended to everything that exists by its authority, or is introduced by its permission. Hence it was to be inferred that the contracts with the city of Charleston were made with reference to this power, and in subordination to it. All this, it was said by the court, may be admitted, but that it did not meet the case of the defendant. That the court did not question the existence of a state power to levy taxes, as claimed, nor the subordination of contract to it, so far as unrestrained by constitutional limitation. But the power was not without limits, and one of its limitations was found in the clause of the Federal Constitution, that no state shall pass a law impairing the obligation of contracts. The opinion in part reads: "A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power

than it can be by the exertion of any other power of a state legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition."

Proceeding further, the court said: "What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends money to a state, or to a municipal division of the state having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid, before payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would 'involve two contradictory things: An obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.'"

A review of a number of cases where the contract for exemption of taxes is found in the corporate charters may properly be considered in this connection. The case at hand is not unlike, in some of its material aspects, that involved in *Gordon v. Appeal Tax Ct.* 3 How. 133, 11 L. ed. 529. The inquiry raised in that case, by the agreed statement of facts was: Did the Act of Maryland of 1841, chap. 23, so far as it imposed a tax upon shares of stock held by stockholders in the Union Bank of Maryland, and other banks mentioned in the statement, impair the obligation of a contract? The banks were classified in the statement as old and new banks. The old were those which were chartered previous to the year 1821; the new, those which were chartered after the year 1830. Their exemption from the tax imposed by the Act of 1841 was claimed under the Acts of Maryland of 1821, chap. 131, and that of March, 1835, chap. 274, called the Act of the Session of 1834. In the opinion it is said: "Has such an exemption been given to the old banks? The language of the 11th section of the act of 1821 is: 'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.' This is the language of grave



deliberation, pledging the faith of the state for some purpose,—some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do, in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the state to lay any further tax upon the franchise was exhausted. That is the contract between the state and the banks. . . . Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption given by it, or to what does it apply? Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, use the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. . . . True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character, or by whose assent it was to become a contract with the state, to ascertain the intention of the legislature in making the pledge, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'

It was further said that the legislatures of 1813 and 1821 were anxious to have a certain highway constructed, which they thought the convenience and intercourse of the citizens of Maryland required; and they were also anxious to raise an adequate school fund for every county in the state. They determined that both should be accomplished by incorporating certain banks, with the obligation upon them to make the roads, and to make all the banks in the state pay an annual tax upon their capital as a condition upon which their charters were to be extended. Referring to the Acts of 1813 and 1821, the court observed: "In L.R.A.1917B.

whatever way we examine the Acts of 1813 and 1821, we are of opinion that it appears from the 11th sections in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons on account of the stock which they owned in the banks. This exemption, however, is limited to the old banks in Baltimore which were chartered before 1821, during the continuance of their charter under the Act of 1821. It is founded upon the 11th section of that act, and it is our opinion that the Act of 1841, chap. 23, in so far as it imposes a tax upon the stockholders in those banks, on account of their stock, does impair the obligations of a contract, and is void by the 10th section of the first article of the Constitution of the United States."

In *Piqua State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977, quoting from the opinion of the court in *State ex rel. Prosecuting Atty. v. Commercial Bank*, 10 Ohio, 535, Mr. Justice McLean said: "The supreme court of Ohio say, we take it to be well settled that the charter of a private corporation is in the nature of a contract between the state and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States, in the case of *Woodward v. Dartmouth College*. And the court remark, 'The general assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the state of Ohio, for this privilege, 4 per cent on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated; to wit, the 4 per cent.' And the court say, 'Here is a contract, specific in its terms, and easy to be understood.' 'A contract between the state and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party.' This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. . . . That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the state of Ohio."

Again, in the course of the opinion, it is said: "A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of

which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can anyone deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these is to take away state sovereignty."

In *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173, the rule was announced that state legislatures, unless prohibited by state Constitutions, may contract by legislation to release from taxation a particular thing, corporation, or person.

In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558, it was said that the charter of a bank which declares, "that the bank shall pay to the state an annual tax of one half of 1 per cent on each share of capital stock subscribed, which shall be in lieu of all other taxes," is a contract between the state and the bank, and any other tax than that therein specified is expressly forbidden. Many authorities are cited or reviewed in the opinion of the court, and the doctrine announced in *Gordon v. Appeal Tax Ct.* is reaffirmed. After referring to the power of the legislature granting the charter, the opinion reads: "There is no question before us as to the tax imposed on the shares by the charter. But the state has by her revenue law imposed another and an additional tax on these same shares. This is one of those 'other taxes' which it had stipulated to forgo. The identity of the thing doubly taxed is not affected by the fact that in one case the tax is to be paid vicariously by the bank, and in the other by the owner of the share himself. The thing thus taxed is still the same, and the second tax is expressly forbidden by the contract of the parties. After the most careful consideration, we can come to no other conclusion. Such, we think, must have been the understanding and intent of the parties when the charter was granted and the bank organized. Any other view would ignore the covenant that the tax specified should be 'in lieu of all other taxes.' It would blot those terms from the context, and construe it as if they were not a part of it."

In *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, the charter exemption from taxation of the capital stock of the Nashville, Chattanooga, & St. L.R.A.1917B.

L. R. Co. was held to apply to its shares of stock in the hands of individual stockholders. In the course of the opinion it was announced that, in construing statutes which were binding on states as contracts, the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In that respect, it was said, there is no difference between a contract of a state and a contract of a natural person. That if the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have. In conclusion, it was said: "The charter exempted the stock from taxation clearly because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called the 'capital stock' divided into shares. As the whole thing is exempt, so must necessarily be its several parts or shares."

In *Powers v. Detroit*, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556, it was held that a contract between a state and a railway company which prevented the subjection of the property of the company to any other than the tax prescribed in Michigan Laws 1855, p. 305, § 9, was created by the provisions of that section, that the company shall pay an annual tax of 1 per cent of the capital stock of said company, paid in, which tax should be in lieu of all other taxes except for penalties imposed on said company, and should be estimated upon its last annual report, the statute being a special one, having reference only to the company in question, which formally accepted the taxation provision, and made large expenditures, and completed an unfinished railroad, to induce which was the motive of the enactment.

In *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718, it appears that when the legislature of Louisiana in 1833 (Laws 1833, p. 172) exempted the capital of the Citizens' Bank of Louisiana from taxation, it meant, according to the opinion, to include in the exemption that which represented the capital,—the shares in the hands of those who had subscribed to the capital stock. And it was said that where there is an exempting clause in the charter, the question is one of the legislative intent as to the scope and extent of the exemption, rather than one of the legislative power. The act incorporating the bank, in consideration of certain benefits therein stipulated the state declared the corporation exempt from taxation. The 30th section thereof provided: "The said corporation shall, during its existence, be exempt in its capital and prop-

erty, . . . from all taxes to the state, or to any parish or corporation created by the law of this state."

A subsequent act passed in 1836 (Laws 1836, p. 16) greatly enlarged the scope of the bank's purpose and the extent of its power. It pledged the faith of the state as security for a sum as large as \$12,000,000, and bonds of the state, predicated upon this pledged faith, to the extent of \$7,000,000, were issued, and by means thereof the capital needed for the enlarged purpose of the bank was secured. There was an exemption of the bank from taxation, superseding the previous exemption, in these words: "And the capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic under the authority of the state during the continuance of its charter."

Construing the exemption feature of the statute, it was observed: "When the legislature exempted the capital of the bank from taxation, it meant to include in the exemption that which represented the capital, which was the tangible evidence of the capital,—the shares in the hands of those who had subscribed to the fund which went to make up the capital. That was the usual meaning, the ordinary significance, of the terms employed. It was so taken and understood at the time and long subsequent thereto, as is shown by the fact that, down to the present time, neither the capital of the bank nor the shares of its capital stock have ever been amenable to taxation."

It was further said, discussing the subsequent effort to tax the shares: "What, invite private subscriptions to a fund designed to form in part the capital of a bank which is to become an instrument of the state, formally exempt this capital from taxation, and yet latently reserve the right, secretly entertain the intention, of some day taxing the certificates which show that A, B, C, D, and others had supplied the money which constituted the capital! To so hold would be to impugn the justice, fairness and good faith of the legislature which enacted, and the executive who approved, the act. It is a question of intention, and we cannot hold that the lawmakers of that early period meant to ensnare the then subscribers to the capital stock by exempting the capital itself, yet reserving the right to succeeding generations to tax the shares representing that capital in the hands of the heirs and assigns of those who subscribed."

It was said that the subscribers dealt with the bank upon the public faith of the state, as declared in its statute; that the exemption was granted for a consideration, and formed a contract between the state and the corporation. Citing *Gordon v. Appeal* L.R.A.1917B.

Tax Ct. 3 How. 133, 11 L. ed. 529, it was said that the contract with the bank was a contract with the stockholders of the bank. Further, in this respect, the opinion reads: "It can hardly be doubted that if the original subscribers to the capital stock had been informed the offer of the state to exempt the capital was not intended to exempt the shares in their hands, the consequence would have been they would not, in many instances, have subscribed to the stock. There would have been no sufficient inducement for them to do so, on that score. Whether the tax came out of their pockets directly, or whether it came out of the bank, to be deducted from their dividends, or to affect the value of their shares, there was not to them the shadow of a difference."

In conclusion, it was noted that when the state contracts, it places itself on an equality with other contracting parties, and thus becomes liable to the application of the rule of *contra proferentem*.

In *Richardson v. St. Albans*, 72 Vt. 1, 47 Atl. 100, it was held that under the Vermont Statutes, § 365, providing that certain manufacturing establishments, and all capital and personal property used in their business, may be exempt from taxation for a term of years, if the town so votes; and § 411 of the statutes, declaring that in determining the list of a taxpayer, the amount of his stocks and bonds which were exempt from taxation should be deducted from the appraised value of his personal estate—where the stock of a manufacturing corporation had been exempted from taxation by vote of the city in which it was located, its shares of stock in the hands of the shareholders were exempt.

In *State v. Baltimore & O. R. Co.* 48 Md. 49, 73, 74, the Baltimore & Ohio Railroad Company, incorporated in 1826 (being the first railroad ever chartered in this country for the transportation of freight and passengers), proposed to construct a railroad from Baltimore to the Ohio river, a distance of 379 miles, involving in its construction an expenditure of an enormous sum of money, and was therefore justly considered not only as a gigantic, but, in a pecuniary sense, a hazardous, enterprise. Under these circumstances the legislature was willing to confer on it every privilege and immunity which could be reasonably required, and which would tend to the completion of the road. In the charter it was provided: "And the shares of the capital stock of the said company . . . shall be exempt from the imposition of any tax or burthen."

It was said by the court, in construing the exemption provision: "As used in this

connection, we understand the legislature to mean that the shares of stock, representing the property and profits of the company, shall be exempt from the imposition of any tax or burthen. The legislature, beyond all question, intended to confer a substantial benefit on the company, and thereby to induce capitalists and others to invest their means in the construction of a road which everyone deemed of so much importance to the state. And to say they meant to exempt the shares only, and to reserve the right to tax the property and franchises, is a construction that would render the privilege thus granted of no practical benefit to the appellee."

And it was held that the exemption from taxation, granted in the charter of the company, was a contract between the state and the corporators, within the protection of the Constitution of the United States, and therefore beyond the power of a subsequent legislature to repeal or in any manner impair.

In *Com. v. Richmond & P. R. Co.* 81 Va. 355, the charter of the Richmond & Petersburg Railroad Company provided that "all machines, wagons, vehicles and carriages purchased . . . with the funds of the company, and all other works constructed under the authority of this act," of the legislature, "and all profits which shall accrue from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever."

And it was held that all the property and profits of the company, and also all the shares of the respective shareholders, were exempt from taxation, whether state, county, or municipal.

Where the tax is in fact laid upon the franchise of a corporation, although measured by the amount of its capital stock, the manner in which the capital is invested is not material. But if the tax is really upon the property or assets of the corporation, as represented by its capital, allowance must be made for such portion of the capital as is invested in nontaxable property. *New York Tax Cases* (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; *German-American Sav. Bank v. Burlington*, 54 Iowa, 609, 7 N. W. 105; *State ex rel. Davis v. Rogers*, 79 Mo. 283; *Whitney v. Madison*, 23 Ind. 331; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13, 28; *New Orleans v. New Orleans Canal & Bkg. Co.* 29 La. Ann. 851; 27 Cyc. 820.

In the present case, of the invested capital of the bank, including surplus fund and

undivided profits, \$180,000 was invested in nontaxable state bonds. This money, the proceeds arising from the sale of said bonds, had been paid into the state treasury to the credit of the state building fund. Had the purchase been made by a private individual, it is obvious that the tax would not lie. In such case the state would in effect be levying a tax upon the bonds. The purchaser, having parted with his money, could not be taxed thereon; not until the redemption of the bonds by the state and the money paid on account thereof was again in his hands. There being a contract between the state and the officers of the bank, acting both on account of the bank and in behalf of the shareholders, and the statute making the bonds nontaxable for any purpose, effect cannot be given the promised immunity, and upon which the bank acted, unless by allowing shareholders the right to deduct from the value of their shares that proportion of the value invested in nontaxable state bonds. Not to do so would be to fail to give to the statute making the bonds nontaxable all practical value and effect, and make the exemption from taxation of the bonds held by national banks as investments of capital wholly unreal and illusory. Pledging the faith of the state, we have seen, is an act evidencing "grave deliberation," intended to accomplish some "effectual purpose." An end not intended, but, on the other hand, forbidden, would result if the shares are taxed without a proportionate reduction in value on account of the bank's investment in the bonds. That the bonds are not taxed *eo nomine* cannot affect the rule. The consequence would be the same in either case.

It is as essential that the public faith should be preserved as that individual grants and contracts should be maintained and enforced. A state must always preserve unsullied its good faith whenever it has been pledged, and its officers should never, by any nice refinement, open a way by which it may be violated. Those of our citizens, who, at the state's invitation, purchased the state building bonds, and thereby enabled the state, at a time when, according to the evidence, there was little or no market for its obligations at par, to discharge its public functions by furnishing shelter and comfort to its unfortunates, and prisons for its criminals, and other necessary public buildings, should not, and will not, be required to pay, even though in the form of taxation, that from which by solemn compact, lawfully entered into, they are exempt. To do so would be to impair the obligations of their contract with the state, and upon the inviolability of which the purchasers of the bonds had full right to rely.

*Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760. Legislative contracts are to be read in the light of the public policy entered into and the purposes sought to be accomplished at the time they were made, rather than at a later period, when different ideas and theories may prevail. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968. The wisdom of the legislature in exempting the bonds from taxation involves a question of legislative policy, over which the courts have no right of review. In that respect its judgment is conclusive and binding upon all branches of the state government.

Aside from what we have said was the legislative purpose in respect to the taxation of said bonds, a well-founded doubt may exist as to the right of the state to tax the shareholders of a national banking association, owning state building bonds, without, according to such shareholders, the right ratably to deduct from the valuation thereof the amount of the capital and surplus invested in such bonds, in view of § 5219, Rev. Stat., requiring that the taxation of such shares "shall not be at a greater rate than is assessed upon other moneyed capital, in the hands of individual citizens of such state." A somewhat similar question was involved in *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705, where it was held that the prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations, and that consequently where the state statute authorized individuals to deduct the amount of debts owing by them from the assessed value of their personal property, and moneyed capital subject to taxation, the owners of shares of national banks were entitled to the same deduction. The cases of *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826, are applications of the same principle. See also *McHenry v. Dow-*

*ner*, 116 Cal. 20, 45 L.R.A. 737, 47 Pac. 779. It would seem that the rule announced in the foregoing cases must hold true in the case at bar, else a condition would exist whereby the taxability of the bonds would be made to depend upon the personality of their owners, or the statute under which the tax was sought to be collected. That is to say, that bonds belonging to individuals and to corporations, taxable upon the net value of their moneyed capital and undivided profits, would not be taxable, while those belonging to national, if not state, banks, would in legal effect be taxable. We do not consider it necessary, however, to a decision of the case, to decide this point, preferring to rest our conclusion upon the ground that the bonds being nontaxable for any purpose, the right of the shareholders to a proper credit on account thereof is sufficiently made to appear.

We have seen that the statute permitting the exemption of state bonds from taxation violates no provision of our Constitution. That it was not the purpose of the legislature to tax the state building bonds issued under authority of the act of March 15, 1911, as evidence both by the act itself and the subsequent act of March 11, 1915, is obvious. It was so recognized by the governor, attorney general, and state treasurer, in office when the bonds were issued and sold. Until 1915 the law was so understood and administered by the state taxing authorities. Fully informed of the foregoing, and relying thereon, the First National Bank of Chickasha purchased the bonds subsequently indirectly sought to be taxed.

From what we have said it follows the action of the state board of equalization, of August 4, 1915, and the subsequent action of the county board of equalization of Grady county, was violative of the rights of the bank and its shareholders, which had theretofore attached under its contract with the state; and that the judgment of the District Court of Grady county, on appeal from the action of the county board of equalization, should be and is in all things affirmed.

All the Justices concur, except Kane, Ch. J., absent, and not participating.

### **Annotation—Constitutional limitation of the power to exempt property from taxation as affecting public obligations or property.**

The present note is intended to include only cases involving the power of the legislature to exempt public obligations L.R.A.1917B.

or property in the face of a general constitutional requirement that all property be taxed, or of a specific constitu-

tional restriction on the legislative power to exempt property.

On implied exemption of state or municipal bonds, see note to *State Nat. Bank v. Memphis*, 7 L.R.A.(N.S.) 663.

On liability of municipal bonds to taxation, see note to *Penick v. Foster*, 12 L.R.A.(N.S.) 1159.

The question as to the intention to include public property or obligations in the constitutional term "property," which is decisive of the question here under annotation, depends upon whether or not there is a presumption in favor of the exemption or immunity of public property from taxation. But that question is broader than the scope of this note, and in some of its aspects has been covered in the notes referred to.

There are not many cases in which the exact question here annotated has been passed upon, but a reference to the cases cited in the other notes will show that, on the underlying principle, the decisions are overwhelmingly in favor of the position taken by the court in *RE FIRST NAT. BANK*, ante, 294.

Many analogous cases supporting this holding on the underlying principles are cited in the note to *Penick v. Foster*, already mentioned. In that case, the court, by way of argument, said: "Let it be conceded, for the purposes of this case, that the state, either directly or through its counties and municipalities, may tax public securities in the hands of individuals. The question then arises whether the words 'all property subject to be taxed,' in the Constitution, embrace bonds issued by the state or its political subdivisions. If they do, there is no power to exempt them from taxation. If they do not, the question as to whether they shall be so subject is a matter left to the discretion of the general assembly. If a municipal bond is property which the Constitution taxes of its own force, and the general assembly has no authority to exempt the same from taxation, then a county bond is likewise taxable, and, for a similar reason, a state bond itself."

Where the Constitution provides that "no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services," the question of the legislature's power to exempt city waterworks from taxation properly turns upon the question wheth-

er the property belongs to the city in its governmental or in its private capacity. *Com. v. Makibben* (1890) 90 Ky. 384, 29 Am. St. Rep. 382, 14 S. W. 372; *Clark v. Louisville Water Co.* (1890) 90 Ky. 515, 14 S. W. 502.

In *Williamson v. Massey* (1880) 33 Gratt. (Va.) 237, it was held that the legislature had power to exempt state bonds from taxation notwithstanding a clause in the Constitution which provided that "taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." But the decision is based upon a construction of the constitutional provision which would permit the exemption even of classes of private property rather than upon the public character of the property.

The Tennessee court is the only authority directly opposed to the result of the decision in *RE FIRST NAT. BANK*. In *State Nat. Bank v. Memphis* (1906) 116 Tenn. 641, 7 L.R.A.(N.S.) 663, 94 S. W. 606, 8 Ann. Cas. 22, that court held that an attempted exemption of state bonds by the legislature violates a constitutional provision that all property shall be taxed, basing its decision upon the theory that there is no implied exemption of state bonds from taxation, hence, state bonds are included in the provision that all property shall be taxed. This underlying theory that there is no implied exemption of state bonds seems to be contrary to the unanimous opinion of other courts (see cases cited in the note in 7 L.R.A.(N.S.) 663), which fact would indicate that the decision is erroneous. But a majority of the same court in *Keith v. Funding Board* (1912) 127 Tenn. 441, 155 S. W. 142, Ann. Cas. 1914B, 1145, reached practically the same ultimate conclusion by a different route, or rather by different routes. Two of the five judges agreed and one concurred in the result only, while two wrote dissenting opinions, none of the judges being content to rest the decision wholly upon the *State Nat. Bank v. Memphis*.

J. W. M.

## PENNSYLVANIA SUPREME COURT.

ROBERT B. ALEXANDER, Appt.,  
v.  
WILKES-BARRE ANTHRACITE COAL  
COMPANY et al.

(— Pa. —, 98 Atl. 794.)

**Nuisance — operation of coal mine.**

1. The operation of a coal mine in the ordinary way with the precautions usually and customarily prevailing in such plants is not a nuisance of which those located in the vicinity can complain.

*For other cases, see Nuisances, I. in Dig. 1-52 N. S.*

**Evidence — failure to call witness — presumptions.**

2. Failure of plaintiff in an action to enjoin the operation of a business as a nuisance to call as a witness an engineer who examined the plant at his request under order of court justifies the court in assuming that he found no violation of the law or existing conditions which proper operation or adoption of other appliances would remedy.

*For other cases, see Evidence, II. c, 9, in Dig. 1-52 N. S.*

**Injunction — arrangement of mine — nuisance.**

3. The failure of a mine operator to arrange his buildings and appliances as required by statute is no ground for injunction at the suit of one complaining of a nuisance, if there is nothing to show that such arrangement affected him adversely.

*For other cases, see Nuisances, II. a, in Dig. 1-52 N. S.*

**Court — interference with act of corporation.**

4. Under a statute empowering private citizens to contest the authority of a corporation to do a particular act, the power of the court ceases if such authority is found to exist.

*For other cases, see Corporations, IV. a, in Dig. 1-52 N. S.*

(May 15, 1916.)

**A**PPEAL by plaintiff from a decree of the Court of Common Pleas for Luzerne County dismissing his bill filed to enjoin defendants from operating and using their plant to the injury of plaintiff's private property rights. Affirmed.

The facts are stated in the opinion.

Messrs. John McGahren and R. B. Alexander, for appellant:

The dust, smoke, noise, and vibration created by the use of defendant company's structures are continuing nuisances to plaintiff's property.

**Note.** — For operation of mine as a nuisance, see annotation following this case, post, 313.  
L.R.A.1917D.

Stokes v. Pennsylvania R. Co. 214 Pa. 415, 63 Atl. 1028.

The defendant company should be enjoined from such operation of its breaker as causes injury to plaintiff, because its operation is a continuing nuisance and the defendant company does not possess the right to maintain it.

Siegfried v. Boyd, 237 Pa. 55, 85 Atl. 72; Jackson v. Thomson, 215 Pa. 209, 64 Atl. 421; United States v. Dickson, 15 Pet. 141, 10 L. ed. 689; Folmer's Appeal, 87 Pa. 133; Com. v. Morass Hill Coal Co. 5 Lack. Jur. 364; Com. ex rel. Roderick v. Vipond, 14 Pa. Co. Ct. 357; Com. v. Mann, 168 Pa. 290, 31 Atl. 1003; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; United States v. State Bank, 6 Pet. 29, 8 L. ed. 308; Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; Union Ins. Co. v. Hoge, 21 How. 35, 16 L. ed. 61; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Brown v. United States, 113 U. S. 569, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Klinger v. Bickel, 117 Pa. 326, 11 Atl. 555; Alexander v. Kerr, 2 Rawle, 83, 19 Am. Dec. 616; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377.

The coal company should use its premises in such manner that no injury will be caused plaintiff.

Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; Pfeiffer v. Brown, 165 Pa. 267, 44 Am. St. Rep. 680, 30 Atl. 844; Sullivan v. Jones & L. Steel Co. 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065; Harvey v. Susquehanna Coal Co. 201 Pa. 63, 88 Am. St. Rep. 850, 50 Atl. 770; Walters v. McElroy, 151 Pa. 549, 25 Atl. 125; Keppel v. Lehigh Coal & Nav. Co. 200 Pa. 649, 50 Atl. 302, 21 Mor. Min. Rep. 605; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, 13 Mor. Min. Rep. 374; Hoy v. Sterrett, 2 Watts, 330; Woelpper v. Pennsylvania Water & Power Co. 250 Pa. 559, 95 Atl. 717; Lewis's Appeal, 67 Pa. 153; Pom. Eq. Jur. 3d ed. § 399; Bell v. Ohio & P. R. Co. 1 Grant, Cas. 105; Todd's Appeal, 24 Pa. 429; High, Inj. § 10a; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

Mr. John G. Johnson also for appellant:

Mr. Benjamin R. Jones, for appellee Coal Company:

This is not a case for equitable intervention by means of a preliminary injunction. People's Pass. R. Co. v. Union Pass. R. & P. Traction Co. 35 W. N. C. 311; Mam-

moth Vein Consol. Coal Co.'s Appeal, 54 Pa. 183, 7 Mor. Min. Rep. 460; Daugherty Typewriter Co. v. Kittanning Iron & Steel Mfg. Co. 178 Pa. 215, 35 Atl. 1111.

Plaintiff, not being a mine inspector or an employee of the defendant company, had no right to enforce alleged violations of the Anthracite Mine Law.

Sparhawk v. Union Pass. R. Co. 54 Pa. 401; Cumberland Valley R. Co.'s Appeal, 62 Pa. 218; Evans v. Reading Chemical Fertilizing Co. 160 Pa. 209, 28 Atl. 702; Klein v. Livingston Club, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606.

The operation of the breaker and washery is not a nuisance.

Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; Joyce, Nuisances, § 95; Com. v. Miller, 139 Pa. 77, 23 Am. St. Rep. 170, 21 Atl. 138, 8 Am. Crim. Rep. 619; Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 13 Am. Neg. Rep. 659; Straus v. Barnett, 140 Pa. 111, 21 Atl. 253; McCaffrey's Appeal, 105 Pa. 253; Alexander v. Stewart Bread Co. 21 Pa. Super. Ct. 526; Keiser v. Mahanoy City Gas Co. 143 Pa. 276, 22 Atl. 759; Price v. Grantz, 118 Pa. 402, 4 Am. St. Rep. 601, 11 Atl. 794; Gold v. Philadelphia, 115 Pa. 184, 8 Atl. 386; Farver v. American Car & Foundry Co. 24 Pa. Super. Ct. 579.

Frazer, J., delivered the opinion of the court:

Defendant corporation operates a colliery situated along North Pennsylvania avenue, in the city of Wilkes-Barre, which was opened and first operated in 1882. In 1902 or 1903, following a suspension of mining for a time, and previous to renewing operations, improvements were made to the plant by the erection of a new breaker, a boiler plant, and a washery; and later, in 1913, by the installation of four additional boilers. The new buildings were erected on the site of structures that had been in existence since 1882. In 1908 a receiver was appointed for the company at that time owning the colliery, and in 1910 the property was sold at receiver's sale, subsequently becoming vested in defendant company, and since that time operated by it. In 1909 Elizabeth C. Alexander, plaintiff's mother, the other defendant, purchased a lot of ground on North Pennsylvania avenue opposite the colliery, and erected a dwelling thereon in which she and her family have since resided. Following the resumption of mining at the colliery in 1910, Mrs. Alexander, through her son, the plaintiff in these proceedings, complained to defendant company of annoyance, and damage to her property, by dust escaping from the breaker, and the vibration caused by a ventilating

fan operated on defendant's premises, and requested that the cause of the injury be abated. On the company's failure to suppress, or lessen, the vibration caused by the fan, a bill in equity was filed by Mrs. Alexander to enjoin its use; and in 1913 a second proceeding was instituted, in which she alleged damage to her dwelling due to the operation of the washery. Both proceedings are pending and undetermined. In the meantime complaint had been made to the state mine inspector, together with a request that an investigation of defendant's premises be made, and asking that he proceed against the company if violations of the mining laws were found to exist. In response to the complaint the inspector made an investigation of defendant's plant, and reported that he found no violation of the law sufficient to warrant an application to the courts for an injunction to restrain the operation of the colliery. The inspector, however, informed Mrs. Alexander that defendant company would be notified to make certain changes in the location of the opening of the air shaft, which was done by the inspector, and the request complied with by the company. Plaintiff, in the meantime, having received from his mother a deed for an undivided half interest in the property, instituted proceedings in equity against the defendant company in which he complained of damage to the property caused by the operation of the colliery, and asked that an injunction be awarded preliminary until final hearing, and thereafter perpetual. Before the motion for a preliminary injunction was disposed of, plaintiff moved the court to dismiss his bill without prejudice, which was done, and immediately following that action he petitioned this court to assume original jurisdiction, which we declined to do, and refused his petition. Whereupon he began the present proceedings. The court below refused his motion for a preliminary injunction, and upon final hearing dismissed the bill. From this action plaintiff appealed.

The city of Wilkes-Barre is located in the anthracite coal mining regions, there being at least seven other coal mining operations within the limits of the city near the location of defendant's mine, and in addition to these industries the locality contains a number of manufacturing and other enterprises. Defendant's colliery has been in operation since 1882, with the exception of about three years, and represents an investment of half a million dollars. In connection with the mining of anthracite coal, the erection and use of breakers, washeries, fans, and other machinery, is a necessary and usual incident in the operation



of such mines, and a certain amount of noise and dust will necessarily result from carrying on the business, and must be expected and endured by persons who take up their residence in a neighborhood devoted to such industries.

Defendant's business is a lawful one, consisting of the development of the natural resources of the land, in which the interests of the entire community are concerned, and for which large expenditures have been made; and so long as defendant carries on its business in the ordinary way, and adopts and uses the precautions usually and customarily prevailing in the operation of such plants, as has been done in this case, it is not accountable for incidental annoyances and damages that necessarily follow its mining operations. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Straus v. Barnett*, 140 Pa. 111, 21 Atl. 253; *McCaffrey's Appeal*, 105 Pa. 253. The court below found, as a matter of fact, that defendant's plant and equipment are such as are usual in the particular locality, and in common and ordinary use in the operation of anthracite coal mining. This finding is fully justified by the evidence, in fact the court in giving weight to the testimony could not have reached a contrary conclusion.

The fourth prayer of plaintiff's bill is for an order on defendant company to allow plaintiff's engineer access to its breaker and other structures for the purpose of inspecting the appliances used in the preparation of coal, and ascertaining if anything was being done or omitted which would lessen the nuisance by preventing the emission of the dust complained of. This order was made as requested, and an inspection of defendant's mines and buildings permitted by plaintiff's engineer, who was not called to testify on the trial. That the court was justified in taking into consideration the absence of this witness, and in assuming he found no violation of the law and no existing condition which a proper operation of the plant, or the adoption of other appliances, would remedy, cannot be questioned.

Plaintiff in his bill further avers defendant violated the provisions of the Mining Law of June 2, 1891 (P. L. 176), by: (1) Erecting its breaker within 200 feet of the mouth of the main hoisting shaft; (2) in constructing the washery in too close proximity to the fan house; and (3) in not properly placing and erecting the boilers above referred to. These violations of the act, assuming them to be such, the court below has found did not in any way injure or affect plaintiff in either his health or his property. As stated before, a new

breaker was built in 1903 on the site of the original one of 1882, and, upon application by the mine inspector for an injunction to restrain the rebuilding of the structure, the court dissolved the preliminary injunction, and in the present case held the decree in that case to be *res judicata* of the question whether in that respect there was a violation of the mining laws. Aside from this, plaintiff is without standing to complain of infractions of the mining laws in a proceeding of this character. The complaint here is that he is being inconvenienced and damaged by smoke, noise, and dust, caused by the proximity of defendant's works to his residence and the vibration of machinery used in operating its plant. It does not appear how compliance with the mining laws with respect to the location of buildings would, in any way, lessen the nuisance complained of. So far as the evidence shows, the structures might be separated as required by the act, and yet be, perhaps, as near plaintiff's property as now situated, or possibly nearer. The sole question raised here is whether or not plaintiff is damaged, and, if so, has he the right to restrain the operation of the plant, if necessary, to avoid a continuation of the damage? The finding of the court below is that plaintiff is not affected by the relative location of the defendant's buildings with respect to each other, and a review of the evidence has convinced us of the correctness of this conclusion. In this case the circumstances do not require us to decide whether, under any conditions, an individual possesses the right by action in his individual name to enforce the mining laws, or whether that duty is devolved solely upon the inspector of mines under article 15, § 1, of the Act of 1891. The purpose of that enactment is to protect the community as well as those employed in the mines, and the rights of plaintiff are the same as the rights of every other member of the community if he suffers no special injury by its violation. The remedy to restrain acts prejudicial to the interest of the public must be in accordance with the provisions of the law, or in absence of express provisions, by the proper public officers, and cannot be accomplished by a proceeding in equity by an individual.

A private action for a public nuisance can be maintained only by one who suffers some particular loss or damage beyond that suffered by all others affected by the nuisance. Interference with a common right does not of itself afford a cause of action by an individual. *Knowles v. Pennsylvania R. Co.* 175 Pa. 623, 52 Am. St. Rep. 860, 34 Atl. 974. In *Rhymer v. Fretz*, 206 Pa. 230, 232, 98 Am. St. Rep. 777, 55 Atl. 959,

it was said by this court, quoting from *Mechling v. Kittanning Bridge Co.* 1 Grant, Cas. 416: "Private citizens have no right of action, either in law or equity, for the suppression of a public nuisance, unless on averring and proving some special damage to themselves. . . . For a nuisance that is merely a public wrong, only a public action can be brought, and that must be done by the proper public functionaries."

Likewise, equity will not enforce a penalty, or enjoin the commission of crime, at the instance of an individual, where there is no special injury to private rights. *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Klein v. Livingston Club*, 177 Pa. 224, 34 L.R.A. 94, 55 Am. St. Rep. 717, 35 Atl. 606. Had plaintiff shown a special damage to himself, by reason of the location of defendant's buildings and machinery within a distance of each other prohibited by the state mining laws, a case would have been presented for the enforcement of the mining laws at the instance of an individual specially damaged. This he failed to do, as his evidence established the only damage sustained by him to be due to the operation of the colliery in a particular neighborhood, there being no evidence that the removal of a building so as to comply with the pro-

visions of the mining laws would lessen, or tend to prevent, the injury complained of.

Neither does the Act of June 19, 1871 (P. L. 1360), assist plaintiff. That act merely gives a private citizen the right to contest the power or authority of a corporation to do certain things injurious to private rights, and to decide whether the franchise to do the particular act has been conferred upon the corporation. Under its provisions the inquiry is limited to the question whether there was a grant to do the thing complained of. If so, the court is without authority to interfere. *Blauch v. Johnstown Water Co.* 247 Pa. 71, 93 Atl. 169. In the case cited it was said, quoting from *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. 390: "The Act of 1871 contemplates nothing more than that it shall be made to appear from the charter, that the corporation has the power to do the particular act in controversy, and which involves some right of the contestant, but when we get beyond this, we assume something with which we have no business in a collateral proceeding; we assume to assert the right of a third party, the commonwealth, who may or may not, at her own option, insist upon the observance of those rights."

The decree is affirmed.

### Annotation—Operation of mine as a nuisance.

This question so far as the pollution of streams by mining operations is concerned is treated in the notes to *Drake v. Lady Ensley Coal, Iron & R. Co.* 24 L.R.A. 64; *Straight v. Hover*, 22 L.R.A. (N.S.) 276; *Arminius Chemical Co. v. Landrum*, 38 L.R.A. (N.S.) 272, and *Packwood v. Mendota Coal & Coke Co.* L.R.A.1915D, 911.

Many cases dealing with questions in relation to nuisances quite analogous to that now under consideration, including the effect of vibration, smoke, etc., are cited in notes that may be found by consulting the Indexes to L.R.A. Notes, under the title "Nuisances."

The mining of coal is not a nuisance in itself. *Pennsylvania Coal Co. v. Sanderson* (1886) 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Pwllbach Colliery Co. v. Woodman* [1915] A. C. (Eng.) 634, [1915] W. N. 108, 84 L. J. K. B. N. S. 874, 113 L. T. N. S. 10, 31 Times, L. R. 271, Ann. Cas. 1915D, 833.

And a mining company, so long as it carries on its business in the ordinary way, and adopts and uses the precautions usually and customarily prevailing in the operation of such plants, is not accountable for incidental annoyances

and damages that necessarily follow its mining operations. *Pennsylvania Coal Co. v. Sanderson* (Pa.) supra; *ALEXANDER v. WILKES-BARRE ANTHRACITE COAL Co. ante*, 310.

See also *Marvin v. Brewster Iron Min. Co.* (1874) 55 N. Y. 538, 14 Am. Rep. 322, 13 Mor. Min. Rep. 40, motion for reargument denied (1874) 56 N. Y. 671, holding that a mine owner will not be restrained from blasting in the nighttime, as is usual in mines, because it disturbs the sleep of the owner of the surface and his family, and thus affects their sleep or diminishes the value of his premises. Consult also Index to L.R.A. Notes under title, "Blasting."

Such an important industry as that of mining will not be interfered with at the instance of an individual, in the absence of proof of actual, visible, and substantial damage.

Thus, in *Salvin v. North Brancepeth Coal Co.* (1874) L. R. 9 Ch. (Eng.) 705, the bill in substance sought by a mandatory injunction to prevent a colliery company erecting or working any coke ovens or other ovens to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapors. The

bill was dismissed on plaintiff's failure to show actual substantial or visible damage. "With respect to this particular property before us," said the court, "I observe that the defendants have established themselves on a peninsula which extends far into the heart of the ornamental picturesque grounds of the plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighborhood on the other side have done, to import ironstone and to erect smelting furnaces forges and mills, and had filled the whole of the peninsula with a mining and manufacturing village, with beer shops and pigsties and dog kennels, which would have utterly destroyed the beauty and the amenity of the plaintiff's ground, this court could not, in my judgment, have interfered. A man to whom Providence has given an estate, under which there are veins of coal worth perhaps hundreds or thousands of pounds per acre, must take the gift with the consequences and concomitants of the mineral wealth in which he is a participant."

The decision in *Robb v. Carnegie Bros. Co.* (1891) 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649, holds that one owning and operating ovens for manufacturing coke from coal obtained from strangers, and not mined in the land on which the ovens stand, the natural effect of which is to substantially injure property in their vicinity, must pay to the owners of such property the damages sustained by them, although the ovens are located on his own land at a place so well adapted to the business that they could not be enjoined. Such cases as this are not considered strictly within the scope of this note, the injury complained of resulting from the manufacture of coke being in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property, but being the consequence of his election to devote his land to the establishment of a particular sort of manufacturing having no natural connection with the soil or the subjacent strata.

In *Harvey v. Susquehanna Coal Co.* (1902) 201 Pa. 63, 88 Am. St. Rep. 850, 50 Atl. 770, plaintiffs alleged that they were injured because the defendant mining company did not properly control the dust from its coal breaker, but adopted and used defective and inadequate appliances; and the court observed that, as there was proof submit-

ted in support of this allegation, it was not for it to say that the injury complained of was *damnum absque injuria*, but it was for the jury to determine whether it resulted from negligence, for the consequences of which the defendant was liable. If such injuries, said the court, can be avoided by the most effective and approved means known of controlling coal dust, it is the duty of the mining company to adopt them. The maxim, "*Sic utere tuo ut alienum non laedas*," as applied to this company, does not mean that it cannot prepare its coal for market, but that in so preparing the same due regard must be had for the rights of others, by controlling, so far as possible, through the most effective known means, the dust generated in breaking and separating the coal. The court also approved of the instruction that "the defendants, in the preparation of the coal, are engaged in a lawful business, . . . the injury of which the plaintiffs complain is not in the mining of the coal, but is the cause of the method of its preparation for the market upon defendant's land after it is mined. Parties can reasonably use their own lands, but they must so use them as not to do injury and damage to the property rights of their neighbors. When parties are engaged in a lawful business, in order to sustain an action for injury resulting therefrom, the injury must be shown to have been real and substantial, not a trifling annoyance or injury, such as is necessarily incident to the business complained of. There are some injuries too slight and exceptional to be recognized as a bar to the active industries of the country. Every lawful enterprise contributes to the public good. It furnishes employment to the idle, promotes every other branch of industry, and in this way directly benefits the whole community. It is not unreasonable that the individual members of the community thus benefited should make some slight sacrifices for the public welfare. There can be no recovery in a case of this kind based upon the theory that it is not pleasant or conducive to the plaintiffs' feelings to have this breaker in proximity to their property. There can only be a recovery upon the principle of the negligence of the defendant, and as a result of such negligence the plaintiffs have sustained more than a trifling injury,—that they have sustained a substantial injury to their property rights."

It is held in *Pwllbach Colliery Co. v. Woodman* [1915] A. C. (Eng.) 634,

Ann. Cas. 1915D, 833, however, that a colliery, by a lease authorizing it to carry on the trade of mining, does not by implication acquire the right, privilege, or easement to so carry on its work as to commit a nuisance; and a person maintaining a slaughter house and sausage factory on adjoining premises under a subsequent lease from the same lessor, "subject to all rights and easements belonging to any adjoining or neighboring property," who is injured in his trade by screening and breaking operations, discharging dust which is carried by the wind to his premises, is entitled to relief by injunction and damages. "To my mind," says Earl Loreburn, "it is clear that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If, indeed, it could be proved that the business authorized could not possibly in a practical sense be carried on without committing a nuisance, so that everyone must have known the purpose was to commit a nuisance, or if some particular method of carrying it on had been authorized, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different."

An injunction to restrain the continued and injurious acts of a company, after mining operations had ceased, consisting of carrying coal and water over, and depositing dirt and debris upon, the land of an adjoining owner, was granted and damages awarded in *Walters v. McElroy* (1892) 151 Pa. 549, 25 Atl. 125, the court, stating: "And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing, to the hurt of another, that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him, as compared with the advantages that would accrue to the defendant from its occupation."

It was stated in *Czarnecki v. Bolen-Darnell Coal Co.* (1909) 91 Ark. 58, 120 S. W. 376, that a burning dump pile incidental to the opening and operating of a mine constituted a nuisance the con-

tinued maintenance of which was a sufficient ground for the recovery of damages. In this case the pile had been burning about three years, and the testimony tended to prove that the burning of the waste caused quantities of smoke and sulphur fumes, and other noxious vapors and gases, to arise constantly from the pile, and, being carried by the wind, to render the adjacent houses uninhabitable and dangerous to health; that the burning of the dump pile caused quantities of sulphur, alkali, salt, and other substances to be separated from the waste product and to become soluble in water; that rains falling upon the dump carried substances in solution upon the plaintiff's property, ruining the wells, destroying vegetation, shrubbery, and shade trees. It is argued, observed the court, that a distinction should be made as to a coal mine, because of the fact that it is operated at a fixed place, and cannot be moved like manufacturing plant. Another way of stating this recognized distinction is that, in the operation of a coal mine, the material is not brought to or accumulated on the land, like a manufacturing plant, but that it is found and utilized there (*Pennsylvania Coal Co. v. Sanderson* (1886) 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Robb v. Carnegie Bros. Co.* (1891) 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649). This distinction, the court goes on to say, is doubtless a sound one as to things which are reasonably essential to the proper operation of the mine. Now, the evidence in this case shows that it is customary in the operation of mines to dump the waste products near the entrance to the mine; but it does not appear that it is either customary or necessary to burn the waste, or that the fire could not have been extinguished. The evidence in this case shows that the pile was comparatively small when it became ignited, but it burned steadily for more than three years because of the fact that the waste product containing inflammable matter had been daily added to it until the pile had grown to immense proportions. The evidence does not show precisely how the pile became ignited, but it was shown that it is customary to throw ashes from the boiler on the pile, and it may have become ignited in this way.

It is held in *McCabe v. Watt* (1909) 224 Pa. 253, 24 L.R.A.(N.S.) 274, 73 Atl. 453, that a mandatory injunction will not lie to compel a corporate lessee of a coal mine within the limits of a

municipal corporation to extinguish a fire in the mine which has become a nuisance to the health and property of adjacent property owners, where it has exhausted its entire capital in an ineffectual effort to control the fire, and such control will require the expenditure

of a large sum of money and the service of a large force of men for a long period of time. (As to burning slack, culm, or other waste material as a nuisance, see note to *Pana v. Central Washed Coal Co.* 48 L.R.A.(N.S.) 244.)  
J. D. C.

#### RHODE ISLAND SUPREME COURT.

ARTHUR E. HUMES

v.

AUGUST H. SCHALLER.

(— R. I. —, 99 Atl. 55.)

#### Highway — duty to look out for passing vehicles.

1. One standing in the roadway engaged in inspecting a bursted tire on an automobile in which he had been riding is not bound to look out for passing vehicles if there is room for them to pass him in safety.

*For other cases, see Negligence, II. c, in Dig.* 1-52 N. S.

#### New trial — insufficiency of evidence.

2. The trial judge cannot grant a new trial because the verdict is not supported by the evidence if the evidence is nearly balanced, or such that different minds would naturally and fairly come to different conclusions thereon, although his judgment may not agree with the verdict.

*For other cases, see New Trial, III. b, in Dig.* 1-52 N. S.

(November 20, 1916.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Kent County, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Boss & Barnefield, for defendant:

Plaintiff was not in the exercise of due care.

*Volosko v. Interurban Street R. Co.* 190 N. Y. 206, 15 L.R.A.(N.S.) 1117, 82 N. E. 1090; *Gunn v. Union R. Co.* 27 R. I. 320, 2 L.R.A.(N.S.) 362, 62 Atl. 118; *Quinn v. Boston Elev. R. Co.* 188 Mass. 473, 74 N. E. 687; *Kelly v. Boston Elev. R. Co.* 197 Mass. 420, 15 L.R.A.(N.S.) 282, 83 N. E. 865; *Hennessey v. Forty-Second Street, M. & St. N. Ave. R. Co.* 103 App. Div. 384, 92 N. Y. Supp. 1058; *Clancy v. St. Louis Transit Co.* 192 Mo. 615, 91 S. W. 509; *Manetta*

*v. United Traction Co.* 174 Fed. 207; *Eddy v. Cedar Rapids & M. City R. Co.* 98 Iowa, 626, 67 N. W. 676.

The trial court did not properly consider the defendant's motion for new trial.

*Wilcox v. Rhode Island Co.* 29 R. I. 292, 70 Atl. 913; *McMahon v. Rhode Island Co.* 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1223.

Mr. William R. Champlin, for plaintiff:

Plaintiff was in the exercise of due care.

37 R. I. 208; *Marsh v. Boyden*, 3 R. I. 519, 40 L.R.A.(N.S.) 582, 82 Atl. 393, 2 N. C. C. A. 410.

The operator or driver of an automobile, seeing a person in a position of danger in time to avoid an injury to him, may nevertheless be liable therefor, though the other's negligence may continue up to the time of the injury.

*Mosso v. E. H. Stanton Co.* 75 Wash. 220, L.R.A.1916A, 943, 134 Pac. 941.

The law of the road requiring vehicle drivers, upon meeting, to pass to the right, is held not necessarily to apply to their meeting of pedestrians.

*Apperson v. Lazro*, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; *Buxton v. Ainsworth*, 138 Mich. 532, 101 N. W. 817, 5 Ann. Cas. 146.

Baker, J., delivered the opinion of the court:

The plaintiff in this case, on August 14, 1915, was severely injured by an automobile driven by a servant of the defendant at a point on the main road in Warwick just south of Apponaug. A verdict has been returned in his favor, and the trial judge has denied defendant's motion for a new trial. To such ruling the defendant only excepted, as he also did to the refusal of the court to grant two requests for instructions. The case is before this court on these three exceptions.

Two grounds of error are urged in support of the exception to the denial of the motion for a new trial, namely: First, that upon the plaintiff's own testimony, as a matter of law, he was not in the exercise of due care; second, that the trial judge would not consider "the question of whether the jury had responded to the real merits

**Note.**—As to liability for striking one engaged about an automobile in a highway, see annotation following this case, post, 319. L.R.A.1917B.

of the controversy, and of whether the verdict failed to do justice between the parties."

These facts are shown by the plaintiff's evidence: The plaintiff, as a sergeant of the First Light Infantry, in charge of a detail of three men, was riding on an automobile truck, which was conveying camp equipage and stores from Providence to the camp at Quonset. Between 1 and 2 o'clock in the afternoon, at a point on the highway south of Apponaug, opposite Brayton Cemetery, the tire on the truck's left rear wheel burst, and the truck was brought to a stop alongside of and 2 or 3 feet to the east of the trolley track. This track is on the west side of the highway, and its easterly rail is 10 feet from the electric car poles on the west side of the highway, and 12 feet from the fence on that side. From the easterly rail to the curb or edge of the sidewalk on the east side the distance is 21 feet. Poles of the Narragansett Electric Light Company are placed in this sidewalk at its edge, the sidewalk being 6 feet wide. The macadam portion of the street lies between the edge of the sidewalk on the east and the easterly rail of the car track. The extreme over-all width of the truck was 5 feet and 8 inches. By the testimony there was a space of about 13 feet between the curb or edge of the sidewalk and the east side of the truck after it was stopped. After the truck stopped there was at first some conversation as to what was to be done, as they had with them no spare tire. Three of the men—Freese, Clarke, and the plaintiff—alighted and went to the rear to look over the injured tire. Freese took a position close to the left rear wheel, facing it; Clarke stood near him, a little to the north and east, and the plaintiff was a little more to the north and east, facing southeasterly, bending over slightly and looking over his right shoulder at the wheel. The attitude of Clarke was similar. All three say that they were thus engaged for a minute and a half. The plaintiff, who was farthest from it, was about 3 feet east of the truck, thus leaving 10 feet of the roadway between him and the edge of the sidewalk. At the point of the accident the highway was nearly straight, and from the truck southward there was an unobstructed view for at least 350 feet. The chauffeur of defendant's automobile testified that he saw the truck standing there when even at a greater distance. The plaintiff says he looked up and down the highway, when he took his position at the rear of the truck, but did not look up afterwards, and ad-

mits that if he had looked up he would have seen the approaching automobile, but says he did not pay attention to what might be coming because he thought he was in a safe place. The defendant's automobile was an Oldsmobile of the Autocrat 1911 type. Its width is not stated, but from what is common knowledge, we think it may be inferred that its extreme width did not exceed 6 feet.

Upon this testimony the defendant argues that, as a matter of law, the plaintiff was not in the exercise of proper care for his own safety at the time of the accident. In support of this claim he cites seven or eight street railway cases in which the duty of persons working upon or in close proximity to street railway tracks to exercise care by looking or listening for approaching cars is upheld. We think that these and similar cases are clearly distinguishable from the case at bar. Practically everyone knows that a street car, normally used, can only proceed upon its track. The track is therefore an obvious place of danger, and the law imposes upon everyone on or in close proximity to it the duty of exercising care to avoid the danger arising from passing cars. But it is clear that the law does not require one, lawfully standing at noonday on a country highway, and directing his attention to a burst or punctured tire on a wheel of the vehicle on which he has been riding, to anticipate and to guard against being run over by an automobile, having ample room to pass him in safety. In other words, the law does not require an ordinarily prudent person to expect such carelessness. On the contrary, he has a right to expect, and to rely on the expectation, that the driver of the automobile will avail himself of the opportunity to pass by in safety. We hold, therefore, that it does not appear that upon this evidence the plaintiff was negligent as a matter of law.

The defendant bases his second claim of error in the denial of the motion for a new trial on this portion of the rescript of the trial judge, namely: "Defendant says that the preponderance of the evidence is that plaintiff stepped suddenly in the way from behind the stalled truck. Suppose I do believe that this is more probable than that defendant's driver ran down a man in plain sight; it is a question of fact which has been passed upon by the tribunal appointed to try questions of fact. Motion for new trial denied."

The defendant urges that by this language the trial judge refused to consider whether the jury had responded to the real

merits of the controversy, and of whether the verdict failed to do justice between the parties, because apparently of the opinion that he had no power to do so. This court, in *Wilcox v. Rhode Island Co.* 29 R. I. 292, 70 Atl. 913; *Noland v. Rhode Island Co.* 30 R. I. 246, 74 Atl. 914, and *McMahon v. Rhode Island Co.* 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1223, has considered and discussed the powers and duties of trial judges in passing upon motions for new trials. From them two rules emerge; namely, "when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way;" but when his judgment tells him that the verdict is wrong, because it fails to respond truly to the real merits of the controversy and to administer substantial justice, and is against the fair preponderance of the evidence, then his duty is to set aside the verdict. These rules have been referred to and affirmed in numerous cases since those above cited. We think it should not be inferred that the trial judge was not informed as to these decisions, but that, being aware of them, he has intended to imply that in his judgment the evidence in this case places it in the first class, where the verdict of the jury is to be accepted as conclusive as to the facts. We say this while recognizing the fact that the language of the rescript is not as discriminating and clear on this point as it might be.

There were two witnesses for the defendant, the chauffeur and the defendant's wife, who was one of the other two occupants of the car. The absence of the third occupant was explained by illness. The chauffeur said that he saw two men standing by the truck, Smith, its driver, and Clarke, but not the plaintiff; that he passed at a distance of 4 feet from the truck, that when his car was about 8 feet from these two men, they ran to the rear of the truck, and he was not aware that the automobile had come in contact with the plaintiff until informed of the fact by Mrs. Schaller, after the automobile had passed the truck. Mrs. Schaller says that the automobile was going not over 12 miles an hour at the time, and that it passed the truck with a clearance of about 3 feet; that as they passed the rear of the truck she saw a man run right into the mud guard and fall; that she did not see him until he struck the fender. They both say that the horn of

L.R.A.1917B.

the automobile was repeatedly sounded as it approached the truck. Smith, the driver of the truck, testifies that when the automobile passed he had not alighted from the truck, but at that time stood on its left-hand running board, near the front end of the truck. The others of his party corroborate him in this. The three men standing near the left rear wheel of the truck all say that on the approach of the automobile they did not leave their places and go to the rear of the truck; that they were unaware of its approach until it whizzed by. Clarke says it touched his clothing. The plaintiff could not tell how he was struck, or what hit him. No one of the other three saw the actual collision, but heard the noise of the impact, and saw the plaintiff while falling and as he struck the ground. Smith and Clarke testified that the tracks of defendant's car showed that it moved a little to its left as it passed the truck, and the latter said that the western rack of the automobile as it passed the rear part of the truck was about 4 feet away.

We have stated the essential portions of the testimony thus fully because of the peculiar question now raised. The testimony was plainly and sharply conflicting. Upon carefully considering it, we are clearly of the opinion that the trial judge did not err in denying the motion for a new trial on the ground that the verdict was against the evidence. The exception to the denial of such motion is overruled.

The two requests refused to which the other two exceptions are directed are:

"(1) In this case the doctrine of last clear chance has no application, unless it be found as a fact that the defendant's driver actually saw the plaintiff in time to avoid striking him."

"(3) In determining the center line of the road in this case the measurements are to be taken from the extreme side of the road, and the space occupied by the car tracks is not to be excluded from the measurements."

In refusing to charge them, the trial judge said: "I do not think they are called for by the evidence in the case, and will probably lead to more confusion than they would be of benefit."

We think there was no error in such refusal, and these two exceptions are overruled.

All the exceptions are overruled, and the case is remitted to the Superior Court in the county of Kent for the entry of judgment on the verdict.

**Annotation—Liability for striking one engaged about an automobile in a highway.**

As to reciprocal duty of operator of automobile and pedestrian to use care, see annotation to *Deputy v. Kimmell*, 51 L.R.A.(N.S.) 989, and earlier annotation there referred to.

The decision in *HUMES v. SCHALLER*, ante, 316, that the law does not require one lawfully standing at noon on a country highway, and directing his attention to a defective tire on a truck on which he had been riding, to guard against being run over by an automobile having ample room to pass him in safety, and that he has a right to rely on the expectation that the automobile driver will avail himself of the opportunity to pass in safety, and that the plaintiff in that case was not, under the circumstances, negligent as a matter of law, appears sound. It is held that drivers are bound to anticipate the presence of pedestrians upon the streets and highways, and to exercise reasonable care not to injure them. A person engaged about a car in the highway is in somewhat the same position as a pedestrian, and the driver of a vehicle approaching such a person undoubtedly owes him the duty to exercise reasonable care to avoid injuring him; and, on the other hand, the one engaged about the car must also use reasonable care for his own safety. What amounts

to the use of such care depends, of course, upon the circumstances of each case. The inquiry is suggested whether one working about a disabled car should not, in the exercise of due care, ordinarily move the car to the right-hand side of the way, and thus obviate as far as possible the danger from passing vehicles. In case of a disabled car at night it would seem that such a course at least should be pursued. As stated, however, each case depends upon its own facts, and no definite rules can be laid down, except that both approaching drivers and those engaged about cars standing in the highway must exercise reasonable care to avoid injury.

*HUMES v. SCHALLER* appears to be the first case which has considered the specific question under annotation. It will be noted that in that case the court distinguishes the street railway cases cited, dealing with the duty of persons working near street railway tracks to look or listen for approaching cars, remarking that everyone knows that street cars, as normally used, can only proceed on the tracks, and that the tracks are therefore places of danger, so that the law imposes upon those in close proximity to them the duty of exercising care to avoid passing cars.

J. T. W.

**SOUTH DAKOTA SUPREME COURT.**

MARTHA ALICE DUSTIN, Resp.,  
v.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appt.

(— S. D. —, 159 N. W. 395.)

**Appeal — statement of facts — sufficiency.**

1. A statement of facts for appeal will not be stricken from the record if from the standpoint of the appellant the facts necessary properly to present the matters sought to be reviewed are set out.

*For other cases, see Appeal and Error, IV. n, in Dig. 1-52 N. S.*

**Insurance — construction — additional insurance.**

2. A provision for apportionment in case a holder of an accident insurance policy shall carry any other accident insurance of which he has not notified the insurer

within the specified time before loss, applies to any such insurance secured during the life of the policy, and is not limited to that existing at the time the policy is secured.

*For other cases, see Insurance, VI. g, in Dig. 1-52 N. S.*

**Same — automatic reduction — validity.**

3. A provision in an accident insurance policy for automatic reduction in case additional insurance of the same kind is taken out is not against public policy.

*For other cases, see Insurance, VI. g, in Dig. 1-52 N. S.*

**Same — conflicting provisions — enforcement.**

4. A provision in an accident insurance policy for pro rata liability of the maker, in case additional insurance of that nature is taken without notifying him, is not so repugnant to a provision making the insurer liable for a specified amount in case of accident that it must yield thereto.

*For other cases, see Insurance, III. d, 2; VI. g, in Dig. 1-52 N. S.*

**Note.** — As to provision in accident policy for prorating in case of other insurance, see annotation following this case, post, 323. L.R.A.1917B.

(October 4, 1916.)



**A** PPEAL by defendant from a judgment of the Circuit Court for Lawrence County in plaintiff's favor, and from an order overruling a motion for a new trial, in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Dunshee & Haines and Stewart & Hodgson, for appellant:

The provisions of paragraph 16 do not contravene public policy.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; 1 Page, Contr. p. 503.

Provisions of similar import are found in the standard fire insurance policy of this state and such provisions are uniformly upheld.

Hronish v. Home Ins. Co. 33 S. D. 428, 146 N. W. 588.

By the terms of the provision it became operative immediately upon the procuring of additional insurance.

Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; Moore v. Phoenix F. Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27; McClure v. Watertown F. Ins. Co. 90 Pa. 277, 35 Am. Rep. 656.

The provision is not void for uncertainty and the propositions made by plaintiff's counsel with reference to the ambiguity of the clause are not well founded.

Cooley, Const. Lim. 6th ed. 51; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Travelers' Preferred Acci. Asso. v. Stone, 50 Ill. App. 222; Carr v. Pacific Mut. L. Ins. Co. 100 Mo. App. 602, 75 S. W. 180.

Plaintiff's contention that it was not the beneficiary's duty to give the notice is conceded, but the liability of the defendant was fixed by the condition at the time of the accident and before her rights accrued.

Globe Acci. Ins. Co. v. Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563.

The provisions of paragraph 16 are not repugnant to the insuring clause, which specifically states that the agreements as to indemnity and benefits are subject to the provisions, conditions, and limitations set forth in the policy.

2 Page, Contr. p. 1753; Wisconsin M. & F. Ins. Co. Bank v. Wilkin, 95 Wis. 111, 60 Am. St. Rep. 86, 69 N. W. 354; Employers' Liability Assur. Corp. v. Morrow, 74 C. C. A. 640, 143 Fed. 750; Bean v. Aetna L. Ins. Co. 111 Tenn. 186, 78 S. W. 104. L.R.A.1917B.

Messrs. Robert N. Ogden and Robert N. Ogden, Jr., for respondent:

Defendants' brief does not contain all the material evidence received upon the trial, and its assignment of error that the decision of the court is not sustained by the evidence, cannot be considered.

Anderson v. Standard Acci. Ins. Co. 36 S. D. 390, 155 N. W. 1; Smith v. Pence, 33 S. D. 516, 146 N. W. 709; Gilfillan v. Schaller, 32 S. D. 638, 144 N. W. 133; Sweeney v. Hewett, 34 S. D. 302, 148 N. W. 503; Clark v. Mosier, 35 S. D. 54, 150 N. W. 475; Dewey v. Chicago, B. & Q. R. Co. 35 S. D. 279, 152 N. W. 104.

The clause in the policy is ambiguous.

1 C. J. 414, notes, 27-30; Fidelity & C. Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Travelers' Preferred Acci. Asso. v. Stone, 50 Ill. App. 222; Wadsworth v. Canadian R. Acci. Ins. Co. Ann. Cas. 1913A, 546, note; McNamara v. Dakota F. & M. Ins. Co. 1 S. D. 342, 47 N. W. 288.

The clause is void for repugnancy.

Cumberland Mut. F. Ins. Co. v. Giltinan, 48 N. J. L. 495, 57 Am. Rep. 586, 7 Atl. 424; Employer's Liability Assur. Corp. v. Morrow, 74 C. C. A. 640, 143 Fed. 750; Bean v. Aetna L. Ins. Co. 111 Tenn. 186, 78 S. W. 104; Wisconsin M. & F. Ins. Co. Bank v. Wilkin, 95 Wis. 111, 60 Am. St. Rep. 86, 69 N. W. 354; Straus v. Wanamaker, 175 Pa. 213, 34 Atl. 648; Williams v. Hathaway, L. R. 6 Ch. Div. 544.

Polley, P. J. delivered the opinion of the court:

This action is brought for the recovery of \$2,500 claimed to be due on an accident insurance policy issued by defendant to one J. F. Dustin, and in which this plaintiff is named as beneficiary. Said policy was issued on the 10th day of July, 1913, pursuant to a written application theretofore made by said Dustin. But two paragraphs, C and 16 of said policy, are of importance on this appeal. Said paragraphs read as follows:

"C. If, as a result of such injury, independently of all other causes, intervening, contributing, or concurring, the death of the member shall occur within ninety days from the date thereof, the association shall pay the sum of \$5,000, which shall be in full and complete satisfaction of every claim against it, including any claim or disability."

"16. If the member shall carry any other accident insurance, of which he has not notified this association in writing at least fifteen days prior to the date of any acci-

dent on account of which any claim is made hereunder, this association shall only be liable for such proportionate amount of the benefits or indemnity herein promised as such benefits and indemnity bear to the total amount of benefits or indemnity promised in all accident policies or certificates, and for the return of such part of the last assessment paid by the member as shall exceed the pro rata of the premium for benefits paid."

These two paragraphs are found on different pages of the policy.

On the 16th day of September, 1913, said Dustin made application to the Chicago Business Men's Association, an accident insurance company of Chicago, Illinois, for additional accident insurance. This application was accepted, and on the 21st day of that month a policy was issued by said company to said Dustin, by the terms of which it was agreed that, in case of the death of the said Dustin from a bodily injury caused by accidental means, the said company would pay to the beneficiary named in said policy the sum of \$5,000. The said Dustin did not give to defendant the notice provided for in paragraph 16 above quoted, and on the 27th day of September, 1913, within six days after the issuance of the policy by the Chicago Business Men's Association, the said Dustin lost his life as the result of an automobile accident. Plaintiff made the proper proof of death, and demanded payment of \$5,000 under the provisions of paragraph C. of the policy issued by defendant. Defendant refused to pay the full amount of \$5,000, claiming that, because of the issuance of the said second policy of accident insurance, and the failure on the part of the said decedent to give the notice provided for in paragraph 16 above quoted, it was liable for only \$2,500. This amount defendant paid to plaintiff without prejudice to her right to prosecute this action for the remaining \$2,500. The case was tried to the court upon an agreed statement of facts. Findings and judgment were in favor of plaintiff, and from such judgment and from an order overruling its motion for a new trial, defendant appeals.

It is contended by respondent that appellant's statement of the facts in the case should be disregarded by the court, for the reason that the same does not contain a sufficient amount of the material evidence to properly present the appeal. The portion of the evidence that respondent claims is material, but which appellant failed to print, is the application made to defendant by the decedent for the issuance of the policy involved. Appellant's brief contains a L.R.A.1917B.

statement that all the material evidence is therein set forth.

The rule which requires the appellant to set out in his brief all the material evidence does not mean all the evidence that may have been material on the trial, but only so much thereof as is necessary to properly present the matters that are sought to be reviewed by this court. Where this has been fairly done from the standpoint of the appellant, the statement will not be stricken from the record, nor be disregarded, though there may be other evidence that respondent, or even the court, believes should have been printed. In such cases the respondent may supply the omission by printing the omitted evidence in an additional statement of the case. Or the court may, if deemed necessary, order the original record sent up for examination. A statement will not be stricken from the record, nor be disregarded by the court, except on motion to that effect by the respondent, and then only when it is apparent that the appellant has, either intentionally or negligently, omitted to print portions of the evidence that are necessary to a proper understanding of the case. *State v. Syverson*, — S. D. —, 159 N. W. 40. No such disregard of the rule is shown in this case; neither was the proper motion made. And, moreover, respondent's brief contains enough of the substance of said application to supply appellant's omission and to answer all necessary purposes.

The purpose of the provisions in paragraph 16 is to give the insurer, in accident insurance, an opportunity to guard against, and prevent, overinsurance. Such provisions can be justified only on the ground that the element of moral hazard is involved in accident insurance,—that there is danger of liability on account of self-inflicted injuries if excessive or overinsurance is permitted. In fire insurance the element of moral hazard is constantly taken into consideration, and is recognized by law; and a provision of similar import to the one herein involved has been written into the standard fire insurance policy, and is a part of the fire insurance law of this state. But it is contended by the respondent that such a provision in an accident insurance policy is against the public policy of this state and for that reason void, and that it is so repugnant to the main purpose of the policy that the two provisions cannot stand together. It is also contended that the language used in paragraph 16 is so ambiguous, and its meaning, if it has any, is so obscure and misleading, as to render the entire paragraph void. The first clause of said paragraph reads as follows: "If the member shall carry any other acci-

dent insurance." It is argued by respondent that the verb "carry," being in the present tense, has reference only to insurance carried at that time; i. e., at the time the decedent made his application for the policy involved. In the said application, the applicant had been required to state whether he was then carrying any accident insurance, and respondent contends that the decedent might reasonably have inferred from the language used in the clause just quoted that the condition in question in paragraph 16 referred only to accident insurance carried by the decedent at that time. The clause in question is not susceptible of this interpretation. When read in connection with the succeeding modifying clause, "of which he has not notified this association at least fifteen days prior to the date of any accident on account of which any claim is made hereunder," it clearly indicates that it has reference to insurance in force at the time of the accident. True, as contended by respondent, if the clause had read, "if the member shall hereafter carry," or, "shall hereafter obtain, take out, or carry," any other accident insurance of which he has not notified this association at least fifteen days prior to the date of any accident on account of which any claim is made hereunder, there could have been no possible ground for respondent's contention. But we are satisfied that the language used is broad enough to include any other accident insurance, whether the same was in force at the time the application was made or was issued thereafter, and that the decedent could not have misunderstood or have been misled by the language used, and that the clause in question is not void for ambiguity.

This brings us to the second and more difficult question: Is the provision found in paragraph 16 so repugnant to the main covenant in the policy that both cannot stand? If it is, then the provision limiting appellant's liability found in said paragraph must give way to the principal agreement found in the first part of the policy. Where two clauses of a contract are in conflict with each other the latter must give way to the former. *Wisconsin F. & M. Ins. Co. Bank v. Wilkin*, 95 Wis. 111, 60 Am. St. Rep. 86, 89 N. W. 354, citing *Green Bay & M. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382; 2 *Parsons, Contr.* 513; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; 2 Bl. Comm. 380; 6 R. C. L. § 236. Again: "If the subsequent stipulation of the contract should restrict what was distinctly stated, and constitutes a principal inducement to the contract, it will be of no effect." *Story, Contr.* § 810.

And, quoting from *Williams v. Hathal*, L.R.A.1917B.

way, L. R. 6 Ch. Div. 544: "The distinction," says Jessel, M. R., 'has always been taken between a proviso which is repugnant to the covenant, and therefore void, and a proviso which can be incorporated into the covenant and be consistent with it.'"

Can the limitation under consideration in this case be incorporated into and be consistent with the main covenants? We think it can. Had the main covenant in the policy in question read: "In consideration of the stipulated premium, appellant agrees, subject only to the terms, conditions, and limitations contained herein and the application herein set out, to pay the beneficiary of the said Dustin, in case of his death from bodily injuries while this policy is in force, the sum of \$5,000: Provided, that if said Dustin shall carry any other accident insurance of which he has not notified this association at least fifteen days prior to the date of any accident on account of which any claim is made hereunder, this association shall pay only such proportionate amount of said sum of \$5,000 as said sum bears to the total amount of all accident insurance policies carried by the decedent,"—it would not be subject to the criticism made by respondent. The condition in the proviso is perfectly consistent with the main covenant in the contract. It merely provides that certain conduct or acts on the part of the insured will reduce the liability of the insurer. The proviso is not contrary to any law, nor is it immoral, and, unless it is contrary to public policy, it must be given effect.

As above stated, the purpose of the proviso contained in paragraph 16 is to enable the insurer to guard against and prevent excessive accident insurance. Under the terms of the provision, the issuance of additional insurance without the giving of the notice therein provided for automatically reduces the amount of the insurance. If the notice is given, the liability is not affected by the additional insurance unless the company chooses to exercise its option to return the unearned premium and cancel the policy. The only reason that is suggested why a policy shall be canceled under these circumstances is the danger of liability on account of self-inflicted injuries where persons have been allowed to carry excessive accident insurance. In other words, that the element of moral hazard is involved in accident insurance. The provision guarding against moral hazard in standard fire insurance policies has been upheld by this court (*Hronish v. Home Ins. Co.* 33 S. D. 428, 145 N. W. 588), and is, we believe, upheld by courts in general. While it is true that the element of moral hazard is not involved in accident insurance

to the same extent as in fire insurance, it cannot be denied that there is some additional risk on account of self-inflicted injuries in case of accident insurance, and that the element of moral hazard does exist. No reason has been shown why the parties to an accident insurance policy may not guard against this risk by contract; and if the contract has been fairly entered into, it ought to be enforced.

The case involves no question of public policy. It is purely a question of the right to enter into the agreement contained in the policy. The decedent failed to give the notice provided for in the policy, and defendant's liability was reduced as therein provided.

The judgment and order appealed from are reversed.

### Annotation—Provision in accident policy for prorating in case of other insurance.

While provisions for prorating in case of other insurance are common in fire insurance policies, a provision of this character in an accident policy seems to be a new one, and no direct authority dealing with such a provision has been found.

Provisions of this kind are held to be valid in fire policies, and the conclusion reached in *DUSTIN v. INTERSTATE BUSINESS MEN'S ACCI. ASSO.* ante, 319, that the provision for prorating there involved was not against public policy, seems sound; as does also the decision that the provision for prorating was not so repugnant to the general provision making the insurer liable to a specified amount in case of accident that it could not be given effect. And under the provisions of the policy there seems to be no question as to the correctness of the further conclusion, that the provision for apportionment was applicable to other accident insurance taken out during the life of the policy, although it was taken out after the policy was obtained.

In cases of fire insurance the right to prorate, as a rule, exists only as to policies which insure the same property, the same interest, against the same risk, and in favor of the same party.

The policy in *DUSTIN v. INTERSTATE BUSINESS MEN'S ACCI. ASSO.* provided for prorating if the insured carried "any other accident insurance" of which he

had not notified the insurer within fifteen days prior to the date of any accident.

It will be noticed that the other insurance contemplated was expressly stated to be accident insurance, and it is clear that the insurer could not successfully claim a proportionate liability on account of policies of life insurance carried by the insured. If, however, the provision for prorating had not specifically designated accident insurance, but had been general, the question might have arisen whether the amount of life insurance carried by the deceased insured should not also have been taken into consideration for the purpose of prorating.

The purpose of provisions of this kind, in accident policies as in fire policies, is to enable the insurer to guard against overinsurance; and it is questionable, at least, whether it would not be material for accident insurers in determining the question of overinsurance to take into consideration policies on the insured's life as well as accident policies.

In cases of injuries not proving fatal, no right of recovery would of course ordinarily accrue under the life policies; but in the event of accidents resulting in death, liability would result on both the accident and life policies.

J. T. W.

### TENNESSEE SUPREME COURT.

E. C. WALLIN et al., Appts.,  
v.

JOHNSON CITY LUMBER & MANUFACTURING COMPANY.

(— Tenn. —, 188 S. W. 577.)

Corporations — dividends — held in treasury — vested right.

1. A dividend on stock of a corporation L.R.A.1917B.

belongs to the holder of the stock at the time it is declared, and not at the time it becomes payable, although the resolution declaring it provides that it is to be held in the treasury and paid out at a later date, on the order of the directors.

For other cases, see *Corporations*, V. 6, 4, in Dig. 1-52 N. S.

Note. — For right to dividends on transfer of stock, see annotation following this case, post, 326.

**Same — recovery — reasonable time.**

2. A dividend declared by the directors of a corporation, to be held in the treasury and paid out at a later day, on the order of the directors, may be recovered by the stockholders after the lapse of a reasonable time.

For other cases, see *Corporations*, V. c, 4, in *Dig.* 1-52 N. S.

(September 23, 1916.)

**A** PPEAL by complainants from a judgment of the Chancery Court for Washington County sustaining a demurrer to a complaint filed to recover a dividend alleged to have been declared on the capital stock of the defendant corporation. Reversed.

The facts are stated in the opinion.

Mr. J. Stanley Barlow, for appellants: The dividend declared by defendant belonged to complainants, and not to their respective transferees, and where it was held in the treasury of the company, to be paid out at a later date upon the order of the board of directors, it was payable "within a reasonable time."

Clephane, *Business Corp.* 2d ed. § 413; Cook Corp. §§ 539, 541-543 & notes; 2 Beach, *Priv. Corp.* §§ 598, 599; Clark, *Corp.* 2d ed. pp. 336-343; 2 Cumming, *Cas. Priv. Corp.* 203; 7 R. C. L. §§ 260, 267; 1 Morawetz, *Priv. Corp.* 2d ed. §§ 162, 163, 450, 451; 7 Thomp. Corp. §§ 2172, 2173, 2175; 8 Thomp. Corp. § 532; 10 Cyc. 546, 556, 557; Wheeler v. Northwestern Sleigh Co. 39 Fed. 347; Dow v. Gould & C. Silver Min. Co. 31 Cal. 630; Bright v. Lord, 1 Willson, *Super. Ct. (Ind.)* 523; Central R. & Bkg. Co. v. Papot, 59 Ga. 342; Chinn v. Courtney, 14 Ky. L. Rep. 422; Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758; Richardson v. Richardson, 75 Me. 570, 46 Am. Rep. 428; Houser v. Richardson, 90 Mo. App. 134; Jones v. Terre Haute & R. R. Co. 17 How. Pr. 529; King v. Follett, 3 Vt. 385; Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771. 20 N. E. 350; Carpenter v. New York & N. H. R. Co. 5 Abb. Pr. 277; Clapp v. Astor, 2 Edw. Ch. 379; Beers v. Bridgeport Spring Co. 42 Conn. 17; Keppel v. Petersburg R. Co. Chase, Dec. 167, Fed. Cas. No. 7,722; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 157; Jermain v. Lake Shore & M. S. R. Co. 91 N. Y. 483; Hill v. Newich-awanick Co. 8 Hun, 459, 71 N. Y. 593; King v. Paterson & H. R. Co. 29 N. J. L. 82; West Chester & P. R. Co. v. Jackson, 77 Pa. 321; Le Roy v. Globe Ins. Co. 2 Edw. Ch. 657; Re Kernochan, 104 N. Y. 618, 11 N. E. 150; De Gendre v. Kent, L. R. 4 Eq. 283, 16 L. T. N. S. 694; Rose v. Barclay, 45 L.R.A. 392, and note, 191 Pa. 594, 43 Atl. 385; Southwestern R. Co. v. Papot, 67 Ga. L.R.A.1917B.

675; Waterman v. Alden, 42 Ill. App. 294; Baltimore City Pass R. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402; Abercrombie v. Riddle, 3 Md. Ch. 320; Brundage v. Brundage, 65 Barb. 397; McGill v. Holmes, 23 Misc. 524, 52 N. Y. Supp. 840; Union Screw Co. v. American Screw Co. 13 R. I. 673, 11 R. I. 569; Spear v. Hart, 3 Robt. 420; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Phinizy v. Murray, 83 Ga. 747, 6 L.R.A. 426, 20 Am. St. Rep. 342, 10 S. E. 358; Hite v. Hite, 93 Ky. 267, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; Clark v. Campbell, 23 Utah. 569, 54 L.R.A. 508, 90 Am. St. Rep. 716, 65 Pac. 496; Ex parte Rutledge, 14 Am. Dec. 697, note; Rose v. Barclay, 45 L.R.A. 392, note; Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417; Ehle v. Chittenango Bank, 24 N. Y. 548; Re London Indiarubber Co. L. R. 5 Eq. 525, 37 L. J. Ch. N. S. 235, 18 L. T. N. S. 530, 16 Week. Rep. 334; Stevens v. South Devon R. Co. 9 Hare, 312, 68 Eng. Reprint, 524, 21 L. J. Ch. N. S. 816; Henry v. Great Northern R. Co. 1 De G. & J. 605, 44 Eng. Reprint, 858, 3 Jur. N. S. 1117; Taft v. Hartford, P. & F. R. Co. 8 R. I. 310, 5 Am. Rep. 575; Gordon v. Richmond, F. & P. R. Co. 81 Va. 621; State v. Bank of Commerce, 95 Tenn. 221, 31 S. W. 993; Pritchitt v. Nashville Trust Co. 96 Tenn. 473, 33 L.R.A. 856, 36 S. W. 1064; Tubb v. Fowler, 118 Tenn. 325, 99 S. W. 988; Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; Phelps v. Farmers & M. Bank, 26 Conn. 269; American Nat. Bank v. Nashville Warehouse & Elevator Co. — Tenn. —, 36 S. W. 960.

Mr. S. E. Miller also for appellants.

Messrs. Thad A. Cox and Ben H. Taylor, for appellee:

The question as to whether or not a dividend shall be declared for the stockholders in a corporation, even where there are profits, is a question that rests within the sound discretion of the board of directors of such corporation, and they will be controlled in the exercise of this discretion at the suit of stockholders only where they abuse it and act fraudulently, oppressively, or unreasonably.

Clark, *Corp.* p. 329; Cook, *Corp.* § 545; 8 Thomp. Corp. § 5294.

No dividend was declared.

Clark, *Corp.* p. 330; 2 Thomp. Corp. § 2126; State v. Bank of Commerce, 95 Tenn. 221, 31 S. W. 993.

There was no declaration in the sense of segregating the property from the property of the corporation, and there was no order to pay it, either on demand or at a fixed

time; but it was to be paid on the order of the board of directors, which order has never yet been made.

*Tubb v. Fowler*, 118 Tenn. 386, 99 S. W. 988; *Clark v. Campbell*, 23 Utah, 569, 54 L.R.A. 511, 65 Pac. 496.

*Williams, J.*, delivered the opinion of the court:

This case, standing on bill and demurrer, involves the right of complainants. Wallin and others, to recover of the defendant corporation portions of a dividend claimed to have been declared.

The bill alleges that in January, 1916, when complainants were the owners of the shares of stock on which they seek to pro-rate, at a regular annual meeting of the board of directors a dividend was declared and set aside to the stockholders holding stock at that time, of \$2,600, or 17.8 per cent; that said dividend was declared and set apart in the treasury of said company, same to be held in the treasury and paid out at a later date on the order of the board of directors of said company. Judgments for the amounts of the respective dividend sums were sought to be recovered.

The demurrer set forth as defenses: (a) That there was no allegation in the bill of complaint that the directors had ordered the payment of the dividend out of the treasury; therefore, that the sums sued for were not due as collectable debts. (b) That it appeared from the recitals of the bill that some of complainants had sold and transferred their shares at a time when the payment of the dividend yet depended upon the condition or contingency that the directors should order same to be made; that, therefore, the right to any dividend that may be declared is in the transferees, and not complainants.

The rule undoubtedly is that a dividend on particular shares belongs to him who owns the shares on the date of the declaration of the dividend, as between the vendor and the vendee of the shares; and this is true notwithstanding the time of payment to stockholders may be postponed to a date subsequent to the transfer.

The declaration of the dividend has the effect to segregate the earnings, to the amount of the dividend, from the corporation's assets, or general mass of property which is represented by the capital stock, and to appropriate the same to the then stockholders. The corporation thereafter holds the dividend for the stockholders, who become entitled to recover the same of the corporation, as debtor, when the time for payment, fixed by the resolution or declaration or by the law, is reached. *Wheeler v. Northwestern Sleigh Co.* (C. C.) 39 Fed. L.R.A. 1917B.

347; *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732; 7 R. C. L. p. 283, §§ 260 et seq.

It is erroneously contended by the defendant corporation that in order to such effectiveness the "declaration of a dividend" must embody as a part of it an express order for payment thereof to the stockholders. The setting aside or segregation may precede the time of payment, postponed for the convenience of the company, or the order for actual payment. The declaration thus operating to segregate, leaves the dividend dissociated from the capital stock and no longer to pass as an incident to the stock certificates when transferred. The law at that time implies a promise on the part of the corporation to pay to the then stockholders their proportionate amounts as dividends.

The main insistence of the defendant corporation is that the payment of the dividend of \$2,600 was conditioned on the board of directors' later order, in that it was to be "paid out at a later date on the order of the board of directors," and that until such order be made the suit is premature.

At least two reported cases have dealt with this phase of the suit, and, as we believe, properly.

In *Beers v. Bridgeport Spring Co.* 42 Conn. 17, the resolution of the directors was to declare a dividend of 26 per cent; the amount to be placed, pro rata, to the credit, on the books of the company, of each stockholder, and made payable, without interest, at such time as may by the directors be ordered. It was held in favor of the stockholder: "The proviso as to the time of payment does not absolve the company from all obligation to him; there remain all the essential elements of a debt, certain in amount, and certain to be paid upon a day not yet appointed, but which it is the duty of the debtor at some time to name. The legal effect of the vote is that the debt is to be paid within a reasonable time."

In *Northwestern Marble & Tile Co. v. Carlson*, 116 Minn. 438, 133 N. W. 1014, Ann. Cas. 1913B, 552, the resolution was, in substance, that a dividend of 6 per cent be declared on the common stock, payable at such time as the finances of the company would, in the judgment of the board of directors, warrant. The court said:

"The board of directors by the resolution declared a dividend, and its action was amply justified by the surplus and undivided profits of the corporation. No further action of the board was necessary to make the segregation of the amount of the dividend of each stockholder from the common

mass of the corporate property. There was no qualification of the declaration of the dividend, and its existence as a debt against the corporation was not dependent upon any further action of the board, but the debt was payable at such time as the finances of the corporation would, in the judgment of the board of directors, warrant.

"This provision as to the time of payment of the dividend must be construed in connection with the fact that a dividend had been rightfully declared and notice thereof given to the stockholders at their annual meeting. So construing the provision, we hold that the time of payment of the dividend was not a matter depending upon the discretionary future action of the board, but that it gave to the board a reasonable time in which to make the necessary arrangements for its payment; that is, the

dividend was payable within a reasonable time."

The chancellor, therefore, was in error in holding that the dividend so declared did not belong to the complainants, but to their respective transferees.

The bill of complaint proceeds upon the theory that the dividend sums were payable on demand, and does not set forth on its face facts showing that the period from January, the dividend declaration date, to May 15, 1916, when this suit was brought, was not such a reasonable time; and we think justice requires that the case be remanded to the chancery court for an answer and issue, in respect to prematurity, if the defendant may be advised to make further defense to the effect that, in the circumstances, a reasonable time had not elapsed.

Reversed and remanded.

### Annotation—Right to dividends on transfer of stock.

The earlier cases on this question are discussed in the note to *Rose v. Barclay*, 45 L.R.A. 392.<sup>1</sup>

The general rule announced in the earlier note, that dividends belong to the one who owns the stock at the time the dividends are declared, in the absence of special circumstances, has been applied in cases decided since the date of that note.<sup>2</sup>

A contrary rule was announced in

North Carolina.<sup>3</sup> In a subsequent case<sup>4</sup> the court recognizes that the earlier case is against the weight of authority, but states that it was not necessary to question it, since there were special circumstances in the case at bar which showed an intention that the dividends were to be the property of the vendor. Upon rehearing, however, the special circumstances were held not to cover a stock dividend included in the declaration, and

<sup>1</sup> The right as between life tenant and remainderman in dividends or distribution by corporations is discussed in the notes to *Holbrook v. Holbrook*, 12 L.R.A.(N.S.) 768; *Newport Trust Co. v. Van Rensselaer*, 35 L.R.A.(N.S.) 563; *Re Osborne*, 50 L.R.A.(N.S.) 510; and *Re Heaton*, L.R.A.1916D, 211.

<sup>2</sup> *Cates v. Consolidated Realty Co.* (1914) 25 Cal. App. 531, 144 Pac. 301; *Redhead v. Iowa Nat. Bank* (1905) 127 Iowa, 572, 103 N. W. 796; *Price v. Morning Star Min. Co.* (1900) 83 Mo. App. 470; *Houser v. Richardson* (1901) 90 Mo. App. 134; *Tepfer v. Ideal Gas & Electrical Fixture Co.* (1908) 58 Misc. 396, 109 N. Y. Supp. 664.

It has been stated that an attachment upon corporate stock which becomes a lien prior to the declaration of dividends thereon impounds the dividends equally with the stock itself, so that a purchaser at an execution sale subsequently had upon a judgment obtained the dividends. *Cates v. Consolidated Realty Co. (Cal.) supra*. The question in this case, however, was whether an assignee of such purchaser obtained title to the dividends,—a question that was answered in the negative.

A recovery of dividends of the corporation was denied a transferee of shares who L.R.A.1917B.

became such subsequent to the declaration of the dividends, and apparently subsequent to the payment thereof, where they were paid to a third person in accordance with an agreement between him and the promoters of the corporation, which operated as an appropriation and assignment of their interest in the net earnings of the company to the redemption of their indebtedness to such third person. *Farquhar v. Canada-Atlantic & Plant S. S. Co.* (1912) 212 Mass. 278, 98 N. E. 1036. The dividends seem to have been assigned to the plaintiff in addition to his being a transferee of the stock.

<sup>3</sup> *Burroughs v. North Carolina R. Co.* (1872) 67 N. C. 376, 12 Am. Rep. 611, discussed in the earlier note.

<sup>4</sup> *Lancaster Trust Co. v. Mason* (1909) 151 N. C. 264, 65 S. E. 1015. The special circumstances relied upon in this case consisted of a statement in the contract of sale that the "January dividend" was to remain the property of the vendor; this statement was held to cover a semiannual dividend, an extra dividend, and an extra stock dividend, all payable to the stockholders of record in January. The sale was made after dividends had been declared, but before they were payable. Upon rehearing, this was modified and held to exclude the stock

this was allowed the purchaser, although declared before sale.<sup>5</sup>

In the cases which apply the majority rule, it is accordingly held that dividends which have been declared prior to a sale belong to the vendor, although the sale is made before the dividends are paid,<sup>6</sup> or even before the making of an order for payment by the directors, who have declared the dividend, but have ordered it held in the treasury, to be paid out at a later date, on the order of the board of directors.<sup>7</sup> The same is true of an assignment.<sup>8</sup> The foregoing rules have been held to apply to a stock

dividend.<sup>9</sup> It has been held that a dividend declared while stock indorsed in blank is in the possession of an organizer or intermediary engaged in forming a combination of corporations belongs to the vendor, and not to the organizer.<sup>10</sup> Cash dividends which have been declared become a personal debt from the corporation to the stockholder. The declaration of the dividends confers a right upon the stockholder which thereafter remains separate from the stock.<sup>11</sup>

Dividends declared after the sale and transfer of title pass to the purchaser.<sup>12</sup>

dividend, but to include the regular and extra cash dividend.

<sup>5</sup> *Lancaster Trust Co. v. Mason* (1910) 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235. Although declared before the sale, it was to be paid to stockholders of record of a future date, upon which date the purchasers were record stockholders. In this case the written contract of sale expressly excluded the "January dividend." The word "dividend" was held to signify dividends payable in money. The certificate of shares of stock is stated to denote the interest of each stockholder, which consists in the right to his proportionate share of the profits when declared as dividends and to a like proportion upon its dissolution, after its debts are paid. "A cash dividend depletes the treasury of the corporation and detracts from its assets, but a stock dividend neither takes from nor adds to the corporate wealth; the interest of each stockholder remains the same when he receives his stock dividend as it was before." Further, it is stated to have been admitted that the vendor did not know of any stock dividend. From this the court concludes that "it is manifest that it intended to sell and transfer to the defendant the entire interest in the corporate property represented by the four shares of stock it held prior to any increase in the capital stock."

See *Bowers v. Post* (1913) 209 Fed. 660, *infra*.

<sup>6</sup> *Redhead v. Iowa Nat. Bank* (1905) 127 Iowa, 572, 103 N. W. 796, holding that one to whom the vendor had assigned this right to dividends might recover of the corporation.

*Price v. Morning Star Min. Co.* (1900) 83 Mo. App. 470, holding that a creditor of the vendor, to whom the vendor had assigned his right to dividends, to accrue upon the declaration of the dividends, became entitled thereto in preference to a subsequent purchaser from the vendor, to whom the right to said unpaid dividends had also been assigned.

See *Lancaster Trust Co. v. Mason* (1909) 151 N. C. 264, 65 S. E. 1015, *supra*.

<sup>7</sup> *WALLIN v. JOHNSON CITY LUMBER & MFG. Co.* ante, 323.

<sup>8</sup> *Cates v. Consolidated Realty Co.* (1914) L.R.A.1917B.

25 Cal. App. 531, 144 Pac. 301, holding that an assignee of purchasers of corporate stock at execution sale, who, by virtue of their purchase, were entitled to certain dividends which had been declared thereon, could not recover the dividends under his assignment by means of which the purchasers at the execution sale transferred to him "all their right, title, and interest in and to said 34 shares of the stock above described, and all thereof."

<sup>9</sup> *Bowers v. Post* (Fed.) *supra*. It was accordingly held in this case that where the corporation provided that a certain amount of the increase in capital stock should be sold by the corporation to employees, and the proceeds shall belong to and be distributed to the holders of the original capital stock, sums so received belonged to the holders of the stock, although they subsequently parted with their stock.

But see *Lancaster Trust Co. v. Mason* (1910) 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, *supra*.

<sup>10</sup> *Rowe v. White* (1906) 112 App. Div. 688, 98 N. Y. Supp. 729, affirmed in (1907) 189 N. Y. 523, 82 N. E. 1132. The organizer had taken an option from the vendor to convey his stock, and subsequently accepted the option, and took an assignment of the certificates in blank. A directors' meeting of the old company was then held and the dividends declared. The organizer was held not to have exercised the option as a purchaser, but as an agent of the new combination; accordingly, he was held not entitled to the dividends.

<sup>11</sup> *Cates v. Consolidated Realty Co.* (Cal.) *supra*; *Price v. Morning Star Min. Co.* (Mo.) *supra*; *Steel v. Island Mill Co.* (1906) 47 Or. 293, 88 Pac. 783.

<sup>12</sup> *Price v. Morning Star Min. Co.* (Mo.) *supra*, holding that a creditor of the stockholder, to whom the stockholder had assigned his right to future dividends, acquired no right to the dividends as against one to whom the stockholder had sold his stock prior to the declaration of the dividends. The suit in this case was brought by a subsequent purchaser from the first purchaser, to whom the stock had been sold and the right to unpaid dividends assigned.

A vendee was allowed to recover divi-



This is true although the transfer of shares has not been recorded.<sup>13</sup>

In an English case dividends declared some time after the death of the owner of the shares, which were bequeathed by him to trustees, the income to arise therefrom to be paid to life tenants, were apportioned between the testator's estate and the life tenants under the English Apportionment Act of 1870, which made such dividends apportionable unless, pursuant to § 7, it is "expressly stipulated that no apportionment shall take place."<sup>14</sup> A provision in the company's articles that "every dividend whether arising from past or current profits shall for all purposes be deemed to accrue and fall due upon the day on which it is declared and not before" is not an express stipulation against apportionment, nor is another provision in the company's articles that "every dividend

shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares" an express stipulation against apportionment.<sup>14</sup>

A pledgee is entitled to dividends declared on the stock while in his possession as pledgee,<sup>15</sup> unless there is an agreement to the contrary.<sup>16</sup> This is true notwithstanding the stock certificate on its face states that the shares are transferable only on the books of the company, and no such transfer has been made.<sup>17</sup> The dividends paid to a pledgee must be accounted for by him upon the redemption of the pledge.<sup>18</sup> All persons having notice of the pledge are affected by the right of the pledgee to the dividend.<sup>19</sup>

Where the dividends belong to the

dends in *Hartley v. Pioneer Iron Works* (1905) 181 N. Y. 73, 73 N. E. 576. The facts are not clearly stated the sale was made by the corporation, and the right of the vendee to the dividends recognized by it for a time. Subsequently the right was denied.

<sup>13</sup> *Houser v. Richardson* (1901) 90 Mo. App. 134; *Farmers' & M. Nat. Bank v. Mosher* (1901) 63 Neb. 130, 88 N. W. 552, on rehearing (1903) 68 Neb. 713, 94 N. W. 1003, 100 N. W. 133; *Tepfer v. Ideal Gas & Electrical Fixtures Co.* (1908) 58 Misc. 396, 109 N. Y. Supp. 664; *Corgan v. George F. Lee Coal Co.* (1907) 218 Pa. 386, 120 Am. St. Rep. 891, 67 Atl. 655, 11 Ann. Cas. 838 (obiter).

<sup>14</sup> *Re Oppenheimer* [1907] 1 Ch. (Eng.) 399, 76 L. J. Ch. N. S. 287, 96 L. T. N. S. 631, 14 Manson, 139.

<sup>15</sup> *Brady v. Irby* (1912) 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054 (stock dividends); *Hunt v. Laconia & L. Street R. Co.* (1896) 68 N. H. 561, 39 Atl. 437; *White River Sav. Bank v. Capital Sav. Bank & T. Co.* (1904) 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197; *Booth v. Consolidated Fruit Jar Co.* (1909) 62 Misc. 252, 114 N. Y. Supp. 1000; *National Bank v. Equitable Trust Co.* (1915) 142 C. C. A. 158, 227 Fed. 526.

*Meredith Village Sav. Bank v. Marshall* (1895) 68 N. H. 417, 44 Atl. 526, holding that the pledgee is entitled to recover the dividends from the pledgeor, to whom the corporation has paid them.

It is stated in *McCrea v. Yule* (1902) 68 N. J. L. 465, 53 Atl. 210, that a pledgee of personal property assigned as collateral security has the right to collect the interest, dividends, and income accruing on the collateral assigned, accounting to the pledgeor upon the redemption of the pledge. It is not clear, however, that corporate stock and dividends were involved in this case.

This rule is recognized in *Maxwell v. L.R.A.* 1917B.

*National Bank* (1904) 70 S. E. 532, 50 S. E. 195, 3 Ann. Cas. 723; but it is there held that an assignee of the pledgee owes the pledgeor no duty to collect the dividends and thus prevent the pledgee from receiving them, so as to make the assignee liable to the pledgeor for dividends received by the pledgee.

<sup>16</sup> *Fourth Nat. Bank v. Manchester Real Estate & Mfg. Co.* (1915) 77 N. H. 481, 93 Atl. 661. The general proposition that the pledgee was entitled to recover of the corporation a dividend not yet paid seems not to have been disputed in this case, the objection to the recovery being that the pledgeor had previously assigned the right to all dividends, due or thereafter to become due, and waiver was urged against the pledgee. The assignment of future dividends was held invalid as against the pledgee, and there was held to be no waiver; consequently, his right to recover was sustained.

<sup>17</sup> *Steel v. Island Mill Co.* (1906) 47 Or. 293, 83 Pac. 783.

<sup>18</sup> *Reid v. Caldwell* (1904) 120 Ga. 718, 48 S. E. 191; *Booth v. Consolidated Fruit Jar Co.* (1909) 62 Misc. 252, 114 N. Y. Supp. 1000. See *McCrea v. Yule* (N. J.) supra.

In *Whitney v. Whitney Bros. Co.* (1913) 152 Wis. 453, 140 N. W. 35, the pledgees had, upon a dividend being declared, payable in cash or in stock, as each shareholder might elect, elected to take the stock dividend, and the additional shares of stock were accordingly issued to them. In an action to redeem, it was held that the pledgeor was bound by this election of the pledgees; that he could not treat the issue of the stock dividend to the pledgees as a conversion.

<sup>19</sup> *National Bank v. Equitable Trust Co.* (1915) 142 C. C. A. 158, 227 Fed. 526.

*Brady v. Irby* (1912) 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054, sustain-

vendor within the rules stated above, the purchaser has not, of course, any right against the corporation so far as such dividends are concerned. But in the case of a dividend declared after a sale or transfer, the vendee, or, in case of a pledge, the pledgee, has the right to collect the dividend of the corporation.<sup>20</sup> The fact that the amount of the dividend was passed to the credit of the stockholder before notice does not change this; such an act does not amount to payment.<sup>21</sup> A recovery may be had of the corporation although it has paid the dividends to the transferrer, if such payment has been made after notice of the transfer.<sup>22</sup>

If, however, the corporation has paid the dividends to the stockholder of record before notice of the transfer, it is not liable to the transferee.<sup>23</sup> A corporation which thus pays the dividends to a stockholder of record is protected under a statutory provision that the unrecorded transfer of a stock certificate

does not affect the right of the corporation to pay dividends to the stockholder of record, although the pledgeor was president of the corporation; the corporation not being chargeable with the knowledge of its president, since he was adversely interested.<sup>24</sup>

In case of options and sales for future delivery, the right to dividends, in the absence of indications of a contrary intention, depends upon the question at what time, with respect to declaration of the dividend, the title passes; all dividends declared before the passing of the title belong to the seller, while those after that event belong to the purchaser.<sup>25</sup> Thus, under a writing entitled "escrow," instructing a depository to deliver stock deposited with the writing to a third person in case he should pay therefor on or before a certain date, no title is held to pass to the vendee until payment is made, so as to entitle him to dividends on the stock, declared between the time of deposit and of payment.<sup>26</sup>

ing an action by a trustee in bankruptcy to recover certain stock dividends issued to one other than the pledgee.

<sup>20</sup> *Reid v. Caldwell* (1904) 120 Ga. 718, 48 S. E. 191; *Merchants' & M. Bank v. Boyd Co.* (1915) 143 Ga. 755, 85 S. E. 914 (dividends upon liquidation of corporation); *Fourth Nat. Bank v. Manchester Real Estate & Mfg. Co. (N. H.)*, and *Steel v. Island Mill Co. (Or.)* supra.

<sup>21</sup> *Steel v. Island Mill Co. (Or.)* supra, sustaining an action by an assignee of the pledgee against the corporation for the dividends.

<sup>22</sup> *Hunt v. Laconia & L. Street R. Co.* (1896) 68 N. H. 561, 39 Atl. 437.

It has been held that in the case of a liquidation dividend, a pledgee of the stock may recover of the corporation although it has paid the same to the stockholder of

record, before notice of the assignment; but the court expressly limits this to dividends that amount to a distribution of the corporate stock itself, and states that it would not apply to dividends that do not partake of a transfer of the corpus of the shares. *Bath Sav. Inst. v. Sagadahoc Nat. Bank* (1897) 89 Me. 500, 36 Atl. 996.

<sup>23</sup> *Merchants' & M. Bank v. Boyd Co.* (1915) 143 Ga. 755, 85 S. E. 914 (dividends paid in liquidation of corporation, before notice of pledge).

<sup>24</sup> *Fourth Nat. Bank v. Manchester Real Estate & Mfg. Co.* (1915) 77 N. H. 481, 93 Atl. 661.

<sup>25</sup> See earlier note in 45 L.R.A. 394.

<sup>26</sup> *Clark v. Campbell* (1901) 23 Utah, 569, 54 L.R.A. 508, 90 Am. St. Rep. 718, 65 Pac. 496. W. A. E.

WASHINGTON SUPREME COURT.  
(Department No. 1.)

GEORGE JACOBS and Wife, Appts.,  
v.

SEATTLE, Resp't.

(— Wash. —, 160 Pac. 299.)

Appeal — sufficiency of record — omission of admissions.

1. It is not ground for dismissal of an appeal from a judgment sustaining a de-

murrer to the complaint that the record does not contain material admissions made in counsel's opening statement, if the preliminary proceedings were merged in the final attack by demurrer, and the record is sufficient for a review of the ruling thereon. For other cases, see *Appeal and Error*, VI. b, in *Dig. 1-52 N. B.*

Eminent domain — injury by garbage incinerator — liability.

2. The establishment and operation by a municipal corporation of a garbage incinerator in such a manner as to depreciate

Note. — The effect of legislative authority upon liability for private nuisance is discussed at length in the note to *Louisville & N. Terminal Co. v. Lillyet*, 1 L.R.A. (N.S.) 49; and see also later cases in this series, referred to in the footnote to *Rich-L.R.A.1917B.*

*ards v. Washington Terminal Co.* L.R.A. 1915A, 887. The concrete aspect presented by this question in its relation to pollution by municipal sewage is discussed in the notes to *Platt Bros. & Co. v. Waterbury*, 48 L.R.A. 691; *Georgetown v. Com.* 61

the value of neighboring property and menace the health of its owner and his family is within a constitutional provision requiring compensation for property taken or damaged for public use, even though, being authorized by the legislature, it cannot, under the statute, be declared a nuisance.

*For other cases, see Eminent Domain, III. c, 1, in Dig. 1-52 N. S.*

#### Action — form — injury to property.

3. An action for compensation as for a taking, and not one for injury for the maintenance of a nuisance, is the proper remedy for the operation under statutory authority of a garbage incinerator so as to diminish the value of adjoining property and menace the health of its owner and his family, where the statute provides that nothing done under statutory authority can be deemed a nuisance.

*For other cases, see Action or Suit, II. a, in Dig. 1-52 N. S.*

(October 11, 1916.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for King County sustaining a demurrer to a complaint brought to recover damages for injury to their property by reason of the construction and operation, on an adjoining lot, of a garbage incinerator. Reversed in part.

The facts are stated in the opinion.

Mr. Jay O. Allen, for appellants:

Defendant is liable to plaintiffs for damages to their property by the construction and operation of the garbage incinerator.

Louisville v. Hehemann, 161 Ky. 523, L.R.A.1915C, 747, 171 S. W. 165; McLaughlin v. Hope, 107 Ark. 442, 47 L.R.A.(N.S.) 137, 155 S. W. 910; Hines v. Rocky Mount, 162 N. C. 409, L.R.A.1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; Kobbe v. New Brighton, 20 Misc. 477, 45 N. Y. Supp. 777; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 177, 20 L. ed. 560; Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Seifert v. Brooklyn, 101

N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622; Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; Atty. Gen. ex rel. Wyoming Twp. v. Grand Rapids (Bird ex rel. Emmons v. Grand Rapids) 175 Mich. 503, 50 L.R.A.(N.S.) 473, 141 N. W. 890, Ann. Cas. 1915A, 968; Moser v. Burlington, 162 N. C. 141, 78 S. E. 74; Donnell v. Greensboro, 164 N. C. 330, 80 S. E. 377; Parish v. Yorkville, 96 S. C. 24, L.R.A. 1915A, 282, 79 S. E. 635; Birmingham v. Land, 137 Ala. 538, 34 So. 613; Thompson v. Winona, 96 Miss. 591, 51 So. 129, Ann. Cas. 1912B, 449; Markwardt v. Guthrie, 18 Okla. 32, 9 L.R.A.(N.S.) 1150, 90 Pac. 26, 11 Ann. Cas. 581; Ft. Worth v. Crawford, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833; Haskell v. Webb, — Tex. Civ. App. —, 140 S. W. 127; New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626; Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1; Bell v. Savannah, 139 Ga. 298, 77 S. E. 165; Waycross v. Houk, 113 Ga. 964, 39 S. E. 577; Massengale v. Atlanta, 113 Ga. 966, 39 S. E. 578; Whitten v. Haverhill, 204 Mass. 95, 90 N. E. 409; Nevins v. Fitchburg, 174 Mass. 545, 47 L.R.A. 312, 55 N. E. 321; Johnston v. District of Columbia, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; Hines v. Nevada, 150 Iowa, 620, 32 L.R.A.(N.S.) 797, 130 N. W. 181; Georgetown v. Kelly, — Ky. —, 123 S. W. 261; Henderson v. Robinson, 152 Ky. 245, 153 S. W. 224; Henderson v. Herron, 152 Ky. 341, 153 S. W. 440; Batchner v. Staples, 120 Minn. 86, 139 N. W. 140; Kellogg v. Kirksville, 132 Mo. App. 519, 112 S. W. 296, subsequent appeal in 149 Mo. App. 1, 129 S. W. 57; Little v. Lenoir, 151 N. C. 415, 66 S. E. 337; Colbert v. Ardmore, 31 Okla. 537, 122 Pac. 508.

Messrs. James E. Bradford and William B. Allison for respondent.

L.R.A. 694; State v. Concordia, 20 L.R.A.(N.S.) 1050; and McLaughlin v. Hope, 47 L.R.A.(N.S.) 137; and see later cases, Joyce v. Janesville, L.R.A.1916D, 426, and Hampton v. Watson, L.R.A.1916F, 180.

It will be observed that while the court in *JACOBS v. SEATTLE*, ante, 329, holds that an incinerator cannot be regarded as a nuisance, in view of the statute authorizing its establishment and maintenance, it does not follow that the property owner is without recourse. Upon the contrary, his right to compensation as for a taking of the property is expressly affirmed. The case, therefore, lends no support to the view that a municipality may, with immunity

from liability, by virtue of statutory authority, create and maintain what in fact amounts to a private nuisance.

The question as to the remedy of one whose property has been taken for a public use without his consent and without condemnation proceedings is discussed in the note to *Boise Valley Constr. Co. v. Kroeger*, 28 L.R.A.(N.S.) 968; and see later case, *Parish v. Yorkville*, L.R.A.1915A, 282.

The general discussion of the distinction between taking or damaging property and consequential injuries will be found in the annotation to *Gordon v. Ellenville & K. R. Co.* 47 L.R.A.(N.S.) 462.

Fullerton, J., delivered the opinion of the court:

This is an action by George Jacobs and Theresa Jacobs, his wife, against the city of Seattle for damages to their residence property by reason of the construction and operation of an adjoining lot of an incinerator for the purpose of burning and destroying city garbage. The appeal is based upon the alleged error of the court in sustaining a demurrer to the complaint, and in entering judgment dismissing the action on plaintiffs' refusal to amend.

The respondent interposes a motion to dismiss the appeal because the record does not disclose the opening statement made by counsel for appellants. This is thought to be material because of the admissions therein contained on which the respondent moved for judgment. It appears, however, that the respondent had answered to the complaint, and on the court's intimation that a demurrer to the complaint would be the better method of attack, the respondent obtained leave to withdraw the answer and file a demurrer to the complaint. It is sufficient answer to the motion to dismiss to say that the preliminary proceedings were merged in the final attack presented by way of demurrer, and that the appeal is from the order of the court on the demurrer. The record is ample for the presentation of the sufficiency of the complaint, which is the sole question before us. The motion is denied.

The complaint for a first cause of action alleged that appellants are the owners of lot 3, block 4, McNaught's third addition to the city of Seattle, Washington; that respondent, prior to the 5th day of May, 1913, installed upon property abutting and adjoining appellants' lot on the south an incinerator for the purpose of burning up and disposing of the garbage and refuse of the respondent city, which are brought to said incinerator from different portions of the city in open wagons; that the wagons pass alongside of appellants' property and frequently stand along its east line; that such wagons give forth noxious odors and are disgusting and sickening to the sight and senses; that said refuse and garbage are burned in said incinerator, by reason of which smoke, steam, and vapors arise and permeate the air, noxious to the smell and other senses, which said odors are sickening, disgusting, and unbearable, and tend to, and will, cause sickness and disease to those forced to smell and inhale the same; that from such incinerated garbage and refuse, ashes, and unburnt portions are carried out and dumped in close proximity to appellants' home: that the said refuse is composed mainly of decomposed and partly

burned matter, which emits strong, disagreeable, and noxious odors, detrimental to the health, peace, and comfort of appellants and of anyone living or being upon appellants' property; that during the process of incineration a large amount of cinders and ashes is carried up into the air and precipitated upon the property of appellants, covering appellants' home and yard and surrounding property; that by reason of the operation of said incinerator flies congregate in great numbers upon and about appellants' home and in and about their house and other houses which they have upon said property, thereby breeding disease and filth and rendering the occupancy of appellants' property disagreeable to the senses and dangerous to health; that respondent maintains an inclined roadway leading from said incinerator and alongside of appellants' property, which is unsightly and unseemingly, and which lessens the value of their property; that at no time has respondent ever condemned the property of appellants, nor brought suit to fix the damage thereto, because of the erection, maintenance, and operation of said incinerator, but has installed same without paying, or having first fixed and ascertained by a jury, the damages to appellants; that by reason of the facts and conduct and uses aforesaid, appellants have been greatly damaged, and the value of their property has been and is constantly being lessened and will permanently continue to be lessened, to their damage in the sum of \$7,000.

For a second cause of action, it is alleged that the incinerator is negligently and carelessly maintained; that it constitutes a nuisance; that by reason of its maintenance large quantities of garbage, rubbish, refuse, and trash are carried to, and burned in, said incinerator, causing a large amount of cinders, ashes, and dust, disagreeable and noxious odors, stench, and gases to arise therefrom and permeate the atmosphere in the vicinity of appellants' premises to such an extent as to be a menace and danger to the health of appellants and to persons occupying their property; that respondent carelessly causes and permits a large amount of ashes, cinders, and debris and partially burned animal matter to accumulate around said incinerator, and to be blown and carried over appellants' property, causing it to be covered with cinders, ashes, and dust; that respondent has built an inclined roadway alongside appellants' property, leading from the ground up into said incinerator, over which is being hauled garbage, refuse, ashes, and debris, from which noxious and vexatious odors arise, and which is unsightly and detrimental to the property of appellants; that appellants

have upon their property three houses for rental purposes, from which they might derive an income, but that they are untenanted and uninhabitable, and appellants are and will be unable to derive any income therefrom; that said damage is a continuing one, and the value of their property has been greatly injured, lessened, and destroyed. They further alleged that on May 5, 1913, within thirty days after said damages first accrued, they presented their claims in writing to the respondent city, and again on April 2, 1914, presented a further and additional claim, both of which the city disallowed. Appellants demanded judgment for \$7,000.

The first cause of action is based upon the guaranty of article 1, § 16, of the state Constitution, which provides that no property shall be taken or damaged for public or private use without just compensation. The second cause of action is based upon the negligent operation of the incinerator plant in a manner which causes it to be a nuisance. Respondent's attack on the sufficiency of the complaint is founded on its contention that the city, in the disposal of garbage, is discharging a governmental as distinguished from a corporate duty, and hence would not be liable for resulting damages of any character. The only question for determination is: Does the complaint state a cause of action on either count? It may be conceded that the construction and operation of an incinerator by the city of Seattle for the disposal of garbage was a lawful exercise of municipal power under the delegation of authority granted by virtue of state legislation. But the lawfulness of the power would not warrant its exercise in such a way as to breach any constitutional guaranty for the protection of the citizen. The disposal of garbage may be a proper governmental function, granted by legislative enactment; but, conceding it to be so, the function must be exercised with due regard to constitutional limitations. Our Constitution (article 1, § 16) explicitly provides that private property shall not be damaged for public use "without just compensation having been first made, or paid into court for the owner." The complaint in this case sets forth the injury to the property of appellants arising from the erection, maintenance, and operation of respondent's plant for the disposal of garbage on land adjoining that of the appellants, and "that at no time has said city ever condemned plaintiffs' property, nor has it ever brought any suit to establish or fix the damage to plaintiffs' property because of the erection, maintenance, and operation of said incinerator, but said city has, without paying to plaintiffs, L.R.A.1917B.

or having first fixed and ascertained by a jury, plaintiffs' damage," so installed and operated said incinerator as to menace and depreciate the value of their property. The complaint does not seek to charge negligence of the respondent or its employees in the performance of governmental duties, in which case the municipality might be absolved from liability. The first cause of action is founded on the higher ground of the taking or injury to property without just compensation. The authorities sustain the right of recovery in such cases.

The case of *Hines v. Rocky Mount*, 162 N. C. 409, L.R.A.1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132, which was an action involving the disposal of garbage, after conceding the rule of nonliability of municipalities for negligence in the performance of governmental duties, said: "This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land."

In *Louisville v. Hehemann*, 161 Ky. 523, L.R.A.1915C, 747, 171 S. W. 165, another garbage case, which concedes the nonliability for the negligence of city employees, it is said: "But there is an element of wrong complained of in this case which goes beyond that. Conceding that a city dump is necessary for the public good, and that Cabel street was the proper place for it, still the city had no right to take or injure adjacent private property or the occupants in the use thereof without making compensation."

In *Kobbe v. New Brighton*, 20 Misc. 477, 45 N. Y. Supp. 777, a garbage incinerator case, it is said: "The constitutional prohibitions against depriving any person of his property without due process of law, or without just compensation, may be violated without the physical taking of property. They extend to every act which injuriously affects property rights. . . . If, therefore, it be true that such a cremator as this statute authorizes is, like a pesthouse, necessarily offensive, and a direct injury to neighboring real property, though conducted in the most careful and scientific manner, the authorization of it by the legislature without providing for compensation for such injury could not

legalize it as against individuals thus damaged in their property."

See also *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *McLaughlin v. Hope*, 107 Ark. 442, 47 L.R.A.(N.S.) 137, 155 S. W. 910.

The Federal Constitution and many of the state Constitutions are without provision respecting the necessity of compensation for the "damaging" of private property by means of a public use; the constitutional inhibition extending only to the "taking" of private property without compensation. But the courts in the most of those states, however, hold that such an injury as in the case at bar is a "taking" of private property, and apply the same principle of necessity of compensation. We cite a number of them, most of them involving an injury to property arising from the disposal of sewage by municipalities. See *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 177, 20 L. ed. 557; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Atty. Gen. ex rel. Wyoming Twp. v. Grand Rapids* (Bird ex rel. Emmons v. Grand Rapids) 175 Mich. 503, 50 L.R.A. (N.S.) 473, 141 N. W. 890, Ann. Cas. 1915A, 968; *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377; *Parish v. Yorkville*, 96 S. C. 24, L.R.A.1915A, 282, 79 S. E. 635.

From the foregoing authorities it is clear that the erection and maintenance by a city of an incinerator for the burning of garbage on land adjacent to that of a private owner, and its operation so as to depreciate the value of his land and render it a menace to the health of himself and family, constitute a damaging of private property for a public use for which he would be entitled to compensation under the terms of Const. art. 1, § 16. The allegations in the first count of appellants' complaint set forth facts sufficient to bring it within the operation of this principle, and therefore state a cause of action as against a general demurrer.

Respecting appellants' second cause of action, we are of the opinion that the demurrer thereto was properly sustained. This cause is based on the theory of the negligent operation of the garbage plant in such a manner as to create a nuisance. There is a respectable line of authorities permitting the right of recovery in such cases. See *Ft. Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52; *Stephenville v. Bower*, 29 Tex. Civ. App. 384, 68 S. W. 833; *Haskell v. Webb*, — Tex. Civ. App. —, 140 S. W. 127; *New L.R.A.*1917B.

*Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626; *Newcastle v. Harvey*, 54 Ind. App. 243, 102 N. E. 878; *Hines v. Nevada*, 150 Iowa, 620, 32 L.R.A.(N.S.) 797, 130 N. W. 181; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

We think, however, under the statutes of this state, the proper theory of recovery is set forth in appellants' first cause of action. The two causes of action in reality seek the same damages for the same injury, and to uphold one cause necessarily excludes the other.

The installation of plants for the disposal of garbage is authorized by 3 Rem. & Bal. Code, § 8005. The Code also provides (§ 8311): "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

The construction of a garbage incinerator being authorized by law, its maintenance in a proper manner and place would not constitute a nuisance in a legal sense. But such a conclusion does not defeat appellants' right of recovery for the damaging of his property without just compensation. The denial of the right to recover damages for an injury on the theory of its constituting a tort, such as is the basis of the second cause of action, does not militate against the right of recovery for a taking or damaging of property for a public use without compensation. The principle upon which we rest appellants' right of recovery is well expressed in *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154, as follows: "But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless liable to the plaintiff. The injury described by the complaint is not a mere consequential damage, like that resulting wholly from the lawful use of one's own property, or the lawful exercise of governmental power; it is a direct appropriation of well-recognized property rights within the guaranty of the Constitution. . . . Public necessity may justify the taking, but cannot justify the taking without compensation. . . . The mandate of the Constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law."

The judgment sustaining the demurrer is reversed as to the first cause of action, and the cause remanded, with leave to the defendant to answer.

Morris, Ch. J., and Mount, Ellis, and Chadwick, JJ., concur.

## WISCONSIN SUPREME COURT.

HILDA LIPPS, by Guardian, Appt.,  
v.

MILWAUKEE ELECTRIC RAILWAY &  
LIGHT COMPANY, Resp't.

(— Wis. —, 159 N. W. 916.)

Infant — injury to unborn child — liability.

No liability to an infant exists for an injury rendering it epileptic, inflicted so long before birth that at the time it could not have been born viable.

For other cases, see *Afterborn Children*, in Dig. 1-52 N. S.

(November 14, 1916.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County sustaining a demurrer to a complaint filed to recover damages for prenatal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Vinje, J.:

Action, by guardian ad litem, to recover damages for personal injuries sustained on defendant's car by plaintiff on September 5, 1912, while a fetus en ventre sa mère of the age of about five months, and before she could have been born viable. Plaintiff's father and mother settled with the defendant for the damage sustained by them. In due course of time plaintiff was born, and it is alleged that she suffers from epileptic fits as a direct result of the prenatal injuries received. Defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and because it appeared on the face thereof that plaintiff had not the legal capacity to sue. The court sustained the demurrer and entered judgment dismissing the action, from which judgment the plaintiff appealed.

Mr. Oscar Kroesing, for appellant:

If the infant has a cause of action, a release by the parents would not bar recovery by it.

Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450.

A child en ventre sa mère is considered as having an existence for purposes beneficial to it.

**Note** — Prenatal injury as ground of action is treated in the note to Buel v. United R. Co. 45 L.R.A.(N.S.) 625. Apparently the only case in point since that note is LIPPS v. MILWAUKEE ELECTRIC R. & L. Co. supra, 334, the decision in which is in harmony with the general rule stated in the earlier note. L.R.A.1917B.

Gillespie v. Nabors, 59 Ala. 441, 31 Am. Rep. 20.

Messrs. Van Dyke, Shaw, Muskat, & Van Dyke, for respondent:

There is no right of recovery for injuries alleged to have been received before birth.

Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242; Walker v. Great Northern R. Co. Ir. L. R. 28 C. L. 69; Allaire v. St. Luke's Hospital, 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427; Gorman v. Budlong, 23 R. I. 169, 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704, 10 Am. Neg. Rep. 188; Nugent v. Brooklyn Heights R. Co. 154 App. Div. 667, 139 N. Y. Supp. 367; Buel v. United R. Co. 248 Mo. 126, 45 L.R.A.(N.S.) 625, 154 S. W. 71, Ann. Cas. 1914C, 613, 4 N. C. C. A. 129.

Vinje, J., delivered the opinion of the court:

But few cases of this kind are found in the reports, though there must have been many occasions for bringing them had it been generally considered by the legal profession that a cause of action accrues to a child for injuries received before birth. This paucity of cases, however, does not determine the right to maintain such an action, but it does indicate, no doubt, the general view relative thereto held by the legal profession. Our attention was called by counsel on both sides to but six cases involving the question under consideration. Independent search has failed to find others directly in point. The first case was that of Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (decided in 1884), where, as the result of a fall on a defective highway, a woman between four and five months advanced in pregnancy was delivered of a child that lived only a few minutes after its birth. It was held that such a child was not a person for the loss of whose life an action may be maintained, within the meaning of Pub. Stat. chap. 52, § 17, which gives a right of action for negligently causing the death of a person. The court, through Holmes, J., says: "Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."

The next case, that of Walker v. Great Northern R. Co. Ir. L. R. 28 C. L. 69, decided in 1891, was one where a woman quick with child was injured while a passenger on defendant's train in such a manner as to permanently wound and cripple plaintiff

then en ventre. The opinions of the judges do not all agree as to whether or not an action for injuries to an unborn child may not, under any circumstances, be maintained, but they do all agree that since defendant's contract relations were with the mother alone, and not with the plaintiff, the latter has no cause of action. The case of *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638, 7 Am. Neg. Rep. 427 (decided in 1900), presents the question in its broadest form. There plaintiff's mother, about ten days before she expected to be confined, went to the defendant for the express purpose of treatment and care during her accouchement. While in the hospital for such purpose she was negligently injured in an elevator therein in such a way that plaintiff, who was born four days later, was also severely injured. After reviewing *Dietrich v. Northampton* and *Walker v. Great Northern R. Co.* supra, and in summing up the case, the opinion of the appellate court, adopted by the supreme court as its opinion, proceeds: "That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."

Boggs, J., in an able dissenting opinion, argued that a cause of action should accrue to every child capable at the time of injury of being born viable for injuries received en ventre, where the defendant knew, or ought to have known, of its existence at the time of the injury, upon the broad ground that an infant capable of being born viable is in fact an independent person or being which the law of torts should recognize as such. In *German v. Budlong*, 23 R. I. 169, 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704, 10 Am. Neg. Rep. 188 (decided in 1901), a woman gave premature birth to a child by reason of injuries received through the negligence of the defendant, which child lived only a couple of days after birth. The court held that since no cause of action accrued to the child, none could be maintained by the next of L.R.A.1917B.

kin. In *Nugent v. Brooklyn Heights R. Co.* 154 App. Div. 867, 139 N. Y. Supp. 367 (decided in 1913), the plaintiff sued for injuries received thirty-six days before his birth while his mother was a passenger on defendant's car. The argument of Thomas, J., writing the opinion of the court, is to the effect that an infant may, in some cases, have a cause of action for injuries received before birth, but the court held that since there were no contract relations between the unborn infant and the defendant, no recovery could be had. The case of *Buel v. United R. Co.* 248 Mo. 126, 45 L.R.A.(N.S.) 625, 154 S. W. 71, Ann. Cas. 1914C, 613, 4 N. C. C. A. 129 (decided in 1913), holds that since no cause of action accrued to a child, who died about six months after birth, from injuries received before birth, while its mother was a passenger on defendant's street car, none survived to next of kin. The case does not turn on a lack of contract relation between the unborn child and the defendant, but is based upon the ground that since by common law no cause of action accrued to an infant for injuries received before birth, none was given by the survival statute.

Quotations have been made from some of the foregoing cases, not necessarily for approval, but to show the trend of judicial thought concerning the question. It will be noticed that in all cases, though courts have differed as to the grounds of denial, the right to maintain the action has been negatived. All, however, so far as expression is found therein, agree that no cause of action accrues to an infant for injuries received before it could be born viable. Such is the present case. The complaint alleges the child could not have been born viable. Since a nonviable child cannot exist separate from its mother, it must, in the law of torts, be regarded as a part of its mother, and hence, being incapable of a separate existence, it is not an independent person or being to whom separate rights can accrue. Its rights are merged in those of the mother of whom it forms a part.

We go no further than the facts of the case require, and hold that no cause of action accrues to an infant en ventre sa mère for injuries received before it could be born viable.

Very cogent reasons may be urged for a contrary rule where the infant is viable, and especially so in cases where the defendant, being a doctor or midwife, has negligently injured an unborn child. As to such cases we express no opinion.

The fact that the criminal law protects nonviable infants does not affect the question of their civil rights. The criminal law rests upon grounds of public policy and af-



fects the public; the law of torts relates solely to the rights of private parties. So, too, the fact that, for purposes of inheritance, taking under a will, etc., the existence of unborn children is recognized in law, has no particular bearing upon the question of their right to recover for injuries sustained before birth. Neither does the medi-

cal or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical.

Judgment affirmed.

**CALIFORNIA SUPREME COURT.**  
(In Banc.)

OCEAN ACCIDENT & GUARANTEE COMPANY et al.

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al.

(— Cal. —, 159 Pac. 1041.)

**Master and servant — workmen's compensation — going to work.**

An engineer on a tugboat, who, after his boat has been moved from its berth for protection from a storm, goes ashore for purposes of his own by crossing other vessels alongside of which it is moored, is not, when attempting to return to the boat, performing a service within the scope of his employment and growing out of and incident thereto, within the meaning of the Workmen's Compensation Act, although, when reaching the place where he left the boat, and finding it returned to its rightful berth, he receives from the captain a direction to come over to it, in response to his inquiry as to what he is doing over there.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(September 8, 1916.)

**A**PPPLICATION by petitioners for a writ to review an award of the Industrial Accident Commission of Compensation for the death of petitioners' employee. Award annulled.

The facts are stated in the opinion.

Messrs. Redman & Alexander, for petitioners:

At the time of his death, Slattery was not performing a service growing out of his employment, nor did his death arise out of his employment.

**Note.**—The American cases on the question as to what injuries arise out of and in the course of the employment within the Workmen's Compensation Acts are treated at pages 232 et seq., of the annotation covering the general subject of Workmen's Compensation Acts in L.R.A.1916A, 23; and the English cases on this question at pages 40 et seq. Specifically as to recovery of compensation, under these acts, for injuries received while going to and from work, see L.R.A.1917B.

Walters v. Staveley Coal & I. Co. 105 L. T. N. S. 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303; Gilmour v. Dorman, L. & Co. 105 L. T. N. S. 54, 4 B. W. C. C. 279; Leach v. Oakley Street & Co. [1911] 1 K. B. 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 93; Biggart v. The Minnesota, 5 B. W. C. C. 69; Fumiciello's Case, 219 Mass. 488, 107 N. E. 349; Byrket v. Lake Shore & M. S. R. Co. 29 Ohio C. C. 614, affirmed in 75 Ohio St. 625, 80 N. E. 1124; Caton v. Summerlee & M. Iron & Steel Co. 39 Scot. L. R. 762, 4 Sc. Sess. Cas. 5th Series, 989, 10 Scot. L. T. 204.

It is immaterial what findings the Commission made, because the evidence does not sustain the award, which, for this reason, should be set aside.

Great Western Power Co. v. Pillsbury, 171 Cal. 69, L.R.A.1916A, 281, 151 Pac. 1136, 11 N. C. C. A. 493; Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; International Harvester Co. v. Industrial Commission, 167 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, 5 N. C. C. A. 822; Buckley's Case, 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474, 5 N. C. C. A. 613.

Mr. Christopher M. Bradley for respondents.

Henshaw, J., delivered the opinion of the court:

Review to consider an award of the Industrial Accident Commission: William J. Slattery was engineer of the fishing tug Condare, owned by the Borzone Fish Company. Upon an afternoon in January she was moored in her customary berth—a wharf between piers 23 and 25, on the San Francisco water front. The weather was stormy, and the captain of the tug con-

annotation following De Constantin v. Public Service Commission, L.R.A.1916A, 331.

As to recovery of compensation for injury to employee, received while on street, see annotation following Hopkins v. Michigan Sugar Co. L.R.A.1916A, 314.

For later cases and annotation on questions arising under these acts, consult the L.R.A. Digest and Indexes to Notes covering volumes subsequent to L.R.A.1916A, under the title, "Workmen's Compensation."

sidered it expedient to move his vessel from this wharf to a place alongside of the schooner Crescent City. The Crescent City lay next to the steamer Moana, which last vessel was moored to pier 25, a short distance away from the Condare's usual berth. As thus placed, to go ashore from the Condare necessitated debarking from the Condare to the Crescent City, crossing the Crescent City, climbing onto the Moana, crossing her, and from her reaching the wharf. Slattery knew the position of the Condare, and knew also that it was a temporary location, chosen for protection against the stormy weather. After the tug was thus moored, he went ashore for purposes of his own, unconnected with his employment, and spent the night on shore. It was a Saturday night. It was Slattery's duty to return to his vessel before 4 o'clock upon the following morning. Not having so returned, the captain of the tug went to the boarding house where Slattery spent the night and had him called for duty. It was Slattery's duty to have reported on his vessel without any such summons. Slattery did not know that the tug during the night had been shifted back, as in fact it had, to its own berth. He went to pier 25, safely crossed the Moana and the Crescent City, and discovered that his vessel was not there. He then called from the dock of the Crescent City, "What are you doing over there?" Capt. Johnson, of the Condare, hearing the call and recognizing Slattery's voice, replied, "I don't know, Bill, come on over here." Slattery answered, "All right," and, seeking to return to the wharf and thence to his vessel, fell into the bay between the Crescent City and the Moana and was drowned.

This fairly epitomizes the facts, though there are certain statements in the findings of the Commission which are in the nature of deductions or conclusions from those unquestioned facts which call for animadversion. Thus it is in terms declared that when Slattery hailed his ship and was told by the captain to "Come on over here" Slattery had "reported for duty, and was directed by his superior to proceed to the boat Condare at its changed position." These statements must be treated as conclusions of law, for as findings of fact they are utterly without evidence to sustain them. The unquestioned facts are that it was Slattery's duty to report to his boat without any instruction, and that he was no more on duty when standing upon the deck of the Crescent City than when he was summoned at his hotel, and that the captain's call to him to "Come on over here" (since it was Slattery's duty to go to his ship without any instructions), amounted

to no more than telling Slattery the location of the ship. Again it is found that the captain of the Condare "caused Slattery to be called at the hotel where said Slattery was staying, but did not leave word nor advise said Slattery with regard to the position of the boat Condare." The evidence establishes without conflict that the captain caused Slattery to be called because Slattery had failed in the performance of his express duty, which was to report to the ship at a given hour; and the fact that the captain did not tell Slattery—a man knowing the usual berth of the ship and familiar with the San Francisco water front—that the Condare was at its usual berth is a circumstance immaterial to this consideration, since there was not the slightest duty upon the captain's part so to tell him. Eliminating, then, from this consideration, such declarations as those above noted, which, if they are to be regarded as findings, are findings absolutely unsupported by the evidence, and, if they are to be regarded as conclusions of law, are conclusions of law erroneously drawn, we are enabled to approach the one real question in controversy, and we do so with the disposition to give to the terms of the act the utmost liberality of construction of which they are legally capable, to the end of effectuating the beneficent purposes of the act itself.

So far as affects this question, the employer's liability or nonliability rests upon the construction to be given to § 12 (a) and subdivision 2 of the Workmen's Compensation Act. Stat. 1913, p. 283. That law is as follows: Section 12 (a). "Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees by accident arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: . . . 2. Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such."

Admittedly the deceased was an employee of the petitioner. Admittedly he met his death while, in the broadest sense, he was such employee. The question is: At the time he met his death was he "performing service growing out of and incidental to his employment and acting within the course of his employment?" It will be noted that § 12 (a) expresses the conditions generally under which compensation for injury shall

be paid. It is to be paid when and only when the injury is a personal injury sustained by the employee "by accident arising out of and in the course of his employment." It will also be noted that subdivision 2, having specific reference to compensation in the event of death, does not broaden the right to this compensation beyond the language just quoted, but, if anything, perhaps restricts it, and certainly makes it more specific by the added declaration that, to entitle the representatives of the deceased to recover in the case of death, the employee must not only be "performing a service growing out of and incidental to his employment," but must also be "acting within the course of his employment as such." Therefore it is quite within the meaning of the statute to say that the controlling language found in § 12(a) is not modified, but merely paraphrased and made more definite, by the language of subdivision 2. Next it is pertinent to call attention to the fact that this language, injury "by accident arising out of and in the course of his employment," is language taken literally from the Workmen's Compensation Act of England, enacted by Parliament in 1897, § 1 of that act declaring that an employer shall be liable "if in any employment to which this act applies personal injury by accident arising out of and in the course of the employment is caused to a workman." L. R. Stat. 60-61 Vict. p. 53. This language, then, had been for many years upon the English statute books before it was adopted and made a part of the Employers' Workmen's Compensation Act of this state, and the courts of England had been called upon, as was inevitable, to construe this phrase many times before our enactment of it. Under familiar principles, when a statute which has received judicial construction by the courts of one state is adopted and re-enacted by another state, it is so adopted and re-enacted in consonance with the construction put upon it by the courts of the first sovereignty. The common sense of this rule of construction is so apparent that it needs in its support nothing more than the obvious suggestion that if the later lawmakers did not design that the construction put upon any given language should obtain, they would modify and change that language to express their different intent.

We may now with profit consider these English adjudications, and, first, those upon which respondent places reliance. In *Robertson v. Allan Bros. & Co.* 77 L. J. K. B. N. S. 1072, 98 L. T. N. S. 821, 1 B. W. C. C. 172, the steward of a steamship went on shore in the evening under permission, for his own purposes. He returned late in the evening and proceeded to board his ship by L.R.A.1917B.

means of the cargo skid or stage which stretched from the ship to the quay. It was a breach of discipline to use the skid, but it was frequently used by members of the crew. In stepping from the skid to the deck he slipped or stumbled, fell down the unguarded hatch into the hold, and died from the effect of the injuries which he sustained. It was not disputed that the accident "arose out of his employment." The question debated was whether it was "in the course of his employment." It was held by the master of rolls that, in view of all the circumstances, the accident occurred in the course of the employment. In *Moore v. Manchester Liners*, 3 B. W. C. C. 527, a fireman had gone on shore to procure certain personal necessities. Returning to his ship, he fell off a ladder, which was the only means provided of gaining access from the quay to the ship. The House of Lords held this accident to have befallen the deceased in the course of his employment, Lord Loreburn, L. C., saying: "In these circumstances it was not, I think, contested that the accident which caused death arose out of the employment; the danger of falling from the ladder which gave the only access from quay to ship being, in its nature, incidental to the service of a seaman."

In *Keyser v. Burdick*, 4 B. W. C. C. 87, a riveter working on a ship at the dock was about to go ashore. Coming on deck, he found that the vessel was being moved to a dry dock, and was already a short distance from the quay. The gangway had been removed. There was no other means of getting ashore than by sliding down a rope, which still held the vessel to the quay. A fellow workman had thus gone ashore in safety. Keyser attempted to follow him. The rope gave way. He was thrown against the quay and injured. The master of the rolls said: "I am satisfied that there is no ground for this appeal. The man, when he came on deck, wanted to get ashore, and he found that the vessel was a little away from the quay side, and that the gangway had gone. He saw one of his mates use the rope, and he followed, but met with an accident. The county court judge found that, in the circumstances, this was a reasonable step to take by the man to get off the ship, when the regular means of exit was closed. We cannot interfere with his findings."

In *Kearon v. Kearon*, 45 Ir. L. T. 96, 4 B. W. C. C. 435, a seaman was on shore leave. When he returned, his vessel was some 5 or 6 feet from the pier, the top of the ship's rail being about 3 feet lower than the quay. No gangway had been provided, but a ladder was used in getting on board. Not seeing the ladder, he hailed the ship, and, receiving no answer, jumped from the

pier to the vessel. His leg struck on the rail, and he was permanently injured. There was no question but that the accident occurred in the course of his employment. The proposition debated was whether or not the seaman had taken a wantonly reckless step in his effort to reach the ship, and it was held that he had not. In the cases of *Kitchenham v. The Johannesburg* and *Leach v. Oakley-Street & Co.* 4 B. W. C. C. 91, two seamen on different ships had been ashore for their own purposes. They were both drowned before reaching their ships. In the *Leach* Case access was obtained to the ship by a ladder extending from the wharf to the ship. As the sailor was mounting this ladder his foot slipped, he fell between the ship and the wharf, and was drowned. *Fletcher Moulton, L. J.*, delivering the judgment, first pointed out that "any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of the crew on the ship, and therefore is one which does not 'arise out of his employment;'" and the opinion proceeds as follows: "But if, whether in his hours of leisure or not, it becomes necessary for him, in fulfilment of his employment, to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. In the cases before us the accident occurred on the return of the seaman to the ship, immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the other class, and it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore v. Manchester Liners*, the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the

water and was drowned. I think that the accident would arise out of his employment. But if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

In the *Kitchenham* Case access to the ship was by a gangway. The evidence showed that the sailor, on returning to the ship, came upon the wharf and walked towards the gangway. It was not shown that he ever reached the gangway. "A splash was heard a little abaft the inboard end of the gangway." Says the court: "It is for the applicant to prove that the accident arose 'out of' the employment; and, if the evidence is not sufficient to establish this, the claim fails."

And it was held that the evidence failed to establish a case for compensation. In *Jackson v. General Steam Fishing Co.* [1909] A. C. 523, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 46 Scot. L. R. 901, 2 B. W. C. C. 56, a workman was employed to watch trawlers as they lay in the harbor. His duties compelled him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to a hotel for refreshment. He was absent a short time, had returned to the quay, and, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. He was in the performance of his duty in leaving the quay to go onto the trawler. He used the means provided and at hand, and it was held that he met his accident in the course of his employment. This completes a review of the cases cited and relied upon by respondent. From them we will turn to petitioner's authorities.

In *Walters v. Staveley Coal & I. Co.* 105 L. T. N. S. 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303, a minor was proceeding to his work along a footpath prepared by his employers for their workmen's convenience. He slipped and sustained injury. There was evidence that the employers knew that the footpath was not safe. The question considered by the House of Lords was: Did the accident "arise out of the employment, and did it arise in the course of the employment?" It was held that there was "no evidence which would have justified a finding that the accident arose out of the employment," and it was declared to be immaterial that the employee was injured upon this footpath prepared for his use by his employers, "since the man was merely going to his employ-

ment." In *Gilmour v. Dorman, L. & Co.* 4 B. W. C. C. 279, a workman was injured upon vacant land belonging to his employer, over which for many years he had been in the habit of going to and from his work, by walking along a footpath over the land. The master of the rolls, holding that the accident did not arise out of his employment, declared: "I cannot regard the case as in any way different from the case where a man slips on the ice on a public road, a quarter of a mile from his employer's works. It has been repeatedly held that a man is not entitled to the protection of the act when on his way from his home to the works."

Dealing specifically with seamen, *Leach v. Oakley, Street, & Co.* has already been discussed. In *Biggart v. The Minnesota*, 5 B. W. C. C. 69, a seaman had gone ashore on leave, for his own purposes. He returned late at night, and found that his ship had been moved to another part of the dock. He proceeded to make his way to the ship along the dock side, on which were many railway lines. He was injured by a train on the docks 200 yards from his ship. Said the master of the rolls: "This appeal seems more hopeless than any we have had to deal with. . . . The accident took place 200 yards from the ship. That was not an accident 'arising out of.'"

Other cases not dealing specifically with ships and their crews, but having a bearing upon the question of what constitutes an injury "arising out of employment" are *Caton v. Summerlee & M. Iron & Steel Co.* 39 Scot L. R. 762, 4 Sc. Sess. Cas. 5th series, 989, 10 Scot. L. T. 204, where it was held that a workman who, after finishing his day's work, was injured while walking along a private branch railway leading from the employer's colliery to the main line of a railroad, had not met with an accident arising out of or in the course of his employment. In *Fumiciello's Case*, 219 Mass. 488, 107 N. E. 349, an employee was killed while crossing a railroad track on private property over which it was necessary for him to pass. The court held that the death did not arise out of the employment, and the fact that the deceased was upon private property as a licensee made no difference; that the principle was the same as if he had been killed on a public highway. To like effect is *Byrket v. Lake Shore & M. S. R. Co.* 29 Ohio C. C. 614, affirmed by Ohio supreme court, 75 Ohio St. 625, 80 N. E. 1124, where it was held that an injury sustained by a workman while walking on the railroad tracks owned by his employer, L.R.A.1917B.

while complying with a direction to report for duty, was not an injury arising out of his employment.

With these authorities before us we think the governing principles of all the decisions are not difficult of discernment. The first of these is that there are excluded from the benefits of the act all those accidental injuries which occur while the employee is going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways. Second, in the case of vessels, a seaman or other employee is entitled to the benefits of the act if injured while using the instrumentality provided in either reaching or departing from his ship, and in case no instrumentality at all is provided, as in *Kearon v. Kearon*, 45 Ir. L. T. 96, 4 B. W. C. C. 435, *supra*, the injured employee will not be excluded from the benefits of the act if he adopts some perilous means of boarding his ship, as by endeavoring to leap to her deck from the pier. But in the case of an employee seeking to board his vessel, until he has come into such proximity to her as to be using, or immediately about to use, the gang plank, ladder, or other instrumentality "specifically connected with the ship," his accident does not arise out of his employment, this indeed being the precise language of *Moulton, L. J.*, as above quoted in *Leach v. Oakley, Street & Co.*, where he says: "If the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment."

In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury "growing out of and incidental to his employment," since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks.

Such, beyond question, is the reasoning of the cases and the meaning of their adju-

lections; and, applying this reasoning to the facts in the case at bar, it is too plain to call for lengthy discussion that Slattery, in his progress toward his vessel, had not reached the point where it could be said that he met his death in "performing serv-

ice growing out of and incidental to his employment."

The award is therefore annulled.

We concur: Angellotti, Ch. J.; Shaw, J.; Sloss, J.; Melvin, J.; Lorigan, J.

## KANSAS SUPREME COURT.

CITY OF KANSAS CITY, KANSAS,

v.

HARRY SEAMAN, Appt.

(— Kan. —, 160 Pac. 1139.)

**Commerce — collecting and returning laundry.**

A corporation located and doing business in Missouri as a steam laundry sent an employee with a wagon to gather up the linen of patrons in Kansas City, Kansas, carry it to the laundry, and, when the service was completed, deliver it to the patrons in Kansas, and collect the charges. The employee, while so engaged, was arrested and fined for the violation of an ordinance of Kansas City, Kansas, imposing a license tax upon each laundry operated within the city, the amount to be determined by the number of wagons employed. Held, that the conviction is unlawful, first, for the reason that the employee of the laundry company was not conducting a laundry within the city, as contemplated by the ordinance, and, second for the reason that collecting the articles in Kansas, carrying them into Missouri, and returning them to their owners after the service had been performed, is interstate commerce.

For other cases, see *Commerce*, IV. a, in Dig. 1-52 N. S.

(November 11, 1916.)

**APPEAL** by defendant from a judgment of the District Court for Wyandotte County, convicting him of violating an ordinance imposing a license tax upon each laundry operated within the defendant city. Reversed.

The facts are stated in the opinion.

Messrs. G. W. Stubbs and F. H. Stubbs, for appellant:

Defendant, in the course of his duties, was engaged in interstate commerce, and was therefore exempt from the provisions of the ordinance.

*International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.)

Headnote by PORTER, J.

Note. — For gathering laundry or other articles in one state, performing services thereon in another, and returning to owners, as interstate commerce, see annotation following this case, post, 343. L.R.A. 1917B.

493, 30 Sup. Ct. Rep: 481, 18 Ann. Cas. 1103, reversing 76 Kan. 328, 91 Pac. 74: *Com. v. Pearl Laundry Co.* 105 Ky. 259, 49 S. W. 26; *Lyng v. Michigan*, 136 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

Mr. H. J. Smith for appellee.

Porter, J., delivered the opinion of the court:

The appellant was convicted and fined in the police court of Kansas City, Kansas, for carrying on the occupation and business of a laundry within the city without having obtained a license under the provisions of a city ordinance. The district court affirmed the conviction, and he appeals.

The appellant resided in Kansas City, Missouri, and was in the employ of the Fern Laundry Company, a corporation located in and doing business as a steam laundry in Kansas City, Missouri. Among the customers of the laundry company are people who reside in Kansas City, Kansas. It was the custom of the laundry company to send the appellant with the company's horse and wagon to Kansas City, Kansas, to gather up the linen of its patrons, take it to the laundry, and when it was ready for delivery, return the same to its patrons and collect the charges. The appellant, while so engaged, was arrested for violation of an ordinance of the city, which provided that no person, firm, or corporation, either as principal, officer, agent, servant, or employee, shall carry on or operate within the city any calling, trade, or occupation therein specified, without first obtaining a license therefor. The ordinance fixed the occupation tax for the business of laundries as follows: "Laundry wagon.—Any person or corporation conducting, pursuing or carrying on a laundry business by collecting or delivering laundry by means of a wagon or other vehicle, for each wagon or vehicle, \$10."

We construe the ordinance as imposing an occupation tax upon the laundry business; the amount of the tax against the business being determined by the number of wagons employed therein.

There are two reasons why we think the judgment convicting the appellant must be reversed: First, he was not carrying on the business of a laundry within the city,

and therefore was not within the terms or contemplation of the ordinance. The laundry was conducted in Kansas City, Missouri. He was engaged solely in collecting and distributing articles to be laundered in Missouri. He had no place of business in Kansas City, Kansas, but was simply using the streets for the lawful purpose of transporting from that city to the state of Missouri articles to be laundered and to return them to the owners when the service was completed. Second, in the course of his employment the appellant was engaged in interstate commerce. The appellee insists that there was no commerce involved; or, at least, that commerce was only incidental to the business, because there was no barter or sale of personal property. A number of decisions are cited in which "trade, barter, sale, or transportation involving trade, barter, or sale" are spoken of as constituting the elements of interstate commerce. In the appellee's brief it is said: "The contract between the laundry company and its customers is, that the company will take, wash, and return the clothing. The transaction is for a personal service with reference to property owned by the customer. No goods are sold by the company. They have nothing but services to sell."

It is seriously insisted that interstate commerce has been defined by the Federal courts to involve only the transfer of the title to personal property and its transportation, and the business of transporting passengers or intelligence. But certain services are held to be commodities. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, it was held that teaching by correspondence, the business of imparting knowledge, is interstate commerce when conducted between residents of different states, because teaching is a service. In the case at bar there was a sale of service involving transportation between the homes of the customers in Kansas and the place where the service was performed in Missouri.

One of the cases relied upon by the appellee which illustrates its attitude as regards the claim that appellant was employed in interstate commerce is *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. In that case Cargill owned a number of grain elevators located upon the rights of way of interstate railways. At these elevators he purchased grain from citizens of Minnesota and shipped it in carload lots to points in other states; the grain being purchased for the express purpose of shipping as Cargill's property to his terminal elevators in L.R.A.1917B.

Wisconsin and Illinois. A statute of Minnesota required grain elevators operating in that state to pay a license fee. The court held that the statute imposing the license was valid for the reason that it had reference only to the business of the defendant at his elevators and warehouses in Minnesota, "in respect to business conducted at an established warehouse in the state between the defendant and sellers of grain." The Minnesota case does not support the contention of the appellee. If the laundry company were resisting the imposition of a license tax by the state of Missouri on its business conducted there, upon the theory that some, or a large part, of its business, was interstate, the Minnesota case would be an authority upholding the power of the state of Missouri to levy such a tax, for the reason that the tax would be imposed in respect to a business conducted in an establishment located in Missouri. Or if a person conducting a laundry business in Kansas City, Kansas, sought to avoid the license tax imposed by the ordinance in question, by claiming that its customers resided in Missouri, the Minnesota case would uphold the authority of the city to levy such a tax in respect to the business actually carried on within the city.

Undoubtedly there were some features of the business conducted by the laundry company which involved interstate transactions. The sending of its wagons into another state, with agents to collect articles to be laundered, the transporting of the same to its place of business in Missouri, and returning the articles to the owners in Kansas after the work had been completed, involved trade and intercourse. In *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23, 68, Chief Justice Marshall said: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse."

Anything which can be bought and sold is a subject of commerce. *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1, 17. In *International Textbook Co. v. Pigg*, supra, it was held that "intercourse or communication between persons in different states through the mails and otherwise, and relating to matters of regular continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the states within the commerce clause of the Federal Constitution."

When a resident of Kansas contracts with an individual doing business in Missouri that the later will mend a pair of spectacles for him, and the one who engaged to perform the service agrees to send into this state for the article which is to be repaired,

take it to his place of business in Missouri, and, after the service has been performed, return it to the owner, the servant or agent of the individual in Missouri, while engaged in transporting the article to Missouri and returning it to the owner in Kansas, is engaged in trade and intercourse between individuals of different states. The servant or agent of the one performing the service is not, while so engaged, carrying on the business of mending spectacles; that business is carried on in Missouri.

A wholesale grocer in Missouri who sells goods there to a retail dealer in Kansas under a contract which requires him to deliver them in Kansas may send them by his own wagon to the customer's place in Kansas. In such a transaction he, and of course his agents, are engaged in interstate commerce. His traveling men who solicit business in Kansas are not engaged in conducting a wholesale grocery in this state, nor can they be required to pay a local license tax. *Kinsley v. Dyerly*, 79 Kan. 1, 19 L.R.A. (N.S.) 405, 98 Pac. 228, and cases cited in the opinion; note in 19 L.R.A. (N.S.) 297, 316. Since the decision of *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733, an exception to the general rule exists in the case of intoxicating liquors because of the provisions of the Wilson Act and other recent acts of Congress touching the control of such liquors.

Instances might be multiplied of cases involving transactions between citizens of different states whereby the owner of per-

sonal property in one state sends it to an individual, firm, or corporation in another state to have some service or labor performed upon it there, and afterwards to be returned to the owner in Kansas. The collecting and transporting of the thing from one state to another, and the return of it after the labor and service have been performed, is trade and intercourse between citizens of different states.

While engaged in collecting articles to be laundered, or in returning them to the owners in Kansas after the labor and service had been performed in Missouri, the appellant, as the servant and agent of his employer, was not carrying on the laundry business in Kansas; and for that reason alone was not within the provisions of the ordinance which purports to levy an occupation tax upon persons carrying on such business within the state. If the ordinance were given the construction contended for by the appellee, grievous burdens might be imposed by one state by the enactment of laws and ordinances which would embarrass traffic, trade, and intercourse between the citizens of different states.

It follows that the appellant is not amenable to the provisions of the ordinance, and his conviction for its alleged violation is void.

The judgment will be reversed, and the case remanded, with directions that appellant be discharged.

All the Justices concur.

**Annotation—Gathering laundry or other articles in one state, performing services thereon in another, and returning to owners, as interstate commerce.**

*KANSAS CITY v. SEAMAN*, ante, 341, finds a support for the decision in *Com. v. Pearl Laundry Co.* (1899) 105 Ky. 259, 49 S. W. 26, which held that one who solicited laundry work for a laundry company situated without the state, the laundry, when the service thereon was completed, being returned to such solicitor, who returned it to the owners, was not subject to a license tax. The court stated that it was not necessary to discuss the Federal question raised by the solicitor for laundry as the law is well settled that a citizen of another state may come into this state and solicit and receive work to be done in such other state, without being required to pay a license tax.

On the other hand, the decision in *KANSAS CITY v. SEAMAN*, that one is engaged in interstate commerce who

solicits laundry work for a laundry company situated without the state, finds opposition in *Smith v. Jackson* (1899) 103 Tenn. 673, 47 L.R.A. 416, 54 S. W. 981, which held that an agent of a laundry company in another state, who collects garments and sends them out of the state to be laundered, and afterwards redelivers them to their owners, is not engaged in commerce so as to be protected against the privilege tax imposed on his occupation by statute. The word "commerce," the court said, found in the interstate clause of the Federal Constitution, cannot be held to embrace a transaction such as is here presented. It implies when used by business men, as it is defined in Webster's Dictionary, trade or traffic; as in the exchange of specific articles or commodities for other articles or commodities, or else of these for



money or its representative. In a case like the present nothing in the true commercial sense is sold or exchanged. The agent takes the articles committed to his care, and agrees with the owner that he will send them across the state line, and have certain labor bestowed on them, and, when returned, he is to receive compensation equal to his labor. There is no commodity created, of which the

ownership is changed. It is simply a personal contract based on a valuable consideration, having no element of a commercial transaction falling within the protection of this clause of the Constitution.

Generally as to interstate commerce, see Index to L.R.A. Notes, under the title, "Commerce." J. H. B.

**MISSISSIPPI SUPREME COURT.**  
(Division B.)

**SARAH WOODS, Appt.,**  
v.  
**CITY OF TUPELO.**

(— Miss. —, 72 So. 879.)

**Criminal law — presence at receipt of verdict.**

The receipt of the verdict in the absence of one accused of illegal sale of intoxicating liquors violates his constitutional right to be present at every stage of the trial.

*For other cases, see Criminal Law, II. b, in Dig. 1-52 N. 8.*

(Stevens, J., dissents.)

(November 6, 1916.)

**APPEAL** by defendant from a judgment of the Circuit Court for Lee County convicting her of unlawfully selling intoxicating liquors. Reversed.

The facts are stated in the opinion.

**Mr. George T. Mitchell**, for appellant:

Defendant has a right to be present at every step during the trial of his case, and especially at the time of the rendition of the verdict, and unless he voluntarily absents himself, the trial is a nullity.

*Ryan v. Couch*, 66 Ala. 244; *Chester v. Bower*, 55 Cal. 46; *Larue v. Russell*, 26 Ind. 386; *Crowe v. Peters*, 63 Mo. 429; *Schneider v. Haas*, 14 Or. 174, 58 Am. Rep. 296, 13 Pac. 236; *Garman v. State*, 66 Miss. 196, 5 So. 385; *Corbin v. State*, 99 Miss. 486, 55 So. 43; 12 Cyc. 528.

**Mr. C. P. Long** for appellee.

**Cook, P. J.**, delivered the opinion of the court:

Appellant was tried in the circuit court of Lee county upon a charge that she had unlawfully sold beer within the corporate limits of the city of Tupelo. After the

evidence was introduced, the instructions of the court were read to the jury, and counsel for the prosecution and for the defendant completed their arguments, and the jury retired to consider their verdict. Before the jury had reported their verdict, the court, at 4 o'clock P. M., announced from the bench that the court would be adjourned until 8:30 o'clock the following morning. The sheriff then announced in open court that all parties and witnesses were discharged until 8:30 o'clock the following morning. After the adjournment of the court, and after appellant and her attorneys had left the court room, the jury notified the court that they were ready to report, whereupon the court, without giving any notice to the defendant or her counsel, received the verdict of the jury finding the defendant guilty as charged. On the following morning, when the court convened, a bill of exception was presented to the presiding judge, embodying the above facts, which was signed by the judge. Defendant also made a motion to arrest the judgment, based on the facts above stated, which motion was overruled by the court. A motion for a new trial was made and overruled, and the court imposed a fine of \$100 and sentenced the defendant to confinement in the county jail for a term of thirty days.

In our opinion the court erred. The defendant, by the affirmative act of the court, was denied her constitutional right to be present at every stage of her trial. It may be said that the verdict of the jury was the important event of the trial, and concerned the defendant more than all of the precedent proceedings.

The argument is made that the defendant was not prejudiced by the error of the court. This is a stock argument, so often repudiated by this court that we deem it unnecessary to comment upon it in this case.

True, the defendant was on bond, but it is clear that she had not forfeited her bond by voluntarily absenting herself; on the contrary, she was absent by the express permission of the court.

In *Garman v. State*, 66 Miss. 196, 5 So.

**Note.**—As to necessity of presence of accused at rendition of verdict for misdemeanor, see annotation following this case, post, 346.  
L.R.A.1917B.

385, is announced the rule and its application.

Reversed and remanded.

Stevens, J., dissenting:

The record in this case affirmatively shows that the city of Tupelo introduced sufficient evidence to warrant the jury in finding beyond every reasonable doubt that the defendant was guilty of the misdemeanor here charged. The defendant offered no testimony whatever, and therefore I presume she has no defense on the facts. The jury reached the only verdict which under the law and facts of this case would have been proper. This verdict, it is true, was returned into court in the absence of both the accused and her counsel. I am perfectly willing to concede that the defendant had a right to be present, and this right the court could not wilfully or arbitrarily deny to her. In this case, however, the circuit court, after concluding the business of the day and after announcing that all parties and witnesses would be discharged until 8:30 o'clock the following morning, thereafter reconvened his court for the purpose of receiving the verdict of the jury then deliberating upon this case. When the learned circuit judge adjourned his court, he, of course, had no intention of denying, and did not thereby necessarily deny, this defendant her privilege to tarry and determine for herself whether the jury would report. The record shows that the adjournment for the day was taken at 4 o'clock P. M. and, without lingering to determine whether the jury would report, the accused left for her home, and the circuit judge did the very natural and humane thing of accepting this verdict in the absence of the accused, rather than keep the jury locked up overnight. The defendant in this case does not say by her bill of exceptions that she desired or intended to poll the jury, and she does not by this appeal attempt to challenge or impeach the verdict; that is to say, she does not even now contend that the verdict as returned was not the unanimous verdict of the jury. She simply relies upon the technical proposition that she was not present when the verdict was returned, and this irregularly my brethren have dignified by classing it as a fatal and reversible error. To this I cannot assent. It must be borne in mind that this is a misdemeanor case, and not a felony. In such cases the weight of authority sustains the view that the presence of the defendant at the reception of the verdict is not necessary. "In prosecutions for misdemeanor the weight of authority seems to be that it is not necessary that the defendant should be personally present at the reception of the

verdict." 22 Enc. Pl. & Pr. 928, and the authorities cited in the footnote. The case is altogether different from that of Garman v. State, 66 Miss. 196, 5 So. 385, relied upon in the majority opinion. In the Garman Case the accused was denied the right to be present during the trial simply because he was a witness in the case. In that case the court denied the accused the constitutional right of being confronted by the witnesses against him, as also the right to conduct his defense. In Price v. State, 36 Miss. 531, 72 Am. Dec. 195, our court on this point said: "The right of the defendant to be present proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court. But under our law he may waive that right. If he is not in custody, so as to be deprived of the power to attend, it would seem that the reason of the rule as to his right to be present would fail; for he is voluntarily absent when he ought to be present, and cannot complain of the consequence of his own voluntary act. His voluntary absence must be taken to be a waiver of his right to be present. . . . Hence, though the verdict in his absence was irregular, so far as his being present, and in the power of the court, to submit to its judgment, yet no prejudice was done to his rights, and he can take no benefit from his own illegal act."

So said our court in a felony case, and there is a vast difference between misdemeanors and felonies. The right of the accused to be present at the reception of a verdict in a misdemeanor case is certainly not a constitutional right. Our court has held squarely that it is not a constitutional right even in a felony case, for this court, speaking through Whitfield, Chief Justice, in Sherrod v. State, 93 Miss. 774, 20 L.R.A. (N.S.) 509, 47 So. 554, observes that "the right to be present when the verdict is received is not a constitutional right, but a very sacred legal right, which may, as indicated, be waived under the conditions stated in the first proposition."

So it is then, that even though appellant were denied the right to be present, this was not the denial of a right guaranteed by the Constitution, and the court certainly had jurisdiction to proceed. In this case the presence of the bond should be regarded as the presence of the accused. This court has recently held that the defendant on bond in a misdemeanor case must attend upon the regular term of the court, and that, even though such defendant attended court two or three days and had temporarily left the court room to attend to business when his case was called, he has no right to com-

plain at the action of the trial court in proceeding to the trial of his case. *Williams v. State*, 103 Miss. 147, 60 So. 73. My brethren, I fear, have reversed this rule by requiring the court to keep up with the defendant in such case, instead of requiring the defendant to keep up with the court. In the case of *State v. Shepard*, an early Iowa case reported in 10 Iowa, 126, it was held that "when the defendant is convicted of an assault and battery, though charged with a higher offense, his presence when the verdict is returned is not required." "In trials for inferior misdemeanors, a verdict may be given in the absence of the respondent (who was defendant)." *Sawyer v. Joiner*, 16 Vt. 499.

The same holding is declared in the early case of *Warren v. State*, 19 Ark. 214, 68 Am. Dec. 214. In the notes to this last case I find this statement: "The verdict of a jury in minor offenses or misdemeanors may be rendered and received in the absence of the accused" (citing several authorities).

As a practical proposition this procedure is more reasonable. Any other holding will necessitate twelve tired jurors and their bailiffs to spend many nights in the very uninviting quarters usually prepared for jurors in our courthouses. Take the present case as an illustration: Was it not more consonant with reason and common sense to receive the verdict of the jury in this case and thereby accord to the several jurors the society and shelter of their own homes, rather than keep them incarcerated all night in order that a guilty "blind tigress" might have the satisfaction of hearing the report of the jury?

The case is essentially different from that of *Corbin v. State*, 99 Miss. 486, 55 So. 43, wherein Judge Anderson speaking for the court, observes that "the appellant had the constitutional right to be present when tried." In the *Corbin* Case the court tried the defendant while she was ill and in her absence. Mr. William E. Mikell, a law professor and writer of high standing, makes the following observation in refer-

ence to the verdict: "When the jury is ready to report, they announce the fact to the officer in charge. He informs the court, which is supposed to be always open for the purpose of receiving a verdict, any hour of the day or night, including holidays and Sundays," and cites in this connection *State v. Atkinson*, 104 La. 570, 29 So. 279; 3 Mod. Am. Law, p. 328. If this be a correct statement,—and I think it is,—then every defendant on bond should take notice of this fact and place himself in position to co-operate with the circuit judge and officers of the court in receiving the verdict. It is said by Hughes, District Judge, in *United States v. Shepherd*, 1 Hughes, 520, Fed. Cas. No. 16,274, that "the cases cited by prisoner's counsel only go to the extent of ruling that verdicts in trials for felony must be rendered in the presence of the prisoner. They do not invalidate verdicts rendered in the absence of the accused in cases of misdemeanor. . . .

The old technicalities of the criminal practice have been gradually discarded, as the necessity for them decreased and finally ceased; and now the rules of the criminal practice are as little arbitrary and technical, and as reasonable and just, as they are in civil proceedings."

In the footnotes on page 686 of 12 Cyc. the statement is made that "at common law a privy verdict may be given in misdemeanors and in the absence of defendant (*Bacon*, Abr. title 'Verdict'; 1 Chitty, *Crim. Law*, 636), and by consent of the parties, a verdict may be delivered at the judge's house, although beyond the limits of the county in which the trial was had (1 Chitty, *Crim. Law*, 636)."

But conceding the right of the defendant to be present and poll the jury, the irregularity in this case was harmless error for which this case should not be reversed. It did not prejudice the rights of the accused. There being, then, no invasion of her constitutional right, and the error assigned under the facts of this case being harmless, this case should be affirmed.

### **Annotation—Necessity of presence of accused at rendition of verdict for misdemeanor.**

This note does not include cases where the absence was voluntary, or where the accused waived the question of his absence.

For waiver of presence of one charged with a misdemeanor at time of receiving verdict, see the note to *State v. Waymire*, 21 L.R.A.(N.S.) 56.

For waiver of presence of accused at L.R.A.1917B.

time of receiving verdict upon trial for felony, see the notes to *State v. Way*, 14 L.R.A.(N.S.) 603; *State v. Gorman*, 32 L.R.A.(N.S.) 306; and *Frank v. State*, L.R.A.1915D, 817.

The cases on this subject are in some apparent confusion, chiefly for the reason that some of them are based on constitutional or statutory grounds which

are not clearly referred to; also to some extent for the reason that it is not always entirely clear whether the absence was voluntary or not. There is a further difficulty in statutes permitting verdicts to be taken in the absence of the defendant, as to whether they apply in cases of involuntary absence. Speaking generally, on the one hand, it seems clear that at common law a verdict in ordinary misdemeanor might be taken in the absence of the defendant; but on the other hand, the modern American courts are reluctant to take any step whatever in the involuntary absence of the accused.

**Theory that presence is not necessary  
—at common law.**

At common law, the presence of accused is not necessary at rendition of verdict of misdemeanor. *Rex v. Ladsingham* (1671) T. Raym. 193, 82 Eng. Reprint, 101. The same was held in the following cases, where, however, it does not appear that the absence was involuntary: *Jackson v. State* (1887) 49 N. J. L. 252, 9 Atl. 740, 7 Am. Crim. Rep. 80 (affirmed on opinion below in (1887) 50 N. J. L. 175, 17 Atl. 1104); *Holliday v. People* (1847) 9 Ill. 111; *People v. Brown* (1916) 273 Ill. 169, 112 N. E. 462. See also, as stating the rule in a case where it appears that the absence was voluntary, *Sawyer v. Joiner* (1844) 16 Vt. 497.

In *Rex v. Ladsingham* (Eng.) supra, it was held proper to give a privy verdict in misdemeanor, the court distinguishing cases concerning life, as in felony, because there the jury are commanded to look upon the prisoner while they give their verdict.

*Holliday v. People* (Ill.) supra, holding that a verdict in misdemeanor was properly received in the absence of the accused, seems to have been decided upon the common-law rule, though it does not appear that the absence was involuntary. The *Holliday* Case was cited in *People v. Brown* (Ill.) supra, where the verdict was rendered in the absence of the defendant, who was on bail, and of his attorney, and where the court said: "According to the common law, a defendant accused of a misdemeanor may be found guilty in his absence."

In *Jackson v. State* (N. J.) supra, where it was claimed that the verdict in a misdemeanor case was taken in the absence of the accused, who was on bail, and of his counsel, the reasons for the absence not appearing, it was held that there was no error. The court said inter L.R.A.1917B.

alia: "The criminal code of this state wholly ignores the distinction between felonies and misdemeanors. Statutory offenses, if designated at all, are called in the Crimes Act either misdemeanors or high misdemeanors. Rev. p. 226. Assault with an intent to commit murder—the offense of which the accused was convicted—is styled a misdemeanor, punishable by imprisonment at hard labor not exceeding ten years, or by a fine not exceeding \$1,000, or both. Rev. p. 241, § 78. The offense was a misdemeanor at common law, and retains that character in the statute, and is punishable, as at common law, by fine and imprisonment. It is such an offense as neither in species nor in the character of the punishment required the presence of the accused when the verdict was rendered, as essential to the legality of the verdict."

In the *United States v. Shepherd* (1875) 1 Hughes, 520, Fed. Cas. No. 16,274, it is held to be no error to receive a verdict for a misdemeanor, punishable by from five to fifteen years' imprisonment and by fine, when the prisoner was in jail, though his counsel was present. The court discusses the general question, observes that the counsel did not ask that the prisoner be brought in but that they did all that he could have done, but does not state that they asked the jury to be polled. The court further states, but whether as governing the question or not is not clear, that "the Code of Virginia (chap. 201, § 25, p. 1243) allows the trial of misdemeanor to proceed, provided a summons has been served, whether a *capias* has been returned executed, or not executed, and whether the accused be present in person or not. In such matters the practice in the courts of the state furnishes the rule of practice in this court."

In *State v. Miller* (1912) 87 Kan. 454, 124 Pac. 361, where the facts on the point do not appear, it is said: "The offense of which the defendant was convicted is a misdemeanor, and there was no error in receiving the verdict during his absence from the court room." The court does not state whether this decision was at common law. The statute provided: "Nor can any person indicted or informed against for any other offense [than felony] be tried unless he be present either personally or by his counsel."

**—under statute.**

In *People v. Ebner* (1863) 23 Cal. 158, it was held that the court had no power to forfeit a recognizance when

the defendant in misdemeanor appeared by attorney, who offered to plead not guilty, the statute providing that a verdict in misdemeanor might be rendered in the absence of the defendant.

In *Gage v. State* (1880) 9 *Tex. App.* 259, it was held that the verdict was properly received when the defendant and his counsel were both absent, the statute providing that in a misdemeanor the verdict may be received and read in the absence of the defendant.

So it was held to be no error in misdemeanor to receive the verdict and discharge the jury while the defendant was in jail and his counsel absent. *Ripsey v. State* (1904) — *Tex. Crim. Rep.* —, 81 S. W. 531.

It has been further held in Texas that a verdict in misdemeanor cases may be received in the absence of the defendant although the punishment may be imprisonment, and that the following two statutes are to be thus harmonized: "In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail." "In all felony cases the accused must be present when the verdict is returned into court, but in misdemeanor cases the verdict may be received in the absence of the defendant." *Wyatt v. State* (1906) 49 *Tex. Crim. Rep.* 193, 94 S. W. 219 (followed in *Booher v. State* (1916) — *Tex. Crim. Rep.* —, 188 S. W. 977; followed also in *Loving v. State* (1907) — *Tex. Crim. Rep.* —, 100 S. W. 154, reversed on rehearing on another ground). In the *Wyatt Case* the court said: "The legislative intent was to draw a distinction between what is termed a trial and the reception of the verdict at the hands of the jury."

#### Theory that presence is necessary.

There are, however, several cases in which it has been held that the presence of the accused is necessary at rendition of verdict in misdemeanor, in the absence of waiver.

*Wells v. State* (1906) 147 *Ala.* 140, 41 So. 630; *Stewart v. State* (1906) 147 *Ala.* 137, 41 So. 631 (obiter); *Lyons v. State* (1909) 7 *Ga. App.* 50, 66 S. E. 149; *State v. Callahan* (1880) 55 *Iowa*, 364, 7 N. W. 603; *State v. Muir* (1884) 32 *Kan.* 481, 4 *Pac.* 812, 5 *Am. Crim. Rep.* 599; *WOODS v. TUPELO*, ante, 344; *Hunt v. Tupelo* (1916) — *Miss.* —, 72 So. 895.  
L.R.A.1917B.

In *State v. Callahan* (1880) 55 *Iowa*, 364, 7 N. W. 603, the jury, without any consent or order, sealed up their verdict, handed it to the officer, and separated.

In *State v. Muir* (1884) 32 *Kan.* 481, 4 *Pac.* 812, 5 *Am. Crim. Rep.* 599, the jury rendered their verdict to the court on Sunday, in the absence of the accused and his counsel, and without their having been called; and at the opening of the court on the following day, the accused asked the court to recall the jury and allow him the opportunity of having the jury polled in his presence. This the court denied. The defendant also moved that the verdict be set aside and stricken from the files; that the jury be recalled, and directed to return a proper verdict,—all of which motions, as well as the motion for a new trial, were overruled, and exceptions taken; and on appeal the judgment was reversed.

*WOODS v. TUPELO*, ante, 344, was followed in *Hunt v. Tupelo* (1916) — *Miss.* —, 72 So. 895, where the court reversed a conviction upon a verdict, where it appeared from the record that the jury in the lower court returned a verdict of "guilty" to the clerk after court had adjourned for the noon hour, and in the absence of the judge, the defendant, and her counsel, without any agreement of the defendant or her counsel that the verdict might be returned in such manner, or any agreement whatever with reference to the return of the verdict by the jury; nor did the defendant in any other way waive her presence when the verdict was returned.

Most of these cases, on examination, are grounded on the local written law. Thus, *State v. Callahan* (*Iowa*) and *State v. Muir* (*Kan.*) supra, rest on the right to poll the jury, which is statutory; and the decision on the question in *Wells v. State* (*Ala.*) supra, is probably to be referred to the same reason, particularly in view of what is said in *Stewart v. State* (*Ala.*) supra. The *Lyons Case* (*Ga.*) supra, seems founded on the constitutional provision that "no person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney or both," which has been reenacted in the Penal Code.

The two Mississippi cases, however, are rested (see *WOODS v. TUPELO*) generally on the "constitutional right to be present at every stage" of the trial, without referring to any particular enactment.

There are two other cases which may be referred to where it is not clear

whether the offense tried was a felony or not. In the North Carolina case the decision seems to have been on the general right of the accused to be present throughout; the Connecticut case gives no reason.

In *State v. Hurlbut* (1789) 1 Root (Conn.) 90, a prosecution for counterfeiting money, not characterized as a felony or misdemeanor, the court refused to receive the verdict where the accused was out on bail and did not appear when called, stating he must appear, "or there will be no propriety in receiving the verdict."

In *State v. Bray* (1872) 67 N. C. 283 (larceny, with a count for receiving), the verdict was guilty of receiving stolen goods knowing them to be stolen, and it was held that a verdict in a case subject to punishment in the penitentiary cannot be sustained, when rendered out of court, to the judge at chambers, in the absence of the prisoners and their counsel, and entered on the record, on the next day, in the absence of the jury and the prisoners. (Smith, Ch. J., states, in *State v. Kelly* (1887) 97 N. C. 411, 2 Am. St. Rep. 299, 2 S. E. 185, that "in the case of *State v. Bray* (N. C.) supra, the conviction was of an aggravated misdemeanor, punished with the same severity as the associated charge, of which the defendant was acquitted;" and the statutes seem to suggest that larceny was not then a felony.)

In *Davis v. State* (1860) 14 Ind. 358, in holding there was no error in receiving the verdict in the absence of the accused and his counsel, as it was voluntary, the court refers to the defendant's right of polling the jury, "or taking any other step that he might desire, upon the rendition of the verdict."

#### Record.

A verdict of misdemeanor will not be set aside as given in the absence of the accused, where contrary to the record. (Suggested in *Rex v. Ladsingham* (1871) T. Raym. 193, 83 Eng. Reprint, 101, supra.) An inference that a prisoner was not present in court, at the time the verdict of a jury against him was received, will not be permitted to overcome the legal presumption that everything was rightly done in court. (Welsh v. State (1890) 126 Ind. 71, 9 L.R.A. 664, 25 N. E. 883.) The presumption obtains that when the presence of a defendant on a misdemeanor trial is once shown it continues until the verdict is

received. (*Feddern v. State* (1907) 79 Neb. 651, 113 N. W. 127.)

#### —statute.

In Missouri, in misdemeanor cases, it is provided by the statute that where the presence of the defendant is once shown by the record, it will be presumed "in the absence of all evidence in the record to the contrary that he was present during the whole trial," and thus at the verdict. *State v. Finley* (1911) 162 Mo. App. 134, 144 S. W. 120.

#### Miscellaneous.

In *Davis v. State* (1860) 14 Ind. 358, supra, it was held that there was no error in receiving the verdict in the absence of the accused, who was not called, nor his counsel, where the court directed the jury to cause the bailiff to ring the courthouse bell whenever they should have agreed upon a verdict, and informed them that upon the ringing of the bell the judge would appear in court and receive their verdict. The court then adjourned until nine o'clock next morning. About seven o'clock the next morning, the jury having agreed, the courthouse bell was rung, and the judge repaired to the court room and received the verdict.

In *Gaussin v. State* (1910) 174 Ind. 583, 92 N. E. 651, it was held that there was no second jeopardy in a conviction entered in a verdict for the state under these circumstances, disclosed by the record: When the jury returned their verdict, the defendant was not present in court. His attorney was there, as was also the prosecuting attorney. The verdict was handed to the clerk, read in open court, the jury duly polled by the court, and each answered that the verdict as read was his verdict. The absence of the defendant being noted, the prosecuting attorney objected to the receiving of the verdict, whereupon the court requested the clerk to hand the verdict back to the jury; which being done, the jury was directed to retire to its room therewith. The defendant was at once brought into court; thereupon the jury was again brought in, and presented to the court as its verdict the same document, or verdict, as before, which was received by the court as the verdict in the case, and the jury was then discharged. The court said: "There was but one receipt of the verdict by the court. Its order to the jury to return to its room with the paper first presented was a refusal by the court, for a sufficient reason, to receive the verdict at that time."

It is proper when no judgment has been entered to move for the setting aside of the verdict. *Lyons v. State* (1909) 7 Ga. App. 50, 66 S. E. 149, supra.

This note does not include the general question, whether trials for misdemeanors may be had in the absence of the defendant, but reference may be had, for example, to the following cases, where that question was considered: *Slocovitch v. State* (1871) 46 Ala. 227; *Henderson v. Murfreesboro* (1915) 119 Ark. 603, 178 S. W. 912; *Lawn v. People* (1888) 11 Colo. 343, 18 Pac. 281; *State v. Young* (1892) 86 Iowa, 406, 53 N. W. 272; *Steele v. Com.* (1835) 3 Dana (Ky.) 84; *Canada v. Com.* (1840) 9 Dana (Ky.) 304; *Com. v. Cheek* (1863) 1 Duv. (Ky.) 26; *Sharp v. Com.* (1895) 16 Ky. L. Rep. 840, 30 S. W. 414; *Payne v. Com.* (1895) 16 Ky. L. Rep. 839, 30 S. W. 416; *Walston v. Com.* (1907) 31 Ky. L. Rep. 378, 102 S. W. 275, on rehearing (1907) 32 Ky. L. Rep. 535, 106 S. W. 224; *Ehrlich v. Com.* (1909) 131 Ky. 680, 115 S. W. 797; *Veal v. Com.* (1915) 162 Ky. 250, 172 S. W. 501; *Corbin v. State* (1911) 99 Miss. 486, 55 So.

43; *Haggett v. State* (1911) 99 Miss. 844, 56 So. 172; *State v. Peacock* (1887) 50 N. J. L. 34, 11 Atl. 270; *People v. Wilkes* (1850) 5 How. Pr. (N. Y.) 105; *Stuart v. State* (1911) 6 Okla. Crim. Rep. 27, 115 Pac. 1026; *Anderson v. State* (1911) 6 Okla. Crim. Rep. 606, 116 Pac. 1134; *State v. Lucker* (1893) 40 S. C. 549; *State v. Spray* (1906) 74 S. C. 443, 54 S. E. 600; *State v. Rabens* (1907) 79 S. C. 542, 60 S. E. 442, 1110; *Love v. State* (1913) 71 Tex. Crim. Rep. 259, 158 S. W. 532; *Shiffett v. Com.* (1894) 90 Va. 386, 18 S. E. 838.

In *Garman v. State* (1888) 66 Miss. 196, 5 So. 385, cited in the opinions in *WOODS v. TUPELO*, ante, 344, the absence was not, apparently, at the time of rendering the verdict.

It may be noted that the quotation in the dissenting opinion in the principal case from *State v. Shepard* (1859) 10 Iowa, 126, was an obiter statement and made on the authority of *Hughes v. State* (1857) 4 Iowa, 554, where it was held that by statute judgment could be rendered in misdemeanor in the defendant's absence. B. B. B.

#### OKLAHOMA SUPREME COURT.

RELIABLE MUTUAL HAIL INSURANCE COMPANY, Plff. in Err.,

v.

LIZZIE ROGERS, Special Admr., etc., of John Rogers, Deceased.

(— Okla. —, 160 Pac. 914.)

#### Pleading — wrongful attachment.

1. In a petition to recover damages for the wrongful issue of an attachment, it is not necessary to aver the want of probable cause for the suing out of the attachment, or a determination of the action in which the attachment was issued.

For other cases, see *Pleading*, II. 1, in *Dig.* 1-52 N. S.

#### Damages — wrongful attachment.

2. Actual damages only for mere wrongful attachment may be recovered in an action against the plaintiff therein, independent of the undertaking required by § 4070, Laws 1893 (§ 4814, Rev. Laws 1910), and without allegation or proof that the same

Headnotes by BOWLES, C.

**Note.**—The want of probable cause to believe the alleged ground of attachment as a condition of an action for a wrongful attachment is treated in the *Vesper v. Crane Co.* L.R.A.1915A, 541.

The right to exemplary damages in an action for malicious prosecution or for abuse of process in suing out attachment for col-

was sued out maliciously or without probable cause.

For other cases, see *Damages*, III. g, in *Dig.* 1-52 N. S.

#### Pleading — wrongful attachment — punitive damages.

3. If exemplary or punitive damages are sought in an action for wrongful attachment against the party instituting the attachment proceedings, both malice and want of probable cause must be alleged and proved.

For other cases, see *Pleading*, II. 1, in *Dig.* 1-52 N. S.

(January 4, 1916.)

**E**RROR to the District Court for Kingfisher County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged wrongful attachment of certain property. Affirmed on condition.

The facts are stated in the Commissioner's opinion.

Messrs. Parker & Simons and F. L. Boynton for plaintiff in error.

lection of debt only is discussed in the note to *International Harvester Co. v. Iowa Hardware Co.* 29 L.R.A.(N.S.) 272.

For loss of profits as element of damages for wrongful attachment, see notes to *Wallace v. Pennsylvania R. Co.* 52 L.R.A. 33, and *Wellington v. Spencer*, 46 L.R.A.(N.S.) 470.

Messrs. Bradley & Bradley, for defendant in error:

Plaintiff was entitled to actual damages by merely showing that the attachment was wrongful; in order to entitle her to exemplary damages, she would have to show that the action was maliciously started or maintained.

McLaughlin v. Davis, 14 Kan. 168; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786; Wiley v. Keokuk, 6 Kan. 94; Hoge v. Norton, 22 Kan. 374; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Dow v. Julien, 32 Kan. 576, 4 Pac. 1000, 4 Cyc. 853, 874; Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253; Clark v. Wilcox, 31 Tex. 322; Brown v. Tyler, 34 Tex. 168; Hughes v. Brooks, 36 Tex. 379; Harris v. Finberg, 46 Tex. 96; Shaw v. Brown, 41 Tex. 449; Rice v. Miller, 70 Tex. 613, 8 Am. St. Rep. 630, 8 S. W. 317; Ellis v. Bonner, 80 Tex. 198, 26 Am. St. Rep. 731, 15 S. W. 1045; Gregory Grocery Co. v. Beaton, 10 Kan. App. 256, 62 Pac. 732; Tootle v. Kent, 12 Okla. 674, 73 Pac. 310; Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57; Overton v. Simon Furniture Mfg. Co. — Okla. —, 151 Pac. 215; Morris v. Shew, 29 Kan. 661; Schwartzberg v. Central Ave. State Bank, 84 Kan. 681, 115 Pac. 110.

Bowles, C., filed the following opinion:

This is an action commenced by defendants in error against the plaintiff in error to recover damages for wrongful attachment. A complete history of the case is as follows:

Plaintiff in error, defendant below, instituted proceedings against defendants in error, plaintiffs below, jointly as husband and wife, to recover judgment upon a promissory note signed by the husband alone. Attachment proceedings were caused to issue, and a crop of cotton growing upon the homestead of defendants in error was attached. Garnishment proceedings were also instituted against defendants in error jointly, and money was garnished in the name of the husband. The homestead was in the name of the wife. It seems that no proceedings were taken to dissolve the attachment. The main case, however, was determined after two trials in favor of defendants in error. Plaintiff in error appealed to the district court, where a trial was had, and again judgment was rendered for defendants in error. After the termination of the suit in the district court of Kingfisher county, the action before us was instituted in the district court of Kingfisher county for wrongful attachment, and defendants in error recovered a judgment; hence this appeal.

The errors complained of by plaintiff in L.R.A.1917B.

error, and relied upon for a reversal of this case, will be considered in the order referred to in plaintiff in error's brief. Plaintiff in error complains of instruction No. 13, given by the court, wherein he instructs the jury in substance that if the attachment proceedings were wrongful, the defendants would be entitled to recover such damages as were the proximate result of such wrongful attachment, and also told the jury in the same instruction that the want of probable cause was not a necessary element in determining whether or not the attachment proceedings were wrongful.

From our investigation of plaintiffs' amended petition, we find that they predicated their cause of action upon the wrongfulness of the attachment proceedings. It is true that an allegation appears in the amended petition that the affidavit for attachment was sworn to without any probable cause therefor. The attachment affidavit, however, was not the only basis of the suit. The suit is based upon the wrongful attachment, including all the proceedings which brought about and caused an unlawful and wrongful taking and converting of the property of defendants in error, and the petition, taken as a whole, states a cause of action for wrongful attachment. The court, however, gave instructions which would lead us to believe that he considered the case one for malicious prosecution; consequently the instruction complained of squarely contradicts the instruction given by the court upon the theory that the cause of action was one for malicious prosecution; in other words, he tells the jury in instruction No. 1: "In order for the plaintiff to recover it is necessary for the plaintiff to prove each and every one of the following four things which are essential to sustaining their cause of action as set forth in the petition: First. That the attachment and garnishment process was sworn out and levied on the plaintiffs' property and money by the defendant. Second. That this was done with malice. Third. That it has been legally terminated in favor of the plaintiff. Fourth. That the institution of these proceedings was without probable cause."

This can be accounted for upon one hypothesis alone: The vigilant and determined effort on the part of the plaintiff in error to transform a case of wrongful attachment into one for malicious prosecution. In a suit for malicious prosecution, four elements must combine: The termination of the main case, damages, malice, and want of probable cause. In a suit for wrongful attachment it was only necessary to allege that the attachment was wrongful and the resulting damages. In the event exemplary



or punitive damages are sought, malice and want of probable cause are necessary allegations.

It is strenuously insisted by counsel for plaintiff in error, and not without authority, that when an attachment is sued out and levied upon the property of the defendant in an action, and the plaintiff therein has failed to maintain his action, two remedies, and only two, are open to the attachment defendant; he may sue upon the undertaking on attachment, or maintain an action for malicious prosecution. We cannot agree with this contention. The dissolution of the attachment proceedings gives the right of action, and it is not necessary to wait until the termination of the main action before instituting proceedings for redress. This being the law, upon the dissolution of the attachment, the aggrieved party may elect to sue upon the bond or waive the bond and sue the attaching plaintiff for wrongful attachment. If the proceedings were malicious and instituted without probable cause, the defendant can await the termination of the main action and sue for malicious prosecution.

Justice Brewer, in *McLaughlin v. Davis*, 14 Kan. 168, speaking of the defendant's right to sue for wrongful attachment and to sue attaching plaintiff, uses this language: "It is insisted that 'the petition should have averred want of probable cause for the suing out of the order, and the determination of the attachment suit.' Neither of these is necessary. A party is entitled to an attachment only when certain facts exist. . . . If the facts do not exist, the attachment is wrongfully issued, and the party causing it to issue is liable for all the damages actually sustained. Nor is it necessary in such case to set out or sue on the undertaking. If the surety in the undertaking is liable, a fortiori the principal is, and that, not by reason of the undertaking, but of the act for which it was given. Nor need the determination of the attachment suit be averred. The attachment is but ancillary to the action in which it was issued. It stands or falls without affecting the progress or termination of" the main case. "A party may have a just cause of action, but no right to an attachment; nor can he justify a wrongful attachment by a valid action."

This court, in *Overton v. Sigmon Furniture Mfg. Co.* — Okla. —, 151 Pac. 215, has held:

"An action at common law may be maintained for wrongful attachment against the plaintiff therein when the attachment is sued out maliciously and without probable cause, in which case, if the pleadings and evidence warrant it, both actual and puni-

tive or exemplary damages may be recovered.

"In such case, by reason of § 4070, Stat. 1893 (§ 4814, Rev. Laws 1910), actual damages only may be recovered for the mere wrongfulness of the attachment and without regard to either malice or probable cause.

"Actual damages only for mere wrongful attachment may be recovered in an action against the plaintiff therein independent of the undertaking required by § 4070, Stat. 1893 (§ 4814, Rev. Laws 1910), and without allegation or proof that the same was sued out maliciously or without probable cause."

We therefore conclude that the instruction complained of stated the law correctly, and that the giving of the same was not error. In coming to this conclusion we have thoroughly considered the authorities cited by plaintiff in error sustaining the opposite view, but we see no reason why we should depart from the former holdings of this court.

The instructions of the court, however, predicated upon the theory that the action was one for malicious prosecution, were erroneous, but plaintiff in error is not in a position to complain of the giving of them, because they were given at the request of plaintiff in error, and, under our theory of the case, these instructions, if followed by the jury, had the effect to add an additional burden to the plaintiffs below, which could in no wise adversely affect plaintiff in error, but would militate in its favor.

Plaintiff in error next complains that the cause of action of defendant in error was barred by the statute of limitations, citing our statute that "actions on a foreign judgment, libel, slander, assault, battery, malicious prosecution, and false imprisonment, must be instituted within one year after the cause of action accrues."

This being an action for wrongful attachment, and not for malicious prosecution, the statute of limitations would not run in any event for a period of three years, and three years not having elapsed from the termination of the attachment until the suit for wrongful attachment was instituted in the district court, the statute has not run, and the contention of plaintiff in error in this regard is without avail. This being the law, a construction of § 5397, *Harris-Day Code*, pertaining to appeals from justice court, is unnecessary in determining whether or not, by virtue of the appeal, the attachment proceedings were taken to the district court. Under the evidence and facts adduced at the trial of the case at bar, plaintiff in error acts upon the assump-

tion, when the appeal was taken in the main case, the attachment proceedings were also appealed. The constable, having charge of the property, continued to retain it until the case was disposed of in the district court, and no instructions were received by him from the justice of the peace or plaintiff in error here to release said property; the damages suffered and the expense incurred in defending the attachment were the same and the liability of plaintiff in error unchanged.

Plaintiff in error also urges that the court erred in permitting evidence to go to the jury relative to the damage to the cotton growing upon the homestead of defendants in error; said homestead being in the name of the wife. That plaintiffs below could not sue jointly for damages to the cotton, even though the attachment was wrongful. Under our law, the homestead is for the benefit of the family, and the husband, in this instance, being a member of the family, and having possession of the cotton by reason of his homestead relation, and the fact that he had produced it, as shown by the evidence, inclines us to the opinion that he had such a special interest, along with his wife, as to permit him to be joined with her to recover for the damages complained of.

Instructions numbered 9, 10, 11, 12, 13, 14, and 16, given by the court, are claimed to be erroneous and prejudicial to the rights of the plaintiff in error. Instructions Nos. 9, 11, and 12 were given by the court, we imagine, to counteract the theory maintained by the defendant in the court below that the appeal from the justice of the peace having been erroneously taken to the district court, the district court having no jurisdiction of appeals from justices of the peace at the time, was void, and the plaintiff in error could not be held for damages accruing to the defendant in error after the matter had been appealed to the district court, and the contention of plaintiff in error that the suit for wrongful attachment must be predicated upon the bond given in the attachment proceedings in the first instance.

Plaintiff in error, having invoked the jurisdiction of the district court, and caused a trial to be had therein, is estopped from denying the liability for injuries done by reason of its wrongful attachment. Instructions of this character are often necessary, that the jury may be advised in such a way as to give them a correct understanding of the law of the case, and in order to prevent them from giving an improper effect to the evidence and argument of counsel. In the same connection, instruction No. 10 advises the jury of the

admitted facts in the case. We fail to see how this instruction could operate to prejudice the rights of plaintiff in error.

Plaintiff in error also complains of instruction No. 16, which reads as follows: "You are instructed that attorneys' fees and expenses, incident to the trial of said former proceedings in attachment the fair, reasonable value of the time expended by reason of the same and all property lost or destroyed by reason of the same, if wrongful, and while such property was under attachment, are elements of actual damages; in the event you find that the defendant company maliciously caused the issuance, levy, and maintenance of said attachment in said former proceedings, and that the plaintiffs herein suffered a loss of credit by reason of such malicious conduct on the part of the defendant company, you will allow the plaintiffs damages for such loss of credit."

In order, however, to discuss instruction No. 16, it will be necessary to understand instruction No. 15, which reads as follows: "You are also instructed that if you find that the order of attachment and said attachment proceedings were sued out or maintained maliciously and without probable cause therefor, you may also award to the plaintiff such exemplary damages as may be just and reasonable, in addition to such actual damages as you may allow them under the instructions heretofore given you by the court. Exemplary damages, also called vindictive or punitive damages, are given by way of example and by way of punishing the defendant."

For wrongful attachment, plaintiffs below were entitled to have the jury instructed, as a measure of damages, that they were entitled to attorneys' fees, loss of time, loss of credit, and the reasonable value of the property destroyed or taken under the attachment and of which they were ultimately deprived. The instruction complained of tells the jury that before it could consider loss of credit, they must find that the prosecution was carried on maliciously. This instruction was wrong, as to the necessity of showing malice in order to recover for loss of credit, and in not admonishing the jury that it could not consider remote, speculative, or conjectural damages; following *Tootle v. Kent*, 12 Okla. 674, 73 Pac. 310. But the instructions militated to the advantage of plaintiff in error, and it will not be heard to complain of the error here. Instruction No. 15 was a correct statement of the law, so far as exemplary or punitive damages are concerned; the better line of decisions holding that even in a suit for wrongful attachment, before punitive or exemplary damages can be claimed, both

malice and want of probable cause must not only be proven, but pleaded.

The theory of instruction No. 18, so far as the item of loss of credit is concerned, is based upon malice. The jury was instructed that it must first find malice before the loss of credit can be taken into consideration. We have examined the evidence and fail to find where the defendant suffered any loss of credit other than in his own imagination, and we do not believe the instruction was proper, unless there had been some evidence upon which to base it. However, the instruction seems to have been given upon the theory that unless there was malice and lack of probable cause, loss of credit could not be taken into consideration; this being true, we are strongly inclined to the opinion that both the court and jury had in mind that loss of credit could only be considered in awarding punitive or exemplary damages.

The jury was directed to specify the amount of exemplary and punitive damages in its verdict. This they did, and returned a verdict in the sum of \$280 for punitive damages, and we believe the punitive damages as returned by the jury, were based upon the item of damages for loss of credit. There being no evidence before the jury that would justify the court in submitting to them the item of loss of credit as an element of damages, the \$280 judgment for punitive damages should be remitted. Complaint is made on the part of counsel for plaintiff in error that counsel for defendant in error in the court below, throughout the entire trial and proceedings, were insinuating, captious, and, by a series of questions, both in direct and cross-examination, were endeavoring to prejudice the jury against the plaintiff in error because it was an insurance company and a corporation.

A reading of the record convinces us of this truth, and such proceedings should not be countenanced, and the trial judge, when

such conduct is called to his attention, should be prompt in admonishing counsel of their duty in that regard; yet we cannot say in this case that the jury was influenced in its verdict on account of such conduct.

Upon the whole, we believe that the verdict of the jury, with the modification made in this opinion, does substantial justice. That the attachment in the first instance was wrongful, cannot be gainsaid. The verdict of \$920 as actual damages suffered by the defendants in error on account of the wrongful attachment included the expense of counsel, witnesses, loss of time for two trials before the justice of the peace of Hennessey township, and the trial in the district court of Kingfisher county. The defendants in error were required to travel long distances and appear in court several times. In addition to this, 20 acres of cotton was attached, and, according to all of the evidence, entirely destroyed. The testimony of several witnesses, qualified to give evidence of the value of the cotton destroyed, estimated the same to be worth from \$500 to \$700, after paying the expenses of picking and hauling to market. We believe the judgment, under the evidence, was no more than a fair and reasonable estimate of the actual damages sustained.

Finding no prejudicial error in the record, except as indicated, we recommend that upon the defendants in error agreeing to remit \$280 of the judgment, the cause be in all things affirmed. In the event defendants in error refuse or fail to remit the said \$280, we recommend that the cause be reversed and remanded, with directions to grant a new trial.

Per Curiam:

Adopted in whole.

Petition for rehearing denied November 14, 1916.

#### WASHINGTON SUPREME COURT. (In Banc.)

STATE OF WASHINGTON EX REL. PORT  
OF SEATTLE et al.

v.

SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR KING  
COUNTY et al.

(— Wash. —, 160 Pac. 755.)

**Municipal corporations — use of public  
funds — defeat of statute.**

A corporation created by the legislature  
L.R.A.1917B.

for governmental and business purposes has no power to use public funds raised by taxation to secure a nullification, by means of a referendum, of a statute increasing the number of its commissioners and limiting the amount of its bonded indebtedness.

For other cases, see *Municipal Corporations*,  
II. a, in Dig. 1-52 N. S.

(November 4, 1916.)

**Note.** — For power of municipal corporation or governmental body to use public funds to promote the passage, or to secure the defeat, of a law, see annotation following this case, post, 358.

**P**ROCEEDING by the State to review an order of the Superior Court for King County enjoining relators, in an action against them, from expending or causing to be expended certain public funds for the purpose of defeating the operation and effect of a proposed statute increasing the number of its commissioners and limiting the amount of its bonded indebtedness. **Affirmed.**

The facts are stated in the opinion.

Mr. C. J. France, for plaintiffs:

It is not ultra vires for representatives of a municipal corporation to expend public funds to present arguments to a legislative body in respect to pending legislation which affects such corporation.

Farrel v. Derby, 58 Conn. 224, 7 L.R.A. 776, 20 Atl. 460; State ex rel. Hill v. Bridges, 87 Wash. 260, 151 Pac. 490; Crawfordville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Torrent v. Muskegon, 47 Mich. 115, 41 Am. Rep. 715, 10 N. W. 132; State ex rel. Ellis v. Tampa Waterworks Co. 56 Fla. 858, 19 L.R.A. (N.S.) 183, 47 So. 358; Clark v. South Bend, 85 Ind. 276, 44 Am. Rep. 13; Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 953; Cooley, Const. Law, 6th ed. p. 163; Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633; Houlton v. Dunn, 60 Minn. 26, 30 L.R.A. 737, 51 Am. St. Rep. 493, 61 N. W. 698; Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Trist v. Child (Burke v. Child) 21 Wall. 441, 450, 22 L. ed. 623, 624; Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Denison v. Crawford County, 48 Iowa, 211.

Messrs. Halverstadt & Clarke and W. M. Whitney, for defendants:

Municipal powers depend upon express grant or necessary implication.

Martin v. Whitman County, 1 Wash. 533, 20 Pac. 599; State ex rel. Winsor v. Ballard, 10 Wash. 4, 38 Pac. 761; Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; Young v. State, 19 Wash. 634, 54 Pac. 36; Smith v. Lamping, 27 Wash. 624, 68 Pac. 195; Farwell v. Seattle, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; State ex rel. Hill v. Bridges, 87 Wash. 260, 151 Pac. 490; Stowe v. State, 2 Wash. 124, 25 Pac. 1085; State ex rel. Rochford v. Superior Ct. 4 Wash. 30, 29 Pac. 764; Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876; James v. Seattle, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84; Mather v. King County, 39 Wash. 693, 82 Pac. 121; State ex rel. Spring Water Co. v. Monroe, 40 Wash. 545, 82 Pac. 888; Linne v. Bredes, 43 Wash. 540, 6 L.R.A. (N.S.) 707, 117 Am. St. Rep. 1068, 86 Pac. 858, 11 Ann. Cas. 238. L.R.A.1917B.

Relators are without power to expend public funds raised by taxation for lobbying purposes.

James v. Seattle, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84; Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 52; Coolidge v. Brookline, 114 Mass. 592; Frankfort v. Winterport, 54 Me. 250; Westbrook v. Deering, 63 Me. 231; Henderson v. Covington, 14 Bush. 312; New London v. Brainard, 22 Conn. 553; Grant County v. Bradford, 72 Ind. 455, 37 Am. Rep. 174; Hooper v. Ely, 46 Mo. 505; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Claflin v. Hopkinton, 7 Gray, 502; Castner v. Minneapolis, 92 Minn. 84, 99 N. W. 361, 1 Ann. Cas. 934; Farmer v. St. Paul, 65 Minn. 176, 33 L.R.A. 199, 67 N. W. 990; Drake v. Phillips, 40 Ill. 388; Wasson v. Wayne County, 49 Ohio St. 622, 17 L.R.A. 795, 32 N. E. 472; Livingston County v. Weider, 64 Ill. 427; Hubbard v. Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477; Jackson County v. State, 155 Ind. 604, 58 N. E. 1037; State ex rel. Milton v. Dickenson, 44 Fla. 623, 60 L.R.A. 539, 33 So. 514, 1 Ann. Cas. 122; Institute for Education v. Henderson, 18 Colo. 98, 18 L.R.A. 398, 31 Pac. 714; State v. Commissioners, 54 Ohio St. 652, 47 N. E. 1117; Wilder v. Daniels, 53 Ohio St. 658, 44 N. E. 1150; Hutchinson v. Ozark Land Co. 57 Ark. 554, 38 Am. St. Rep. 258, 22 S. W. 173.

Mount, J., delivered the opinion of the court:

This is a proceeding to review an order of the lower court granting an injunction in the case of C. O. Qualheim, Plaintiff, v. The Port of Seattle and Robert Bridges, C. E. Remsberg, and Carl A. Ewald, as Port Commissioners of the Port of Seattle, Defendants.

The plaintiff in that case alleged that the legislature, in 1915, enacted a law amending the Port District Act of this state, being chapter 46 of the laws of that year. This amendment increased the number of port commissioners, and limited the bonded indebtedness of port districts of the first class. It is alleged that the port commissioners, for the purpose of defeating that enactment, are attempting to secure a nullification thereof by means of a referendum, and, for that purpose, the port commissioners have wrongfully, unlawfully, and without authority, expended large sums of the funds of said port district for the purpose of advertising, lobbying, and printing circulars, which have been scattered over King county and a considerable portion of the state; that the port commissioners, unless restrained from so doing, will expend other large sums of port funds for

the purpose of carrying on a political campaign against said chapter 46; and that, by reason of said unlawful expenditures, the rate of taxation in King county will be increased, and the taxpayers of King county will be compelled to repay the money so unlawfully expended. It is also alleged that the plaintiff is a resident and taxpayer of King county. An application was made to the court below for a restraining order. After a hearing upon that application, the superior court of King county, on the 18th day of October, entered an order enjoining the defendant port of Seattle and the port commissioners, their agents and servants, from expending, or causing to be expended, any of the funds of the port of Seattle for the purpose of defeating the operation and effect of chapter 46 of the Laws of 1915. This writ is to review that order.

The amendment to the Port District Act, being chapter 46 of the Laws of 1915, was made the subject of a referendum under the Constitution. It is now designated as referendum measure No. 8, to be printed on the official ballot, to be approved or rejected at the general election on November 7th of this year. By reason of the reference, this chapter has not yet become a law. This amendment is intended to increase the board of port commissioners from three to seven members, and provides that the total bonded indebtedness of any port of the first class shall be limited to 2½ per cent of the assessed valuation of taxable property in said district, but in no event shall the total bonded indebtedness ever exceed the sum of \$5,750,000.

The question presented is whether the board of port commissioners is authorized to expend public funds raised by taxation, to defeat proposed legislation affecting that corporation. It is contended by the relators that, while the port of Seattle is a municipal corporation, it is also a business corporation, and has the power to expend the money of the corporation to the best interest thereof. It is not contended, as we understand the brief of the relators, that there is any express provision in the law authorizing the port commission to expend money belonging to the corporation for political purposes, but it is argued, in substance, that, because this corporation is in the nature of a business corporation, engaged in commercial enterprises in competition with private individuals engaged in similar enterprises, and is conducting such business as an agency of the state, it has a right to expend its moneys in such way as the port commissioners deem for the best interest of the corporation; that, inasmuch as the powers of the corporation are gen-

eral in their character, the power is implied to the trustees to apply the money of the corporation as, in their opinion, will best promote the affairs of the corporation. There can be no doubt that a corporation exercising powers of the state possesses only those powers expressly granted, or such as are necessarily implied. The general rule is stated by Dillon on Municipal Corporations, vol. 1, at § 89, as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

In the case of Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655, this court said: "It is a well-settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment."

And in Young v. State, 19 Wash. 634, 54 Pac. 36, this court said: "It is well settled that public officers have, and can exercise, only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents."

See also Smith v. Lamping, 27 Wash. 624, 68 Pac. 195; Farwell v. Seattle, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130. In this latter case, it is said: "A municipal corporation is limited in its powers to those granted in express words, or to those necessarily or fairly implied in or incident to the powers expressly granted, and also to those essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. 4th ed. § 89. . . . It is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it. Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601. The doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations. 1 Smith, Modern Law of Mun. Corp. § 661. Upon this subject the supreme court of Minnesota has said: 'A different rule of law would in effect vastly enlarge the

power of public agents to bind a municipality by contracts not only unauthorized, but prohibited, by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

It is plain from these authorities that, unless the port of Seattle may be fairly implied to have the power to expend money in the way here proposed, it has no such authority. It is not claimed that there is any express provision authorizing the port of Seattle to expend money as is here attempted. The powers of the corporation, as defined by the act creating it (Laws 1913, chap. 62), are general in their character. They are stated as follows: ". . . To lay out, construct, condemn, purchase, acquire, add to, maintain, conduct, and operate any and all systems of sea walls, jetties, wharves, docks, ferries, canals, locks, tidal basins, and other harbor improvements, rail and water transfer and terminal facilities within such port district. . . ."

The port commissioners have, no doubt, implied authority to spend the money of the port for any of these purposes, but clearly the purpose for which this money is being spent is not and cannot be reasonably implied from the powers named. This corporation, the port of Seattle, is a creature of the state. It is in the nature of a municipal corporation engaged in the business of building wharves and docks and harbor improvements, and in operating and maintaining the same. Its powers are given by the state. If the state desires to limit those powers, the port itself and its commissioners have no special interest therein. They are simply agents of the state, and it seems absurd to say that an agent of the state may be permitted to expend money of the state for the purpose of defeating a proposed curtailment of the powers of that corporation by the state. No such power is expressly granted to the corporation, and it is not a necessarily or fairly implied incidental power to those expressly granted. It may be convenient for the port and the port commissioners to desire no change in its powers, but the curtailment of these powers, as is proposed, is clearly not indispensable, and for that reason alone the courts ought not to construe in favor of such corporations the power here sought to be exercised. In *James v. Seattle*, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84, this court held that the city of Seattle had no power to pay the expenses of councilmen on a visit to other cities to inform

themselves concerning waterworks, street paving, terminal facilities, street lighting, and other municipal matters. We there said: "And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power."

See also *Minot v. Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592; *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 231; *Henderson v. Covington*, 14 Bush, 312; *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639.

In this last-named case, it was said: "The question of local self-government is one which has engaged the attention of the courts since the formation of the Union. A few states have adopted the view that the municipalities have an inherent right to local self-government not dependent upon legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries from which our laws descended. This view is entertained by the courts of Indiana, Kentucky, and Michigan; while practically all the rest of the jurisdictions hold that municipal corporations have only such power as is conferred upon them by the legislature, and that the legislature, in the absence of constitutional inhibition, controls such municipalities absolutely. This is the view of the Supreme Court of the United States, which, in *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, held in substance that a municipal corporation was but a department of the state, and that the legislature could give it all the powers it was capable of receiving, or that it might deprive it of every power, leaving it a corporation in name only, and could create and recreate changes in its government as it chose. In addition to the overwhelming weight of authority, this is the view that has been taken by this court. In *McLean v. Shields*, 57 Wash. 617, 107 Pac. 835, in discussing the constitutionality of the State Aid Road Law and in commenting thereon, it was said: 'Our Constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the Constitution remain with the state and may be exercised by the legislature as the lawmaking power of the state. Rules and regulations for local county government

and control, except as otherwise provided for in the Constitution, are as much within the control of the state as those matters which are more general and state wide."

We are of the opinion, therefore, that the port of Seattle and its commissioners have not authority to expend the money of the corporation in an endeavor to defeat any law which has been passed by the legislature and referred to the people for approval or rejection. The approval or rejection of the amendment proposed to the port of Seattle is a matter of no concern to the port itself, or its commissioners. As stated above, this corporation is a branch of the state government, municipal in its character, and its authority is limited to the powers expressly granted or necessarily inferred from express grants. If the port commissioners may take the money of the port acquired by taxation upon property within the district or otherwise, for politi-

cal purposes, or purposes other than those for which the port was organized, then there is no limit upon the port commissioners in expending the money of the port. The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office, and because of that reason, use the funds of the port to insure their own election. We are clearly of the opinion that when the port was created no thought was held by any person that the money raised by the port could be used for political purposes, or any purpose other than for the direct use of the port and its business.

We find no error of the lower court in granting the injunction. The order is therefore affirmed.

Morris, Ch. J., and Main, Ellis, Holcomb, Chadwick, and Parker, JJ., concur.

**Annotation—Power of municipal corporation or governmental body to use public funds to promote the passage, or to secure the defeat, of a law.**

It would seem clear that if any efforts may properly be made by anyone before the legislature or its committees touching matters of legislation, that no general rule is to be made for or against the power of a municipal corporation to make such efforts, but that the question of power depends upon the particular case. The theory of some of the courts that a town has no interest in its existence or size does not compel us to say, for example, that a city is to remain silent while a railroad secures from the legislature the right to use its streets.

The courts have differed materially as to whether in particular cases a municipal corporation or governmental body has power to use public funds to promote the passage or to secure the defeat of a law.

The power was denied in the following cases as not being for an authorized corporate purpose:

Thus it has been held that there was no power—

—in a town to pay the expenses of a committee "for the purpose of preventing the annexation of the town, or any part thereof, to the city of Boston" *Coolidge v. Brookline* (1874) 114 *Mass.* 592 (holding also that no such power was implied in a statute providing that "whoever intends to present a petition affecting the rights of a city or town shall cause a copy to be served on the city or town" in the manner provided"); *1 L.R.A.* 1917B.

—in a town to incur expenses in opposing before a legislative committee a division of its territory. *Westbrook v. Deering* (1874) 63 *Me.* 231 (stating also that the question decided in *Frankfort v. Winterport* (*Me.*) *infra*, was that "the town, in its corporate capacity, cannot legally raise and expend money for the purpose of sending lobby members to oppose before the legislature a division of the town");

—in a town to provide for the expenses of a committee directed by a vote of the town to petition the legislature to annex the town to a city, and to appear with counsel to advocate the annexation. *Minot v. West Roxbury* (1873) 112 *Mass.* 1, 17 *Am. Rep.* 52;

—in a town to pay the expenses of a committee for appearing before the legislature and procuring the passage of an act authorizing the town to pay bounties. *Mead v. Acton* (1885) 139 *Mass.* 341, 1 *N. E.* 413, where the act procured was held unconstitutional;

—in a city to pay the expenses of agents for advocating legislation by the state legislature and by Congress authorizing the city to build a bridge over the Ohio river. *Henderson v. Covington* (1878) 14 *Bush* (*Ky.*) 312;

—in a county to oppose a bill requiring the county to pay a large sum to another county. *Colusa County v. Welch* (*Cal.*) *infra*.

See also *STATE EX REL. SEATTLE V. SUPERIOR CT.* ante, 354.

Where a town sent twenty delegates to the legislature to oppose the division of the town, and paid for their services, part before and part after the separation, it was held it could not recover any of the payment from the part of the town separated from it, nor could the part separated into a new town recover from the old town for any part of such payment made before the separation. *Frankfort v. Winterport* (1865) 54 Me. 250, *supra* (where the opinion is of great obscurity).

In *Henderson v. Covington (Ky.) supra*, the court said: "The construction of a bridge across the Ohio river, to connect the city of Covington with the neighboring city of Cincinnati, in the state of Ohio, was not, under the charter as it then existed, a part of the duty of the city council of Covington, nor was the legislation sought by the council necessary to enable it to perform its corporate duties or to accomplish the purposes for which the corporation was created. True, such an enterprise might be of very great advantage to the city by inviting population, enhancing the value of real estate, and in many other ways."

In some cases the decision has turned in whole or in part on the question of public policy.

In *Colusa County v. Welch* (1898) 122 Cal. 428, 55 Pac. 243, *supra*, it was held that an attorney could not recover of a county for services in securing the defeat of a bill whereby the county would have had to pay a large sum to another county, on two grounds: (1) that the contract involved personal solicitations and private interviews with members of the legislature, and hence was void as against public policy; and (2) because the board of supervisors had no power or duty to act in the matter. The court does not seem to hold that the case was within the constitutional provision that "any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying, which is hereby declared a felony."

In *Buchanan v. Farmer* (1916) 122 Ark. 562, 184 S. W. 33, it was held that an attorney may not recover from a county his expenses in "lobbying" a bill through the legislature, as such action contravened public policy.

In *Richardson v. Scott's Bluff County* (1899) 59 Neb. 400, 48 L.R.A. 294, 80 L.R.A.1917B.

*Am. St. Rep.* 682, 81 N. W. 309, it was held that an attorney could not recover against a county for procuring the passage of a bill reimbursing the county for the expenses of a criminal trial, under a contract by which the pay was contingent upon success, as such contract was illegal and void. In *Stroemer v. Van Orsdel* (1905) 74 Neb. 132, 4 L.R.A. (N.S.) 212, 121 *Am. St. Rep.* 713, 103 N. W. 1053, 107 N. W. 125, where no municipality was involved, the court modified the rule expressed in the *Richardson Case*.

Other cases take broader views of municipal powers.

Thus it has been held in Connecticut that the selectmen of a town may employ counsel to oppose before the general assembly a proposed division of the town. *Farrel v. Derby* (1889) 58 Conn. 234, 7 L.R.A. 776, 20 Atl. 460.

In *Meehan v. Parsons* (1916) 271 Ill. 546, 111 N. E. 529, reversing (1915) 194 Ill. App. 131, it was held that a city might properly pay its mayor his expenses in going to Washington and interviewing Senators and Congressmen in the endeavor to induce them to vote an appropriation for strengthening and repairing levees and embankments in and about the city. The court said: "The courts have not gone so far as to hold that in no event and under no circumstances is it proper to interview and importune members of a legislative body to enact certain legislation in which the party importuning them may be interested. The interests of the city of Cairo would undoubtedly be affected by whatever action Congress should choose to take in reference to the appropriation for the building of its levees. Should Congress refuse to appropriate any sum whatever, the whole burden of building and maintaining its levees would rest upon the city. That burden would be lightened by whatever appropriation Congress should see fit to make. The city, therefore, had the undoubted right to authorize its chief executive to appear before the various congressional committees and interview the members of Congress to urge upon them the claims of the city, and to advance any legitimate argument in favor of the passage of an appropriation bill for the relief of the city in this respect. Having the undoubted right to intercede with the members of Congress, and to appear before its committees through its authorized agent, it must follow that the city undoubtedly would have the right to pay the necessary and legitimate expenses of



its agent in presenting its claims to the members of Congress."

Where Congress had recognized the fact that a county was entitled to swamp lands within its borders, and further legislation by Congress became necessary to complete the matter, it was held competent for the county to employ an agent to bring the matter to the attention of Congress and obtain further legislation by proper means. *Denison v. Crawford County* (1878) 48 Iowa, 211, where the court said: "It was perfectly competent for the county to employ agents or attorneys for this purpose, and an agreement to pay them therefor is valid. Such agents may lawfully draft the petition to set forth the claim, attend to taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced." *Swayne, J., in Trist v. Child* (*Burke v. Child*) 21 Wall. U. S. 441, 22 L. ed. 623."

In the briefly reported case of *Arthur v. Dayton* (1883) 4 Ky. L. Rep. 831, it was held that a city has the right to employ, if necessary, a competent person to prepare an amendment to its charter, and to employ, if need be, such a person to attend before the proper committee of the legislature to show cause why the additional powers should be granted.

Where a town appointed a committee to apply to the legislature to get the court of common pleas to hold one term of that court in each year in the town, it was held that the town should pay for the expenses and services of the committee. *Bachelder v. Epping* (1854) 28 N. H. 354, where the court said: "A town is certainly as well able to pay its servants as an individual is; and if an individual, for the purpose of advancing his own interests, should employ a person to apply to the legislature to get the

court to be held in the town where he resided, and the agent should devote his time and money for that purpose, the principal would be bound to compensate him."

#### **Under statute.**

A town may employ and pay counsel for opposing the division of the town, and for representing the town generally in reference to such division, before a committee of the legislature, under a statute providing that a town "interested in a petition to the legislature may . . . authorize the employment of counsel to represent such town at any hearing before any committee of the legislature upon such petition: "Provided, however, that no expense shall be hereby authorized excepting such as would be incurred in presenting a case before the judicial courts." *Connolly v. Beverly* (1890) 151 Mass. 437, 24 N. E. 404.

The following cases are of interest as closely allied to the subject.

A town has no authority to pay expenses incurred before it was incorporated not provided for by its charter, including lobbying and other expenses of obtaining its charter. *Frost v. Belmont* (1863) 6 Allen (Mass.) 152.

The legislature may authorize the employment of an agent to prosecute claims on behalf of the state which require the procurement of legislation, for a fee contingent on his success. *Davis v. Com.* (1895) 164 Mass. 241, 30 L.R.A. 743, 41 N. E. 292.

A borough may not pay expenses of resisting the annulment of its charter in the court of quarter sessions. *Webster v. Hopewell* (1902) 19 Pa. Super. Ct. 549.

A city has not the power to pay printing expenses of those campaigning to make the city a state capital, as this is foreign to the purposes and objects of the corporation. *Shannon v. Huron* (1896) 9 S. D. 356, 69 N. W. 598.

B. B. B.

#### **OKLAHOMA SUPREME COURT.**

LE ROY E. WAUGH, Plff. in Err.,  
v.

W. J. DIBBENS et al.

(— Okla. —, 160 Pac. 589.)

**Courts — county — power to commit for contempt.**

1. A judge of the county court, while

Headnotes by RITTENHOUSE, C.  
L.R.A.1917B.

taking depositions, has power to commit a witness for contempt for refusing to answer a material question.

For other cases, see *Contempt*, III. b, in Dig. 1-52 N. S.

**Judge — personal liability.**

2. An action will not lie against a judicial officer for a judicial act, where there

Note. — The liability of a judicial officer to civil action for acts of a judicial nature is discussed in the note to *Broom v. Douglass*, 44 L.R.A.(N.S.) 164; and see also

is jurisdiction of the person and the subject matter, although it be alleged and proved that such act was done maliciously, or even corruptly.

*For other cases, see Judges, VI. in Dig. 1-52 N. S.*

**Same — inferior court.**

3. The same protection extends to judges of courts of inferior and limited as to those of general jurisdiction; the law exempts all judicial officers alike.

*For other cases, see Judges, VI. in Dig. 1-52 N. S.*

**Attorney and client — liability of attorney.**

4. Attorneys at law, in the exercise of their proper functions as such, are not liable for their acts, if such acts are in good faith and pertinent to the matter in question.

*For other cases, see Attorneys, II. a, in Dig. 1-52 N. S.*

(July 11, 1916.)

**ERROR** to the District Court for Logan County to review a judgment in defendants' favor in an action brought to recover damages for alleged wilful and malicious false imprisonment. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Joseph Wisby and Milton Brown for plaintiff in error.

Messrs. Dale & Blerer and O. O. Smith, for defendants in error:

An action will not lie against a judicial officer for false imprisonment, where such officer acts within the apparent scope of his judicial authority, no matter what the allegations of the petition may be.

Comstock v. Eagleton, 11 Okla. 487, 69 Pac. 955; Bradley v. Fisher, 13 Wall. 336, 20 L. ed. 646; Flint v. Lonsdale, 41 Okla. 448, 139 Pac. 268; Cooke v. Bangs, 31 Fed. 640.

The same exemption applies to an attorney which applies to a court.

Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355; Carpenter v. Ashley, 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601; Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Hollis v. Meux, 69 Cal. 628, 58 Am. Rep. 574, 11 Pac. 248; Lester v. Thurmond, 51 Ga. 118; Conley v. Key, 98 Ga. 115, 25 S. E. 914; Atlanta News Pub. Co. v. Medlock, 123 Ga. 719, 3 L.R.A. (N.S.) 1139, 51 S. E. 756; Morgan v. Booth, 13 Bush, 481; Stewart v. Hall, 83 Ky. 375; Mauleby v. Reifsnider, 69 Md. 164, 14 Atl. 505;

later cases Gordon v. District Ct. 44 L.R.A. (N.S.) 1078, and Rammage v. Kendall, L.R.A.1916C, 1295.

The liability of a judicial officer for libel or slander is considered in the note to Houghton v. Humphries, L.R.A.1915E, 1051. L.R.A.1917B.

Hoar v. Wood, 3 Met. 193; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; McLaughlin v. Cowley, 127 Mass. 316, affirmed in 131 Mass. 70; Hartung v. Shaw, 130 Mich. 177, 89 N. W. 701; Gilbert v. People, 1 Denio, 41; Ring v. Wheeler, 7 Cow. 725; Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; Dada v. Piper, 41 Hun, 256, 2 N. Y. S. R. 152; Marsh v. Ellsworth, 50 N. Y. 309; Sickles v. Kling, 60 App. Div. 515, 69 N. Y. Supp. 944; Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265; Sheller v. Gooding, 2 Jones, L. 175; Com. v. Culver, 1 Clark (Pa.) 361; Vausse v. Lee, 1 Hill, L. 197, 26 Am. Dec. 168; Davis v. McNees, 8 Humph. 40; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704; Jennings v. Paine, 4 Wis. 358; Com. v. Gotshalk, 13 Phila. 575; McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317; Burdette v. Argile, 94 Ill. App. 171.

Rittenhouse, C., filed the following opinion:

Le Roy E. Waugh brought an action against the Guthrie Gas, Light, Fuel, & Improvement Company for injuries alleged to have been received on account of an explosion. After the petition was filed, the defendant served notice to take depositions before Honorable J. C. Strang, judge of the county court of Logan county, at which hearing the plaintiff, Le Roy E. Waugh, was sworn as a witness and testified to certain matter. When asked as to the name of the physician, living in Missouri, who attended him during his injuries, he refused to testify, whereupon Frank Dale, attorney for the company, requested and procured an order, punishing him for contempt. The defendant was subsequently discharged by this court in Ex parte Waugh, 40 Okla. 188, 137 Pac. 105, wherein it was held that in cases of contempt, where a mandatory statute (§ 5061, Rev. Laws 1910) requires that the questions propounded be set out in the order of commitment, and such is not done, the commitment is void, and the prisoner should be discharged. On July 11, 1914, this action was brought against J. C. Strang, who was the judge of the county court of Logan county and issued the commitment, Frank Dale, who was the attorney for the company, for whom the depositions were taken for use in the case of Le Roy E. Waugh v. Guthrie Gas, Light, Fuel & Improvement Company, and W. J. Dibbens, who was general manager of said company, asking judgment in the sum of \$16,347, for an alleged false imprisonment, occasioned by his refusal to testify in the original action.

It is alleged that Frank Dale and W. J. Dibbens were present at the time the commitment was issued, advising, urging, so-

liciting, counseling, and procuring the court to cause the unlawful imprisonment, and that such wrongful acts were done wilfully, knowingly, maliciously, wantonly, and oppressively on the part of said defendants. At the close of the evidence the court sustained the demurrer of J. C. Strang on the ground that he was acting in a judicial capacity at the time the commitment was issued, and within the jurisdiction conferred upon him by law. The court instructed the jury to return a verdict in favor of the remaining defendants, on the ground that the proof failed to establish a cause of action against them. The evidence offered by the plaintiff in the instant case, which would, in the least, connect W. J. Dibbens with this controversy, was that he was the manager of the Guthrie Gas, Light, Fuel & Improvement Company, that he was in the court room at the time the commitment was issued, and that prior to the taking of the depositions he had sworn to an affidavit stating that the depositions were being taken in good faith. This evidence was insufficient to constitute a cause of action for false imprisonment, and the court properly instructed the jury.

The argument contained in the brief of plaintiff in error does not refer to any particular assignment of error, but we gather from such brief that there are three questions for our determination: (1) In taking depositions under authority of § 5075, Rev. Laws 1910, does the judge of the county court take the depositions as a judicial officer with power to commit for contempt, or merely as a ministerial act? (2) Will an action lie against a judicial officer for false imprisonment where such officer acts within the scope of his judicial authority, even though it is alleged that such imprisonment was done wilfully, knowingly, maliciously, wantonly, and oppressively? (3) Is an attorney at law, while acting in good faith, liable for damages for false imprisonment upon a showing that, while conducting a judicial hearing, he requested the court to punish a witness for contempt of court in refusing to answer a question which was material and pertinent to the issues involved in the suit?

We are asked to hold that the order committing the witness for contempt was without authority of law. Section 5075, Rev. Laws 1910, confers upon judges of courts of record authority to take depositions. Section 5057, Rev. Laws 1910, gives such officer power to punish a witness for contempt in refusing to answer as a witness, or to subscribe a deposition, when lawfully ordered. These identical sections were under consideration in 1898 in the case of *Ex parte Abbott*, 7 Okla. 78, 54 Pac. 319, L.R.A.1917B.

wherein it was held that a judge of the probate court had power to punish for contempt a witness who refused to be sworn or to give his depositions. It is insisted that under § 1, art. 7, of the Constitution, the judicial power of the state is vested in the senate, sitting as a court of impeachment, a supreme court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions, or boards inferior to the supreme court as may be established by law, and therefore the judges of courts of record have no judicial powers, other than those mentioned in subsequent sections of the Constitution. In this argument we cannot agree. The wording of the Constitution is practically the same as § 9 of the Organic Act, which was construed in the *Abbott Case*. That section provided that the judicial power of the territory was vested in a supreme court, district courts, probate courts, and justices of the peace, and in construing that section this court held that such courts and the judges thereof were by the Organic Act vested with judicial power, and it was further held that where, by constitutional provisions, judicial power is vested in certain courts, the judges thereof may, by legislative enactment, be authorized to perform acts that are in their nature judicial.

The evidence offered by the plaintiff disclosed that the officer taking the deposition had jurisdiction of the person and the subject matter, and, where this condition exists, a judicial officer is not liable in a civil action for false imprisonment for an erroneous exercise of judicial power. *Comstock v. Eagleton*, 11 Okla. 487, 60 Pac. 955; *Flint v. Lonsdale*, 41 Okla. 448, 139 Pac. 268. But it is contended that there was not only proof of an act in excess of jurisdiction, but proof that such act was done wilfully, knowingly, maliciously, wantonly, and oppressively. From the evidence we are not willing to say that such proof was made. If it be conceded, however, that the proof is sufficient to sustain the contention, the position is not well taken; an action will not lie against a judicial officer for a judicial act when there is jurisdiction of the persons and the subject matter, though it be alleged and proved that such act was done maliciously, or even corruptly. In *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, in discussing the question, Mr. Justice Field said: "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality or maliciously or corruptly, the protection essential to judicial independence would be

entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

And, again, in the same opinion, it is said: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made; and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

See also *Coleman v. Roberts*, 113 Ala. 323, 36 L.R.A. 84, 59 Am. St. Rep. 111, 21 So. 449; *Irion v. Lewis*, 56 Ala. 190; *Lacey v. Hendricks*, 164 Ala. 280, 137 Am. St. Rep. 45, 51 So. 167; *Broom v. Douglass*, 175 Ala. 268, 44 L.R.A.(N.S.) 164, 57 So. 860, Ann. Cas. 1914C, 1155; *Cooke v. Bangs* (C. C.) 31 Fed. 640; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80. From these cases and those collated in the notes thereto, it is obvious that upon existence or nonexistence of jurisdiction, and not upon malice or corruption, rests the question of immunity from liability from acts done in a judicial capacity; where there is jurisdiction of the person and of the subject matter, no civil liability can attach. In the case of *Flint v. Lonsdale*, supra, it was said: "A judicial officer will not be held liable in a civil action for the false imprisonment for an erroneous exercise of judicial power, nor for acting in excess of his jurisdiction, where he has jurisdiction over the person and subject matter, where he has not acted maliciously and corruptly."

And in so far as the expression, "where he has not acted maliciously and corruptly," is in conflict with this opinion, it is disapproved, as this question could only be pre-L.R.A.1917B.

sented where there is an entire want of jurisdiction and the good faith of the officer came into question. The Supreme Court of the United States in the case of *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285, used a similar expression, which was disapproved in *Bradley v. Fisher*, supra, wherein the court said that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts are not liable in civil actions for their judicial acts, even when such acts are alleged to have been done maliciously and corruptly.

The plaintiff advances the argument that while the foregoing rule may apply to judges of the courts of general jurisdiction, it does not apply to those of inferior and limited jurisdiction. In this we cannot concur. The same protection extends to judges of courts inferior and limited as to those of general jurisdiction; the law exempts all judicial officers alike. In *Robertson v. Hale*, 68 N. H. 538, 44 Atl. 695, it is said: "It is a general rule that courts and judges are not liable in civil actions for their judicial acts within the scope of their jurisdiction, and this protection extends to magistrates exercising an inferior and limited jurisdiction, as justices of the peace. For the purpose of securing a fearless and impartial administration of justice, the law exempts all judicial officers, from the highest to the lowest, from civil liability in the performance of their judicial duties within their jurisdiction; and, to guard against an oppressive abuse of legal authority, makes them liable to impeachment or indictment for official misconduct."

See also *Coleman v. Roberts*, 113 Ala. 323, 36 L.R.A. 84, 59 Am. St. Rep. 111, 21 So. 449; *Early v. Fitzpatrick*, 161 Ala. 171, 135 Am. St. Rep. 123, 49 So. 686; *Lund v. Hennessey*, 67 Ill. App. 233; *Broom v. Douglass*, 175 Ala. 268, 44 L.R.A.(N.S.) 164, 57 So. 860, Ann. Cas. 1914C, 1155; *Flint v. Lonsdale*, supra; *Johnston v. Moorman*, 80 Va. 131; *Comstock v. Eagleton*, supra.

We now come to the question of the liability of an attorney for an alleged false imprisonment. The facts as developed at the trial show that an action for damages caused by an explosion was pending against the Guthrie Gas, Light, Fuel & Improvement Company; that Frank Dale, the attorney representing such company, was attempting to take the deposition of the plaintiff in that case, for use in the subsequent trial, which resulted in a judgment against his client. That he had the right to take the plaintiff's deposition cannot be controverted. § 5048, Rev. Laws 1910, construed in *Ex parte Abbott*, supra, is ample authority for such proceeding. It became material

in the trial of the damage suit to ascertain the facts connected with the plaintiff's injuries, and the company through its attorney was attempting to elicit from the witness the name of the physician who attended him during his confinement resulting from such injuries. This the witness refused to answer; whereupon the attorney requested that he be punished for contempt. There was no evidence of bad faith or malicious motive. *Anderson v. Canaday*, 37 Okla. 171, L.R.A.1915A, 1186, 131 Pac. 697, Ann. Cas. 1915B, 714. He was merely representing his client in his capacity as an attorney at law, requesting an order which he was entitled to have, but which was held to be void because the order of commitment failed to show the question propounded to the witness, and that such question was pertinent and material to the issue in the action for damages. Upon a thorough examination of the authorities, we are convinced that the general rule is that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts, if such acts are made in good faith and pertinent to the matter in question; and when in the course of a judicial proceeding a witness refuses to answer a question which is pertinent and material to the issue involved, and the attorney requests that such witness be punished for contempt, the attorney is not liable in damages for false imprisonment. In the case of *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355, it is said: "It is a general rule that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients. The public interest demands this. If at-

torneys cannot act and advise freely and without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights. If not free to advise and defend those who seek their aid, the laws are made in vain. Injustice and oppression would rule high-handed in the land. The untrammelled freedom and zeal, no less than the learning and ability of the members of the legal profession, are necessary to make them what they really are,—the great bodyguard of men's rights in society. It is as necessary to the public zeal that they should be privileged from molestation by actions and suits in the courageous performance of their duty, as it is that the representatives of the people in the legislature or the judges of the court should be thus privileged. *Hastings v. Luak*, 22 Wend. 410, 34 Am. Dec. 330; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, 106 Eng. Reprint, 86, 19 Revised Rep. 301; *Wright v. State*, 18 Ga. 383; *Hunt v. Printup*, 28 Ga. 297; *Wigg v. Simonton*, 12 Rich. L. 563; *Hargrave v. Le Breton*, 4 Burr. 2423, 98 Eng. Reprint, 269, 9 Eng. Rul. Cas. 169;" *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Hollis v. Meux*, 69 Cal. 628, 58 Am. Rep. 574, 11 Pac. 248; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701; *Ring v. Wheeler*, 7 Cow. 725; *Moore v. Manufacturer's Nat. Bank*, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048.

The cause should therefore be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied October 31, 1916.

#### OKLAHOMA SUPREME COURT.

MANGOLD & GLANDT BANK, Plff. in Err.,  
v.

W. T. UTTERBACK.

(— Okla. —, 160 Pac. 713.)

**Bills and notes — guaranty — indorsement.**

1. When the payee of a negotiable promissory note transfers it by indorsing thereon, "Payment guaranteed. Protest waived,"

Headnotes by MATHEWS, C.

Note. — As to transfer of title to note by indorsement in form of guaranty, including the question whether the transferee is an "indorsee" entitled to protection against defenses good as between the L.R.A.1917B.

the purchaser is an "indorsee," within the rule protecting an innocent purchaser of such paper for value and before maturity against defenses good between the original parties.

For other cases, see *Bills and Notes*, V. b, 1, in Dig. 1-52 N. S.

**Same — character of indorsement.**

2. The tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases toward holding the same to be a commercial indorsement in due course.

For other cases, see *Bills and Notes*, III. b, in Dig. 1-52 N. S.

original parties, see notes to *Dunham v. Peterson*, 36 L.R.A. 232; *McNary v. Farmers' Nat. Bank*, 41 L.R.A.(N.S.) 1009; and *Ireland v. Floyd*, L.R.A.1915C, 661.

**Same — effect of indorsement.**

3. A simple indorsement by the payee of his name upon a note serves the double purpose both of transferring the title to the holder, and of charging the payee with the obligation to pay it in the event the maker, upon presentation, declines to pay it. *For other cases, see Bills and Notes, III. b, in Dig. 1-52 N. S.*

**Trial — judgment on pleadings.**

4. Where plaintiff declares upon an indorsed negotiable promissory note, and a copy of the note is attached to the petition, showing an undated indorsement, and defendant does not deny such indorsement under oath, or fails to plead facts showing that plaintiff took the note with knowledge of such infirmities as would operate to defeat it between the original parties, plaintiff is entitled to judgment upon the pleadings.

*For other cases, see Pleading, I. k, in Dig. 1-52 N. S.*

(January 11, 1916.)

**E**RROR to the Caddo County Court to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Randall U. Livesay for plaintiff in error:

As plaintiff had alleged, it was a purchaser in due course of business, for value, before maturity and without notice; the defenses set up were not available to defendant.

Showalter v. Webb, 42 Okla. 297, 141 Pac. 439; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; 1 Dan. Neg. Inst. 6th ed. §§ 769a, 770, p. 890; Clapp v. Cedar County, 5 Iowa, 15, 68 Am. Dec. 678; Bliss, Code Pl. 3d ed. p. 289, § 175; Draper v. Cowles, 27 Kan. 484.

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Lehman v. Press, 106 Iowa, 389, 76 N. W. 818; Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537; Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; 7 Cyc. 944 (b); Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Goetting v. Day, 87 N. Y. Supp. 510; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655; McCarthy v. Louisville Bkg. Co. 100 Ky. 4, 37 S. W. 144; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62; Atlas Nat. Bank v. Holm, 19 C. C. A. 94, L.R.A.1917B.

34 U. S. App. 472, 71 Fed. 489; St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank, 10 Colo. App. 339, 50 Pac. 1055; Coors v. German Nat. Bank, 14 Colo. 202, 7 L.R.A. 845, 23 Pac. 328; Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130; Rand v. Pantagraph Stationery Co. 1 Colo. App. 270, 28 Pac. 661; Merchants' Bank v. McClelland, 9 Colo. 608, 13 Pac. 725; Forbes v. First Nat. Bank, 21 Okla. 206, 95 Pac. 785; Vaught v. Miners' Bank, 27 Okla. 101, 111 Pac. 214; Murray v. Lardner, 2 Wall. 110, 17 L. ed. 857; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. ed. 645; Clark v. Evans, 13 C. C. A. 433, 27 U. S. App. 640, 66 Fed. 263; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934.

The maker of a negotiable instrument, procured through fraud, may be held liable to a purchaser for value before maturity, without notice, and the maker will not be allowed to set up the defense of fraud to relieve himself of the liability.

Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522; McMahon v. Thomas, 4 Cal. (Unrep.) 984, 39 Pac. 783; Bedell v. Her-ring, 77 Cal. 572, 11 Am. St. Rep. 307, 20 Pac. 129; Palmer v. Poor, 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984; Walters v. Palmer, 110 Ga. 776, 36 S. E. 79; Taylor v. Cribb, 100 Ga. 94, 26 S. E. 468; Highsmith v. Martin, 99 Ga. 92, 24 S. E. 805; Lamier v. Union Mortg. Bkg. & T. Co. 64 Ark. 39, 40 S. W. 466; Mulberger v. Morgan, — Tex. Civ. App. —, 34 S. W. 148; Hawkins v. Wilson, 71 Iowa, 761, 32 N. W. 416; First Nat. Bank v. Houseknecht, 121 Mich. 313, 80 N. W. 13; McCormick v. Warren, 74 Conn. 234, 50 Atl. 740; Ross v. Webster, 63 Conn. 64, 26 Atl. 476; Gillespie v. Rogers, 184 Pa. 488, 39 Atl. 290; Second Nat. Bank v. Morgan, 165 Pa. 199, 44 Am. St. Rep. 652, 30 Atl. 957; Hoats v. Aschbach, 160 Pac. 6, 28 Atl. 437; Draper v. Cowles, 27 Kan. 484.

Fraudulent representations as to the value of the consideration for which a negotiable promissory note is given may be shown in an action between the original parties, but such fraud is not a defense against an action by a bona fide holder for value.

Taylor v. Cribb, 100 Ga. 94, 26 S. E. 468; Grooms v. Olliff, 93 Ga. 789, 20 S. E. 655; Second Nat. Bank v. Morgan, 165 Pa. 199, 44 Am. St. Rep. 652, 30 Atl. 957; Clark v. Tanner, 100 Ky. 275, 38 S. W. 11; Stedman v. Rochester Loan & Bkg. Co. 42 Neb. 641, 60 N. W. 890; Franklin Phosphate Co. v. International Harvester Co. 62 Fla. 185, 57 So. 206, Ann. Cas. 1913C, 1247; Showalter v. Webb, 42 Okla. 297, 141 Pac. 439; Morrison v. Farmers' & M. Bank, 9 Okla. 697, 60 Pac. 273; Forbes v. First Nat. Bank, 21

Okla. 206, 95 Pac. 785; *Farmers' Bank v. Nichols*, 25 Okla. 547, 138 Am. St. Rep. 931, 106 Pac. 834, 21 Ann. Cas. 1160; *City State Bank v. Pickard*, 35 Okla. 243, 129 Pac. 38; *Wood v. Stickle*, 36 Okla. 592, 128 Pac. 1082; *McPherrin v. Tittle*, 36 Okla. 510, 44 L.R.A.(N.S.) 395, 129 Pac. 721; *Citizens' Sav. Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101; *Western Exch. Bank v. Coleman*, 38 Okla. 178, 132 Pac. 488; *First State Bank v. Tobin*, 39 Okla. 96, 134 Pac. 395; *Cedar Rapids Nat. Bank v. Bashara*, 39 Okla. 482, 135 Pac. 1051.

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration.

*Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Davies v. Wakelee*, 156 U. S. 680, 690, 39 L. ed. 578, 585, 15 Sup. Ct. Rep. 555; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790; *Smith v. Keeler*, 151 Ill. 518, 38 N. E. 250; *Davis & R. Bldg. & Mfg. Co. v. Dix*, 64 Fed. 411; *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Harris v. Chipman*, 9 Utah, 101, 33 Pac. 242; *Wyatt v. Henderson*, 31 Or. 48, 48 Pac. 700; *Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997; *Sandefur v. Hines*, 69 Kan. 168, 76 Pac. 444; *Stanton v. Barnes*, 72 Kan. 541, 84 Pac. 116; *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Holbrook v. Wight*, 24 Wend. 169, 35 Am. Dec. 607; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Wallace v. Minneapolis & N. Elevator Co.* 37 Minn. 464, 35 N. W. 268; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; *Donley v. Porter*, 119 Iowa, 542, 93 N. W. 574; *McDermott v. Mahoney*, — Iowa, —, 106 N. W. 925; *Frenzer v. Dufrene*, 58 Neb. 432, 78 N. W. 719; *State ex rel. Seth Thomas Clock Co. v. Cass County*, 60 Neb. 566, 83 N. W. 733; *Hixson Map Co. v. Nebraska Post Co.* 5 Neb. (Unof.) 388, 98 N. W. 872; *Powers v. Bohuslav*, 84 Neb. 179, 120 N. W. 942.

Mr. A. J. Morris for defendant in error.

Mathews, C., filed the following opinion:

In October, 1910, the defendant purchased from the Denver-Laramie Realty Company certain shares of stock in said company, and executed his note to said company in payment for same. On August 14, 1911, the note was renewed, and afterwards transferred to the plaintiff in error. A copy of the note with indorsements is as follows:

\$1,000.00.

Denver, Colorado, August 14, 1911.

December 14, 1911, after date, I promise L.R.A.1917B.

to pay to the order of Denver-Laramie Realty Company one thousand & no /100 Dollars, for value received. Payable at First State Bank of Binger, Okl., with interest at 7 per cent, from maturity.

[Signed] W. T. Utterback.

Indorsed on back:

Payment Guaranteed. Protest waived.

The Denver-Laramie Realty Co.,

By A. J. Spengel, Treasurer.

Northwestern Land and Iron Co.,

By A. J. Spengel, Treasurer.

On October 10, 1912, suit was instituted on said note in the county court of Caddo county. The defendant answered by general denial, admitted the execution of the note, and alleged that the note was given for certain shares of stock in the Denver-Laramie Realty Company, but claimed that he was induced to sign the same through certain false and fraudulent representations upon the part of said company. Trial was had to a jury, verdict was returned for defendant, and plaintiff prosecutes this appeal.

Its first specification of error is stated as follows: "The court erred in overruling motion of plaintiff for judgment, for the reason that, as plaintiff had alleged it was a purchaser in due course of business, for value, before maturity, and without notice, the defenses set up were not available to defendant."

The defendant advances the following argument against the foregoing contention of plaintiff: "While the note is negotiable in form, the indorsement is in no sense a commercial indorsement. It is a guaranty of payment pure and simple; that is, the words, 'Payment guaranteed. Protest waived,' followed by the signatures of the two companies, mean that the companies guarantee the payment of the note and waive the protest thereof. The indorsement, amounting to a guaranty of payment, gives the plaintiff in error no standing as a bona fide holder of the note, but it holds the same subject to all defenses which would be available as against the original payee."

If plaintiff's contention is correct that the said indorsement upon the note was a commercial indorsement, there being no allegations in the answer that plaintiff had notice of the alleged infirmity of the note, then plaintiff was entitled to judgment upon the pleadings.

In arriving at a decision on this point we are confronted with a chaotic conflict of opinions thereon, and, as far as our investigation has led us, we find that the courts of but few, if any, of the states, have been consistent in declaring on this proposition, and

our own court is in conflict thereon. The case of McNary v. Farmers' Nat Bank, 33 Okla. 1, 41 L.R.A. (N.S.) 1009, 124 Pac. 286, Ann. Cas. 1914B, 248, sustains plaintiff, and the case of Ireland v. Floyd, 42 Okla. 609, L.R.A.1915C, 661, 142 Pac. 401, sustains defendant. An instructive note to the case of Hendrix v. Bauhard, Ann. Cas. 1913D, 688, after giving a list of the states, including both Oklahoma and Kansas, which hold that a signed guaranty on the back of a note makes the guarantor liable as an indorser, states that the great weight of authority supports that view. In the case last cited there was written on the back of the note, "For value received we hereby warrant the makers of this note financially good on execution," which was followed by the signatures of the payees, and it was there held, if the note was negotiated before maturity to a bona fide purchaser for value, he would be protected from any defense the maker might have against the payees.

The leading case holding to this view is a North Dakota case, Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 36 L.R.A. 232, 57 Am. St. Rep. 556, and there the subject is also treated with an extended note which declares that the numerical weight of authorities support the decision in Dunham v. Peterson. The indorsement on the note in the Dunham Case was as follows: "For value received, I hereby guarantee the within note, waiving notice of protest and demand." Beneath this guaranty the payee signed his name. The court held therein that, when the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee within the rule protecting an innocent purchaser of such paper for value, before maturity, against defenses good between the original parties.

The case of Markey v. Corey, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493, presents an instance where an assignment was written on the back of the note, followed by the signatures of the payee of the note, and the court held the payee liable as an indorser.

The case of Pattillo v. Alexander, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646, is an exhaustive and well-considered one on the point under discussion, and, after reviewing the authorities thereon at great length, concludes that a guaranty written on the back of a negotiable promissory note, followed by the signature of the payee, ordinarily amounts to a commercial indorsement. Robinson v. Lair, 31 Iowa, 9; Kellogg v. Douglas County Bank, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587; 2 Dan. Neg. Inst. 6th ed. § 1781; Judson v. Gookwin, 37 Ill. 286; Green v. Burrows, 47 Mich. 70, 10 N. L.R.A.1917B.

W. 111; Russell & Co. v. Klink, 53 Mich. 161, 18 N. W. 627; State Nat. Bank v. Haylen, 14 Neb. 480, 16 N. W. 754; Mulen v. Jones, 102 Minn. 72, 112 N. W. 1048; German American Sav. Bank v. Hanna, 124 Iowa, 374, 100 N. W. 57; Dunham v. Peterson, supra; Elgin City Bkg. Co. v. Zelch, 57 Minn. 487, 59 N. W. 544; Childs v. Davidson, 38 Ill. 437; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254; Partridge v. Davis, 20 Vt. 499; 3 R. C. L. § 241, p. 1035; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482.

We are not unmindful of the fact that the case of Ireland v. Floyd, supra, is supported by a respectable line of authorities headed by the Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876. Other authorities to the same effect are found in Ann. Cas. 1913D, 695, 36 L.R.A. 232, and 67 N. W. 295. But we think the better reasoning and greater weight of authority is with the case of McNary v. Farmers' Nat. Bank, supra.

But, even if the case of Ireland v. Floyd, supra, was not opposed by the case of McNary v. Farmers' Nat Bank, supra, and by the weight of authority from other states, we are inclined to the view that it is in conflict with the negotiable instruments law of this state, adopted in 1909.

Section 4067, Rev. Laws 1910, so far as applicable, is as follows:

"Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply. . . .

"Sixth. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

Section 4088: "Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

Section 4107: "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Section 4109: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder



to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Section 4113: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It will be observed from § 4113 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution, and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions.

A simple indorsement by the payee of his name upon a note serves the double purpose both of transferring the title to the holder and of charging the payee with the obligation to pay it in event the maker upon presentation declines to honor it. But before the liability can be fixed against the indorser there must be: First, a demand made upon the maker of the note for payment; and, second, in case the same is not paid, notice must be given the indorser. The rule seems to be that a general guaranty is in law a general indorsement of the instrument, with a waiver of the condition precedent of a notice of nonpayment by the drawers. 3 R. C. L. § 371.

There is no contention but that in the case at bar the defendant is at least a guarantor. If he be a guarantor only, then he is not entitled to the legal rights of an indorser to be served with notice of nonpayment. Yet we find written upon the back of the instrument in controversy the very significant words "Protest waived." Why waive a right that the party did not have? It must be presumed that the parties did not intend to do a useless and unnecessary act when these words were written upon the back of the instrument, and the reasonable construction is that by the entire indorsement he became an indorser with the enlarged liability of being legally held to pay. L.R.A.1917B.

ment without notice of the dishonor of the note. Further, no one can fairly say that the intention of defendant not to be bound is clearly indicated from the words written upon the back of the instrument in controversy; in fact, the indication points the other way.

It will be admitted that, where the payee in a note makes a written assignment of the same on the back of the note, followed by his signature, he can with much better logic argue that such an act should be construed as an assignment only, and not a commercial indorsement, than can one who makes a guaranty in a similar way; yet in the recent case of *Farnsworth v. Burdick*, 94 Kan. 749, 147 Pac. 863, under the same negotiable instruments law as our own, the Kansas court held: "Under the negotiable instruments law (§§ 5247-5446, Gen. Stat. 1909), a writing in these words, 'I Here By assigne this note over to E. H. Farnsworth this the Nov. 1st, 1910,' signed by the payee, on the back of a negotiable promissory note, complete and regular on its face, accompanied by delivery to the person named in the writing, is an indorsement of the note; and one who takes the note in good faith, for value, before it is due, without notice that it had been previously dishonored, and who, at the time he takes it, has no notice of any infirmity in the note or defect in the title of the person negotiating it, becomes the holder thereof in due course, and holds it free from any defect of title of the payee, and free from defenses available to the maker against the payee, and may enforce payment of the note for the full amount thereof against the maker."

Therefore, holding, as we do, that the defendant was an indorser of the note in controversy, it appears that his answer was defective in two important particulars.

Section 4095, Rev. Laws 1910, reads as follows: "Except where an indorsement bears date after maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue."

Not only was there a presumption of law that the plaintiff became a bona fide holder before maturity, but it so averred in its petition, and defendant has failed to plead that plaintiff took the note in bad faith or had notice of any infirmity of the note. *Showalter v. Webb*, 42 Okla. 297, 141 Pac. 439.

Section 4759, Rev. Laws 1910, provides: "In all actions, allegations of the execution of written instruments and indorsements thereon, . . . shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

The plaintiff having alleged that the note was indorsed to it before maturity, for a valuable consideration, in due course of business, and a copy of said note having been attached to its petition, showing the indorsement, and the indorsement having not been denied under oath, it follows that plaintiff was entitled to judgment on the pleadings. See the case of *First Nat. Bank v. Vaughn*, 96 Kan. 402, 151 Pac. 1118.

The judgment will be reversed and remanded, with instructions to the trial court that, if defendant does not elect to amend his answer, to enter judgment upon the pleadings in favor of plaintiff; if the answer is amended, then to proceed in conformity with this opinion.

Per Curiam:

Adopted in whole.

# OKLAHOMA SUPREME COURT.

S. J. STRONG, Plff. in Err.,

v.

GEORGE W. DAY et al.

(— Okla. —, 160 Pac. 722.)

Officer — personal liability of county commissioner.

The individuals composing a board of county commissioners are personally liable to any person suffering damage thereby, and who is himself not guilty of contributory negligence, for their negligent failure to repair a county bridge under their care and supervision; there being sufficient public funds available for making such repairs. For other cases, see *Officers, II. c, in Dig* 1-52 N. S.

(October 24, 1916.)

**E**RROR to the District Court for Custer County to review a judgment sustaining a demurrer to a petition filed to recover damages for injury to plaintiff's property alleged to have been caused by defendants' negligent failure to repair a bridge. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. George T. Webster, for plaintiff in error:

Defendants were vested with an absolute, certain, and imperative duty.

*Mott v. Hull*, — Okla. —, L.R.A.1916B, 1184, 152 Pac. 92; *Jordan v. Davis*, 10 Okla. 329, 61 Pac. 1063; *Harris v. Carson*, 40 Ill. App. 147; *Hover v. Barkhoof*, 44 N. Y. 113; *Adsit v. Brady*, 4 Hill, 630, 44 Am. Dec. 305; *McCord v. High*, 24 Iowa, 336; *McCarthy v. Syracuse*, 46 N. Y. 194; *Clark v. Miller*, 64 N. Y. 628.

An administrative officer, though under a general duty to the public, is at the same time under a specific duty not to cause special damage to any members of the public by reason of his negligence.

Headnote by BURFORD, C.

Note. — The personal liability of highway officer for negligence is discussed in the note to *Mott v. Hull*, L.R.A.1916B, 1180. L.R.A.1917B.

*Mott v. Hull*, — Okla. —, L.R.A.1916B, 1184, 152 Pac. 92; *Tholkes v. Decock*, 125 Minn. 507, 52 L.R.A.(N.S.) 142, 147 N. W. 648; *Hanson v. Clinton*, 156 Wis. 147, 145 N. W. 646; 23 Am. & Eng. Enc. Law, 337; 29 Cyc. 1442, and notes; *Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420; *Hungerford v. Waverly*, 56 Misc. 186, 107 N. Y. Supp. 291; *Robinson v. Chamberlain*, 90 Am. Dec. 713, note; *Adsit v. Brady*, 40 Am. Dec. 305, note; *Anne Arundel County v. Duckett*, 83 Am. Dec. 557, note.

Mr. George C. Darnell for defendants in error.

BURFORD, C., filed the following opinion:

Plaintiff alleged that the individual defendants constituted the board of county commissioners of Custer county; that, as such, they were charged by law with the duty of repairing the public bridges in the county over 20 feet in length; that among such bridges was one constructed over Deer creek at a point particularly described, said bridge having been built by the county in 1910; that said bridge was upon an improved public road upon a section line laid out and improved by the county; that said bridge was being used as a county bridge on June 2, 1915; that on said day, while crossing the same with a loaded wagon, the plaintiff's work animals were killed by reason of the bridge falling down and precipitating them and their driver into the creek below. Many defects in the original construction of the bridge were set out, and it was further alleged that the beams and supports thereof had become rotten and decayed, and had been in such condition for more than seventeen months prior to the accident. The petition then states: "Which condition was unknown to plaintiff, but was well known to said defendants, as plaintiff verily believes and so charges, but if such fact were not known to them, their ignorance and want of knowledge relative to the rotten condition of said tiebeams and struts was due to their wanton negligence and want of care in looking after and trying to ascertain the true condition of said bridge; and said plaintiff alleges

that, if said defendants had given said bridges any attention, or had made the most casual examination of same with the end in view of ascertaining if the same was in good repair, they would have readily discovered that the same was in a dangerous condition and liable to collapse at any time, and this they wantonly and negligently failed to do. That the joints and ends of said beams where the struts entered against the shoulders became and were rotten and in a decayed and worthless condition, destroying the use and value of said bridge, and making it extremely dangerous to the traveling public, and liable to collapse at any time, and that the 8x8 beams extending over said piling at the ends thereof upon which rested the tiebeams became and were rotten and decayed and incapable of resisting the usual and ordinary weight of public travels; but these were so covered that their true condition was not capable of being readily discovered by the public, and could only be seen by making a careful inspection thereof; but these defects could have been readily ascertained by these defendants if they had attempted to inspect the same, or have caused the same to be inspected by any competent person by them employed, which duty rested upon them because of their official duties toward the public, and for the purpose of protecting the public from falling of said bridge."

It was further alleged: "That said defendants have at all times hereinafter mentioned had ample and sufficient money in their hands and under their control to repair the bridge hereinafter described."

The value of the animals killed was set out, together with a prayer for damages.

To the petition the individual defendants filed a general demurrer, which was by the court sustained. The Fidelity & Deposit Company, surety upon their official bonds, filed no pleading, and neither its rights nor liabilities are considered herein.

Considering this petition with all the reasonable intendments to be drawn therefrom, we are of the opinion that it states a cause of action. The American courts have widely divided upon the question of personal liability of road officers for negligent or wilful misfeasance or nonfeasance in the repair of the roads and bridges under their care. Some states have apparently taken different views upon the subject at different periods of their judicial history. The following cases will be found to be illustrative of the various holdings and reasons therefor: *Sussex County v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Livermore v. Camden County*, 29 N. J. L. 245; *Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 428; *New York v. Furze*, 3 Hill, 617; *Adsit v. Brady*, 4 L.R.A.1917B.

*Hill*, 632, 40 Am. Dec. 305; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Smith v. Wright*, 24 Barb. 170; *Hover v. Barkhoof*, 44 N. Y. 113; *Coleman v. Eaker*, 111 Ky. 131, 63 S. W. 484; *Lynn v. Adams*, 2 Ind. 143; *McConnell v. Dewey*, 5 Neb. 385; *Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468; *Tearney v. Smith*, 86 Ill. 391; *Allen v. Michel*, 38 Ill. App. 313; *Harris v. Carson*, 40 Ill. App. 147; *Skinner v. Morgan*, 21 Ill. App. 209; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697, 2 Am. Neg. Rep. 136; *Sells v. Dermody*, 114 Iowa, 344, 86 N. W. 325; *Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Calvert County v. Gibson*, 36 Md. 229; *Downes v. Hopkinton*, 67 N. H. 456, 40 Atl. 433; *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707; *Worden v. Witt*, 4 Idaho, 404, 95 Am. St. Rep. 70, 39 Pac. 1114; *Hathaway v. Hinton*, 46 N. C. (1 Jones, L.) 243; *McKenzie v. Chovin*, 1 McMull. L. 222. Upon the common law *Brooke's Abr. title Action on Case*, reviewing the Year Books, *Russell v. Devon*, 2 T. R. 698, 100 Eng. Reprint, 359, 1 Revised Rep. 585, 12 Eng. Rul. Cas. 694, and *Henly v. Lyme*, 5 Bing. 91, 130 Eng. Reprint, 995, 6 L. J. C. P. 222, 30 Revised Rep. 542, are often cited.

It appears to be not necessary to go into a discussion of these cases in view of the decision of this court in *Mott v. Hull*, — Okla. —, L.R.A.1916B, 1184, 152 Pac. 92. In that case certain township trustees were individually sued for damages arising from their negligently leaving an unguarded obstruction in a highway which they were repairing. It was there held that their duties in this regard were purely ministerial, and that for negligence in the performance thereof they might be held individually liable. This court said: "Where the duties of an officer are purely ministerial, he may be liable in damages to any one who can show he has suffered a special injury because of such officer's failure to perform or negligent performance of such duty."

Indeed, there is little conflict in the adjudicated cases upon the principle. It is in its application that diversity of opinion has arisen. The rule is tersely stated in *Amy v. Supervisors (Amy v. Barkholder)* 11 Wall. 136, 20 L. ed. 101: "The rule is well settled that, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

It must be taken as settled by *Mott v.*

Hull, *supra*, that the work of repairing roads—and bridges must rest in the same category—by public officers is ministerial in its nature, and likewise that the distinction between acts of misfeasance and nonfeasance in some of the cases does not exist in this state; for each is placed upon the same plane in the language above quoted. But one distinction is noted between the governing principles announced in *Mott v. Hull*, *supra*, and those to be applied in the instant case. In the *Mott* Case the officers sued were township officers, who pleaded that they “were charged by law with power and duty of repairing the highway.” Here the parties sued are county commissioners, and the point is made that the statutes of this state impose no absolute duty upon them to repair the bridges under their charge. We therefore pass to a consideration of the laws governing county commissioners in this regard. It is to be noted that there is no allegation that the bridge in question was upon a “state road,” and that therefore the provisions of the Act of 1915 peculiar to the duties of the various officers having supervision of such roads are not considered.

By § 7581, Rev. Laws 1910:

“All bridges more than 20 feet long shall be under the control and supervision of the board of county commissioners.”

By § 1600, Rev. Laws 1910: The county commissioners “shall have power . . . to construct and repair bridges and to open, lay out and vacate highways . . . [and] to do and perform such other duties and acts that the board of county commissioners may be required by law to do and perform.”

And it is provided in § 7609, contained within the general articles upon roads and bridges, that “the board of county commissioners shall provide all roads improved, under the provisions of this article, with suitable bridges of a permanent and substantial character and shall keep and maintain same in repair.”

Some question is raised that the latter section applies only to roads within the “improvement districts” provided for in said article. However that may be, we are of the opinion that the general grant of power to repair bridges above set out carries with it the duty so to do within the funds provided by law for such purpose. As early as *Rex v. Derby*, Skinner, 370, 90 Eng. Reprint, 164, 3 Barn. & Ad. 147, 1 L. J. M. C. N. S. 15, it was held that “may” in the case of a public officer is tantamount to “shall,” and in *Rex v. Barlow*, 2 Salk. 609, 91 Eng. Reprint, 516, it was said: “Where a statute directs the doing of a thing for the sake of justice or the public good, L.R.A.1917P.

the word ‘may’ is the same as the word ‘shall.’”

In *Rock Island County v. United States*, 4 Wall. 435, 18 L. ed. 419, the statute provided that the supervisors “may, if deemed advisable, levy a tax,” etc. Construing the statute, the Supreme Court of the United States said: “The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory.”

This language was adopted and followed in *Jordon v. Davis*, 10 Okla. 329, 61 P&c. 1063.

Almost the identical language of our statute was involved in *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707, *supra*. The law there provided that “the trustees have power to provide for the opening, lighting, and keeping in good repair streets and alleys.”

Under the statute it was held that if the officers, in regard to repairs, negligently performed their duty or did not perform it at all, they were liable in damages to anyone specially injured as a result of such neglect.

We can scarcely conceive of a power whose exercise is more strongly called for by the “public interest” than that of keeping bridges in repair. The people use these bridges upon the supposition that they are capable of sustaining ordinary traffic. The county commissioners are public officers, paid for their services, who have the supervision of these bridges and the power to repair them. Under such conditions we hold that power to repair carries with it a duty to exercise that power within the lawful limitations regarding available funds and the like. With the duty to repair necessarily goes the duty to inspect, in person or by agent, in order to ascertain the necessity therefor. Whether or not repairs are necessary; upon what bridges, if more than one is in disrepair, the public funds should be expended; the amount to be devoted to each; the kind of repairs to be made,—all these may be matters of discretion, for a mistake in the exercise of which the officers would not be liable; but if this bridge, as alleged, funds being available to do this particular repairing, as alleged in the petition, were left for seventeen months so decayed that it constituted, in the language of the petition, “a veritable death trap,” and the commissioners knew these facts or could have ascertained them upon “a casual examination,” as alleged, and neglected to so inspect the bridge or cause it to be inspected, “wantonly and negligently,” then

we think that, the necessity for repairs being apparent, and the funds being available therefor, the duty to repair the bridge becomes ministerial, and if they negligently failed to perform that duty they are liable to the plaintiff in the absence of contributory negligence upon his part. The word "negligently" is used herein advisedly, and we are not to be taken as holding that every failure to repair a bridge constitutes a negligent failure of duty or raises a presumption of negligence upon the part of the commissioners.

Defendants rely wholly upon *James v. Wellston Twp.* 18 Okla. 56, 13 L.R.A. (N.S.) 1219, 90 Pac. 100, 11 Ann. Cas. 938, and *Howard v. Rose Twp.* 37 Okla. 153, 131 Pac. 683, holding the township not liable for damages arising from defects in the township highways. This contention is disposed of by the language of *Mott v. Hull*, supra: "An officer may be liable to an individual for negligence in the performance

of a purely ministerial duty, although the state or political subdivision thereof which elects him may not, under the law, be liable for his negligence."

We have confined our remarks to a discussion of the duty to repair. So far as the petition alleges defects in the original construction, there being no allegation that these defendants were in office at the time the bridge was first built, we are of opinion that no liability can be fastened upon them in that regard. If any cause of action exists for negligence in the original construction, the right of action is against the persons in office at that time. It does not extend to their successors. *Lament v. Haight*, 44 How. Pr. 1.

The judgment of the trial court is reversed, with directions to overrule the demurrer to the petition.

Per Curiam:

Adopted in whole.

## KANSAS SUPREME COURT.

ANDREW SEDLOCK

v.

CARR COAL MINING & MANUFACTURING COMPANY, Appt.

(98 Kan. 680, 159 Pac. 9.)

**Master and servant — workmen's compensation — injury in leaving property — course of employment.**

A miner, at the end of his day's work, changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft with the intention of ascending to the top of the mine. About 200 feet from the room where he had been at work, and about one-half mile from the bottom of the shaft, his face came in contact with a piece of slate which was hanging from the roof of the mine, and one of his eyes was destroyed. Held, that the injury arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, and that under its provision he is entitled to compensation for the injury. *For other cases, see Master and Servant, II.*

a, 1, in *Dig. 1-52 N. 8.*

(July 8, 1916.)

Headnote by JOHNSTON, Ch. J.

**Note.**—The annotation in L.R.A.1916A, 23, on the general subject of Workmen's Compensation Acts, treats, at pages 232 et seq., of the American cases as to what injuries are deemed to arise out of and in the course of the employment within such acts; and the English cases on the subject at pages 40 et seq. The specific question as to recovery of compensation for injuries re-

**A**PPEAL by defendant from a judgment of the District Court for Leavenworth County in plaintiff's favor in an action brought to recover compensation for injuries sustained by him while employed in defendant's mine. Affirmed.

The facts are stated in the opinion.

Mr. A. E. Dempsey, for appellant:

The injury sustained did not "arise out of and in the course of employment," within the meaning of the Workmen's Compensation Act.

*Parker v. Hambrook*, Ann. Cas. 1913C, 4, note; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B, 498, note; *De Constantin v. Public Service Commission*, L.R.A.1916A, 331, note.

Mr. W. W. McCanles, for appellee:

Plaintiff was injured while in the performance of his duties.

*Pittsburg Vitrified Paving & Bldg. Brick Co. v. Fisher*, 79 Kan. 577, 100 Pac. 507; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090; *Hobbs v. Rowland*, L.R.A.1916B, 192, note; *Marshall v. Stewart*, 33 Eng. L. & Eq. Rep. 1; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Terlecki v. Straus*, 86 N. J. L. 708, 92 Atl. 1087; *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E.

ceived while going to and from work is also treated in the annotation following *De Constantin v. Public Service Commission*, L.R.A.1916A, 331.

For later cases and annotation on questions arising under these acts, consult the L.R.A. Digest and Indexes to Notes covering volumes subsequent to L.R.A.1916A, under the title, "Workmen's Compensation."

433, 5 N. C. C. A. 616; *Blovelt v. Sawyer* [1904] 1 K. B. 271, 78 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16; *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761; *De Constantin v. Public Service Commission*, L.R.A.1916A, 331, note; *Putnam v. Pacific Monthly Co.* 68 Or. 36, 45 L.R.A.(N.S.) 338, L.R.A.1916F, 782, 130 Pac. 990, 136 Pac. 835, Ann. Cas. 1915C, 256; *Hobson v. Moorman*, 115 Tenn. 73, 3 L.R.A.(N.S.) 749, 90 S. W. 158, 5 Ann. Cas. 601; *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 14, 591; *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570; *Chicago, R. I. & T. R. Co. v. Oldridge*, 33 Tex. Civ. App. 436, 76 S. W. 581; *Helmke v. Thilmann*, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172; *Muller v. Oakes Mfg. Co.* 113 App. Div. 689, 99 N. Y. Supp. 923; *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 810; *Amys v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117; *Kitchenham v. The Johannesburg* [1911] A. C. 417, 90 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 56 Sol. Jo. 599, 4 B. W. C. C. 311.

*Johnston, Ch. J.*, delivered the opinion of the court:

In an action in the district court Andrew Sedlock recovered a judgment for \$1,456 against the Carr Coal Mining & Manufacturing Company, as compensation for an injury sustained by him while employed in the defendant's mine. There is no controversy between the parties as to the employment, or the nature and extent of the injury suffered, nor yet as to the amount of the compensation allowed. The question which divides them is whether the accidental injury sustained by the plaintiff arose out of and in the course of his employment with the defendant within the meaning of the Compensation Act. It appears that plaintiff had been at work during the day in one of the rooms in the coal mine. About 4 o'clock he quit work, changed his mining clothes for street clothes in the room, then started to walk along the entry in the mine leading towards the shaft for the purpose of ascending to the top of the mine. He wore his miner's lamp, and it was necessary for him to do so in order to find his way to the bottom of the shaft. While he was walking along one of the straits of the mine leading to the shaft, and about 200 feet from his room and one-half mile from the bottom of the shaft, he struck his face against a piece of slate that was

hanging from the roof of the mine, and the result was an injury, including the destruction of one of his eyes. At the time of the injury both parties were within the operation of the Workmen's Compensation Law.

The defendant contends that the plaintiff was not entitled to compensation under the act. To recover, it must appear that the plaintiff's injury arose out of and in the course of his employment. Laws 1911, chap. 218, § 1. In an amendment of § 9 of the act it is provided that "the words 'arising out of and in the course of employment' as used in this act, shall not be construed to include injuries to the employee occurring while he is on his way to assume the duties of his employment, or after leaving such duties, the proximate cause of which injury is not the employer's negligence." Laws 1913, chap. 216, § 4.

While the plaintiff had laid aside his pick and other tools, he was still in the mine and subject to the rules prescribed by the defendant when the accident occurred. The relationship of master and servant continued to exist while he was within the control and subject to the orders of the defendant. While the plaintiff was in the mine he was under obligation to observe the rules prescribed by the defendant, and it was incumbent on the defendant to provide him not only a safe place to work in the mine, but also a safe passageway out of it, as well as the means to carry him safely to the top of the mine. His duties to his employer had not ended until he left the mine, nor had the duties of the defendant towards him ended until that time. It cannot be said, therefore, that he was on his way to assume the duties of his employment, or had left such duties at the time of his injury. The statutory definition of the words, "arising out of and in the course of employment," is substantially the meaning applied to them by the courts which have had them under consideration.

In *Milwaukee v. Althoff*, 156 Wis. 68, L.R.A.1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110, compensation was allowed to an employee who, after receiving instructions as to where he was to work during the day, proceeded along a street toward the place, and while on the way he fell and injured his knee. It was contended that, as he was not actually at work and had not in fact reached the place of work, the injury could not be said to have been received in the course of employment or to have arisen out of it. The decision was rested largely on the relationship that existed between the parties when the accident occurred, upon the theory that if the relationship of master and servant existed at the time of the injury, he was entitled to the benefits of

the act. It was held that if the servant was under the master's control and subject to his direction, the accident is to be regarded as having arisen out of and in the course of the employment. Many American and English cases are cited to show that the relation may extend beyond the hours when the servant is carrying on his regular work, and in some instances, where he goes to places other than the mine, factory, or premises where the actual work was being done.

In *De Constantin v. Public Service Commission*, 75 W. Va. 32, L.R.A.1916A, 329, 83 S. E. 88, a workman employed by a contractor to do work upon a railroad was killed about five minutes before the actual work was to begin and also before his arrival at the place where the work was to be done. The accident was supposed to have occurred while the workman was proceeding on a way chosen by himself, and when he stepped in front of one train to escape another. As he was not upon the premises of the employer, nor upon a road or other way provided by the employer as the only means of access to the place where the work was to be done, compensation was not recoverable. The court held that a recovery may be had in some instances before the arrival at or retirement from the place of actual work. It was said: "A reasonable time after the termination of actual work is allowed. If a workman is injured on the premises of the employer and while leaving his place of actual work by the usual course of travel, the injury is deemed to have arisen out of the employment. *Kinney v. Baltimore & O. Employees' Relief Assn.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8. Since injury after the termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment, and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern."

It was held in a Michigan case that the fact that a workman is upon the premises of his employer when the injury occurs is L.R.A.1917B.

not a conclusive test that he is covered by the act, as he might be so far beyond the place of work at the time of the accident as to be beyond the control or direction of the employer, and therefore outside of the protection of the act. A section hand, instead of eating his dinner with others of the crew near the place of work as was customary, concluded to go to his own home for dinner, a considerable distance away. While walking on a railroad track towards his home he was struck by a train and killed. The court followed the rule that accidents which befall an employee while going to and from his work are not to be regarded as happening in the course of or arising out of his employment, and held that, as the workman had gone on a mission of his own, not connected with the employer's business nor in accordance with the usage of the crew, but for his own purposes and pleasure, he was not entitled to compensation. In deciding the case the court remarked: "In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment." *Hills v. Blair*, 182 Mich. 20, 27, 148 N. W. 243, 7 N. C. C. A. 409.

In *Zabriskie v. Erie R. Co.* 86 N. J. L. 266, L.R.A.1916A, 315, 92 Atl. 385, an employer failed to provide toilet facilities for employees in the building where they were at work, and they were obliged to, and did, habitually resort for such facilities to another building of the employer which lay across a public street. One of them, while crossing the street to reach the toilet during working hours, was struck by a vehicle, and the court held that the action arose out of and in the course of employment.

*Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac. 1090, did not arise under the Compensation Act, but it is somewhat analogous. There an employee at work on the premises of the company asked and obtained permission to go into a certain part of the factory to warm himself, and while attempting to enter the place, fell into an uncovered cistern and was scalded. It was contended that the employee was pursuing his own comfort and pleasure at the time, and was not engaged in the business of his employer; but the court held that he was engaged in the line of his duty at the time of the injury.

In *Pittsburg-Vitrified Paving & Bldg. Brick Co. v. Fisher*, 79 Kan. 576, 100 Pac. 507, four men were employed to work at a certain machine in a brick plant, and under their plan each one took a turn at resting while the others were at work. One of them, while resting, went into another department of the establishment near his own machine, and was injured because of the failure of his employer to guard machinery near which he went. It was held that he was engaged in the performance of duty at the time, and that a recovery might be had under the provisions of the Factory Act.

An elaborate annotation of the Workmen's Compensation Act, covering every feature of it, may be found in L.R.A.1916A, in which the American and English cases are cited, and most of those applicable to the point in contention here are set forth at pages 40, 232, 327, and 329. In the note authorities are cited in support of the proposition that "the moment that the

actual work stops cannot be considered in every case as the time of termination of the employment," and that a "recovery may be had for an accident occurring before the place of work has been reached, if, during the antecedent period within which it occurred, the servant was, as a matter of fact under the master's control." L.R.A. 1916A, 332.

Here, as we have seen, the workman was in the mine, under the direction and entitled to the protection of the defendant at the time of the accident. Each owed duties to the other, and the relation of master and servant still existed between them when the injury was sustained, although the workman was not actually using the pick and shovel at that time.

A motion to dismiss the case was filed, but the merits of the controversy were fully presented by both parties when the motion was submitted, and therefore final disposition of the case will be made at this time.

The judgment is affirmed.

# KENTUCKY COURT OF APPEALS.

WESTERN & SOUTHERN LIFE INSURANCE COMPANY, Appt.,  
v.  
CARRIE WEBSTER.

(172 Ky. 444, 189 S. W. 429.)

## Insurance — insurable interest — illegal wife.

1 A woman living with a man as his wife pursuant to a formal but illegal marriage has an insurable interest in his life. For other cases, see *Insurance*, II. b, in Dig. 1-52 N. S.

## Same — destruction of insurable interest — effect.

2. The annulment of a formal but illegal marriage, during which the woman took insurance on the life of the man, destroys her insurable interest, and she can recover only the premiums which she has paid on the policy.

For other cases, see *Insurance*, II. b, in Dig. 1-52 N. S.

(November 28, 1916.)

Note. — Generally, as to insurance on life in favor of paramour, see note to *Mutual L. Ins. Co. v. Cummings*, 47 L.R.A. (N.S.) 252.

The effect of divorce on rights of beneficiary under insurance policy or benefit certificate is treated in the notes to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A. (N.S.) 478; *Green v. Green*, 39 L.R.A. (N.S.) 370; and *Filley v. Illinois L. Ins. Co.* L.R.A. 1915D, 130. L.R.A.1917B

APPEAL by defendant from a judgment of the Circuit Court for Campbell County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Mr. A. M. Caldwell, for appellant:

Plaintiff's petition does not state a cause of action.

*Schauberger v. Moral*, 168 Ky. 368, 182 S. W. 198; *Sea v. Conrad*, 155 Ky. 51, 47 L.R.A. (N.S.) 1074, 159 S. W. 622, Ann. Cas. 1915C, 318.

Plaintiff, never having been lawfully married to the assured, had no insurable interest in his life.

*Western & Southern L. Ins. Co. v. Grimes*, 138 Ky. 338, 128 S. W. 65; *Rupp v. Western Life Indemnity Co.* 138 Ky. 18, 29 L.R.A. (N.S.) 675, 127 S. W. 490; *Scott v. Scott*, 25 Ky. L. Rep. 1356, 77 S. W. 1122.

Messrs. Judson A. Shuey and L. J. Crawford, for appellee:

A person may take out insurance on his own life and designate whom he pleases as beneficiary; but in addition to this, under the facts, this innocent, dependent plaintiff, who supposed she was Weesner's wife, and for whom he insured his life and paid the first premium, had an insurable interest.

*Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Hess v. Segenfelder* (*Morgan v. Segenfelder*) 127 Ky. 348, 14 L.R.A. (N.S.) 1172, 128 Am. St. Rep. 343, 105 S. W. 476; *Provident Sav. Life Assur. Co. v. Dees*, 120 Ky. 285, 86 S. W. 522; *Rupp v. Western*



Life Indemnity Co. 138 Ky. 21, 29 L.R.A. (N.S.) 675, 127 S. W. 490; *Mutual Ben. L. Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694; *Scott v. Scott*, 25 Ky. L. Rep. 1365, 77 S. W. 1122; 25 Cyc. 705; *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040; *Ruoff v. John Hancock Mut. L. Ins. Co.* 86 App. Div. 447, 83 N. Y. Supp. 758; *Joyce, Ins. § 1055*; *Equitable Life Assur. Soc. v. Patterson*, 41 Ga. 338, 5 Am. Rep. 535.

Clarke, J., delivered the opinion of the court:

Appellee filed this action seeking to recover of appellant the sum of \$1,000, the amount of a policy issued by appellant upon the life of James P. Weesner on the 29th day of June, 1907, in which she was designated as the beneficiary, alleging that she was married to Weesner on the 14th day of February, 1906, and that he had died on or before the 22d day of March, 1915. She further alleged that the policy was issued and delivered to her and Weesner, but that she had paid all the premiums that were paid upon it, and that she had been divorced from insured by judgment of the Campbell circuit court on the 7th day of January, 1909; that the company had refused to accept the offered proof of Weesner's death, or to pay her the amount of the policy. A demurrer was filed to the petition and overruled. Appellant answered in three paragraphs. In the first paragraph it denied that Weesner was dead. In the second it denied that appellee was the legal wife of the insured, or that she had any insurable interest in his life, and tendered and paid into court the sum of \$287.75, alleged to be the total amount of premiums, with interest and costs then accrued, paid by appellee, which it asked that appellee be required to accept in full settlement of all demands. In the third paragraph appellant alleged that if appellee ever had any interest, insurable or otherwise, in the policy of insurance sued on, or in the life of James P. Weesner, such rights were terminated by the judgment of divorce. A demurrer was sustained to the second and third paragraphs of the answer, and appellee declined to accept the amount tendered and paid into court in full satisfaction of her claim. At the conclusion of the evidence, both appellee and appellant entered a motion for a peremptory instruction. The motion of appellant was overruled, to which it excepted, while the motion of appellee was sustained, to which appellant objected and excepted, and the jury, pursuant to the instructions of the court, returned a verdict in favor of appellee for the full amount of the policy, upon which L.R.A.1917B.

judgment was entered, and from which judgment this appeal is prosecuted.

Numerous errors are relied upon by appellant for reversal; but, as the questions involved depend upon the validity of the contract, it will only be necessary to construe the contract in the light of the facts of record.

Since appellee alleged in her petition that "the said contract of insurance was entered into by and between the James P. Weesner, plaintiff and defendant therein," but that she had paid all the premiums paid to appellant upon the policy, it was necessary to the validity of the contract that she should have, at the time the contract was made, an insurable interest in the life of Weesner; otherwise it would have been a wagering contract and against public policy. *Western & Southern L. Ins. Co. v. Grimes*, 138 Ky. 338, 128 S. W. 65, and *Rupp v. Western Life Indemnity Co.* 138 Ky. 18, 29 L.R.A. (N.S.) 675, 127 S. W. 490. That appellee and Weesner were not legally married is admitted, and appellant contends that appellee therefore did not have an insurable interest in his life. In *Joyce on Insurance*, § 1055, it is said: "Although it is held that by the term 'wife' is meant a lawful wife, yet a woman has an insurable interest in the life of a man with whom she has for years been living as his wife."

In *Mutual Ben. L. Ins. Co. v. Martin*, 108 Ky. 11, 55 S. W. 694, this court said [25 Cyc. 705]: "Where a man and woman live together as husband and wife, either has an insurable interest in the life of the other, irrespective of whether there is a valid marriage."

It is true that, in all of the cases so holding which we have examined, the policy was procured by the insured and the premiums paid by him; but insurable interest is not dependent upon who pays the premiums, but solely upon the relationship the parties bear toward each other. As said in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life."

As the policy was issued upon the life of Weesner while he and appellee were living together as husband and wife pursuant to a formal but illegal marriage, and

they were recognized as such by friends and acquaintances, we conclude appellee had, when the policy was issued, an insurable interest in the life of Weesner, such as permitted her to pay the premiums thereon, and that the contract was not therefore void.

But one other question with reference to the policy remains, and that is: Did the judgment annulling the marriage of appellee and the insured, upon the ground that it was void ab initio because Weesner had a living wife from whom he had not been divorced, terminate her interest in the contract? Appellant contends that it does, and that she is only entitled to recover the amount she has paid to it as premiums, with interest, which amount it tendered in full settlement of the claim. In support of this contention, appellant cites *Schauberger v. Morel*, 168 Ky. 368, 182 S. W. 198, and *Sea v. Conrad*, 155 Ky. 51, 17 L.R.A. (N.S.) 1074, 159 S. W. 622, Ann. Cas. 1915C, 318, in the former of which cases this court said: "It is now a settled rule of law in this jurisdiction that if a husband procures a life insurance policy on himself, naming his wife as beneficiary, but with the right reserved to himself to change the beneficiary, and the parties are thereafter divorced by a judgment of a court of competent jurisdiction, the wife is thereby divested of all interest in the policy of insurance, and cannot at the death of the husband claim the proceeds. In other words, the wife's interest in the policy on the husband's life is divested by the judgment of divorce, and this is true though the premiums thereon may have been paid by the wife; but in the latter case she will be entitled to be reimbursed out of the proceeds of the policy the amount of the premiums paid by her thereon. The judgment of divorce operates to restore to the divorced parties the title to such property as either may have obtained from or through the other during marriage, in consideration or by reason thereof; and this is true whether the return of the property is ordered by the judgment of divorce or in a subsequent proceeding. If the order of restoration be, as is often the case, merely formal, or none is made when the divorce is granted, any question thereafter arising as to what property shall be restored by either party to the other may be settled by subsequent proceedings."

Counsel for appellee contends that the above rule applies only where there has been a divorce from a legal marriage, and has no application where the judgment annuls a void marriage; that the above rule is dependent upon § 425 of the Civil Code and § 2121 of the Kentucky Statutes; that L.R.A.1917B.

neither of these statutory provisions has reference to any divorce except from the bonds of matrimony such as exist under a legal marriage, but which never existed between appellee and the insured. Appellee cites from the latter part of § 2121 of the Statutes the following: "Upon final judgment of divorce from the bond of matrimony the parties shall be restored such property, not disposed of at the commencement of the action, as either obtained from or through the other before or during the marriage in consideration thereof," in support of his argument that it is only a "judgment of divorce from the bond of matrimony" that restores property acquired by reason of the marriage.

The argument is ingenious, and, if sound, leaves a pseudo wife in a very much better position with reference to property acquired by her from the illegal husband during and by reason of an illegal marriage relationship when same is declared a nullity, than a legal wife, is left with reference to property acquired by her from her husband during and by reason of a legal marriage when same is dissolved. This anomalous condition can receive judicial sanction only if it necessarily results from statutory enactment, and we do not believe that any such necessity exists here, the quotation by counsel for appellee from § 2121, *supra*, when taken by itself, would seem to indicate that restoration of property might apply alone to a final judgment of divorce from the bonds of matrimony; but, when you read the entire section of the statutes, it is apparent that the only purpose of the legislature in restricting the language to a final judgment of divorce from the bonds of matrimony was to distinguish such a divorce from a judgment of divorce from bed and board, following which there is no restitution of property. The entire section deals with property rights of husband and wife, and it is clear that the legislature intended by its enactment that an absolute divorce, as distinguished from a separation from bed and board, should carry with it a restoration of property acquired by one spouse from the other during and by reason of the marriage relationship, and that this section was meant to apply to all absolute divorces, and applies with equal force to a judgment annulling a marriage that was void ab initio. But even if this were not true, for another reason appellee could not, under the facts here, be permitted to recover more than the amount that she had paid to the company with interest. Although she had an insurable interest such as authorized her to pay the premiums so long as she and the insured lived together as husband and wife, without

contravening public policy against wagering contracts, when that relationship ceased, she no longer had any interest in his life, and could not then pay premiums to keep alive insurance upon his life without engaging in a wagering contract. There can be no doubt that after her marriage to the insured was annulled, she had no insurable interest in his life, since her insurable interest was based upon a mere cohabitation, which could not survive the existence of the relationship. This case is in no wise analogous to the cases where one of the two dies while the relationship exists, and the survivor is permitted to collect the policy. The policy here not only did not mature while the conditions creating an insurable interest existed, but in order to mature the policy it was necessary for appellee to pay the premiums for more than five years upon a policy insuring a life in which she had no insurable interest. In *Sea v. Conrad* and *Schauberger v. Morel*, supra, it was held that a life insurance policy containing a change of beneficiary clause was the property of the insured even if the

premiums were paid by the beneficiary. The policy here, then, since it contains such a clause, was the property of Weesner, and appellee had no interest in same except as beneficiary subject to his right of change, and consequently no right to keep it alive by payment of the premiums in the absence of an insurable interest in the life of the assured. For her so to do, even with the consent of appellant, would be engaging in the maintenance of a wagering contract, which is against public policy. *Western & Southern L. Ins. Co. v. Grimes*, 138 Ky. 338, 128 S. W. 65. The only interest appellee had in the policy after the termination of her insurable interest in the life of the insured was the amount of the premiums that she had paid upon the policy.

It therefore results the court erred in sustaining a demurrer to that portion of appellant's answer confessing liability for the premiums paid by appellee and tendering the amount of same with interest.

Wherefore the judgment is reversed for proceedings consistent herewith.

#### NEW MEXICO SUPREME COURT.

RE OWEN N. MARRON et al.

(— N. M. —, 160 Pac. 391.)

##### Attorney — concealment of evidence — reprimand.

1. An attorney at law, having in his possession a copy or duplicate of an original contract, the contents of which are material to the determination of the issues in a case, who conceals the same, and replies, when called upon by opposing counsel to produce it, that the contract is not in his possession or custody or under his control, when, as a matter of fact, the said contract is at that time where it has been concealed by him, is guilty of unprofessional conduct and subject to a reprimand therefor.

*For other cases, see Attorneys, I. d, in Dig. 1-52 N. S.*

##### Same — false evidence — suspension.

2. An attorney at law who offers in evidence on behalf of his client an alleged release as constituting valid and admissible evidence of payment and discharge of the cause of action against his client, and who moves to instruct the jury that said release constitutes a valid and sufficient defense on behalf of his client, when in truth and in fact the said release is not a valid and law-

ful release, discharge, or satisfaction of the claim, all of which is then well known to the attorney, is guilty of unprofessional conduct in the practice of intentional deceit of the trial court before whom the cause is then pending, and by reason of said conduct is subject to suspension from practice in the courts.

*For other cases, see Attorneys, I. b, in Dig. 1-52 N. S.*

##### Same — use of professional secrets.

3. Attorneys at law accepting employment from one client, and in the course of such relations gaining information adverse to the interests of such client, which, after the termination of such employment, is used to secure the employment of such attorneys by the person in such adverse relations to the former client, are guilty of unprofessional conduct, deserving of suspension from practice before the bar in the courts of this state.

*For other cases, see Attorneys, I. b, in Dig. 1-52 N. S.*

(September 23, 1916.)

**O**RIGINAL proceedings for the disbarment of respondents. Suspension from practice for one year.

The facts are stated in the opinion.

Mr. Frank W. Clancy, Attorney General, for the State.

Messrs. A. B. Renchan and E. R. Wright for respondents.

Hanna, J., delivered the opinion of the court:

There are nine specifications in the ac-

##### Headnotes by HANNA, J.

Note. — Concealment or failure to produce document as ground for disbarment or suspension is the subject of the annotation following this case, post, 384. J.L.R.A.1917B.

cusation filed against the respondents. The first specification is to the effect that in a certain civil action pending in the district court of Bernalillo county said respondent Francis E. Wood, having then and there in his possession a certain copy or duplicate of an original contract, the contents and purport of which were material to the determination of the issues in said cause, concealed the same beneath a blotter in the office of the clerk of said court, and when, afterwards, he was requested by counsel for the opposite party to produce his said copy of said contract, he replied in substance that the contract was not in his possession or custody or under his control, when as a matter of fact the said contract was at that time remaining where it had been concealed beneath a blotter in the office of the clerk of the district court.

It is contended by the respondent Francis E. Wood that this copy of the contract was not material to the issues in said cause, and that therefore his conduct was not subject to criticism. It is urged by the attorney general, however, that regardless of the materiality of the said document in the trial of the issues in said cause, the conduct of the said respondent Francis E. Wood was reprehensible to the same degree as if the said document were material and necessary to the trial of the issues in said cause. With this contention we fully agree. The conduct of the said respondent in concealing the paper from and deceiving the court and opposite counsel by statements bordering upon, if not amounting actually to, falsehood, is certainly unbecoming a member of the legal profession.

The court therefore finds that said Francis E. Wood in the particulars hereinbefore mentioned has been guilty of unprofessional conduct requiring punishment at the hands of the court.

It is therefore considered, ordered, and adjudged by the court here that said Francis E. Wood, by reason of his said conduct, is deserving of the reprimand of this court.

The second specification of the accusation is to the effect that the respondent Francis E. Wood, while engaged as counsel for the defendant in the trial of a certain cause before the district court of Bernalillo county, in which Ernest Meyers was plaintiff and the Meyers Company, Incorporated, was defendant, offered in evidence on behalf of the defendant a certain alleged release, which was in words and figures as follows:

Albuquerque, New Mexico, Nov. 1st, 1913.

Whereas, by article 8 of the contract between the Meyers Company, Incorporated, of Albuquerque, New Mexico, and myself, dated January 1st, 1912, said company is L.R.A.1917B.

required to make a certain payment to me in the matter of Alex D. Shaw & Company, of New York, on the happening of certain events therein stated:

Now, therefore, in consideration of the sum of \$1 and other valuable considerations to me in hand, receipt of which is hereby acknowledged, I hereby release said Meyers Company from any payment to me of the sum of \$501.88, or any part thereof, mentioned in said article 8 as a credit to said Alex D. Shaw & Company.

Ernest Meyers.

That said respondent Francis E. Wood then and there alleged and pretended to the court that the said release constituted valid and admissible evidence of the payment and discharge of the cause of action upon which the plaintiff had brought suit in said court. That said respondent Francis E. Wood moved and requested the court to instruct the jury that said release constituted a valid and sufficient defense on behalf of the defendant in said cause, and that he thereby caused the district judge then presiding in said cause to so instruct the jury, which jury, under the instructions of the court, returned a verdict finding the issues for the defendant. That in truth and in fact the said alleged release was not a valid and lawful release, discharge or satisfaction of the said defendant from liability to the said Ernest Meyers, and that the said respondent Francis E. Wood then and there well knew the same.

It appears from the evidence that the said release was procured from the plaintiff Ernest Meyers for the purpose of enabling the firm of Alex D. Shaw & Company, of New York city, to recover from the Meyers Company the sum of \$501.88, which had been placed with the defendant, the Meyers Company, by the said Ernest Meyers as security against possible liability upon a merchandise account at that time unsettled and disputed. At the time the said release was introduced in evidence it appears from the proofs that the said respondent Francis E. Wood was thoroughly familiar with all of the facts and circumstances surrounding the execution and delivery of the said release, and knew that the same had never been delivered to the Meyers Company except for the purposes hereinbefore stated. He also knew at that time that a reassignment of the said claim had been executed by the said Alex D. Shaw & Company to the said Ernest Meyers, which was intended to supersede and cancel the said alleged release.

In consideration of all the facts and circumstances in regard to this specification, the court finds that the said Francis E. Wood, in so introducing in evidence the

said release, was guilty of deliberate and intentional deceit of the district judge before whom the said cause was then being heard, and that his conduct requires punishment.

It is therefore considered, ordered, and adjudged by the court, that said Francis E. Wood be, and he is hereby, suspended from further practice in the courts of New Mexico as an attorney at law for and during the period of one year from the date hereof.

The third specification in the accusation is to the effect that in a certain cause in the district court of Bernalillo county wherein W. J. Johnson was plaintiff and the New Mexico Fire Brick Company was defendant, the district judge of said court entered a default judgment in favor of the plaintiff, upon the express understanding with the respondent Francis E. Wood, who was attorney for the said plaintiff, that upon application, without any showing of meritorious defense, the said district judge would open said default; that the said district judge shortly thereafter left the state for a vacation; that before leaving the jurisdiction, the said district judge left word with the clerk of the court that he did not desire any other district judge to be called in to hear and determine any application to open the said default which might be filed by the defendant; that thereafter there was filed in said cause a motion by the defendant to vacate the said default judgment; that in the absence of the said district judge, the said respondent Francis E. Wood attempted to call up the said motion before another district judge, who was unfamiliar with the facts and circumstances under which the said default was entered, thereby intending to secure an undue advantage over the defendant in said cause, and an advantage which he could not take had the presiding district judge been present and heard the said motion.

The proofs offered in regard to this charge entirely fail to establish the fact that the said respondent Francis E. Wood was informed or knew that the said district judge desired personally to hear the motion to vacate the said default. All that can be drawn from the proofs would be a mere inference or suspicion that the said respondent Francis E. Wood desired, in the absence of the presiding judge, who knew all of the facts in regard to such default judgment, to present the same to some other judge unfamiliar with the facts, and before whom he might be enabled to secure an undue advantage over the defendant. The court does not feel justified in drawing any such inference or in acting upon any such suspicion. There is no substantial evidence upon which the court could base any judgment against the said respondent Francis E. Wood.

E. Wood in the record, and said charge is therefore dismissed.

The fourth specification of the accusation is to the effect that the said respondents Owen N. Marron and Francis E. Wood were the attorneys of one Mrs. A. S. Averyt in a civil action against the Journal Publishing Company of Albuquerque, New Mexico, for libel, and that the plaintiff agreed with the respondents that they should receive one half of the amount of any recovery from the defendant; that with the consent of the plaintiff the said cause of action was compromised and settled for the sum of \$1,750; that the said respondent Owen N. Marron retained out of the said sum \$1,300 and paid the plaintiff the sum of \$450; that said retention of the said amount was so unconscionable, and that said respondent Owen N. Marron in so doing was guilty of overreaching his client.

It appears from the proof in the case that the plaintiff, after having employed the respondents and having agreed with them to allow them one half of all sums recovered in the case, absolutely refused to go further with the trial, stating to them that she could not endure the notoriety of a public trial; that prior to the time when the question arose as to whether the trial should proceed, the respondents had successfully carried to judgment a companion case involving the same facts and questions of law: that there remained to be litigated the sole question of the amount of damages recoverable by the plaintiff against the defendant; that the labor expended by the respondents was large, they having successfully maintained the cause of action both in the district court and in this court upon appeal. The plaintiff testified before us and stated that she was entirely satisfied with the settlement which was made with the respondents; that she knew fully all of the facts when she made the settlement, and was not now complaining of the same.

Under all of the facts and circumstances, it seems perfectly clear that the respondents were guilty in this regard of no unprofessional conduct. We know of no reason why an attorney at law may not make a contract with his client which, under the circumstances, brings him the fair compensation for his services. While it is true there was uncertainty as to the amount which the plaintiff might have recovered in that case, it seems perfectly reasonable to assume that she would in all probability have recovered more than was recovered in the companion case, she being a woman and the plaintiff in the companion case being a man. We find no evidence in the record of overreaching or mistreatment of the plaintiff in that case, and we therefore dismiss the said charge.

The fifth specification under the charges presented is that Marron & Wood, a firm composed of Owen N. Marron and Francis E. Wood, were attorneys and counsel for Anna Machette Edgar in a certain civil action against William Edgar, which was No. 10,065 on the civil docket at the district court of the county of Bernalillo, being an action for divorce from the defendant and for the settlement of certain property rights between the parties. It is alleged that, in pursuance of an agreement between Owen N. Marron one of the attorneys for the plaintiff, and Thomas N. Wilkerson, the attorney for the defendant, and the defendant himself, the defendant paid to Owen N. Marron the sum of \$500 in full settlement, discharge, and satisfaction for their services rendered and to be rendered to the plaintiff in said cause, but that, after receiving the said sum and after the decree of divorce had been entered in said cause, the said Owen N. Marron demanded of said plaintiff a further sum of \$500 for services rendered by his firm, notwithstanding the fact, as alleged, that the said services had been fully paid for by the payment of the aforesaid sum of \$500, previously paid to Mr. Marron by the defendant. It is asserted that the attempt to collect from his client the additional sum of \$500 constituted unfaithful and unconscionable conduct towards his said client, and this is the essential feature of the charge under consideration.

The client in this case referred to, Mrs. Anna Machette Edgar, was not produced as a witness. The deposition of William Edgar was taken and introduced in evidence, but throws no light upon the essential element of the charge in question. The respondent Owen N. Marron as a witness fully covered the situation explaining that he had informed his client that he would expect her to pay the difference between the amount recovered from the defendant William Edgar and a fee of \$1,000, which he considered his firm entitled to in view of the large property interests involved in this particular litigation. His testimony in this respect is not in any essential particular contradicted by the other evidence introduced before us, and we therefore conclude and find that this charge has not been supported by the evidence, which condition is admitted to be the fact by the attorney general, for which reason the charge is dismissed.

The sixth specification of the charges against the respondents has to do with the same divorce action of Edgar v. Edgar, in the district court of Bernalillo county, and particularly refers to alleged misconduct on the part of the respondent Owen N. Marron in demanding and securing from the said William Edgar a fee in the sum of

\$500, by threatening and intimidating the said William Edgar, and stating to him in substance that, in the event the said sum was not paid to the said Owen N. Marron, criminal proceedings would be taken against the said Edgar, which would tend to bring him in disrepute among the citizens of Albuquerque; the essential element of his charge therefore being that the fee in question was extorted by threats or intimidation.

The facts upon which the charge is based are testified to by Thomas N. Wilkerson, attorney for the defendant, and contradicted in all essentials by the testimony of the respondent Owen N. Marron. The deposition of William Edgar, introduced in evidence in this case, does not support the evidence of Mr. Wilkerson in the matter of the threats or intimidation, but tends to support the testimony of the respondent Owen N. Marron, for which reason it would seem clearly apparent that the charge is not supported by the evidence introduced with that clearness and certainty which should be required, and we therefore must find the respondent Owen N. Marron not guilty of the charge in question, which is therefore dismissed.

The seventh charge as incorporated in the specification of charges against the respondents is that some time in the month of July, 1910, the said Owen N. Marron and Francis E. Wood accepted employment from one Petra G. Garcia, of the city of Albuquerque, New Mexico, in connection with the administration of the estate of one Elias G. Garcia, deceased the son of the said Petra G. Garcia, and that in the course of said employment and during the continuance of their relations as attorneys and client, the said Marron and Wood were informed of the existence of a possible claim against the said estate of Elias G. Garcia, on the part of a woman then residing in Salt Lake City, Utah, which information it is alleged was divulged to the attorneys in question for the purpose of enabling them to meet such claim, should the same subsequently arise; that thereafter the employment of the said Marron & Wood was terminated by the said Petra G. Garcia, subsequent to which it is alleged that the said Owen N. Marron, on behalf of the firm of Marron & Wood, wrote a letter to an attorney in Salt Lake City, Utah, requesting him to put in a Salt Lake City paper an advertisement asking Mrs. Elias Garcia, the alleged common-law wife of said Elias Garcia, deceased, to call at the office of the said attorney, who had something of importance to communicate to her; that as a result of such advertisement the woman in question appeared at the attorney's office in Salt Lake City, and subsequently employed the said Marron & Wood

to bring a suit in behalf of her child, which was alleged to be the child of said Elias G. Garcia.

The gist of this charge is that the said firm of Marron & Wood, on information imparted to them in connection with their employment by said Petra G. Garcia, failed to maintain inviolate the confidence and preserve the secrets of their client, and by their conduct in stirring up litigation, soliciting and accepting employment in the manner aforesaid, violated their duties as attorneys at law and members of the bar of this court.

The eighth specification of the charges against the respondents deals with the same case as the specification last referred to, and particularly charges the two respondents with wrongfully attempting to place the Federal district court before the public in the attitude of receding from a position previously taken by that court in said cause, concerning alleged acts of the said Owen N. Marron and Francis E. Wood in connection with certain letters which had been introduced in evidence in the Federal court and which were subsequently alleged to be altered or fabricated documents. The plaintiff and her attorneys had contended in the trial of the case in the Federal court that such letters were written by one Elias G. Garcia, and the court held in effect that said letters were spurious. The said attorneys subsequently presented to the Federal court a motion in which references were made to the effect that the opinion of the court referred to had been understood by the public and members of the bar as imputing to the firm of Marron & Wood responsibility for such altered or fabricated exhibits, or that they were in some manner privy to the alteration or fabrication thereof, and the court was asked to state more fully the facts found in this particular and pertaining to the exhibits in question. The Federal court thereupon did so and made a further finding, disclaiming an intention to impute improper conduct to the attorneys Marron & Wood. A copy of this opinion or finding of the Federal court was subsequently published in the Albuquerque Evening Herald at the instance of the said Owen N. Marron, with headlines and comments alleged to have been submitted to the said Owen N. Marron prior to publication, and by him approved. The substance and effect of the finding, as alleged by the charge numbered 8, did not justify the headlines and comment as the same appeared in the publication in question, which it is alleged was well known to the said Owen N. Marron at the time he gave his approval to said headlines and comment, and that the act and conduct of the said Owen N. Marron

in this particular was done with an intent to deceive and mislead the public into believing that the court had exonerated him and the said Francis E. Wood in connection with all of the acts of alleged improper conduct ascribed to the said respondents in connection with the trial of the case in the Federal court, the main ground of this charge being more briefly stated as an attempt on the part of the said Owen N. Marron to betray the trust and confidence of the Federal district judge and wrongfully attempt to place the said judge before the public in the attitude of receding from the position previously taken in a former opinion in said cause, concerning the acts of the said Owen N. Marron and Francis E. Wood.

The evidence in support of this latter charge, in connection with the Garcia Case, does not disclose that the comments or heading of the article in question, as published in the Albuquerque Evening Herald, were shown or exhibited to the said Owen N. Marron and by him approved. The body of the article unquestionably was shown to him and by him read and approved, but the evidence fails in the essential particular that it does not bring home to him, the said Owen N. Marron, a knowledge of the objectionable matter contained in the heading of the article or the comments pertaining thereto which appeared as a portion of said heading. The failure of the evidence in this respect does away with charge No. 8 in connection with the publication referred to in the charge.

The Garcia Case resulted in proceedings for disbarment instituted in the Federal court for the district of New Mexico, upon a number of grounds, and this proceeding resulted in a finding by the judge of the Federal district court sustaining the charges upon three of the grounds and dismissing upon a fourth, the findings of the court being as follows:

"1. As to charge 1 the court finds the respondents and each of them guilty. It is clear that the firm of Marron & Wood were, as alleged, employed by Mrs. Petra G. Garcia in July, 1910, and within a few days after the death of Elias Garcia. This conclusion is reached solely upon what has emanated from the respondents, and without taking into consideration anything on this point proceeding from other sources. The answer of the respondents to the present proceeding in effect admits this employment. The complaint in a suit for fees filed in the district court of Bernalillo county October 18, 1910, by the firm of Marron & Wood against Petra G. Garcia alleges services. The testimony of respondent Wood in that case, introduced in evidence here, is unqualifiedly to the same effect, and the

testimony of the same respondent before the court in the present case shows this relationship between the firm and Mrs. Garcia. The claim by respondent Wood that the above-mentioned suit of Marron & Wood v. Petra G. Garcia, although in form one for fees, was intended in reality as a slander suit against Mrs. Garcia, falls far short of mitigating the situation, especially in view of the fact that the complaint is verified as a suit for fees by respondent Wood. With this relationship of attorney and client existing between respondents and Mrs. Petra G. Garcia, in July, 1910, respondents received as a result of such employment and in the course of consultation thereunder certain information to the effect that a woman living in Salt Lake City, and claiming to be the wife of Elias Garcia, was likely to make a claim jeopardizing the whole estate. The representations of Mrs. Garcia by Marron and Wood terminated about August 1, 1910, but the confidential information which they possessed as a result of the brief employment, and especially upon the point above named, still necessarily remained with them. On August 10, 1910, the possession of this information led to their advertising in a newspaper at Salt Lake City, the place that had been named to them as the residence of this claimant, in which advertisement there was an invitation for 'Mrs. Elias Garcia, the wife of Elias Garcia, of Albuquerque, New Mexico, to call.' A person claiming to be within the description responded to the advertisement, and contracts were entered into by respondents to represent her and her infant child. This was followed by litigation on behalf of that child in the above-named case, No. 202. Thus it came about that confidential information received by respondents during one employment was used by them to secure a client adverse to that employment. This was clearly unethical. Information so received is sacred to the employment to which it pertains, and to permit it to be used in the interest of another, or worse still, in the interest of the adverse party, is to strike at the element of confidence which lies at the basis of, and affords the essential security in, the relation of attorney and client. Respondents seek to meet this view of the matter upon the ground, first, that they in 1912, and before the bringing of the case No. 202, asked the opinion of the attorney who had succeeded them in representing the Garcia estate in the probate court, as to whether that attorney objected to respondents bringing case No. 202, and whether the attorney thought it ethically permissible to bring the suit, and that such attorney stated he had no objection to the bringing of the suit by Marron & Wood, but that the mat-

ter of ethics was one for them to decide for themselves. But such an incident lacks value as an excuse. The utmost that is claimed is that the attorney said he had no objection. But even had there been an express consent, the power of an attorney employed by an estate for a restricted purpose did not include an agreement that a suit in another court might be brought against the estate. In addition, the conversation did not pretend to be an expression upon ethics, but that the matter was in terms remitted to the place where it belonged, to wit, the consciences of the respondents. As an evidence of good faith the incident likewise lacks importance for the reason that the gist of the present charge is not the bringing of the suit in 1912, but that respondents showed lack of professional integrity in using confidential information received in July, 1910, as a guide by which to seek for and locate a client in August, 1910. What may have been done in 1912 is a matter far subsequent to the relevant issue which arose in 1910. Equally unavailing is the further defense made by respondents that, as the Garcias never objected to respondents appearing in case No. 202 during the progress of that litigation in 1912-1914, they are to be deemed to have waived any objection thereto. But the question here is not one of the rights of the Garcias, but as to whether respondents have adhered to proper professional standards. The silence of the Garcias while being made the victims of unprofessional conduct by members of the bar cannot mitigate the law's prohibition upon such conduct, and cannot avail to render the respondents immune from the consequences of such misconduct.

"It is accordingly found as to the first charge that the respondents, Owen N. Marron and Francis E. Wood, and each of them, is guilty as charged, and that the conduct of each in the respect charged was contrary to the ethics of the profession of the law.

"2. Charge 2 concerns itself not with the manner in which respondents obtained the information as to the existence at Salt Lake City of a claimant against the Elias Garcia estate, but with the accusation that respondents having such information, however acquired, used it as a basis upon which to advertise for a client, and thus to stir up a protractive and extensive litigation against the Elias Garcia estate. The facts of this solicitation for business are not denied. That the conduct of respondents in this respect was unethical was frankly admitted on the stand in the present trial by the respondent Wood. The Code of Ethics of the American Bar Association and of the Bar Association of New Mexico are each



to the same effect. Such conduct is equally denounced by the common law.

"Respondents are accordingly found guilty under charge 2.

"3. A careful consideration of charge 3, which it will be noted is against the respondent Marron alone, leads to the belief in its truth. An additional finding made upon respondents' request on August 6, 1915, in the case of *Garcia v. Garcia*, No. 202, upon the single question of whether Marron & Wood had been connected with the fabrication of four exhibits in the *Garcia* Case, and leaving undisturbed and untouched the expressions of the court as to the conduct of respondents upon all other features of the case, was within a day or two after the making of the findings represented to the public by a number of newspapers, including the *Albuquerque Evening Herald*, as exonerating the firm of Marron & Wood 'from all suspicion of wrongdoing in connection with the famous case of *Garcia v. Garcia*.' Of this intended misstatement of the court's action respondent Marron had knowledge before the publication, and in it he acquiesced. The conclusion is inevitable that he was more desirous of vindication, however unwarranted, in the public mind than that the action of the court should be correctly reported. This was to overlook the fact that as an officer of the court the duty rests upon an attorney to guard the court against misrepresentations before the public. That respondent Marron did not do this constitutes a failure in a professional duty, and he is found guilty.

"4. The prosecuting committee are unanimous in the position, and have so stated in open court, that the fourth charge, accusing respondents of complicity in the fabrications of exhibits 144b, 145, 146b, and 147, used in the case of *Garcia v. Garcia*, No. 202, and of using such letters knowing them to be spurious, should be dismissed. Upon a careful review of the extended testimony taken upon this trial, as to this issue, the court concurs in the view of the committee, and holds that this charge is not sustained by the proofs. In view of the additional proofs presented upon the present trial, the court reiterates as its conclusion the finding made on August 6, 1915, as follows: "The

court finds no evidence in the case justifying the belief that Owen N. Marron and Francis E. Wood, or either of them, were either parties or privies to the fabrication of said letters. Indeed, the evidence found in the record upon this issue is to the contrary."

The record of the proceedings in the Federal district court has been introduced in evidence before us in this case upon the theory that the record constitutes a *prima facie* case against the respondents. We agree with the contention, and while we have examined the evidence offered by respondents in an attempt to justify their alleged acts of misconduct in connection with the *Garcia* Case, we are not disposed to agree with them that that evidence explained away the consequences of their alleged acts. It would not serve any useful purpose to discuss the facts further than they have been referred to in this opinion, and believing that the conduct of respondents in connection with this case is such as to deserve punishment, we find that the respondents and each of them should be suspended from further practice as attorneys at law in this and the district courts of the state of New Mexico for a period of one year from the date of this opinion, the suspension in this connection, so far as it applies to the respondent Francis E. Wood, to run concurrently with the suspension ordered in the *Meyers* Case as previously referred to in this opinion.

The ninth specification of the charges against Owen N. Marron and Francis E. Wood has been dismissed by the attorney general and require no consideration at our hands.

Wherefore, it is ordered and adjudged that respondents, Owen N. Marron and Francis E. Wood, and each of them, be suspended from practice in the courts of the state of New Mexico for a period of one year; and it is so ordered.

Parker, J., and Neblett, District Judge, concur.

Petition for rehearing denied October 16, 1916.

### **Annotation—Concealment or failure to produce document as ground for disbarment or suspension.**

This note does not include suppression of papers by an attorney in securing admission to practice, nor cases of papers belonging to the court files, nor cases where an attorney refuses to deliver papers to his client.

For requiring attorney to produce papers, see *L.R.A.* 1917B.

pers or documents belonging to client as violation of privilege, see the note to *earson v. Yoder*, 48 *L.R.A.* (N.S.) 334.

Besides *RE MARRON*, ante, 378, but one case has been found within the scope of this note.

In *Bar Asso. of Boston v. Greenhood*

(1897) 168 Mass. 169, 46 N. E. 568, an attorney was removed from his office on several grounds, one being that he endeavored to suppress a paper. There the respondent, as attorney for contestants of a will, made a contract with a legatee providing in part that if the contestants succeeded in their contest by a decree against the last will, or by settlement, they would allow the legatee the amount of her legacy, she with certain other parties agreeing that they would, to the utmost of their power, aid the contestants in the preparation and conduct of the contest of the will. The attorney at the time did not know that said legatee would be a witness, but, finding later that her testimony would be material as to the mental condition of the testator, he put her on the stand, and on cross-examination she disclosed the fact of the agreement. The witness was then ordered to attend and produce the agreement, but after she left the stand, the respondent told her that when he wanted her again he would send for her. She did not appear on Monday; on Tuesday the judge called for her and said to the attorney: "I thought . . . I asked the question whether [the witness] would be here to-day, and you said she would." The respondent denied having said so, stating that he said, "If necessary," but the judge replied, "I understood you said she would." The same day the respondent said to the judge that he had a duplicate original with him in court; but upon searching among his papers he did not find it, and at no time after the disclosure of the fact of the agreement, and pending the order that the witness should come into court and

produce the agreement, did he offer to show the judge the duplicate in his possession. The judge on that day ordered the agreement to be produced and that the witness should attend with it, which she did on Thursday. The supreme court in affirming the decision said: "We think the finding of the court that he tried to suppress this evidence was well warranted. Whatever may be thought of his conduct up to the time when the existence of the paper was disclosed in cross-examination and the paper was called for by the judge, it was clearly his duty then, if not to do what he could to obtain and present the evidence, at least to do nothing to conceal or suppress it. He had taken an official oath to 'do no falsehood, nor consent to the doing of any in court,' and to conduct himself 'with all good fidelity as well to the courts' as to his clients. Pub. Stat. chap. 159, § 36. Fidelity to the court required him, when he had in his possession an important paper which the court called for to be put in evidence, to produce it. Instead of producing it, he waited four days without disclosing that he had any connection with it, and it was two days more, after a formal order from the judge, before the paper was obtained from his witness, who, in the meantime, had been staying away under his direction. The question before us on this branch of the case is not whether these facts necessarily show deceit, malpractice, or other gross misconduct, but whether they furnish any evidence of it from which the court could find it by way of inference or otherwise."

B. B. B.

# TENNESSEE SUPREME COURT.

THOMAS A. PERRY et al.

v.

FRANK YOUNG et al., Plffs. in Certiorari.

(133 Tenn. 522, 182 S. W. 577.)

## Courts — settling interests in insurance policy — nonresidents.

A court of equity having before it the company which issued an insurance policy and its custodian may reform an assignment from which a condition was inad-

**Note.** — For service by publication to give jurisdiction of issues between nonresident and resident claimants to benefits under an insurance policy, see annotation following this case, post, 393.

L.R.A.1917B.

vertently omitted so as to revest title in the assignor as against nonresident distributees of the deceased assignee; at least where their interest in the policy has been attached and service of process upon them has been made by publication.

*For other cases, see Courts, I. b, in Dig 1-52 N. S.*

(Faneher and Buchanan, JJ., dissent.)

(February 1, 1916.)

**C**ERTIORARI to the Court of Civil Appeals to review a judgment overruling an order of the Chancery Court for Davidson County sustaining a demurrer to a bill filed to reform a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. W. L. Granbery and H. E. Palmer, Jr., for plaintiffs in certiorari.

Messrs. Jeff McCarn and Pendleton & De Witt, for defendants in certiorari.

Neill, Ch. J., delivered the opinion of the court:

The bill in this case was filed in the chancery court at Nashville on the 25th of September, 1913, by Thomas A. Perry, and his sister Minnie L. Perry, and his sister Betsie Bostick and her husband, W. E. Bostick, against Frank Young and his wife, Mattie Young, and the Mutual Benefit Life Insurance Company of New Jersey.

The bill alleged, in substance, that complainant Thomas A. Perry, some time before the occurrence complained of, had caused to be issued to him a policy of life insurance in the sum of \$2,000 on his life, payable to himself; that he had assigned this policy to his mother; that the purpose and understanding between him and his mother was that this assignment should be so worded as that the policy should belong to him in case she died before his death; that by oversight this latter provision was left out; that he had sought recently to borrow money from the insurance company on this policy, but it declined to lend unless all of the distributees of his mother should consent to it; that he endeavored to get the defendants Frank Young and wife to agree, as required by the insurance company, but they declined to do so. The bill alleges, in effect, that the complainants and the defendants represent all of the distributees of the deceased mother. The purpose of the bill is to have the policy reformed so as to conform to the original agreement for the assignment made between the complainant Thomas and his mother. Complainants charged that the present interest of Mrs. Young, the granddaughter of complainant's deceased mother, would only be \$100, and asked and obtained an attachment, and caused the same to be levied on that interest. A publication was ordered and made for the said Frank Young and wife which indicated the matter in controversy, that is, the policy of insurance, giving its number and the name of the company that issued it, so that the notice showed the matter about which the litigation was projected. The insurance company accepted service of the bill through its accredited agent, the insurance commissioner. This company then filed a demurrer making the point that the court had not acquired jurisdiction of Young and wife, and therefore its decree would not protect the insurance company; the point being this: that those parties could not be made defendants by L.R.A.1917B.

publication, but that personal service would be required to bind their interest. The bill shows that they are residents of Texas, and, of course, personal service is impossible. They have not entered their appearance, but as to them the bill stands on the order of publication and the publication thereof.

The chancellor sustained the demurrer filed by the insurance company. On appeal to the court of civil appeals that court overruled the chancellor. The case was then brought to this court on the writ of certiorari, and the ground of demurrer before mentioned urged in the chancery court and in the court of civil appeals is urged again here.

We think the court of civil appeals reached the right conclusion. No personal judgment is sought against Young and wife, and none could be rendered against them on publication. The court, however, has before it the insurance company that issued the policy, the complainants Thomas and his two sisters, who represent three of the four distributees of the deceased assignee, and Mrs. Young, the fourth distributee. The court also has within its control the policy of insurance which is the legal evidence of the claim against the insurance company, and the assignment on the back of it, and has the res itself, the claim against the insurance company, through having the latter company before it. The policy is not actually exhibited with the bill, but it appears from the allegations of the latter that the property is in the possession of the complainant Thomas A. Perry, and he has submitted himself to the jurisdiction of the court, and it is within its power at any moment to order the actual filing of the policy in the cause.

The court, thus having control of the res, can settle the status and rights of the parties with respect to the insurance policy, although one of the persons interested therein, under the assignment as it now stands, is a nonresident, and made a defendant only by publication. Our statute (Shannon's Code, § 6115) provides that suit may be instituted wherever any material defendant is found, unless otherwise provided by law. The insurance company in the present case was a material defendant found in Davidson county. Section 6121, subsec. 4, as to bills against non-residents, provides that they may be filed in the district or county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which the subject of the suit or any material part thereof is. Subsection 5 provides that, whenever attachment of property is allowed in lieu of personal service

of process, the bill may be filed in the county or district in which the property, or any material part thereof sought to be attached, is found at the commencement of the suit. Section 6162 declares that personal service of process on a defendant in a court of chancery is dispensed with when such defendant is a nonresident of the state. The following sections direct how the fact of nonresidence is to be made known, and the order of publication made, and how long the order shall be published, what it shall contain, etc. No question is made on these technical matters.

The present case belongs to the class of quasi proceedings in rem. Such proceedings are sufficiently described in 23 Cyc. 1410, by the author of Black on Judgments, in the following language: "Judgments dealing with the status, ownership, or liability of particular property, but which are intended to operate on these questions only as between the particular parties to the proceeding, and not to ascertain or cut off the rights or interests of all possible claimants, are so far in rem that jurisdiction may be acquired by the seizure or control of the court over the res, together with reasonable constructive notice to parties defendant, but, unlike judgments strictly in rem, they are binding only upon the parties joined in the action and thus notified, and have no effect upon the rights or liabilities of strangers."

One case in our reports bearing a pretty close analogy to the present one is that of *Wilcox v. Morrison*, 9 Lea, 700. In that case it appeared that Wilcox had executed a trust deed in the state of Virginia conveying real and personal property in that state, and also including therein a judgment which he had in Hawkins county, Tennessee, on one Netherland. After litigation had progressed for considerable time in Virginia, Wilcox came to Tennessee and filed his bill against Netherland, a resident of Tennessee, who was the debtor in the judgment, and also certain of his creditors who resided in Virginia, and the trustee under the Virginia mortgage, who likewise resided there. The bill charged that the debts had been practically settled in Virginia, and that the Tennessee judgment belonged to the complainant Wilcox. The trustee and one of the creditors, residents of Virginia, demurred because the trustee and effects were in Virginia, and the cause was being administered in that state. The demurrer was overruled. Here the court had control of the res, the judgment, by having before it the plaintiff in the judgment, and also the defendant, and proceeded to settle the rights of the parties thereunder. It seems from the report of L.R.A.1917B.

the case that the parties subsequently answered the bill, and so submitted themselves to the jurisdiction, but the overruling of the demurrer indicated the view the court had as to its right to settle the status of the parties with respect to the judgment, even against nonresidents.

The case of *Amparo Min. Co. v. Fidelity Trust Co.* 74 N. J. Eq. 197, 71 Atl. 605, is nearer in point. There it appears that a bill was filed in the chancery court of New Jersey by the complainant corporation against the defendant corporation, the latter a resident of Pennsylvania, for the purpose of having declared the ownership of the complainant as against the defendant of certain treasury stock in the complainant company. It appears from the report of the case that some of the certificates were in Pennsylvania, but the complainant company, which had issued the shares, resided in New Jersey. The court held that, the res being thus situated in New Jersey, it had control thereof, and could settle the rights of the respective parties in respect thereto, although the defendant was a nonresident and had notice only by publication and other substitutionary process directed by the court. It was held that the court, having control of the complainant whose treasury stock was in controversy, had control of the stock or res, since it could order the same into actual custody at any time. The court said: "In the case at bar no receivership is prayed for, and no party having the custody of the res is brought in as a defendant in order to subject the res to the control of the court. The situation seems to be analogous to one where a complainant in New Jersey, holding the possession of chattels, files a bill in this court to obtain equitable relief against a defendant not resident in New Jersey in respect to such chattels. . . . The authorities which control this court indicate, I think, the following as the essential elements of an action quasi in rem: 1. A res located within the territorial limits of the state in such a way that the state can, if it sees fit to do so, exercise absolute power to control and dispose of it. 2. A course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res in accordance with the mandate of the judgment or decree. 3. A course of judicial procedure on its face directed specifically toward the res so as to disclose this

res to the defendant when reasonably notified of the action."

Further the court said: "The origin of the jurisdiction of our courts in actions quasi in rem is to be found in the power of the sovereign state to exercise control over all objects to which that power can be directly applied. The state must control all property within its territorial limits. Parties interested in that property and residing within the state, or voluntarily coming into the state in order to have their rights in respect of the property in question enforced or protected, have a right to be heard in the courts of the state, and the utmost that can be demanded on the part of nonresident defendants is that they shall be fairly notified of the action so as to have an ample opportunity to appear and be heard therein. When these conditions exist, the rights of all parties interested in the res are determined by due process of law. . . . Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and, if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust,—a trust in respect of a res situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its right in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the state of Pennsylvania in order to secure such surrender. . . . The last matter to be considered is whether it is necessary, where the res is personal property, to have the res actually placed within the custody of the court through the instrumentality of a receiver, in order to give to the action the quality of an action quasi in rem. I can find no warrant in reason, and none in the authorities, disregarding a few dicta, which makes the actual seizure of the res by an officer of the court essential to the status of the action as one quasi in rem. The fundamental essential, of course, must be that the personal property which is the res is so situated within the state that it may be seized; in other words, the res must be within the L.R.A.1917B.

control of the state. . . . It is not the actual seizure of the res which is the essential element of an action quasi in rem, but the power to seize the res and to seize it in the action. If the res is within the jurisdiction of the court, it may be entirely unnecessary to take possession of it through a receiver in order to secure its presence when the decree of the court is to be enforced. . . . So long as the res is situate within the jurisdiction of the court, and the custodian of the res is made a party to the suit, the requirements of an action quasi in rem under consideration seems to me to be complied with. . . . I think it follows from the principles enunciated in a number of recent Federal cases, and in the New Jersey cases above cited, that an action like the present one, brought by the complainant to establish a trust in shares of stock in a New Jersey corporation, is an action quasi in rem, provided the corporation the stock of which is in litigation is made a party to the suit, and is lawfully subjected to the jurisdiction of the court in which the suit is brought by service of process within the state or by voluntary appearance."—citing *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Jellenik v. Huron Copper Min. Co.* 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Citizens' Sav. & T. Co. v. Illinois C. R. Co.* 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425. "All parties, whether resident in New Jersey or residing in other states, may be lawfully brought into the suit by serving process upon the New Jersey residents, and giving the reasonable notice provided by law to the defendants residing in other states. I discover no basis for the proposition that the whole fabric of the action quasi in rem falls to the ground unless the court of chancery, through a receiver, attempts in some way to take possession of the res and actually obtains such possession. The question remains whether, when the custodian of the res, the New Jersey corporation whose stock constitutes the res, comes into court as a party complainant, the case is essentially different from that which is presented where the custodian is made a party defendant. In each case the res is subjected to the power of the court, in the one case by the control over the res, which the court acquires when the custodian of the res is brought into court by service of process, and in the other by the voluntary action of complainant in coming into court and presenting to the court for adjudication his claims in respect of the res. No doubt, the court, at the instance of the de-

defendant, may preserve the res to meet the decree of the court by an injunction or by a receiver."

This method of deciding rights has been often recognized by the Supreme Court of the United States. In *Goodman v. Niblack*, 102 U. S. 556, 563, 26 L. ed. 229, 232, the court said: "This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and, as the trustees and complainant have the requisite citizenship, § 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed for by the complainant."

In *Bryan v. Kennett*, 113 U. S. 179, 195, 199, 28 L. ed. 908, 913, 915, 5 Sup. Ct. Rep. 407, the Supreme Court recognized the right of the court to pass title to land within jurisdiction of the court as against minors, although the latter had been made defendants only by publication. So it has been held that the land of one made defendant by publication only may be subjected to condemnation proceedings for the benefit of a public improvement. *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603. It has also been held that a court having under its control a corporation for winding-up purposes may make an assessment on the stockholders pursuant to law for the payment of corporate debts, and that persons who are defendants only by publication will be bound by the assessment if they were, in fact, stockholders subject to the law under which the assessment was made, and that they would not be suffered in a collateral proceeding to question the propriety of the assessment itself, although such persons would be permitted to show in such collateral proceedings that they had transferred their stock, and might litigate any matter bearing upon the extent or duration of their stockholding. *Selig v. Hamilton*, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926.

Under the foregoing authorities, and many others that might be cited, we are of the opinion that the defendants Young and wife are properly before the court under the publication ordered and made, and that they will be bound by whatever decree may be finally made in the cause.

It is proper to say that we do not consider important the attachment that was issued and served on the supposed interest of Mrs. Young in the policy, inasmuch as the com-

plainant asserted no debt against Young and wife, nor any right by which they could subject such interest to sale. The jurisdiction of the court over the res depends on other principles which have been fully stated. The publication, however, made under the attachment, served the useful purpose of not only notifying Young and wife of the existence of the suit, and of their duty to appear and defend, but also that the controversy was over a policy of insurance in the defendant company, stating the number of that policy. Thus, on reading the notice they will be sufficiently informed of the necessity of appearing and defending any rights that they may wish to assert.

The result is that the decree of the Court of Civil Appeals is affirmed and the cause is remanded to the Chancery Court for further proceedings.

Fancher, J., dissenting:

I cannot give assent to the proposition that the Texas defendant can be brought before the court by publication in this case. The insurance company is a nonresident corporation. It is before the court by service of process upon its agent in this state by virtue of a statute on the subject. The nonresident defendant has such right in the policy of insurance, or in the subject of litigation, that it cannot be taken away from her unless the court can gain jurisdiction over her person.

The principle is well settled by all the courts in this country that no effective personal judgment can be rendered in one state against a nonresident defendant who is not personally served with process and does not appear. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165. All the authorities upon the subject of substituted process against a nonresident defendant recognize the right to affect his property, and in this manner bring him before the court, but only to the extent of his property situated within the jurisdiction of the court. The right to summon a party from his distant place of abode and compel him to submit to an adjudication of matters in another state lies only in the right to seize and affect his property located in the state. The law goes no further than this, and this far only upon the presumption that it is supposed a party will look after his property, and, when that is seized by the law, he is bound to take notice.

The case of *Selig v. Hamilton*, 234 U. S.

658, 58 L. ed. 1523, 34 Sup. Ct. Rep. 926, discussed in the opinion of the majority, does not violate the principle above stated. That was a case affecting the right of a stockholder in a corporation and subjecting him to assessment for payment of debts, and arose under the Minnesota statute upon that subject. The corporation was properly before the court, and, of course, all matters affecting the corporation as such, and its property, consequently its stockholders to the extent of their stock, could be adjudicated. It was held that the statute provided reasonable regulations for enforcing liability assumed by those who became stockholders under the laws of Minnesota. The assessment as to the amount thereof against the stockholders, including the propriety and necessity for same, might be made effective against nonresident stockholders as well as those who were resident, after proper notice by publication or otherwise, as directed by the court. And in fixing the amount of such pro rata liability of stockholders the court would consider the expenses of the receivership, the amount of corporate assets available, the parties liable as stockholders, the nature and extent of such liabilities, considering the probable solvency or insolvency of the stockholders, and expenses in levying the rate upon all the parties. It was expressly held that in determining these matters the judgment of the court was not in the nature of a personal judgment, but the stockholders were deemed to be represented by the corporation itself, which was before the court. This upon the principle of the obligation assumed by virtue of the relationship of the stockholders to it. However, in order to give the stockholder the right to make any personal defense, this course of procedure did not preclude him from showing he was not a stockholder, or not a holder of as many shares as was alleged, or that he had a claim against the corporation, or any other defense personal to himself. In bringing the corporation before the court, the stockholders were necessarily before the court, inasmuch as the several shares owned by the stockholders compose the corporate body. The right to bring the stockholder before the court in the first instance, however, is upon the logical basis that, being a mere shareholder in the corporation, he was presumed to be represented by the general corporate body, and he was before the court upon the same principle that a nonresident may be brought before the court in any other action to the extent that he has property subject to seizure within the jurisdiction of the court.

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The New Jersey case of *Amparo Min. Co. v. Fidelity Trust Co.* 74 N. J. Eq. 197, 71 Atl. 605, cited in the majority opinion, likewise falls within the same rule. The court had the corporation before it, the stock of which was owned in part by the nonresident corporation sought to be brought before the court as a defendant. It was held that the stock of the corporation before the court could be ordered before it at any time. Manifestly this was true, since the stock is but a share in the concern itself which was before the court. Having the corporation before the court, it had the several shares within its control. These shares had been issued in the state of New Jersey, and the principal corporation was a resident of that state, and was before the court of the state of its residence.

I do not consider the case of *Wilcox v. Morrison*, 9 Lea, 700, as authority here. It seems clearly distinguishable to my mind. The judgment in Tennessee was against a resident of Tennessee. Wilcox, the judgment creditor, had transferred this judgment to a trustee in Virginia. Afterward Wilcox sought in equity to assert his rights to this Tennessee judgment on the ground that the Virginia debts had been settled, and it was held he could bring before the court the nonresident trustee to whom the judgment had been assigned. This was correct upon the principle that the nonresident trustee would have notice of matters concerning this judgment just as he would be presumed to look after property in Tennessee. His rights under the judgment could only be asserted here, and he was forced to take notice that the court of equity, having power to control this judgment, was asserting this power. It was very much as if he were a party to the judgment sought to be affected, because that judgment had been assigned to him by the plaintiff.

I do not regard the matters affecting this Texas defendant in the present case as coming within that large class of cases which are not strictly actions in rem, but are often spoken of as actions quasi in rem. These actions quasi in rem only seek to subject certain property of the owner to the discharge of the claim asserted, such as attachment cases, actions for the enforcement of mortgages and other liens, and all other proceedings having for their sole object the sale of other disposition of the property of the defendant to satisfy the demands of the plaintiff. They differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected so that citation to him is required, and the

judgment therein is only conclusive between the parties.

The state has power over property within its limits owned by nonresidents, and it is by virtue of this ownership that tribunals can inquire into the nonresident's obligations to its citizens. The inquiry in such case can only proceed so far as may be necessary for the disposition of the property. If the nonresident possesses no property within the state, there is nothing upon which its tribunals can act. *Pennoyer v. Neff* and *Freeman v. Alderson*, *supra*.

Now in the present case, as I view it, the Texas defendant has no property within this state. She is not a stockholder of the insurance corporation. She has no such interest in the affairs of the corporation as that she will be presumed to take notice of anything respecting the court's action as to the liability of the insurance company.

It is said that the *res* is before the court in this case. To my mind, no *res* is here. The claim is not the *res*. The action is entirely personal. Suit upon the subject matter of this litigation might be brought in any state so far as the insurance company is concerned, where it might be served with process through its proper agents. The Texas defendant might bring her suit involving her rights in any court in any state having such jurisdiction. Furthermore, the property of the insurance company is not before the court, nor involved in the suit. Then, upon what principle must she take notice of a suit against the corporation here in Tennessee? The policy of insurance is like a note. It is not property. It is only the evidence of the obligation. The obligation itself is like a thing in the air which may fly anywhere. The suit is to change or declare a liability of the insurance company personal in its nature. Can it be that a nonresident having an interest in that contract must take notice of the proceeding and appear because the insurance company is before the court? Suppose this action had been brought in any other of the many states where the insurance company, no doubt, does business and has agents; will Mrs. Young, the nonresident having an interest in the obligation of insurance, be forced to take cognizance and appear, upon mere constructive notice? We think not.

It was suggested in argument that under modern insurance the policy holder has a right to share in certain surplus arising from the earnings on money paid in by the policy holder as premiums in excess of the

amount necessary to carry the actual risk. If this be so, it is still a personal relationship arising from the contract of insurance, the main feature of which is the insurance, not as an investment or shareholder in the company, but to indemnify the holder against the loss. But, if the policy holder, under modern insurance, has certain rights in the earnings of the company, this suit is not to change or affect the status of policy holders in general upon the principle that they hold a position analogous to stockholders. In point of fact, such policy holders do not stand in such relationship that a suit against the company will authorize the court to deal with them upon the grounds held in *Amparo Min. Co. v. Fidelity Trust Co.* and *Selig v. Hamilton*, *supra*, that, having the corporation before the court, the shares therein are subject to its orders. This is not a suit to change the relationship of the shareholders to the corporation. It is a suit entirely of a personal nature and involving the rights under one policy alone.

The publication has its office, but it does not give actual notice. The party sought to be brought before the court in reality is before the court by the publication, not alone, but in conjunction with the assertion by the court of control over the property or *res* within its jurisdiction.

Webster defined "due process of law" in his argument in the Dartmouth College Case as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Within that fundamental right, how can it be said that a court proceeds to hear and give trial when no actual personal notice is given, and when no property of the defendant is affected within the control of the court, which will afford presumptive notice?

The whole proposition reduces to the question of notice. I am unable to see how notice can be had as here attempted, within the rules governing the action of courts exercising power only within a given jurisdiction, within which the defendant does not come. I therefore respectfully dissent from the opinion of the majority on this question, believing the chancellor was correct in sustaining the demurrer of the insurance company.

Buchanan, J., dissenting:

"Jurisdiction has been well defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law and



to carry his sentence into execution." *Swift & Co. v. Memphis Cold Storage Warehouse Co.* 128 Tenn. 82-100, 158 S. W. 480; 11 Cyc. p. 660. The primary question in the present case is whether such power was in the chancery court of Davidson county, in respect of the right of Mrs. Young, which it was the purpose of the bill to have the court adjudicate by its decree. His Honor the chancellor held that, under the facts disclosed by the bill, no such jurisdiction or power existed in his court, and, in my opinion, that holding was correct. The right sought to be affected by the decree was one which existed wholly under contracts referred to in the bill. The first of these was a contract between complainant and the insurance company; the second a contract of assignment between complainant and his mother by which complainant made an assignment, absolute on its face, of all his rights under the insurance contract to his mother. The mother died, and, by operation of law, all her rights under the absolute assignment were cast upon her distributees; Mrs. Young being one of this class. The bill was filed for the purpose of reforming the contract between complainant and his mother in such manner as to wholly defeat the right of Mrs. Young and the other distributees, under the assignment and descent cast, as above stated.

Now the right of Mrs. Young under the foregoing contracts is wholly incorporeal in character. It is a right in property of the same character. Her right is one which inheres in her person. It is attached to no tangible property, and it is capable of being brought into judgment only by personal service of process upon her, affording notice to her that her right is in question, and opportunity to defend the same. It is not pretended that such service of process was had upon her. She was beyond the jurisdiction of the court when the bill was filed, and when the court sustained the demurrer to its jurisdiction. She was at the times aforesaid a resident of the state of Texas. If the case were different in its facts, as, for instance, if the bill had sought to subject, under the decree of the court, a right to real property within the local jurisdiction of the court, or a right to tangible personal property located within the jurisdiction of the court, or other character of property so situated that the court assuming the jurisdiction would be in a position to protect the rights of parties, the court might well have assumed jurisdiction. In such classes of

cases the court can lay its hand upon the property, and thereby draw into its jurisdiction the rights of parties attached to the particular property over which the court has assumed jurisdiction. But no such case is presented here. The property right of Mrs. Young is wholly intangible, and is attached to no property which by any proceeding in this cause has or can be brought within the local jurisdiction of the court. Her property right sought to be reached by the decree is inseparable from her person, except by her voluntary surrender of it with or without consideration, her death, or the judgment or decree of a court of competent jurisdiction founded on her voluntary appearance or process personally served upon her.

"The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit' . . . 'is a mere nullity, and incapable of binding such persons or property in any other tribunal.'" *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

As I see this suit, it was not a proceeding in rem, nor even one quasi in rem, but was purely a personal action involving only personal and intangible property rights where the jurisdiction of the subject matter of the suit could only be acquired by personal service of process upon the parties in interest. In *Pennoyer v. Neff*, supra, it was said: "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a proceeding against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

On the grounds above stated, and those advanced in the dissenting opinion of Mr. Justice Fancher, in which I concur, I respectfully dissent from the opinion of the majority of the court in this cause.

**Annotation—Service by publication to give jurisdiction of issues between nonresident and resident claimants to benefits under an insurance policy.**

Generally, as to jurisdiction, upon constructive service, to garnish a debt due to a nonresident, see note to *Starkey v. Cleveland, C. C. & St. L. R. Co.* L.R.A. 1915F, 880, and earlier notes there referred to.

On right to intervene in attachment proceedings, see note to *Potlatch Lumber Co. v. Runkel*, 23 L.R.A.(N.S.) 536.

On right of intervener in attachment to attack validity of service of process, see note to *Ballew v. Young*, 23 L.R.A.(N.S.) 1084.

On nonownership of attached property as ground for vacation of the attachment, see note to *Thornley v. Lawbaugh*, 47 L.R.A.(N.S.) 1127.

A clear distinction must be made between the question of jurisdiction of an issue raised when a creditor of a nonresident attaches a fund due under an insurance policy to the nonresident debtor, and the question here under annotation; i. e., jurisdiction of the issue between claimants one of whom is a nonresident, the relation of debtor and creditor not existing between them. In the former class of cases the creditor's cause is based upon the theory that the property belongs to the nonresident. He makes affidavit to that fact, and the court takes jurisdiction on the assumption that it is a fact.

But in the latter class of cases, the resident claimant goes into court on the allegation that the nonresident does not own the property or the rights claimed, and asks the court to so decide. He is necessarily in the position of alleging and asking the court to hold that the very fact that would give it jurisdiction is not true. The only possible way to avoid the conclusion that the court lacks jurisdiction is to maintain that ownership by the nonresident is not essential to jurisdiction, i. e., that the proceeding is in rem, in which case the judgment of the court as to the property would be conclusive upon the whole world, which of necessity includes the particular nonresident.

It would hardly be contended, however, that the judgment of a court in New York, for instance, between two claimants to the benefits of an insurance policy, would be conclusive against a third person, the real beneficiary, who lives in California, even if one of the claimants lives in Pennsylvania and was L.R.A.1917B.

served by publication. But this would be the necessary result of holding that the proceeding was strictly in rem.

In *PERRY v. YOUNG*, ante, 385, the court held that a proceeding to reform an assignment of an insurance policy is so far a proceeding in rem that a court having jurisdiction of the policy, one claimant, and the insurance company has jurisdiction to enter a decree that will bind a nonresident claimant on service by publication. The decision is based upon a supposed analogy between the case before the court and the cases in which it was held that nonresident stockholders may be served with notice by publication when the court has jurisdiction of the corporation that issued the stock. The dissenting judges have sufficiently pointed out the distinction between the two classes of cases. And see the *Dunlevy* Case discussed, *infra*.

In *PERRY v. YOUNG*, the court seems to have overlooked a point which, under a decision of the Supreme Court of the United States rendered since the decision in the *PERRY* CASE, would have been fatal to plaintiff's case, i. e., a court has no jurisdiction to make a final and conclusive adjudication of the personal rights of a nonresident who has not appeared, even though it has property within its jurisdiction which it could appropriate to the payment of his debts. It will be observed that the issue between the parties in the *PERRY* CASE was not such as could even create the relation of debtor and creditor between the defendant and the plaintiff; that the personal rights of both plaintiff and defendant were created by the same contract that was before the court for final adjudication, and that plaintiff did not claim that there was a debt due and owing from defendant.

In *New York L. Ins. Co. v. Dunlevy* (1916) 241 U. S. 518, 60 L. ed. 1140, 36 Sup. Ct. Rep. 613, where an insurance policy had been assigned by the insured to his daughter while they were both residents of the state, and the daughter had become a nonresident after the plaintiff had obtained a judgment against her on a claim not based upon the policy, and had issued an attachment upon the fund that was then due, the insurance company being made garnishee, and the court had, on an interpleader petitioned for by the garnishee, held that the

assignment was invalid and had ordered the money, which had been paid into court, to be paid to the assignor, and the payment had been made, it was held by the Federal court that the nonresident assignee, who had not appeared in the attachment proceedings, could maintain an action against the insurance company in the state where she then resided for the recovery of the amount due under the policy, for the reason that the court in the attachment proceedings had no jurisdiction upon constructive service to render a judgment against her on the issue between her and the assignor. Presumably, if it had found that issue in her favor, it could have made a legal appropriation of the fund—or enough of it to pay the judgment—to the attaching creditor, but it had no jurisdiction to finally adjudicate her personal rights as between her and the assignor and award the fund to him leaving her debt unpaid. (It should be observed here that the circuit court of appeals, in (1914) 130 C. C. A. 473, 214 Fed. 1, held that the service upon the nonresident in the attachment case was irregular and invalid for any purpose, but the Supreme Court completely ignored this point, evidently upon the principle that there could not be a service that would give the court jurisdiction to adjudicate the personal rights of the nonresident.) The Supreme Court said: "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the court of common pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company, and, if found to exist, then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. *Chicago, R. I. & P. R. Co. v. Sturm* (1899) 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Harris v. Balk* (1905) 198 U. S. 215, 226, 227, 49 L. ed. 1023, 1028, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; *Louisville & N. R. Co. v. Deer* (1906) 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207; *Baltimore & O. R. Co. v. Hostetter* (1916) 240 U. S. 620, 60 L. ed. 829, 36 Sup. Ct. Rep. 475; *Shinn, Attachm. & Garnishment*, § 707. See *Brigham v. Fayerweather* (1886) 140 Mass. 413, 5 N. E. 265. But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely

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to discover property and apply it to debts. And unless in contemplation of law she was before the court and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff* (1877) 95 U. S. 714, 24 L. ed. 565; *Shinn, Attach. & Garnishment*, § 674. See *Cross v. Armstrong* (1887) 44 Ohio St. 623, 10 N. E. 160."

The district court that tried the *Dunlevy Case* (1913) 204 Fed. 670, also scored a strong point by the remark that "the judgment of the court of common pleas itself [the state court that tried the attachment suit] determines that it had no jurisdiction of the latter [the person of the nonresident], since it adjudged that the debt levied upon, and which alone would give it jurisdiction, was not the debt of the plaintiff, but of a third party, as against whom the creditors of the plaintiff had no rights."

It was also contended that the jurisdiction of the nonresident's person acquired by the court when the attaching creditor's judgment was rendered against her continued even though she left the state, so that "when the company paid the money into court where she was, it was just the same in legal effect as if it had been paid to her," but the Supreme Court held that this position was untenable. This untenable position was a stronger one than the position of the plaintiff in *PERRY v. YOUNG*, ante, 385, for in the *Dunlevy Case* the court had jurisdiction not only of the policy, but of the money due thereon and of the valid judgment against the nonresident, and this was not enough to give it jurisdiction either by virtue of the attachment proceeding or independently of that proceeding. Had the court regarded the action as a proceeding in rem or quasi in rem so as to give full jurisdiction to dispose of the property to a third party, it would no doubt have so held. It would seem that the *Dunlevy Case* is stronger than the *PERRY Case* in another respect. In the former there was an actual, bona fide attachment proceeding which gave jurisdiction for one purpose, i. e., to appropriate the nonresident's property to the payment of her debt. But in the latter case there was no debt, hence there was no valid ground for the attachment.

As the question as to the jurisdiction upon constructive service by process involves the question as to due process of law, it would seem that the holding of the *Dunlevy Case* (U. S.) supra, settles the point and in effect overrules *PERRY v. YOUNG*.

J. W. M.

## OKLAHOMA SUPREME COURT.

T. A. DAVIES et al., Pliffs. in Err.,  
v.  
C. E. THOMPSON.

(— Okla. —, 160 Pac. 75.)

**Attachment — sale — property of stranger — attack.**

1. An action was instituted in the district court of Montana against E. H. Thompson, and a horse belonging to C. E. Thompson was attached in said action. C. E. Thompson was a nonresident, and no service of process of any kind was had or attempted on him. The court made an order reciting that an immediate sale of said horse was necessary in order to conserve the interest of the parties to the suit, and directed the sheriff to make sale of said horse after giving two days' notice by posting up notices of the time and place of the said sale in three public places in said county. Held, the actual owner of the horse is not bound by said sale, and can attack said proceedings collaterally.

*For other cases, see Judicial Sale, I. c, in Dig. 1-52 N. S.*

**Same — jurisdiction — notice.**

2. The court in an attachment action does not acquire jurisdiction to pass absolutely upon the rights of the parties until the defendant has been given legal notice, either actual or constructive, to appear and defend.

*For other cases, see Attachment, III. a, in Dig. 1-52 N. S.*

**Same — effect of judgment.**

3. Notices being limited to the debtor, the attached property being proceeded against only as his, and the judgment being against it only as such, the debtor and his privies are concluded. All who are parties to the action are bound, but only the rights of property of the debtor and his privies in the attached property which is condemned and sold are affected by the proceedings.

*For other cases, see Judgment, II. c, 2, in Dig. 1-52 N. S.*

(September 26, 1916.)

**ERROR** to the County Court for Tulsa County to review a judgment in plaintiff's favor in an action brought to recover possession of a certain race horse. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. L. J. Martin and Baldwin & Spradling for plaintiffs in error.

Messrs. Poe, Hindman, & Lundy, for defendant in error:

Before a record of a proceeding arising

Headnotes by MATHEWS, C.

**Note.** — As to effect of attachment and sale of stranger's property, see annotation following this case, post, 400.  
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out of a special statutory enactment can be admitted in evidence, the record must show that the court had jurisdiction generally over this class of statutory proceedings. The attempted exemplification made by the secretary of state is not sufficient to show the jurisdiction of the court.

2 R. C. L. 827, § 35; State ex rel. Stack v. Grimm, 230 Mo. 340, 143 S. W. 450, Ann. Cas. 1913B, 1188; 1 Black, Judgm. 2d ed. § 270; Com. v. Blood, 97 Mass. 538; Ward v. Boyce, 152 N. Y. 191, 36 L.R.A. 540, 46 N. E. 180; White v. Johnson, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511; Duxbury v. Dahle, 78 Minn. 427, 79 Am. St. Rep. 408, 81 N. W. 198; Pullman Palace Car Co. v. Harrison, 122 Ala. 140, 82 Am. St. Rep. 68, 25 So. 697; De Vall v. De Vall, 57 Or. 128, 109 Pac. 755, 110 Pac. 705; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959.

The laws of another state, unless pleaded and proved, will be presumed to be the same as in this state.

Schlotterbeck v. Schwinn, 23 Okla. 681, 103 Pac. 854; Keagy v. Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811; Sivils v. Taylor, 12 Okla. 47, 69 Pac. 867; Harn v. Cole, 20 Okla. 553, 95 Pac. 415.

Under the laws of Oklahoma an affidavit is a prerequisite to the issuance of a writ of attachment, and the writ cannot regularly be issued until an affidavit is filed in strict accordance with the statute.

Maples v. Tunis, 11 Humph. 108, 53 Am. Dec. 779; Beebe v. Morrell, 76 Mich. 114, 15 Am. St. Rep. 288, 42 N. W. 1119; Horkey v. Kendall, 53 Neb. 522, 68 Am. St. Rep. 623, 73 N. W. 953; Paine v. Moreland, 15 Ohio, 435, 45 Am. Dec. 585; Duluth Brewing & Malting Co. v. Allen, 51 Mont. 89, 149 Pac. 494; First State Bank v. Lattimer, — Okla. —, 149 Pac. 1099; 23 Cyc. 1577, 1578.

An action against "E. H. Thompson" can have no validity to bind the property of C. E. Thompson, another nonresident, whom the evidence shows to have been several hundred miles away, and at no time to have been within the jurisdiction of the Montana court.

Sleeper v. Killion, 166 Iowa, 205, 147 N. W. 314; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A. (N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114; Klondike Lumber Co. v. Bender Wagon Co. 71 Ark. 339, 75 S. W. 855; Tipton v. Christopher, 135 Mo. App. 619, 116 S. W. 1125.

Mathews, C., filed the following opinion:

C. E. Thompson will be designated as plaintiff, and T. A. Davies as defendant.

This is an action in replevin instituted in

the county court of Tulsa county for the recovery of a certain race horse named "Palatable." Defendant answered by general denial, and further alleged that he had purchased the horse in controversy from one S. Ambrose through the office of the British Columbia Thoroughbred Association of Vancouver, for \$700, without any knowledge of any claims of plaintiff to said horse; that on the 21st day of September, 1912, in the district court of the third judicial district of Montana, in an action wherein one William Gemmell was plaintiff and one E. H. Thompson was defendant, an order was issued by the court directing the sheriff to make a sale of the horse in controversy, and that on the 23d day of September, 1912, the said sale was had and the said horse bought in by said William Gemmell, copies of said order of the sheriff's certificate of sale being attached to said answer. To this answer the plaintiff replied by general denial.

At the trial the plaintiff, C. E. Thompson, testified that he had owned the horse in controversy about three years, and that between two and three years before the trial he let a man by the name of Jackson take the horse to Butte, Montana, to race him; that he next heard that Jackson had mortgaged the horse, but that he did not authorize him to do so; that he had never disposed of the horse and still owned him; and that he found the horse in Tulsa in possession of defendants.

The defendant then offered in evidence the following "order" and "certificate of sale:—"

In the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge. William Gemmell, Plaintiff, v. E. H. Thompson, Defendant. No. 3064. Order.

Upon reading the affidavit of William Gemmell, the plaintiff in the above-entitled action, and it appearing therefrom and from the records and files in the above-entitled action that certain property has been attached, and is now in the custody of the sheriff of Deer Lodge county, under a writ of attachment issued out of the above-entitled court in the above-entitled action; and it appearing to the court satisfactorily that an immediate sale of said property is necessary in order to conserve the interests of the parties thereto; and it appearing from the affidavit aforesaid that the delay necessary to give notice of the application for this order and of the sale of said property would cause material depreciation in the value thereof and material loss, both to the plaintiff and the defendant above named; and it also appearing that the defendant is outside of the state of Montana, L.R.A.1917B.

and that it is impossible to give notice of the hearing of this application and of said sale,

It is therefore ordered, and this does order, that the sheriff of Deer Lodge county make a sale of said property on Monday, the 23d of September, A. D. 1912, and that said sale be made without notice to said defendant, but that notice of the said sale be given by posting notices in writing of the time and place of said sale in three public places in the city of Anaconda, in Deer Lodge county, Montana, for two days prior to September 23, 1912, and that the proceeds of said sale be paid into court, pending the determination of the above-entitled action by final judgment or otherwise.

George B. Winston, Judge.

Dated this 21st day of September, A. D. 1912.

#### Certificate of Sale.

I, James O'Keefe, sheriff of the county of Deer Lodge, state of Montana, do hereby certify that under and by virtue of an order issued out of the district court of the said county of Deer Lodge in a certain action lately pending in said court at the suit of William Gemmell, plaintiff, against E. H. Thompson, defendant, attested the 21st day of September, A. D. 1912, by which I was commanded to make the sum of nine hundred dollars (\$900) with interest and costs, to satisfy the judgment in said action, out of the personal property of said defendant, if sufficient personal property could be found, all as more fully appears by the said order, reference thereunto being hereby made; I have levied on, and on the 23d day of September, A. D. 1912, at the race track in the county of Deer Lodge, state of Montana, duly sold at public auction, according to law and after due and legal notice, to William Gemmell, who made the highest bid therefor at such sale, for the sum of seven hundred dollars (\$700) in lawful money of the United States, which was the whole price paid therefor, all the right, title, and interest of the said judgment debtor, E. H. Thompson, in and to the following described personal property; to wit, one chestnut stallion, two years old, no brand, named "Palatable;" one bay gelding named C. W. Kennon, no brand; and bay mare, star in face, named Ourlast, no brand.

Dated this 23d day of September, A. D. 1912.

James O'Keefe, Sheriff of Deer Lodge County, State of Montana.

W. A. McAndrews, Undersheriff.

The plaintiff made the following objec-

tions to the introduction of the same, which the court sustained: "We object to the introduction of the exhibit as offered, for the reason that it appears upon its face that it is not a final order or decree; second, that it appears upon its face that it is only an interlocutory order, and not made or based upon the merits of the cause; and, third, it appears upon its face that the court had acquired no jurisdiction either over the person or subject matter or the res or horse attempted to be sold thereunder."

No further evidence was introduced by either party, and judgment was rendered for plaintiff, from which defendants appeal.

The only question presented here by appellants is the correctness of the action of the trial court in excluding the above records of the said Montana court. As we view the case, it is immaterial whether the said records were introduced or not, as the results of this action should have been the same, even if these records had been admitted in evidence, although we are of the opinion that the action of the court in excluding the same was correct; at least upon the last objection urged.

It will be noted the Montana action was against "E. H. Thompson," a nonresident. The property attached belonged to "C. E. Thompson," who was also a nonresident. The kind of service had is not disclosed, but it is presumed, if any was attempted, it was by publication. As C. E. Thompson was not a party to the Montana action it follows no service of any kind was attempted as to him.

It is urged on behalf of the plaintiff that the Montana court acquired no jurisdiction over the horse in controversy, as the records show that if any proceeding had been instituted that it was not against the plaintiff, C. E. Thompson, and therefore not binding upon him. The defendant urges that as the plaintiff only replied to their answer by general denial, that thereby nothing was put in issue except the existence of the record, and consequently a want of jurisdiction in the court to render the judgment cannot be shown under such plea. As said before this becomes immaterial when it is considered that even if the proffered records had been received in evidence it would have had no effect against C. E. Thompson, as the records offered show that they have nothing to do with C. E. Thompson, and therefore do not bind him.

The next proposition advanced by the defendants is that the sale of the property was an action in rem, and that the sale under this order was valid, regardless of who was the owner at that time or of the lack of service. This contention, with the one

advanced by plaintiff, set out above, are based somewhat upon the same principle and will, to a certain extent, be discussed together.

While we have been unable to find any decision of this court bearing directly upon the points raised, yet we believe the general principles laid down in the well-considered case of *Ballew v. Young*, 24 Okla. 182, 23 L.R.A.(N.S.) 1084, 103 Pac. 623, followed and discussed in *Bilby v. Jones*, 39 Okla. 613, 136 Pac. 414, practically decide the issues in the case at bar against defendant's contentions.

In the case of *Ballew v. Young*, an attachment was sued out and levied upon real property. The defendant was a non-resident, and the publication affidavit and notice were invalid, but the plaintiff there insisted that notwithstanding those facts such defects did not defeat the court's jurisdiction over the property attached so as to render a judgment thereon a nullity and subject to collateral attack. This is practically defendant's contention in the case at bar, but this court, while admitting that there was a conflict in the authorities on that point, there quoted with approval 4 Cyc. 814, as follows: "In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy thereupon, and its judgment in regard thereto is binding until reversed on appeal, or set aside in some direct proceeding for that purpose, but the weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties, but only to pass upon such right after defendant has been given an opportunity to appear and defend; and, where this view is maintained, a judgment rendered without the notice prescribed by law, against a defendant who has not appeared, is deemed absolutely void, and open to collateral attack."

If a judgment rendered in an attachment proceeding wherein the service upon defendant was attempted by publication, but proved to be defective to the extent that it was held void, is subject to collateral attack, as is stated in *Ballew v. Young*, it equally follows that, in an attachment action where there was no attempt at service upon the owner of the property, the judgment must also be void and subject to collateral attack.

In the case of *Troyer v. Wood*, 96 Mo. 478, 9 Am. St. Rep. 307, 10 S. W. 42, we find the following discussion of the principles involved in the case at bar: "It is a principle of universal justice that no one shall be condemned in his person or property without notice and opportunity to be

heard in his defense. Notice is therefore essential to the jurisdiction of all courts; and the rule which requires that it be given to the party whose interests and rights are sought to be affected by judicial proceedings is as old as the law itself. A judgment without notice given, without opportunity to be heard, possesses none of the attributes of a judicial determination; it is simply judicial usurpation and oppression, a mere arbitrary edict based upon an *ex parte* statement and entered upon the records of the courts in defiance of the maxim, 'Audi alteram partem.' Such a judgment deserves not the name it bears, and will not be respected and upheld in any forum where right and justice are administered. This doctrine is met with and approved at almost every turn you take in the broad fields of adjudication, and is announced by authorities too numerous for computation. *Nations v. Johnson*, 24 How. 203, 16 L. ed. 631; *Walden v. Craig*, 14 Pet. 154, 10 L. ed. 397; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Rockwell v. Nearing*, 35 N. Y. 302; *Mason v. Messenger*, 17 Iowa, 261; *Freeman*, Judgm. 3d ed §§ 117, 118, 495; *Hitchcock v. Aicken*, 1 Caines, 473; *Blackwell*, Tax Titles, 213. But notice may be either actual or constructive, and the state possesses the power to substitute service by publication in lieu of personal service; but such substituted service, when authorized or permitted by law, is as much an element of jurisdiction as is personal service where trial is the only method of service prescribed. *Re Empire City Bank*, 18 N. Y. 199. And proceedings in rem or quasi in rem are not exempt from the operation of the rule which makes service of notice in some form an essential of jurisdiction. *Cooley*, Const. Lim. 2d ed. 498, 499, 500, and cases cited; *Wells*, Jurisdiction of Courts, § 88; *Wade*, Notice, 2d ed. §§ 1144, 1161; *Waples*, Proceedings in Rem, §§ 88, 570 et seq. and cases cited; *Woodruff v. Taylor*, 20 Vt. 65; *Denning v. Corwin*, 11 Wend. 647; *Freeman v. Thompson*, 53 Mo. 196, and cases cited."

While the case last quoted involved a judgment for taxes, yet a judgment for taxes is the same in effect as judgments in other actions. *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595.

In the case of *National Bank v. Peters*, 51 Kan. 62, 32 Pac. 637, it is said: "Notice being limited to the debtor, the attached property being proceeded against only as his, and the judgment being against it only as such, the debtor and his privies are con-

cluded. All who are parties to the action are bound, but only the rights of property of the debtor and his privies in the attached property which is condemned and sold are affected by the proceedings."

We take the following from the case of *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359:

"Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a nonresident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action, or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action in personam, with the added incident that the property attached remains liable for any judgment the plaintiff may recover. But if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding in rem against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the res is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired. When, therefore, the court has the de facto custody of the property by virtue of a de facto writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack. A judgment founded on service of process by publication is, of course, ineffectual, unless it is an adjudication concerning property which the court has in its custody under some lawful process, because there is nothing upon which it can

operate; but where the property has been actually seized and brought within the control of the court by some process authorized by law, and the right to determine its liability for the demands of the plaintiff is subsequently acquired by publication, an error of the court in determining the status of the property, or its liability, or the validity of the attachment, can, it seems to us, no more affect the jurisdiction, under a statute like ours, than an erroneous decision as to the amount of plaintiff's demand, or any other error in the case. *Van Fleet, Collateral Attack*, 257, 838; *Paul v. Smith*, 82 Ky. 451; *Barelli v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17; *Thompson v. Eastburn*, 16 N. J. L. 100; *Diehl v. Page*, 3 N. J. Eq. 143.

"There is much conflict in the authorities generally as to whether the statutory prerequisites to the issuance of writs of attachment are jurisdictional and must affirmatively appear to protect the proceedings from collateral attack, or whether, in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken. Mr. Waples states with apparent confidence that all the statutory requirements are jurisdictional, and are not to be presumed after judgment, even on a collateral attack, and cites a large number of cases which more or less directly support the text (*Waples, Attachm.* § 625); while Mr. Works, with equal confidence, says that, while there are authorities holding that such proceedings are special, and that no presumptions in favor of the jurisdiction of the court can be indulged, 'the clear weight of authority and reason is to the contrary' (*Works, Courts & Jurisdiction*, p. 547); and this seems to be the view of Judge Van Fleet, as will be seen by reference to the citation from his work on *Collateral Attack*, already made." *Ward v. Boyce*, 152 N. Y. 191, 36 L.R.A. 549, 40 N. E. 180; *Yarbrough v. Pugh*, 63 Wash. 140, 33 L.R.A. (N.S.) 351, 114 Pac. 918, 2 R. C. L. § 4, p. 803.

Now as to defendant's contention that, as the horse was sold as perishable property under a chambers order of the Montana court, a sale under such an order operated to give the purchaser at said sale a good title notwithstanding the horse may have belonged to plaintiff, and not to E. H. Thompson, the defendant in that action.

Counsel has cited many respectable authorities (4 Cyc. 716; *Young v. Kellar*, 94 Mo. 581, 4 Am. St. Rep. 405, 7 S. W. 293; *Megee v. Beirne*, 39 Pa. 50; *Millard v. Hall*, 24 Ala. 230; and *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284), which seems to support his contention, but upon this point

there are many authorities to the contrary, and we believe the holding in the case of *Ballew v. Young*, 24 Okla. 182, 23 L.R.A. (N.S.) 1084, 103 Pac. 623, upon the general principle there laid down that a judgment rendered in an attachment proceeding wherein the service by publication was void is subject to collateral attack, is equally applicable to the point here under consideration. There was no service of summons, either actual or constructive, upon C. E. Thompson; therefore as to him the attachment proceedings were void and open to collateral attack.

In the case of *Sleeper v. Killion*, 166 Iowa, 205, 147 N. W. 314, the court says: "Men are known, and their identity fixed, by the name by which they are known. When addressed by name, they respond as segregated individual entities. When not so addressed, they, as a rule, are not expected or required to respond. In nearly every state in which courts acquire jurisdiction by writ, summons, or process, it is required that the paper, on the service of which the court assumes a right to act, must be addressed to the party summoned by his true name, or by the name by which he is generally known. It has been uniformly held that a writ, summons, or process to one, but served on another, gives the court no jurisdiction of the person served, although he be the real party to the suit, and the one against whom relief is sought."

In the case of *D'Autremont v. Anderson Iron Co.* (*D'Autremont v. Gaylord*) 104 Minn. 165, 17 L.R.A. (N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114, it was held that a summons served by publication, designated "George H. Leslie" as defendant, was fatal, and conferred no jurisdiction upon the court to adjudicate any rights of "George W. Leslie." The court says: "Though the partition suit was a proceeding in rem, the mere fact that the court acquired jurisdiction over the subject matter thereof, the land, did not authorize it to adjudicate the rights or interests of parties in the absence of proper service of summons upon them."

The court further said: "The reasons for disregarding the error where there is personal service upon the right party do not apply where the only service is by publication against a nonresident of the state."

Further the court says: "If the error in the name is jurisdictional, as we hold, a judgment entered is void, and to adopt the contention of appellant would result in compelling a defendant in a particular case to waive the want of jurisdiction in the court to enter judgment against him, and to come to this state and litigate the cause on its



merits. This the court has no right to do. The law providing for the manner of acquiring jurisdiction over nonresidents is plain, and should not be ignored even in a case of apparent hardship."

In *Klondike Lumber Co. v. Bender Wagon Co.* 71 Ark. 339, 75 S. W. 855, the precise question was involved. The case was an appeal from a judgment in an action of replevin. The court, in its opinion, says: "The title of the Bender Wagon Company rested upon a sale made by virtue of an order of the circuit judge in vacation. Whether this was a valid sale and passed the title of the lumber was the question raised by the action of replevin. If the sale was valid, then the wagon company was entitled to the lumber, otherwise not."

The court, further passing upon the question, said: "The only remaining question for us to determine is whether the sale of the lumber made under the order of the circuit judge in vacation was a valid sale. The order for the sale was, as before stated, made in an action brought in the circuit court by Williams Brothers against the Long Pine Lumber Company to enforce a lien for labor upon the lumber replevied in this action. Now we find in the statute regulating the proceedings for the enforcement of laborers' liens no provision authorizing the sale of the property by an order of the judge made in vacation, and there is room for doubt as to whether the judge in vacation can order such a sale in actions of that kind. But there is a provision in the statute regulating proceedings in actions of attachment authorizing the judge in vacation to order the sale of perishable property, and this is no doubt the statute under which the judge acted in this case. That section provides that 'no such sale shall be made in vacation without reasonable notice in writing to the opposite party or his attorney, if either of them reside in the county in which the cause is pending, of the time and place of the application therefor.' *Sandels & H. Dig.* § 348.

"Now, the Long Pine Lumber Company was the party sued in that case, but the evidence shows, and the court found, that this company was not the owner of the lumber sold. The lumber was owned by the Klondike Lumber Company, and that company was not a party to the suit until after the order for the sale of the lumber was made, and had no notice of the application for the sale of the lumber. Under these circumstances the sale of the lumber did not affect any right or interest which the Klondike Lumber Company had in the lumber. The sale did not affect their title. The company, after the sale, still owned the lumber, subject, of course, to any valid liens existing against it, and had the right to recover the same from the purchaser at the sale, for the purchaser acquired only the right, title, and interest therein owned by the Long Pine Lumber Company, the defendant in the action. *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33."

In the instant case it will be seen that the record sought to be introduced recites: "I have levied on, and on the 23d day of September, 1912, at the race track in the county of Deer Lodge, state of Montana, duly sold at public auction, according to law, and after due and legal notice to William Gemmell, who made the highest bid therefor, at public sale, for the sum of \$700 in lawful money of the United States, which was the whole price paid therefor, all the right, title, and interest of the said judgment debtor, E. H. Thompson, in and to the following described personal property."

The certificate of sale also recites that the sale was made for the reason that he was commanded to make the sum of \$900 to satisfy the judgment against "E. H. Thompson." *Hornthall v. Burwell*, 109 N. C. 10, 13 L.R.A. 740, 26 Am. St. Rep. 556, 13 S. E. 721.

For the reasons given, we recommend that the judgment be affirmed.

**Per Curiam:**

Adopted in whole.

### **Annotation—Effect of attachment and sale of stranger's property.**

This note does not deal with the question of jurisdiction when the claimant resides out of the state and has been served with constructive notice. One phase of that question is discussed in the note to *PERRY v. YOUNG*, ante, 395.

It is a general rule that a judgment in an attachment proceeding is binding only upon the parties to the suit. 6 C. J. 33, § 26. It would seem to be a necessary deduction from this rule that

a claimant to the attached property who is not made a party in some way would not be bound by the judgment, and this would be true even where an attempt is made to make him a party, but the attempt fails because of irregularity or illegality of an attempted service of process, as well as where no such attempt is made. Such an attempt would not constitute service. On the effect of summons or notice to person by wrong

initial, see note in 42 L.R.A.(N.S.) 151, and notes there referred to. But in *DAVIES v. THOMPSON*, ante, 395, the service was not on, or intended to be on, the person who was the real owner. So, for the purposes of this note, it is assumed that there was either no notice or one so defective that it was considered of no value.

It would seem to be inconceivable that a court would hold that the owner of property sold under order of court in an attachment proceeding to which he was not made a party by service of some kind is barred of all right to maintain an action of some sort against someone. It might be that his action should be against the sheriff (see *Megee v. Beirne* (Pa.) infra), or perhaps against the garnishee (see *Olin v. Figeroux* (S. C.) infra), or perhaps against the purchaser of the property (see *DAVIES v. THOMPSON*).

In *Megee v. Beirne* (1861) 39 Pa. 50, it was held that there is no rule of law that compels the owner of property attached as that of another, to intervene on penalty of forfeiting his rights, even if he knows of the fact. It was also held that if the order of court for the sale of perishable property attached, and a sale thereunder, are conceded to be so far a proceeding in rem that the title of the purchaser is indefeasible, still the real owner, who was not a party to the proceeding, could recover from the sheriff

who sold the property, although he knew that the property had been attached in time to intervene.

In *Olin v. Figeroux* (1841) 1 McMull. L. (S. C.) 203, it was held that there is nothing in the attachment laws that compels a claimant of attached property to come into court and defend his title, unless he is made a party to the suit, even if he knows that the property has been attached. If he does not, the judgment is not binding upon him, and he is not estopped from collecting the debt from the garnishee, who paid the money into court in the attachment proceeding.

In some jurisdictions anyone claiming to own property that has been attached as that of another may intervene and have his rights determined, but in other jurisdictions this is not allowable. See note to *Polatch Lumber Co. v. Runkel*, 23 L.R.A.(N.S.) 536.

So it has been held that there is no rule of law which compels the owner of property to intervene when it is attached as the property of another on penalty of forfeiting his rights, even where he has actual notice of the attachment. *McGee v. Beirne* (Pa.) and *Olin v. Figeroux* (S. C.) supra. These questions of intervention are, of course, not within the scope of this note, but they may form the basis for a conclusion upon the question of the owner's right to attack the judgment in attachment collaterally. J. W. M.

#### TENNESSEE SUPREME COURT.

MRS. A. B. McMILLAN  
v.

AMERICAN SUBURBAN CORPORATION,  
Appt.

(— Tenn. —, 188 S. W. 615.)

**Vendor and purchaser — failure to make improvements — rescission.**

One who has paid the purchase price and taken possession of real estate cannot, in the absence of fraud, mistake, or insolvency of vendor, rescind the contract for the vendor's breach of his agreement to lay water mains to the property, but he must rely on his legal remedies.

For other cases, see *Vendor and Purchaser*, I. e, in Dig. 1-52 N. S.

(October 14, 1916.)

**Note.** — The right of a vendee to rescind contract for sale of land because of vendor's breach of covenant to make improvements is discussed in the annotation following this case, post, 403.

L.R.A.1917B.

**A** PPEAL by defendant from a decree of the Chancery Court for Knox County in plaintiff's favor in a suit to rescind a contract. Reversed.

The facts are stated in the opinion.  
Mr. Reuben L. Cates for appellant.  
Mr. A. C. Grimm for appellee.

Williams, J., delivered the opinion of the court:

The bill of complaint is one praying for the rescission of a contract in relation to realty.

Defendant company is the owner of a tract of about 100 acres of land in the suburbs of Knoxville, which in 1906 it subdivided into blocks and lots, giving the addition the name of "Piedmont Place," and put the property on the market for sale on the instalment plan. The method of business was to take from those proposing to purchase a written application, and in the event of acceptance by the company it executed a contract to convey or "bond for deed."

Complainant in December, 1906, purchased a lot in the subdivision at the price of \$500, and in the application signed by her, and also in the contract for deed signed by the company, there were inserted certain restrictions in favor of the vendor company and the following guaranties in favor of the purchaser:

"The American Suburban Corporation guarantees the following improvements:

"A. That the streets and sidewalks on the property will be graded and shade trees planted.

"B. That granolithic sidewalks will be laid in front of the lot herein named.

"C. That water pipes will be laid in Piedmont Place."

In January, 1911, complainant completed her payments, and at that time received a deed from the corporation which incorporated the restrictive conditions in favor of the company, but omitted any reference to its guaranties. Complainant surrendered the contract for conveyance at the same time.

Prior to the institution of this suit the company had spent \$8,826 in grading streets and sidewalks and in planting shade trees. A sidewalk was laid in front of complainant's lot as well as in other parts of the property.

At the date the suit was brought water pipe lines were not laid, but in the summer of 1912, following suit and before final decree in the cause, water lines were laid at a cost of \$4,548. Prior to that, however, complainant had been insisting on the laying of the water lines, but without success. The bill was filed May 24, 1912, praying for rescission.

The cases are not numerous that deal with the right of a vendee to rescind an executory contract for the sale of land because of the vendor's breach of a covenant or guaranty to make improvements. This fact is commented on, and the decisions collated, in a note to *Crampton v. McLaughlin Realty Co.* 51 Wash. 525, 21 L.R.A. (N.S.) 823, 99 Pac. 586. In that case it was held that a vendee of real property cannot rescind because of the vendor's breach of his covenant to lay sidewalks and pavements and put in water mains and sewers, where such covenant is one of several relating to building restrictions, etc., on the theory that the covenant was to be deemed an independent one, and, therefore, that the vendee's remedy for its breach was an action for damages.

The decision was, in part, rested on the authority of *American Emigrant Co. v. Adams County*, 100 U. S. 61, 25 L. ed. 563, which involved a covenant by the vendor to drain the land sold. In an action to re-

scind, the court in the last-mentioned case said: "The allegations of the bill, to the effect that the emigrant company has not fulfilled its engagements with respect to the drainage and settlement of the land, rest in covenant merely, and afford no ground for avoiding the contract. Where covenants are mutual and dependent, the failure of one party to perform absolves the other, and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not made a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more."

See also *Fountain v. Semi-Tropic Land & Water Co.* 99 Cal. 677, 34 Pac. 497.

A few decisions on the point have appeared since the date of the note referred to.

In *Cheney v. Bierkamp*, 58 Colo. 321, 145 Pac. 691, the breach relied on was of an agreement to raise the level of laterals, for irrigation purposes, on the realty sold. The purchase price of the land was \$2,500, and the cost of raising the laterals was about \$75. The court held that the agreement in respect to the lateral was not an essential part of the consideration or a dependent covenant, but a minor detail, distinct and separable from the principal agreement, and that the proper remedy was not rescission, but an action for damages on breach. The purchaser had gone into possession of the property.

In *Tennant Land Co. v. Nordeman*, 148 Ky. 361, 146 S. W. 756, the covenant was to construct a sewer, water and gas mains, with connections to the property lines, concrete sidewalks and curbing, and a modern asphalt roadway. There was a failure as to all features except the sidewalks. The court held that a case for rescission was made.

In *Laser v. Forbes*, 105 Ark. 166, 150 S. W. 691, the agreement on the part of the vendor was to grade and lay sewer pipes in front of the property and build cement sidewalks along its street line. After paying seven monthly instalments of the purchase price, the vendee elected to rescind. The court, after commenting on the facts that the contract was entirely executory and that plaintiff had never been put in possession of the property, said: "Under these circumstances, we are of opinion that the breach by defendant of this material provision of the contract entitled the plaintiff to rescind his purchase and to recover the

money paid thereon as for money had and received."

In our opinion these more recent cases announce the better doctrine as regards executory contracts. An agreement to lay water or sewer lines to a lot is to be deemed a material inducement, so affecting the consideration as to be of the essence of the contract of sale. It is not to be regarded as a minor detail, independent of or separable from the agreement whereby the vendor agreed to sell. The sale of the lot without connection with such lines would not be contemplated in all likelihood. The test for rescission is the materiality of the covenant to improve in the given case, rather than any metaphysical notion touching the mutuality or dependency of covenants.

It does not follow, however, that a rescission was properly awarded in this case, the contract here involved being an executed one. The vendee had completed her payments, taken a deed, and gone into possession. The above cases relate to executory contracts, save *Tennant Land Co. v. Norde-man*, in which the facts closely parallel those of the instant case. The court's attention in that case apparently was not directed to the distinction; no comment of the court discloses that it was in mind.

As has been well said, the power of a court of equity to decree the rescission of

an executed contract and order its surrender for cancellation is one of the most delicate powers it is ever called upon to exercise. The equitable remedy of rescission is not one enforceable as a matter of right, and the court should not award it in a case where some such element as actual fraud, accident, mistake, or insolvency does not appear to justify it. This is true even though the circumstances are such that, where the contract still executory, the court would grant that relief. The vendee is left to resort to his legal remedy for damages for the breach.

It cannot be claimed on this record that the contract of sale was induced by fraud or mistake, or that the vendor company is insolvent.

If there has been a failure to cause water lines to be laid, such as the contract calls for to serve the contract purpose, the situation is to be likened to one of a partial deficiency in the thing purchased. In such case the vendee in possession under an executed contract is remitted to his legal remedy. *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 5 L.R.A. 45, 11 S. W. 797, and cases cited.

In our opinion the Court of Civil Appeals was in error in decreeing a rescission. Reversed, and the bill of complaint dismissed.

### **Annotation—Right of vendee to rescind contract for sale of land because of vendor's breach of covenant to make improvements.**

The earlier cases on the right to rescind an executory contract are discussed in the note to *Crampton v. McLaughlin Realty Co.* 21 L.R.A.(N.S.) 823. Since the date of that note, the right of a purchaser who had paid a part of the purchase price and entered into possession of the land, to rescind the contract for breach of the vendor's agreement, in case a portion of the land was too high, to put it under irrigation by raising or changing the irrigation lateral or by shaving off the top of the land, thereby lowering its surface, has been denied where only a very small part of the land was affected by the clause and the agreement could have been complied with at a very small relative cost. *Cheney v. Bierkamp* (1914) 58 Colo. 321, 145 Pac. 691. See further in regard to this case *McMILLAN v. AMERICAN SUBURBAN CORPORATION*, ante, 401.

On the contrary it has been held that, where the covenant of the vendor as to improvements and the other covenants in the contract are dependent, the breach by the vendor of his contract to make

improvements does furnish ground for rescission. *Ihrke v. Continental L. Ins. & Invest. Co.* (1916) 91 Wash. 342, L.R.A.1916F, 430, 157 Pac. 866, in which it was held that a breach by the vendor of fruit land, of his agreement to plant fruit trees upon the parcels sold, care for them for a period of years, and turn over to the purchaser a bearing orchard, justified a rescission of the contract by the purchaser. With reference to the covenants, the court states that they are mutual and dependent. "The very contract is to convey a tract of land with a bearing orchard, which was to be planted and matured prior to the time the last of the payments were due. There was no separation in regard to the consideration."

And it has been held that the vendee is entitled to rescind the contract for breach of the covenant to make improvements where the contract is entirely executory and the parties can be placed in statu quo. *Laser v. Forbes* (1912) 105 Ark. 166, 150 S. W. 691; *Laser v. Fowler* (1914) — Ark. —, 170 S. W.

223 (agreement was to surface grade and lay sewer pipe in front of property, and build a 4-foot cement sidewalk along the street line). In *Laser v. Forbes* (Ark.) supra, the purchaser had paid seven monthly instalments on the purchase price, while in *Laser v. Fowler* (Ark.) supra, the entire purchase price had been paid, but the purchaser, who had never taken possession, refused to accept a deed tendered because the contract had not been complied with. Recovery of the amount paid was allowed in each case. The Arkansas court does not expressly consider whether the covenants were dependent, but states in *Laser v. Forbes*, supra: "In the contract there were mutual obligations which were assumed by both parties; the promises therein made by one were the consideration for the promises made by the other, and the failure or refusal by one to fulfil his promises justified a rescission of the contract by the other." See discussion in *McMILLAN v. AMERICAN SUBURBAN CORP.* ante, 401, as to resting the right to rescind upon the mutuality or dependency of the covenants.

The sales in *Laser v. Forbes* and in *Laser v. Fowler* were of land in an addition being developed by the vendor. The agreement of the vendor to make the improvement provided that "these improvements will be made as fast as 25 per cent of the money received from the sale of the property will pay for the same." In *Laser v. Forbes*, the vendor urged that the required amount of improvements had been made upon other property in the addition, and that improvements in any part of the addition were sufficient to comply with the covenant, the entire amount of improvements called for not being required until all the lots were sold and payments made thereon. This contention was denied, the court stating that "the contract is a separate one disconnected with any other sale that the defendant made or will make of any other lot in the addition. The contract makes no reference to any other property in the addition or to other proposed sales thereof, but specifically provides that to the extent of 25 per cent of the payments made by plaintiff surface grading should be made and sewer pipes laid 'in front of' the blocks described in the contract, and that a cement sidewalk should be built along 'the street line of said property.' The plain meaning of this language of this provision of the contract is that these improvements shall be made in effect upon the property described in the contract out of the L.R.A.1917B.

purchase money paid thereon. . . . The amount received from plaintiff on the contract up to the time he claimed a rescission amounted to \$1,530, 25 per cent of which was sufficient to pay for the character of improvements named in the above provision upon this property. But defendant not only failed to make any of these improvements upon this property, but refused to do so, claiming and asserting the right to expend the money thus collected from plaintiff for improvements made upon other property in the addition. This he had no right to do, and by so doing he not only violated the obligation he assumed by the terms of this provision of the contract, but evinced an intention not to comply therewith."

But in *Dowling v. Miller-Kendig Real Estate Co.* (1909) 115 N. Y. Supp. 154, a purchaser of a lot in an addition was held not entitled to recover the purchase price for the vendor's failure to lay a sidewalk in front of his premises, but this decision is based upon the ground that not sufficient time had been given for the construction of the improvement, the court stating: "This enterprise shows many hundreds of lots facing on many streets; a purchaser in these circumstances should realize that such a clause related to the enterprise generally. To say arbitrarily that defendant must at once or within two years place these sidewalks in front of the lots of each purchaser, or return the purchase price paid on account, would result in a construction of the contract not jointly contemplated by the parties."

A case of some interest in this connection, although not involving an agreement by the vendor to make improvements, is the decision in *Aurand v. Perry Town Lot & Improv. Co.* (1916) — Iowa, —, 159 N. W. 779, where a purchaser of a lot in an addition some distance from the business portion of the city was held entitled to rescind the contract, in which the seller guaranteed to the buyer that within two years from the date of the contract a street railway would be built and in operation from the main business portion of the city across the addition in which the lot was located, no such street railway having been built.

In *Miller v. Beck* (1914) 72 Or. 140, 142 Pac. 603, a purchaser of lots in a tract, under a contract entitling him to a right of way for road purposes along adjoining tracts until such time as a road shall be opened along the front of the lots purchased, is held entitled to rescind the contract and recover the

amount paid, where the road along the adjoining tracts was closed and the vendor refused to open the road mentioned in the contract.

A vendee is not entitled to recover a sum paid to the vendors, who had agreed to make certain alterations in the premises prior to the taking of title, because the alterations were made without first filing the plans and specifications thereof with the municipal authorities, where the alterations were made in accordance with the requirement of the law. *Umburg v. Neinken* (1908) 128 App. Div. 165, 112 N. Y. Supp. 618.

There is little authority as to the right of a vendee to rescind a contract for the sale of realty because of vendor's breach of his covenant to make improvements, where the contract has been executed. It is held in *Tennant Land Co. v. Nordeman* (1912) 148 Ky. 361, 146 S. W. 756, that a purchaser of suburban property has a right to rescind for breach of his vendor's covenant to construct a sewer, water and gas mains with connections to the property line, concrete sidewalks, curbing, and a modern asphalt roadway. The court states: "It is manifest that the improvements contemplated by the contract were necessary to its proper enjoyment as a home or to its profitable sale; that being true, they constituted an essential part of the consideration."

In *McMillan v. American Suburban Corp.* ante, 401, the purchaser had completed the payment, taken a deed, and gone into possession. This is treated as an execution of the contract, and rescission thereof is refused for this reason. In *Tennant Land Co. v. Nordeman* (Ky.) supra, the contract between the parties contained the stipulation that the improvements of a street as advertised were included in the price named in the contract. According to the advertisement the vendor agreed to construct the improvements above mentioned. The

advertisement stated that the improvements were well under way and would be completed in the fall of 1906. The purchase was made in the early part of 1907, and about two years and a half thereafter the purchaser accepted deeds to the land purchased, and executed his note for the balance of the purchase price. This was urged as constituting a ratification of the contract and a waiver of the grounds upon which a rescission was asked.

It is true, as stated in *McMillan v. American Suburban Corp.* ante, 401, that the court in *Tennant Land Co. v. Nordeman* did not consider the question of an executed contract; but in answer to the argument that the right to rescission had been waived, the court states that the purchase under the conditions above stated did not amount to a waiver of his right to rescind, because the vendor was attempting all the time to carry out the agreement and was assuring the purchaser that it would be carried out. That being true, it is stated that it was not apparent at the time of the acceptance of the deeds that the improvements would not be made. When it did become reasonably apparent that the improvements contracted for would not be made, the purchaser elected to rescind.

It is held in *Braddy v. Elliott* (1908) 146 N. O. 578, 16 L.R.A.(N.S.) 1121, 125 Am. St. Rep. 52, 60 S. E. 507, that the mere failure by one party to an exchange of land to comply with his agreement to construct buildings on the land granted by him is not sufficient to justify a rescission of the entire contract by a court of equity.

The waiver of a purchaser's right to rescind a contract for the purchase of real property is discussed in the note to *Faulkner v. Wassmer*, 30 L.R.A.(N.S.) 872; and see later case *Whitney v. Bissell*, L.R.A.1915D, 257. W. A. E.

# WASHINGTON SUPREME COURT.

LAURA J. GRAHAM, Appt.,

v.

E. T. GRAHAM, Resp't.

(54 Wash. 70, 102 Pac. 891.)

## Divorce — opening decree — fraud.

1. A court will reopen and try a divorce

Note. — As to attacks on decrees of divorce for other causes than lack of jurisdiction, see annotation following this case, post, 409.  
L.R.A.1917B.

case if the decree which has been entered therein is the result of fraud practised upon the other party or upon the court.  
For other cases, see *Judgment*, VII. c, in Dig. 1-52 N. S.

Same — sufficiency of case made.

2. A divorce decree may be opened if promptly attacked when the record bears marks of collusion, and the prosecuting attorney was not called upon to inquire into the merits of the case, while the divorcée alleges that the facts alleged in the petition were untrue, that plaintiff's attorney represented her, and that she was induced not to appear by threats of suicide on the part

of her husband, while his real purpose in securing the divorce was to marry another. *For other cases, see Judgment, VII. c, in Dig. 1-52 N. S.*

(July 8, 1909.)

**A**PPEAL by plaintiff from an order of the Superior Court for King County, dismissing a petition filed to vacate a decree of divorce, and for permission to withdraw her answer and defend the suit. Reversed.

The facts are stated in the opinion.

Mr. Fred C. Brown, for appellant:

A decree of divorce will be set aside when there is duress, coercion, or collusion.

McDonald v. McDonald, 34 Wash. 294, 75 Pac. 865; Danforth v. Danforth, 105 Ill. 603; Rawlins v. Rawlins, 18 Fla. 345; Maher v. Title Guarantee & T. Co. 95 Ill. App. 365; 23 Cyc. 917, 919, 921.

Mr. J. D. Bauer, for respondent:

A decree granted through fraud and perjury is voidable only, and will only be set aside by the court which granted it upon the strongest evidence.

23 Cyc. 1022.

Generally, a general statute permitting the opening of a judgment for fraud does not apply to divorce decrees.

Ewing v. Ewing, 24 Ind. 468; Gilruth v. Gilruth, 20 Iowa, 225; Whitcomb v. Whitcomb, 46 Iowa, 437; Lewis v. Lewis, 15 Kan. 181; O'Connell v. O'Connell, 10 Neb. 390, 6 N. W. 467; Metler v. Metler, 32 Wash. 494, 73 Pac. 535.

The decree of divorce is conclusive upon the parties.

Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; Re Ellis, 55 Minn. 401, 23 L.R.A. 292, 43 Am. St. Rep. 514, 56 N. W. 1056; Keller v. Keller, 139 Ind. 38, 38 N. E. 337; Rouse v. Rouse, 47 Iowa, 422; Edson v. Edson, 108 Mass. 597, 11 Am. Rep. 393; Larimer v. Knoyle, 43 Kan. 338, 23 Pac. 487; Parish v. Parish, 9 Ohio St. 534, 75 Am. Dec. 482; Lord v. Lord, 66 Me. 265; Stewart, Marr. & Div. § 422; Kingman v. Kingman, 61 Ill. App. 134; Sparhawk v. Wills, 5 Gray, 427; Lucas v. Lucas, 3 Gray. 140; Hood v. Hood, 11 Allen, 200, 87 Am. Dec. 709; Carley v. Carley, 7 Gray, 545; Whiting v. Whiting, 114 Mass. 496; Edgerly v. Edgerly, 112 Mass. 53; Peyton v. Peyton, 28 Wash. 278; 68 Pac. 757; 23 Cyc. 1023, 1097; 14 Cyc. 717, 723, 725, 726.

Chadwick, J., delivered the opinion of the court:

On September 1, 1908, a decree of divorce was entered in the superior court of King county, dissolving the bonds of matrimony then existing between appellant and respondent. On October 1, 1908, appellant

filed her petition under the statute, praying for an order vacating the decree, and for permission to withdraw her answer and defend the suit. For the sake of the discussion of the only legal proposition involved we deem it necessary to set out, in part, at least, the facts alleged in her petition. She sets up the original complaint, in which her husband had asked a divorce upon the ground that she had treated him with extreme cruelty, had refused to live with him, had heaped personal indignities upon him, rendering his life burdensome, and that there was such incompatibility of temper between them that they could no longer live together as husband and wife. No facts were alleged in his complaint that would have saved the pleading from an attack by general demurrer. To this complaint she had entered a general denial. The trial was had without her presence, and a decree entered, so far as the record shows, upon the respondent's testimony alone. She further alleges that, prior to November, 1907, the relations existing from the time of their marriage in March, 1882, had been most amicable; that she had been a dutiful wife, and that he had been a fond, faithful, and indulgent husband; that from the time mentioned he began to grow cold and distant, and cease to manifest that love and affection that had so long characterized his conduct toward her; that in June, 1908, he requested her to procure a divorce; that this she refused to do; that his inattention and neglect then became more marked, until finally, with intent to deceive her as to his real motive, he more than once threatened to commit suicide unless she consented to allow him to procure a divorce; that he procured a revolver, and made a pretended attempt to take his life; that his conduct so terrorized her and their children that she was reduced in health, and so shocked in her nervous system that she was induced to believe that he would commit suicide, and so she yielded to his demand; that thereafter, on August 28th, he sent an attorney, whom he had employed, to her with a copy of the summons and complaint, together with an answer which he had prepared; that she signed the answer; that respondent thereafter telephoned her that he would take his life if she resisted the divorce, or appeared in the court room at the hearing; all of which she believed, and for that reason she did not appear. She further alleges that all of the facts set forth in his complaint were false and untrue; that his threats of suicide were made with fraudulent intent to cover his real purpose, which was to marry another,—a purpose he had thereafter admitted to her; that she has a good defense to his complaint, and

that he has neglected her and their children, so that they are in necessitous circumstances. It would seem that this recital was enough to warrant the court in vacating the decree, and we take it that it would have done so but for its conception of the case of *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535, wherein this court said: "The reasons for making this distinction between judgments in this particular action and judgments in ordinary actions are apparent. A decree of divorce affects the status of the parties, both with respect to their relations to one another and their relations to the public. By the terms of the statute divorced persons may lawfully marry after a limited time from the rendition of the decree, and to permit its vacation is to make it possible, under the guise of law, to inflict injury and suffering upon persons whose innocence entitles them to every protection the law can afford. It is therefore highly important, not only for the sake of the parties thereto, but also for the sake of such persons, that decrees of divorce should not be granted except, for specific causes provided by law, proved, and found by the court, in actions where the court has undoubted jurisdiction over the subject matter and the parties; but it is also equally important that the decree, when once granted, be not disturbed by the court granting it."

The power of a court having jurisdiction of the parties to vacate a decree of divorce once formally entered is therefore squarely before us. In the *Metler* Case the court also said: "The court can, of course, lawfully vacate such a decree when entered without jurisdiction, and perhaps where it is the result of fraud practised on the court or the other spouse." The *Metler* Case was referred to in *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865, wherein it was said: "It would seem to be violative of fundamental principles to hold that a divorce decree, fraudulently procured, may not be timely assailed by the innocent party to the proceedings." It would seem, therefore, that, notwithstanding the doctrine frequently announced that a decree of divorce will never be vacated because of the probable evil consequences following the severance of a new relation, bearing, as it might, after-begotten children, the better rule is that, notwithstanding the decree, a court will reopen and try the case if the decree is the result of a fraud practised upon the other party or upon the court.

This rule is admitted in the case of *Lewis v. Lewis*, 15 Kan. 181, cited and relied upon by respondent, although the court refused to reopen the decree, finding no irregularity in the proceeding. This case, L.R.A.1917B.

however, was distinguished in the later case of *Hemphill v. Hemphill*, 38 Kan. 220, 16 Pac. 457, wherein the rule here announced was declared. In the case of *Whitcomb v. Whitcomb*, 46 Iowa, 437, cited by respondent, the distinction between the force of a decree entered upon constructive service, the statute having been strictly complied with, and a fraud upon the party or the court, is clearly pointed out. It was held that the decree would not be vacated where summons was regularly had by publication, but that the court had power in all cases to vacate a decree obtained by fraud, even though the plaintiff may have subsequently married and become a parent. The case of *Ewing v. Ewing*, 24 Ind. 468, also relied upon by respondent, followed the case of *McQuigg v. McQuigg*, 13 Ind. 294. In the case of *Earle v. Earle*, 91 Ind. 27, after a careful review of all the authorities, the court held that a decree of divorce obtained by fraud may be vacated and set aside as any other decree thus obtained. Continuing, the court said: "We think, therefore, that when such a wrong has been consummated in the obtaining of decrees of divorce, the courts have the right, and owe the duty, to set them aside and declare them null and void, and that, as far as the case of *McQuigg v. McQuigg*, supra, and the cases following it, conflict with the conclusion reached, they should be overruled. Very much good we think will come from the adoption of the rule in divorce cases, and no harm, provided the injured party is not negligent in moving upon the discovery of the fraud. Possibly, in some cases, a second husband or wife may innocently be made to suffer, but, with proper restriction, this is not more likely than in the reversal of decrees on appeal to this court. It is proper and right in the administration of the law to protect innocent third parties, who may marry a divorced man or woman, but it is quite as proper and important to protect the husband and wife and innocent children from fraudulent divorces. Some of the cases in this state, in which relief has been denied, are forcible illustrations of the necessity of the rule here adopted. The adoption of the rule is essential to the complete administration of justice, will tend to protect the courts and the family from fraud and wrong, and will serve as a warning to those inclined to practise such fraud." The doctrine of this case has been followed in the later case of *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223. The case of *O'Connell v. O'Connell*, 10 Neb. 390, 6 N. W. 467, is also relied on. That the force of this case as an authority had been weakened by the subsequent decisions of that court was insinuated but not dis-



cussed by the court in *Smithson v. Smithson*, 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300. It is unnecessary to review other cases cited by respondent, and which only incidentally bear upon our discussion.

The reason for the better rule is aptly stated in *Brown v. Brown*, 58 N. Y. 609, wherein the chapter of the Code allowing vacation of decrees and judgments and the power of the court thereunder was clearly defined. "Under that provision [in relation to opening judgments] the period of seven years must elapse before a judgment founded on publication can be reposed upon as final. It is obvious that such a provision is inappropriate to actions for divorce. They were therefore excepted from it. But the power which the courts had, before the Code, over their own judgments and records is not interfered with. It is not contended that § 135, or any other, takes away the power of the court to open a judgment of divorce entered upon default, where the summons has been personally served, and it would indeed be an anomaly to give so much greater effect to one entered upon publication than, while the former could be opened by the exercise of the discretionary power of the court, the latter would be beyond the reach of any such power. We do not think that it was the intention of the act to produce any such unreasonable result." The rule that such a decree may be vacated is sustained by the following authorities: *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Boyd's Appeal*, 38 Pa. 241; *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; *Helmes v. Helmes*, 24 Misc. 125, 52 N. Y. Supp. 734; *Hamilton v. Hamilton*, 29 App. Div. 331, 51 N. Y. Supp. 365; *Elmgren v. Elmgren*, 25 R. I. 177, 55 Atl. 322; *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Van Derveer v. Van Derveer*, 30 Ohio L. J. 96; *Womack v. Womack*, 73 Ark. 281, 83 S. W. 937, 1136; *Bishop, Marr. & Div.* 1556; *Stewart, Marr. & Div.* § 422; and, in the opinion of the writer, by the case of *Winstone v. Winstone*, 40 Wash. 272, 82 Pac. 268, as well as the *Metler and McDonald Cases*.

It is contended, however, that, the lower court having had complete jurisdiction, a mere offer to prove that the decree was obtained as the result of perjured testimony, and was fraudulently obtained, is insufficient. Whatever the rule may be when the divorce proceeding is collaterally inquired into, it must be remembered that this is a direct application, timely and diligently prosecuted, and no harm can result to any innocent person by a further inquiry as to the justice of respondent's cause. Aside from these considerations, the interest of the public in all actions for divorce is such L.R.A.1917B.

that a policy has grown up, in accord with enlightened sentiment, to discourage and deny divorces unless claimed upon proper grounds and sustained by an honest disclosure of the facts. There is much in the record that prompts further inquiry. The complaint did not, as the statute (*Ballinger's Anno. Codes & Stat.* § 5730 [*Pierce's Code*, § 4641]) expressly provides, distinctly state the causes relied upon. Although the proceeding must have borne the earmarks of a divorce by consent or collusion, the prosecuting attorney was not called upon to inquire into the merits of the cause. It was, in effect, notwithstanding the record, a decree by default. The fact that respondent, as it now appears, had prompted the whole proceeding, including the employment of an attorney who was willing to accept the questionable agency of appearing for the defendant, through the intervention of the plaintiff, whose interest was hostile, was in itself, when promptly disavowed, a showing of fraud upon the law and upon the court, calling for further inquiry. The demurrer admits the conduct of respondent prior to and subsequent to the entry of the decree; and, while ordinarily the plea of coercion or duress would not be heard upon the facts alleged, when we consider the years of intimate relationship existing between these parties, the trust and confidence inspired by mutual interest in the rearing of children, it is not for us to say in this proceeding that appellant was not the victim of a well-founded dread that respondent, the father of her children, would take his life unless she submitted to his demand. His after declaration that he intended to marry another was enough to disabuse her mind, make the cowardice of his silly threat stand naked and revealed, and recall the fact that her rights had been taken from her without a hearing. It is not, as counsel says, an indication that she has allowed her "jealous and spiteful disposition to overcome her better judgment." In it we see the way of woman, and when it appears that she has been deprived of her right by pretense that prevented a full inquiry, the interest of the public, as well as that of the wife, intervenes and demands a rehearing upon the full merits of the cause. "Where the unsuccessful party has been prevented from exhibiting fully his cause by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise, . . . these and similar cases which show that there has never been a clear contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a

fair hearing." *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93.

The order of the lower court sustaining the demurrer to appellant's petition and dismissing her from the court is reversed, and the cause remanded, with instructions to the

lower court to entertain her petition for the vacation of the decree.

Rudkin, Ch. J., and Fullerton, Gose, and Morris, JJ., concur.

### **Annotation—Attacks on decrees of divorce for other causes than lack of jurisdiction.**

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***I. Previous notes pertinent to attacks on divorces.***

There have heretofore been published in the Lawyers Reports Annotated sundry notes kindred to this annotation which profitably the reader may again peruse. Attention especially is here directed to the following:

I. The note to *Butler v. Washington*, 19 L.R.A. 814, on the validity of a decree of divorce obtained on publication or service out of the state, where the defendant did not appear.

II. The note to *Merriman v. Walton*, 30 L.R.A. 786, on injunctions against judgments obtained by fraud, accident, mistake, surprise, or duress.

III. The note to *Tyler v. Aspinwall*, 54 L.R.A. 758, on who may sue or take other proceedings to set aside judgments against other parties.

IV. The notes to *Lawrence v. Nelson*, 57 L.R.A. 583, and *McElrath v. McElrath*, 44 L.R.A.(N.S.) 505, on the right to contest the validity of a divorce decree after the death of one or both of the parties.

V. The notes to *Karren v. Karren*, 60 L.R.A. 294, and *Robinson v. Robinson*, 51 L.R.A.(N.S.) 534, on the right of a party obtaining or consenting to a divorce to contest its validity.

VI. The case note to *Nolan v. Dwyer*, 1 L.R.A.(N.S.) 551.

VII. The notes to *Graves v. Graves*, 10 L.R.A.(N.S.) 216; *South Haven & E. R. Co. v. Culver*, 23 L.R.A.(N.S.) 564; *Reeves v. Reeves*, 25 L.R.A.(N.S.) 574; and *Robertson v. Freebury*, L.R.A.1916B, 883 et seq., on perjury as ground for relief against judgment.

VIII. The note to *Rumping v. Rumping*, 12 L.R.A.(N.S.) 1197, on the necessity of alleging jurisdictional residence in divorce proceeding.

IX. The note to *Flood v. Templeton*, 13 L.R.A.(N.S.) 579, on relief from judgment suffered in reliance upon a promise which was not kept.

X. The note to *Clark v. Southern Can Co.* 36 L.R.A.(N.S.) 980, on the character and kinds of judgments and orders within the rule that judgments and orders

cannot be collaterally attacked for fraud not affecting the jurisdiction.

XI. The note to *Atkinson v. Atkinson*, 47 L.R.A.(N.S.) 499, on delay in procuring order for publication of summons after making affidavit.

***II. The finality of judgments of divorce.***

There are no maxims of the law more firmly established or of more value in the administration of justice than "Interest reipublice ut sit finis litium," and "Nemo bis vexari pro una et eadem causa,"—the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

The same verity attaches to a decree of divorce granted by a competent court that guards the sanctity of judgments of superior courts having jurisdiction of their subjects and the parties. *Whitford v. Whitford* (1911) 100 Ark. 63, 139 S. W. 653.

When a decree of divorce rendered by a superior court of general jurisdiction which had jurisdiction of the parties is attacked, every reasonable presumption will be indulged in favor of its validity. *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706.

A divorce granted by a court clothed by statute with general jurisdiction over the subject is presumed, under an attack by a subsequent spouse of the person divorced, to be valid, notwithstanding the silence of the record respecting the existence of the jurisdictional fact of residence. *Werz v. Werz* (1881) 11 Mo. App. 26.

A party who, without fault or neglect, has had an unjust or unauthorized judgment rendered against him through the fraud of his adversary, can treat it as invalid only after he has, in some mode prescribed by law, had it reversed or annulled. *Davis v. Davis* (1873) 61 Me. 395.

One cannot have a judgment against him set aside without showing that he was unable, for some good reason sufficient to excuse his failure, to make a defense against the action. *Clark v. Ramsey* (1915) 143 Ga. 729, 85 S. E. 869.

Unless there is some special and recognized cause for the interference of a court of equity with the judgment of a court of law or the decree of a court of probate, such judgment will remain a positive bar to future litigation at law

or in equity. *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293.

A decree of divorce between a husband and wife legally domiciled in the state where it was granted, rendered in conformity with the laws of such state, when there is a statute providing for service of process by publication in such cases, is not invalid because the defendant was not served personally with process, and did not appear and submit to the jurisdiction of the court in the suit. *Harrison v. Harrison* (1851) 19 Ala. 499.

In a suit for a divorce, an earlier decree of divorce obtained by the defendant against the plaintiff, and pleaded in bar, cannot be attacked and annulled on the ground that it was procured by fraud and duress, when the court had full jurisdiction of both the subject and the parties. *De Graw v. De Graw* (1879) 7 Mo. App. 121.

An application of a husband to open an interlocutory decree of divorce obtained by his wife upon clearly proven grounds, and to be allowed to defend, without offering adequate excuse for not appearing and defending in time, is properly denied where there has been no collusion, no imposition on the court, and no other reason appears why the court, in the public interest, should direct or allow any further inquiry. *Gabriel v. Gabriel* (1916) — N. J. Eq. —, 97 Atl. 495.

The petition of a husband who was regularly served with process in his wife's suit for divorce, and deliberately suffered a default therein, presented after her death, and obviously in order to obtain a share of her estate, merely alleging the falsity of her charges and of the testimony in support of them, and offering no excuse for his failure to defend, should be denied and dismissed. *Roberts v. Roberts* (1896) 19 R. I. 349.

A man sued for divorce by his wife, duly cited and charged with cruelty, who enters no appearance, and, knowing the time and place of hearing, absents himself from the taking of depositions, and who employs counsel who confers with his wife's counsel while the suit is pending, cannot, after a decree has been granted and alimony awarded to his wife, upon a motion unsupported by any excuse for his default, have the judgment set aside and the cause restored for trial on the merits, upon allegations that the decree was procured by testimony known to his wife to be false, and which amounted to a fraud upon the court. L.R.A.1917B.

*White v. White* (1913) — R. I. —, 86 Atl. 552.

A man who knew his wife had begun a suit for divorce from him, and who was personally served with a citation, fully explained to him, issued on her original petition, and who knew within three weeks afterwards, and in time to appeal, that a decree had been rendered against him, cannot maintain suit to set aside a decree granted upon an amended petition of which he had no notice, but which set up no new ground of action. *Richards v. Minster* (1902) 29 Tex. Civ. App. 85, 70 S. W. 98.

A defendant regularly served with process in a divorce suit, and having knowledge of its pendency, cannot complain of a decree rendered against him by default, on the ground that he was not specially notified to appear at the trial on the merits. *O'Brien v. D'Hemecourt* (1907) 118 La. 996, 43 So. 654.

When a husband has obtained a decree of divorce from his wife upon the ground that she had, at the time of the marriage, and concealed it from him, an incurable physical disease which made her incapable of child-bearing, in a suit brought while the couple were living apart in voluntary separation, of which she had personal notice in ample time and due form to appear and defend, and which she allowed to go to judgment against her by default, an attack afterwards made by her on the decree in so far only as it omitted to make any provision for alimony for her must fail upon its appearing that, while the action was pending, she had written a letter to her husband's attorney, releasing any claims for alimony that she might have, notwithstanding her allegation that such letter was not her voluntary act, in the absence of any sufficient or credible proof of any duress. *Rouse v. Rouse* (1877) 47 Iowa, 422.

As to whether or not a final decree of divorce granted by a court of competent jurisdiction over the subject matter, between parties domiciled in the commonwealth, after the respondent had appeared and defended, or had been duly summoned and was legally in default, was open to any reversal by review, writ of error, certiorari, or other proceeding in the nature of an appeal, the Massachusetts supreme judicial court declined, in *Greene v. Greene* (1854) 2 Gray (Mass.) 361, 61 Am. Dec. 468, to express any opinion, and contented itself with deciding that such a decree, on the principle of *res judicata*, was conclusive in

a subsequent litigation between the parties, even when it was attacked upon the ground that it was procured by means of false witnesses suborned to commit perjury by the spouse who obtained it.

The case of *Greene v. Greene* (Mass.) supra, was reviewed and limited afterwards in *Edson v. Edson* (1867) 108 Mass. 590, 11 Am. Rep. 393. In the later case it was said of the former that some of the general expressions used in it by the court, when disconnected from the facts there involved, have been thought to sanction the doctrine that a divorce once obtained could not be impeached in any proceeding or set aside by a party to the original suit, however fraudulent and collusive may have been the other party's conduct in procuring it. But, it was added, such a conclusion is not a fair and legitimate result of the language and reasoning of the court when considered, as it ought to be, solely with reference to the actual case before the court for adjudication. The attempt there was upon a new libel for divorce to try over again a case which had before been adjudicated between the same parties after due notice and opportunity for a full hearing on the merits. Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated on the ground of fraud in its procurement in a separate and independent libel subsequently brought between the same parties when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon evidence offered in support of the allegations in the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases. But, beyond this, which was the precise point adjudicated, the authority of the case cannot be properly extended.

### III. *Relation of nature of the marriage contract and public interest in divorces toward attacks on decrees.*

There are considerations which profoundly influence the decisions of the courts in suits and proceedings attacking decrees of divorce which have no place in other litigations to set aside judgments. These arise out of the nature of the marriage contract and the interest of the state in its stability.

A judgment dissolving a marriage contract differs essentially in its effects from judgments determining property rights, because marriage contracts are fundamentally different from all other con-

tracts. Marriage, viewed solely as a civil relation, does possess elements of contract. *Andrews v. Andrews* (1902) 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237.

It is often termed a civil contract by textbook authors and in court decisions, but it is very much more than a mere contract, for, while other contracts may be modified, restricted, enlarged, or entirely abrogated by the consent of the contractors, the law steps in and holds those who make a marriage contract to divers obligations and liabilities, and its dissolution is always subject to legislative control. *Maynard v. Hill* (1888) 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723.

Although marriage is in a sense a contract, because it is both stipulatory and consensual, not valid without the spontaneous concurrence of two competent minds, it is nevertheless sui generis, and, unlike ordinary or commercial contracts, is publici juris because it creates fundamental and important domestic relations. *Maguire v. Maguire* (1838) 7 Dana (Ky.) 181.

As every well-organized society is deeply interested in the existence, harmony, and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state, and cannot, like mere contracts, be abrogated or dissolved by the mutual consent alone of the contracting persons, but only by the sovereign, when the public interest requires it, and in furtherance of justice. *Maguire v. Maguire* (Ky.) supra.

The causes for which a marriage contract may be broken are limited to such as the government deems incompatible with its continuance for the welfare of the parties and society. *True v. True* (1861) 6 Minn. 458, Gil. 315.

The community and the state have a vital interest in the sanctity of the marriage compact, and have confided its keeping to the courts alone. *True v. True* (Minn.) supra.

The institution of marriage has been judicially declared to be an important feature of civilization, the preservation of which is essential to the maintenance of organized society. *Grannis v. Superior Ct.* (1905) 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

In every civilized country, it has been said, marriage is recognized as the most important relation in life, and one in which the state is vitally interested. It is a well-recognized public policy to

foster and protect marriage, to make it a public institution, to encourage spouses to live together, to prevent their separation, and to discourage illicit unions. *Deyoe v. Superior Ct.* (1903) 140 Cal. 482, 98 Am. St. Rep. 73, 74 Pac. 28.

It has been aptly said that the sanctity of the marriage relation is so essential to the stability of our social and moral institutions, and is so necessary to the preservation of the home,—the essential unit of government and modern civilization,—that no technical rules as to judicial procedure should be allowed to interfere with its protection by the courts of the country, but it should be the aim and desire of every court to give the law that liberal interpretation that will tend to build a fortress about the marriage institution. *Dickinson v. Dickinson* (1911) — Tex. Civ. App. —, 138 S. W. 205.

The public has an interest in the result of every suit for divorce. *McBlain v. McBlain* (1888) 77 Cal. 507, 20 Pac. 61; *Cottrell v. Cottrell* (1890) 83 Cal. 457, 23 Pac. 531.

A bill for a divorce partakes of the nature of a suit in chancery, and, to a great extent, is governed by chancery rules. *Bowman v. Bowman* (1872) 64 Ill. 75.

The courts aim to afford the fullest possible hearing of divorce suits. *McBlain v. McBlain and Cottrell v. Cottrell* (Cal.) supra.

Although a suit to dissolve a marriage is nominally between two individuals, the state, because of its interest in maintaining the marital relation unless good cause for its dissolution exists, is an interested party. *Deyoe v. Superior Ct.* (Cal.) supra.

A divorce suit is a litigation of public interest in which the litigants can waive nothing essential to the validity of the proceedings, and must observe all statutory requirements. *Whitford v. Whitford* (1911) 100 Ark. 63, 139 S. W. 653.

The public, having an interest in marriages and divorces, will not sustain contracts designed to uphold illegal or fraudulent divorces. *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191.

In divorce suits, which often are uncontested, and where collusion may exist, the public has a peculiar interest, which is in the care of the courts, which will be astute to enforce the principles and policies of the law, lest, by the suppression or perversion of important facts, they may be used to allow decrees to which neither litigant is justly or legally entitled. *Fisher v. Fisher* (1902) 95 L.R.A.1917B.

*Md.* 319, 93 Am. St. Rep. 334, 52 Atl. 898; *Foxwell v. Foxwell* (1914) 122 Md. 263, 89 Atl. 494.

A judgment of divorce is peculiar in that it establishes the personal status of the parties to it in a particular which is of the highest importance to them and to the community. *Tyler v. Aspinwall* (1901) 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

#### IV. Vulnerability of judgments and decrees of divorce.

Notwithstanding the general finality of judgments, any judgment may be set aside if good grounds exist, in an appropriate proceeding seasonably instituted for the purpose. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank* (1880) 101 U. S. 514, 25 L. ed. 929; *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134; *Noble v. Moses Bros.* (1883) 74 Ala. 604; *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534; *Evans v. Wilhite* (1912) 176 Ala. 287, 58 So. 262; *McAdams v. Windham* (1915) 191 Ala. 287, 68 So. 51; *Wells, F. & Co. v. W. B. Baker Lumber Co.* (1913) 107 Ark. 415, 155 S. W. 122; *Malone v. Big Flat Gravel Min. Co.* (1892) 93 Cal. 384, 28 Pac. 1063; *Clark v. Oyharzabal* (1900) 129 Cal. 328, 61 Pac. 1119; *Flood v. Templeton* (1907) 152 Cal. 148, 13 L.R.A. (N.S.) 579, 92 Pac. 78; *Davis v. Hibernia Sav. & L. Soc.* (1913) 21 Cal. App. 444, 132 Pac. 462; *Pearce v. Olney* (1850) 20 Conn. 544; *Moore v. Moore* (1913) 139 Ga. 597, 77 S. E. 820; *Wierich v. De Zoya* (1845) 7 Ill. 385; *French v. Thomas* (1911) 252 Ill. 65, 96 N. E. 564; *Stodgell v. Garnett* (1910) 159 Ill. App. 301; *Woodruff Place v. Gorman* (1912) 179 Ind. 1, 100 N. E. 71; *Gorman v. Johnson* (1910) 46 Ind. App. 672, 91 N. E. 971; *Griffith v. Merchant's Life Assn.* (1910) 148 Iowa, 727, 127 N. W. 1079; *Frisbie v. Chase* (1913) 161 Iowa, 133, 140 N. W. 842; *Lawrence v. Lawrence* (1911) 145 Ky. 61, 140 S. W. 36; *Southern Nat. L. Ins. Co. v. Ford* (1913) 151 Ky. 476, 152 S. W. 243; *Harding v. Alden* (1832) 9 Mo. 140, 23 Am. Doc. 549; *Kent v. Richards* (1850) 3 Md. Ch. 396; *Barr v. Packard Motor Car Co.* (1912) 172 Mich. 299, 137 N. W. 697; *Geisberg v. O'Laughlin* (1903) 88 Minn. 431, 93 N. W. 310; *Hinkle v. Lovelace* (1907) 204 Mo. 208, 11 L.R.A. (N.S.) 730, 120 Am. St. Rep. 698, 102 S. W. 1015, 11 Ann. Cas. 794; *Einstein v. Strother* (1916) — Mo. App. —, 182 S. W. 122; *Loeb v. Schmith* (1868) 1 Mont. 87; *Tebbetts v. Tilton* (1855) 31 N. H. 287;

*Binsse v. Barker* (1832) 13 N. J. L. 263, 23 Am. Dec. 720; *Boyd v. Williams* (1903) 70 N. J. L. 185, 56 Atl. 135; *Corning v. Tripp* (1844) 1 How. Pr. (N. Y.) 14; *Williams v. Richmond & D. R. Co.* (1892) 110 N. C. 466, 15 S. E. 97; *Chicago, R. I. & P. R. Co. v. Reese* (1910) 26 Okla. 613, 110 Pac. 1071; *Chicago, R. I. & P. R. Co. v. Eastham* (1910) 26 Okla. 605, 30 L.R.A.(N.S.) 740, 110 Pac. 887; *Brown v. Trent* (1912) 36 Okla. 239, 128 Pac. 895; *Johnson v. Filtsch* (1913) 37 Okla. 510, 138 Pac. 165; *Bowman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270.

The jurisdiction of a court of equity will always be exercised to nullify a judgment upon grounds rendering it against conscience to enforce it. *Pearce v. Olney* (1850) 20 Conn. 544.

A court of equity will grant relief against a judgment contrary to conscience, obtained in any way by which injustice has been done. *Moore v. Gamble* (1852) 9 N. J. Eq. 246.

A decree of divorce constitutes no exception. *Daniels v. Benedict* (1892) 50 Fed. 347; *Golden v. Golden* (1893) 102 Ala. 353, 14 So. 638; *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706; *Womaek v. Womaek* (1904) 73 Ark. 281, 83 S. W. 937, 1136; *Stewart v. Stewart* (1911) 101 Ark. 86, 141 S. W. 193; *Elliott v. Wohlfrom* (1880) 55 Cal. 384; *Cohn v. Cohn* (1890) 85 Cal. 108, 24 Pac. 659; *Morton v. Morton* (1891) 16 Colo. 358, 27 Pac. 718; *Medina v. Medina* (1896) 22 Colo. 146, 43 Pac. 1001; *Rawlins v. Rawlins* (1881) 18 Fla. 345; *Shrader v. Shrader* (1895) 36 Fla. 502, 18 So. 672; *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795; *Brown v. Brown* (1871) 59 Ill. 315; *Bradford v. Abend* (1878) 89 Ill. 78, 31 Am. Rep. 67; *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342; *Dunham v. Dunham* (1896) 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841; *Scanlan v. Scanlan* (1891) 41 Ill. App. 449; *Walrad v. Walrad* (1894) 55 Ill. App. 668; *Maher v. Title Guarantee & T. Co.* (1901) 95 Ill. App. 365; *Nihell v. Nihell* (1911) 161 Ill. App. 589; *Earle v. Earle* (1883) 91 Ind. 27; *Nicholson v. Nicholson* (1888) 113 Ind. 131, 15 N. E. 223; *Brown v. Grove* (1888) 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; *Day v. Nottingham* (1903) 160 Ind. 408, 66 N. E. 998; *Smith v. Smith* (1854) 4 G. Greene (Iowa) 266; *Pinkney v. Pinkney* (1854) 4 G. Greene (Iowa) 324; *Whetstone v. Whetstone* (1871) 31 Iowa, 276; *Whitcomb v. Whitcomb* (1877) 46 Iowa, 437; *Tollefson v. Tollefson* (1908) 137 L.R.A.1917B.

*Iowa*, 151, 114 N. W. 631; *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27; *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191; *Patterson v. Patterson* (1896) 57 Kan. 275, 46 Pac. 304; *Re Smith* (1906) 74 Kan. 452, 87 Pac. 189; *Newcomb v. Newcomb* (1877) 13 Bush. (Ky.) 544, 26 Am. Rep. 222; *Bryant v. Austin* (1884) 36 La. Ann. 808; *O'Rourke v. Lawrence* (1913) 132 La. 710, 61 So. 764; *Holmes v. Holmes* (1874) 63 Me. 420; *Spinney v. Spinney* (1895) 87 Me. 484, 32 Atl. 1019; *Leathers v. Stewart* (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366; *Gechter v. Gechter* (1879) 51 Md. 187; *Galloway v. Galloway* (1915) 125 Md. 511, 94 Atl. 97; *Carley v. Carley* (1856) 7 Gray (Mass.) 545; *Edson v. Edson* (1867) 108 Mass. 590, 11 Am. Rep. 393; *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84; *Young v. Young* (1871) 17 Minn. 181, Gil. 153; *Olmstead v. Olmstead* (1889) 41 Minn. 297, 43 N. W. 67; *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; *Plummer v. Plummer* (1859) 37 Miss. 185; *Mansfield v. Mansfield* (1858) 26 Mo. 163; *Lieber v. Lieber* (1911) 239 Mo. 1, 143 S. W. 458; *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94, second appeal (1914) 257 Mo. 317, 165 S. W. 783; *De Graw v. De Graw* (1879) 7 Mo. App. 121; *McDonald v. McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850; *Simpkins v. Simpkins* (1894) 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759; *State ex rel. Happel v. District Ct.* (1909) 38 Mont. 166, 35 L.R.A.(N.S.) 1098, 12 Am. St. Rep. 636, 99 Pac. 291; *Atkins v. Atkins* (1879) 9 Neb. 191, 2 N. W. 466; *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594; *Hard v. Hard* (1897) 51 Neb. 412, 70 N. W. 1122; *Miller v. Miller* (1914) 37 Nev. 257, 142 Pac. 218; *Adams v. Adams* (1871) 51 N. H. 388, 12 Am. Rep. 134; *Doughty v. Doughty* (1876) 27 N. J. Eq. 315; *Britton v. Britton* (1889) 45 N. J. Eq. 88, 15 Atl. 266; *Voorhees v. Voorhees* (1890) 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172, affirmed in (1890) 47 N. J. Eq. 315, 14 L.R.A. 366, 20 Atl. 676; *Jones v. Jones* (1913) 82 N. J. Eq. 558, 89 Atl. 29, on second appeal (1914) 83 N. J. Eq. 571, 91 Atl. 819; *Dyott v. Henderson* (1916) 85 N. J. Eq. 338, 97 Atl. 35; *Bulkley v. Bulkley* (1858) 6 Abb. Pr. (N. Y.) 307; *Wortman v. Wortman* (1863) 17 Abb. Pr. (N. Y.) 66; *Denton v. Denton* (1871) 41 How. Pr. (N. Y.) 221; *Helmes v. Helmes* (1898) 24 Misc. 125, 52 N. Y. Supp. 734;



Lake v. Lake (1908) 124 App. Div. 89, 108 N. Y. Supp. 964; Fox v. Fox (1911) 143 App. Div. 483, 127 N. Y. Supp. 989; Cary v. Cary (1911) 144 App. Div. 846, 129 N. Y. Supp. 444; Nichells v. Nichells (1895) 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73; Dallas v. Luster (1914) 27 N. D. 450, 147 N. W. 95; Fritz v. Fritz (1899) 9 Ohio S. & C. P. Dec. 275; Mulligan v. Mulligan (1908) 11 Ohio C. C. N. S. 585, 31 Ohio C. C. 106; Rodgers v. Nichols (1905) 15 Okla. 579, 83 Pac. 923; Holt v. Holt (1909) 23 Okla. 639, 102 Pac. 187; Clay v. Robertson (1912) 30 Okla. 758, 120 Pac. 1104; Butler v. Butler (1912) 34 Okla. 392, 125 Pac. 1127; Crow v. Crow (1914) 40 Okla. 455, 139 Pac. 122; Richardson v. Howard (1915) — Okla. —, 151 Pac. 887; Smith v. Smith (1871) 3 Or. 363; Hague v. Hague (1916) 79 Or. 646, 156 Pac. 277; Allen v. Maclellan (1849) 12 Pa. 328, 51 Am. Dec. 608; Boyd's Appeal (1861) 38 Pa. 241; Fidelity Ins. Co.'s Appeal (1880) 93 Pa. 242; Wanamaker v. Wanamaker (1873) 10 Phila. (Pa.) 466; Nickerson v. Nickerson (1883) 13 W. N. C. (Pa.) 210; Wilt v. Wilt (1899) 2 Dauphin Co. Rep. (Pa.) 100; State v. Watson (1898) 20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193, 11 Am. Crim. Rep. 24, affirmed in (1900) 179 U. S. 679, 45 L. ed. 383, 21 Sup. Ct. Rep. 915; Elmgren v. Elmgren (1903) 25 R. I. 177, 55 Atl. 322; McMurray v. McMurray (1887) 67 Tex. 665, 4 S. W. 357; McConkey v. McConkey (1916) — Tex. Civ. App. —, 187 S. W. 1100; Atkinson v. Atkinson (1913) 43 Utah, 53, 47 L.R.A.(N.S.) 499, 134 Pac. 595; Pringle v. Pringle (1909) 55 Wash. 93, 104 Pac. 135; Chaney v. Chaney (1909) 56 Wash. 145, 105 Pac. 229; Cooper v. Cooper (1916) — Wash. —, 158 Pac. 1007; Weatherbee v. Weatherbee (1866) 20 Wis. 499; Johnson v. Coleman (1868) 23 Wis. 452, 99 Am. Dec. 193; Crouch v. Crouch (1872) 30 Wis. 667; Everett v. Everett (1884) 60 Wis. 200, 18 N. W. 637; Metzler v. Metzler (1907) 132 Wis. 601, 113 N. W. 49.

If there is no legislation, or what is construed as such, to interfere, in respect of their impeachability for fraud in their procurement, decrees of divorce are treated by the courts, just like other judgments. Golden v. Golden (1893) 102 Ala. 353, 14 So. 638; Stewart v. Stewart (1911) 101 Ark. 86, 141 S. W. 193; Elliott v. Wohlfrom (1880) 55 Cal. 384; Morton v. Morton (1891) 16 Colo. 358, 27 Pac. 718; Rawlins v. Rawlins (1881) 18 Fla. 345; Parramore v. Parramore (1911) 61 Fla. 701, 55 So. 795; Caswell

v. Caswell (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548; Dunham v. Dunham (1896) 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841, affirming (1895) 57 Ill. App. 475; Scanlan v. Scanlan (1891) 41 Ill. App. 449; Wood v. Wood (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; Tollefson v. Tollefson (1908) 137 Iowa, 151, 114 N. W. 631; Wisdom v. Wisdom (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594; Smithson v. Smithson (1893) 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300; Rodgers v. Nichols (1905) 15 Okla. 579, 83 Pac. 923; Allen v. Maclellan (1849) 12 Pa. 328, 51 Am. Dec. 608; Wilt v. Wilt (1899) 2 Dauphin Co. Rep. (Pa.) 100; McMurray v. McMurray (1887) 67 Tex. 665, 4 S. W. 357; Chaney v. Chaney (1909) 56 Wash. 145, 105 Pac. 229.

Decrees of divorce are generally treated like judgments in ordinary civil actions in suits to set them aside, except for a justifiable reluctance to annul them, manifested by the courts, after second marriages on the faith of them have been contracted. Bomsta v. Johnson (1888) 38 Minn. 230, 36 N. W. 341.

There is no distinction between judgments of divorce and other judgments in respect of their impeachability for fraud in their procurement. Re Smith (1906) 74 Kan. 452, 87 Pac. 189.

So far as the general power of courts to set aside, vacate, modify, or amend their judgments in concerned, decrees of divorce stand upon the same footing as other judgments. Adams v. Adams (1871) 51 N. H. 388, 12 Am. Rep. 134.

The inherent power of all courts to vacate or modify their judgments in direct proceedings for the purpose, for good causes, extends now in Indiana to decrees of divorce, save only in so far as it is restricted specifically by statute. Nicholson v. Nicholson (1888) 113 Ind. 131, 15 N. E. 223.

In general, divorce decrees are open to attack in the same manner and upon the same grounds as other judgments. Barber v. Barber (1916) — Me. —, 98 Atl. 822.

Attacks on decrees of divorce rest on the same bases as those upon judgments in other cases. Cooper v. Cooper (1916) — Wash. —, 158 Pac. 1007.

In respect of remedies to set it aside, a decree of divorce does not differ from any other judgment determining the property or personal rights of the person against whom it has been rendered. State ex rel. Happel v. District Ct.

(1909) 38 Mont. 166, 35 L.R.A.(N.S.) 1098, 129 Am. St. Rep. 636, 99 Pac. 291.

Judgments of divorce are open to attack in the same manner, upon the same grounds, and within the same periods of time, as other judgments. Nichells v. Nichells (1895) 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

A decree in a divorce suit is within the operation of the rule that whenever a judgment has been obtained by the fraud of the person in whose favor it was rendered, without implicating the adverse party, there is a good and sufficient cause for vacating that judgment. State v. Watson (1898) 20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193, 11 Am. Crim. Rep. 24, affirmed in (1900) 179 U. S. 679, 45 L. ed. 383, 21 Sup. Ct. Rep. 915.

There is, upon principle, according to the supreme court of Maine, no solid ground for any distinction in respect of impeaching judgments for fraud between decrees in divorce suits and other judgments; or, if there be any distinction, it is to be found in the much greater danger of fraud and imposition in divorce cases as compared with others, and the added necessity and importance of preserving the power to correct or vacate decrees fraudulently obtained. Adams v. Adams (1871) 51 N. H. 388, 12 Am. Rep. 134.

In the esteem of the court of appeals of Kentucky neither reason nor policy demands that judgments of divorce should be outside the general law applying to grants of new trials, and in that commonwealth there is a special reason why courts having jurisdiction in such cases should have every possible means of preventing frauds and correcting an error or injustice in a judgment of divorce because no appeal lies from it; and unless the court that committed the wrong can right it, the injured party has no redress. Meyar v. Meyar (1860) 3 Met. (Ky.) 298.

#### V. Judicial power to set aside divorces.

The power to set aside judgments in original suits and proceedings is ordinarily exercised subject to restrictions imposed by general rules of law and equity or statutes, by courts of equity, or those clothed with equitable jurisdiction. Horton v. Stegmyer (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134; Renfro v. Merryman (1881) 71 Ala. 195; McDonald v. Pearson (1896) 114 Ala. 630, 21 So. 534; Evans v. Wilhite (1910) 167 Ala. 587, 52 So. 845; McAdams v. Windham (1915) 191 Ala. L.R.A.1917B.

287, 68 So. 51; Womack v. Womack (1904) 73 Ark. 281, 83 S. W. 937, 1136; Flood v. Templeton (1907) 152 Cal. 148, 13 L.R.A.(N.S.) 579, 92 Pac. 78; Davis v. Hibernia Sav. & L. Soc. (1913) 21 Cal. App. 444, 132 Pac. 462; Medina v. Medina (1896) 22 Colo. 146, 43 Pac. 1001; Pearce v. Olney (1850) 20 Conn. 544; Shrader v. Shrader (1895) 36 Fla. 502, 18 So. 672; Parramore v. Parramore (1911) 61 Fla. 701, 55 So. 795; Wierich v. De Zoya (1845) 7 Ill. 385; Bradford v. Abend (1878) 89 Ill. 78, 31 Am. Rep. 67; Caswell v. Caswell (1887) 120 Ill. 377, 11 N. E. 342; French v. Thomas (1911) 252 Ill. 65, 96 N. E. 564; Scanlan v. Scanlan (1891) 41 Ill. App. 449; Maher v. Title Guarantee & T. Co. (1901) 95 Ill. App. 365; Stodgell v. Garnett (1910) 159 Ill. App. 301; Brown v. Grove (1888) 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; Gorman v. Johnson (1910) 46 Ind. App. 672, 91 N. E. 971; Lawrence v. Nelson (1901) 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84; Tollefson v. Tollefson (1908) 137 Iowa, 151, 114 N. W. 631; Comstock v. Adams (1880) 23 Kan. 513, 31 Am. Rep. 191; Newcomb v. Newcomb (1877) 13 Bush (Ky.) 544, 26 Am. Rep. 222; Kent v. Ricards (1850) 3 Md. Ch. 396; Barr v. Packard Motor Car Co. (1912) 172 Mich. 299, 137 N. W. 697; Mansfield v. Mansfield (1858) 26 Mo. 163; Dorrance v. Dorrance (1912) 242 Mo. 625, 148 S. W. 94; Einstein v. Strother (1916) — Mo. App. —, 182 S. W. 122; State ex rel. Happel v. District Ct. (1908) 38 Mont. 166, 35 L.R.A.(N.S.) 1098, 129 Am. St. Rep. 636, 99 Pac. 291; Dyott v. Henderson (1916) 85 N. J. Eq. 338, 97 Atl. 35; Voorhees v. Voorhees (1890) 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172, affirmed in (1890) 47 N. J. Eq. 315, 14 L.R.A. 366, 20 Atl. 676; Brown v. Brown (1874) 58 N. Y. 609; Dallas v. Luster (1914) 27 N. D. 450, 147 N. W. 95; Rodgers v. Nichols (1905) 15 Okla. 579, 83 Pac. 923; Clay v. Robertson (1912) 30 Okla. 758, 120 Pac. 1102; Brown v. Trent (1912) 36 Okla. 239, 128 Pac. 895; Johnson v. Filtsch (1913) 37 Okla. 510, 138 Pac. 165; Richardson v. Howard (1915) — Okla. —, 151 Pac. 887; Bowman v. Anderson (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270; Wilt v. Wilt (1899) 2 Dauphin, Co. Rep. (Pa.) 100; Wolf v. Sahn (1909) 55 Tex. Civ. App. 564, 120 S. W. 1114, 121 S. W. 561; Atkinson v. Atkinson (1913) 43 Utah, 53, 47 L.R.A.(N.S.) 499, 134 Pac. 595; Johnson v. Coleman (1868) 23 Wis. 452, 99 Am. Dec. 193; Moyer v. Koontz (1899) 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50.

A petition to set aside a judgment is addressed to the equity powers of the court. *Patrucio v. Selkirk* (1913) — **Tex. Civ. App.** —, 160 S. W. 635.

The district courts of Texas are held to have the power of courts of equity to relieve from judgments obtained by fraud, accident, or mistake. *McMurray v. McMurray* (1887) 67 **Tex.** 665, 4 S. W. 357.

One district court in Nebraska has been held to have no jurisdiction to set aside a decree of divorce granted by another district court of equal rank, on the ground that the assailed decree was obtained by means of perjury and fraud. *Smithson v. Smithson* (1893) 37 **Neb.** 535, 40 **Am. St. Rep.** 504, 56 N. W. 300.

A court of equity will afford relief against a judgment at law on grounds which were not available at law to the defeated litigant. *Kent v. Ricards* (1850) 3 **Md. Ch.** 396.

Or when the justice of the judgment is impeached by facts. *Ibid.*

Since courts of law in New York have been authorized to refer disputed facts to a referee for report on motions for relief, it is not necessary for one who seeks to set aside a judgment got by fraud to resort in ordinary cases to a court of equity, because the law courts are as capable of passing on controverted facts as is a judge sitting in chancery. *Denton v. Denton* (1871) 41 **How. Pr. (N. Y.)** 221.

The power of setting judgments aside in proceedings instituted for the purpose is also exercised under like restrictions by the courts in which the judgments were obtained.

The supreme court of Maine has said that it could see no good reason why a court might not vacate a decree of divorce during the same term, of its own motion. The power to vacate such a decree should be exercised if justice requires, whether there is a motion or not; and, it added, we do not doubt that the court has such power. *Barber v. Barber* (1916) — **Me.** —, 98 **Atl.** 822.

It has several times been declared that, as a general thing, every superior court possesses inherent power to set aside or modify its own judgments, decrees of divorce included, for good and sufficient causes, in furtherance of justice. *Adams v. Adams* (1872) 51 **N. H.** 388, 12 **Am. Rep.** 134; *Wood v. Wesley* (1912) 75 **Misc.** 521, 135 **N. Y. Supp.** 876, affirmed in (1912) 151 **App. Div.** 897, 135 **N. Y. Supp.** 1150; *Mendola v. Illinois Surety Co.* (1912) 141 **N. Y. L.R.A.** 1917B.

*Supp.* 114, affirmed in (1913) 155 **App. Div.** 895, 141 **N. Y. Supp.** 1131.

Despite the doctrines of *Parish v. Parish* (1859) 9 **Ohio St.** 534, 75 **Am. Dec.** 482, it has been asserted in Ohio, in an attack upon a divorce, that the courts of the state have inherent power to protect themselves and the public from fraud and perjury. *Mulligan v. Mulligan* (1908) 11 **Ohio C. C. N. S.** 585, 31 **Ohio C. C.** 89.

The inherent power of all courts to vacate or modify their judgments for good cause, in a direct proceeding, was said, in *Nicholson v. Nicholson* (1887) 113 **Ind.** 131, 15 **N. E.** 223, to be too firmly settled, both on principle and by authority, to justify further discussion.

They have this power as a part of their necessary machinery for the due administration of justice. *State v. Watson* (1898) 20 **E. I.** 354, 78 **Am. St. Rep.** 871, 39 **Atl.** 193, 11 **Am. Crim. Rep.** 24, affirmed in (1900) 179 **U. S.** 679, 45 **L. ed.** 383, 21 **Sup. Ct. Rep.** 915.

A decree of divorce obtained by fraud may be set aside by the court which granted it upon a summary application, seasonably made. *Olmstead v. Olmstead* (1889) 41 **Minn.** 297, 43 **N. W.** 67.

A court which granted a decree of divorce has inherent power to vacate it upon a motion made in apt time, grounded upon a fraud or imposition upon it by the plaintiff. *Scribner v. Scribner* (1904) 93 **Minn.** 195, 101 **N. W.** 163.

A court of general jurisdiction possesses not less in divorce than in other cases, ex necessitate and independent of statute, power to rid itself of the effects of a deceit practised upon it, and to expunge from its records what has been spread upon them only through deception and fraud. *Yorke v. Yorke* (1893) 3 **N. D.** 343, 55 **N. W.** 1095.

Every court of record, unless restrained by positive enactment, has the power to vacate its judgments when it is established that they were obtained by fraud. *Denton v. Denton* (1871) 41 **How. Pr. (N. Y.)** 221.

A superior court may always exercise the power to amend or correct the record of one of its own judgments so as to make that record speak the truth, —show what really was the judicial action. *Tyler v. Aspinwall* (1901) 73 **Conn.** 493, 54 **L.R.A.** 758, 47 **Atl.** 755.

No statute prohibiting, a court which granted a divorce upon a service by publication has the power and right, for good cause shown, and on a proper application by the defendant, to set the judgment aside and allow a defense to

be made. *R— v. R—* (1866) 20 Wis. 331.

It is generally agreed that every court of general jurisdiction has power inherently and virtually, at its discretion, of its own motion, or upon application of either litigant, in a proper case, for good cause and upon due notice, of course, to the parties in interest, to alter, modify, open, or set aside any judgment, decree, or order that it had rendered or made, not excepting a decree of divorce, at any time during and before the end of the same term. *Wells, F. & Co. v. W. B. Baker Lumber Co.* (1913) 107 Ark. 415, 155 S. W. 122; *Tyler v. Aspinwall* (Conn.) supra; *Moore v. Moore* (1913) 139 Ga. 597, 77 S. E. 820; *Danforth v. Danforth* (1883) 105 Ill. 603; *Nihell v. Nihell* (1911) 161 Ill. App. 589; *Todhunter v. De Graff* (1914) 164 Iowa, 567, 146 N. W. 66; *Greer v. Greer* (1903) 25 Ky. L. Rep. 655, 76 S. W. 166, rehearing denied in (1903) 25 Ky. L. Rep. 1247, 77 S. W. 703; *Carley v. Carley* (1856) 7 Gray (Mass.) 545; *Harkness v. Jarvis* (1904) 182 Mo. 232, 81 S. W. 446; *Ewart v. Peniston* (1911) 233 Mo. 695, 136 S. W. 422; *Higgins v. Higgins* (1912) 243 Mo. 164, 147 S. W. 962; *Currey v. Trinity Zinc, Lead & Smelting Co.* (1911) 157 Mo. App. 423, 139 S. W. 212; *Bradley v. Slater* (1899) 58 Neb. 554, 78 N. W. 1069; *Winder v. Winder* (1910) 86 Neb. 495, 125 N. W. 1095; *Howell v. Howell* (1911) 89 Neb. 243, 131 N. W. 216; *Zitnik v. Union P. R. Co.* (1914) 95 Neb. 152, 145 N. W. 344; *Douglas County v. Broadwell* (1914) 96 Neb. 682, 148 N. W. 930; *Kredel v. Kredel* (1891) 11 Ohio Dec. Reprint, 421; *Simpkins v. Parsons* (1915) — Okla. —, 151 Pac. 588; *Parks v. Haynes* (1915) — Okla. —, 152 Pac. 400; *R— v. R—* (1866) 20 Wis. 331; *Brown v. Brown* (1881) 53 Wis. 29, 9 N. W. 790.

Every proceeding in court is in fieri until the close of the term; hence, the court has full and complete control over its record of proceedings during the entire term at which they are had, and may at any time while the term lasts, for good cause shown, correct, modify, or vacate any judgment it has rendered. *Foote v. Foote* (1913) 53 Ind. App. 673, 102 N. E. 393.

It is said to be "undoubted law that the power of a court over its judgments during the entire term at which they are rendered is unlimited." The court has full power to amend, correct, or vacate a decree or judgment. During the term the judgment is still in fieri, and subject to the further action of the court. *Bar-*

*ber v. Barber* (1916) — Me. —, 98 Atl. 822.

The power of a court of record to vacate or modify its own judgment or decree at the same term in which it was rendered is inherent. It does not depend upon, but is independent of, statutes. *Wells, F. & Co. v. W. B. Baker Lumber Co.* (1913) 107 Ark. 415, 155 S. W. 122.

The power of a court to set aside or change its own judgment during the term at which it rendered it is not lost by continuing a timely motion to vacate beyond the term. *Parks v. Haynes* (1915) — Okla. —, 152 Pac. 400.

In Iowa it has been provided by statute (Code, § 243) that the record of proceedings in court remains under the control of the court, and may be amended or any entry in it may be expunged at any time during the term at which it is made and before its final attestation by the judge's signature; but the statute only declares the common law, since the supreme court of the state has said, after citing it: "Even without such a statute . . . the court has undoubted inherent power to correct its own records during the term, and to set aside, modify, or expunge any order, decree, or judgment theretofore ordered at the same term, and the power exists until adjournment sine die." *Todhunter v. De Graff* (1914) 164 Iowa, 567, 146 N. W. 66.

The Kentucky Statute (Civ. Code, § 426) which restricts the power of the court which has granted a decree of divorce to set it aside to cases where both parties unite in asking annulment does not affect the right and power of the court to vacate the decree at the same term, provided neither party has remarried. *Droste v. Droste* (1910) 138 Ky. 53, 127 S. W. 506.

During the term at which a decree of divorce has been rendered, and as long as the condition of both parties remains unchanged, it may, upon due notice to the opposing party, be set aside upon the application of the other, by the court which rendered it. *Ficener v. Ficener* (1887) 8 Ky. L. Rep. 867, 3 S. W. 597.

It was objected in *Barber v. Barber* (Me.) supra, that a court which had granted a decree of divorce and then vacated it at the same term, upon its own motion, could not rightfully do so without notice to the spouse who obtained the decree; but, as to this, the supreme court said: We are not persuaded that this view is the correct one. The justice had heard the case. His first decision and decree favorable to the libellant gave her no fixed right. It was

subject to change during the term. During the term it was ambulatory. The order vacating the decree left the case pending on the docket. The libellant was deprived of no right. She might have asked for and had another hearing on the libel. Under such circumstances we do not think notice to show cause was necessary as a matter of law.

On the other hand, it has been held that a court has not the right, upon its own motion, to vacate a decree of divorce granted by it during the term at which it was granted, except upon a showing of some legal ground for such action, and after notice to the spouse who obtained it, and an opportunity to be heard in opposition. *Morris v. Morris* (1894) 60 Mo. App. 86.

After a decree of divorce, made at the end of a trial, has been settled in terms, signed by the trial judge, and spread upon the record as the judgment of the court, a change in its provisions intended to affect the title to and ownership of real estate held by the parties in common, made on the ex parte application of one party without notice to the other, even before the end of the term, and by the same judge, is void and may be successfully attacked and annulled by the party whose rights were infringed in an action to partition quiet title to, or recover the possession or value of the property affected by the change in the decree. *Kiventsky v. Sirovy* (1909) 142 Iowa, 384, 121 N. W. 27.

The defendant in a divorce suit who was served by publication only, and who did not appear therein, need not be cited when the court, of its own motion, at the same term, proceeds, upon notice to the plaintiff, to set aside a decree previously granted, upon the ground that the court was imposed upon by false testimony. *Todhunter v. De Graff* (1914) 164 Iowa, 567, 146 N. W. 66.

The courts in the different jurisdictions are not in accord as to whether or not a court of record has power to vacate or set aside a judgment after the term at which it was rendered has expired; and those which grant the power differ in different jurisdictions upon the conditions, circumstances, and limitations affecting its exercise. *Tyler v. Aspinwall* (1901) 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

It has been held that the inherent power and right of a court to set aside one of its own judgments does not outlast the term at which the judgment was

rendered. *Ewart v. Peniston* (1911) 233 Mo. 695, 136 S. W. 422.

The power of a court to vacate or modify its own judgment at or after the term does not extend to setting aside a final judgment after the term at which it was rendered, for alleged errors of law properly to be considered on a motion for a new trial, made during the term. *Clark v. Roman* (1915) — Okla. —, 151 Pac. 479.

After the term at which a decree of divorce was granted has expired, the court which granted the decree has no right or power to change, on notice and motion, the provisions thereof respecting alimony and a division of property, on the ground that they are different from what he supposed and actually intended them to be, where the statute in virtue of which the court assumed to make the change in the decree merely provided for vacating or modifying it for a mistake, negligence, or omission of the clerk, or an irregularity in obtaining the judgment. *Hatfield v. Hatfield* (1916) — Okla. —, 158 Pac. 942.

The grounds that justify setting aside ordinary judgments at law or in equity after the terms expire during which they were rendered have been held not to apply to decrees of divorce, which are final. *Ficener v. Ficener* (1887) 8 Ky. L. Rep. 867, 3 S. W. 597.

Again, it has been held that a court of general jurisdiction from which a decree of divorce was obtained by a fraud has the power to set it aside at a later term. *Allen v. Maclellan* (1849) 12 Pa. 328, 51 Am. Dec. 608.

And it has been declared that such a court, independently of an express statute, has power to set aside a decree of divorce fraudulently procured after the term at which it was granted has ended. *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

As the record of a judgment is a history of the court proceedings, the power to make it truthful is a necessary one possessed by every court of record, and one which may be exercised during the term at which the judgment was rendered or afterwards, on the court's own motion or otherwise. *Tyler v. Aspinwall* (1901) 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

Upon a petition addressed to the sound judicial discretion of the court, asking that a decree of divorce rendered at a former term be reopened and vacated, upon the ground that it was fraudulently obtained, the court has power to entertain the application and grant the prayed-for relief if the facts warrant it.

*Edson v. Edson* (1867) 108 Mass. 590, 11 Am. Rep. 393.

A petition asking the court to exercise judicial discretion and open and vacate a decree of divorce rendered at a previous term, on the ground that it was procured by fraud, is, in its nature and effect, an application to correct the record and prevent injustice and wrong likely to result from the judgment if it should be left undisturbed. *Ibid.*

By a statute of Iowa (Code, § 4091) district courts were authorized to vacate or modify judgments, including decrees of divorce, or to grant new trials at subsequent terms, for certain stated causes. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

After terms have expired, judgments or orders obtained by fraud in district courts of Nebraska might by statute (Civ. Code, § 602), held to apply to divorce suits, be vacated or modified for errors in the proceedings against infants or lunatics, where the infancy or lunacy did not appear on the face of the record. *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

A superior court in the state of Washington has been empowered by statute, which embraces divorces, to vacate or modify judgments after term time for frauds practised in obtaining them, and upon the petition of the injured party, whether served personally or constructively. *Chaney v. Chaney* (1909) 56 Wash. 145, 105 Pac. 229.

A remedy by motion to open a default and set aside a decree in a divorce suit is open in a proper case under the provision (§ 116) of the Code of Civil Procedure of Montana, empowering the court to grant relief to a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Simpkins v. Simpkins* (1894) 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759.

Under a statute (Tex. Rev. Stat. 1895, art. 1375) which provides that in cases where judgment is rendered on service by publication, and the defendant has not appeared in person or by an attorney of her own selection, a new trial may be granted for good cause shown upon her application, supported by her affidavit, a wife petitioning to set aside a divorce granted her husband in a suit where service was by publication only, and in which she was represented only by an attorney appointed for the purpose by the court, need not allege either fraud

in obtaining the decree or falsity in the affidavit to procure publication service. *Bracht v. Bracht* (1908) — Tex. Civ. App. —, 107 S. W. 895.

A proceeding under the Texas statute (Rev. Stat. 1895, art. 1375) to set aside a judgment rendered upon service by publication only, against a defendant who did not appear either in person or by his own attorney, is not a new suit, but merely a continuation of the former one; and the order for a new trial is therefore an interlocutory one, and not reviewable by direct appeal. *Wolf v. Sahm* (1909) 55 Tex. Civ. App. 564, 120 S. W. 1114, rehearing denied in (1909) 55 Tex. Civ. App. 572, 121 S. W. 561.

*VI. Bill in equity to set aside a divorce as a bill of review.*

A bill in equity to annul a judgment or a decree of divorce for fraud is commonly called an original bill in the nature of a bill of review. *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534; *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795; *Sloan v. Sloan* (1882) 102 Ill. 581; *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548.

But it is not strictly a bill of review. *Tribble v. Patton* (1913) 180 Ala. 258, 60 So. 863.

A bill of review aims to reverse, alter, or explain a judgment or decree in a former action or suit. *Watkinson v. Watkinson* (1905) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326.

A bill in equity for a review must proceed upon an error of law apparent upon the face of the judgment or decree to be reviewed, or upon fraud in obtaining it, or upon matter either new or newly discovered which was not available to prevent the judgment or decree, and which, if it had been available might have prevented it. *Ibid.*; *Kingman v. Kingman* (1895) 61 Ill. App. 134.

And it is essential for maintaining a bill of review to set aside a decree of divorce that leave to file it be first had from the court. *Kearns v. Kearns* (1905) 70 N. J. Eq. 483, 65 Atl. 464; *Leveridge v. Leveridge* (1911) — N. J. Eq. —, 79 Atl. 422.

The granting or refusing of leave to file a bill of review rests in the sound discretion of the court, and its action, when there has been no abuse of discretion, is not subject to revision on appeal. *Stockley v. Stockley* (1892) 93 Mich. 307, 53 N. W. 523; *Tisman v. Tisman* (1913) 176 Mich. 94, 142 N. W. 358.

An application for leave to file a bill

of review to set aside a decree of divorce alleged to have been obtained by a fraud which induced the applicant to refrain from defending the suit is addressed to the discretion of the court of chancery, and it should be denied when the evidence refutes the charge of fraud and shows affirmatively that the applicant had throughout full knowledge of the proceedings to obtain the divorce, and that the spouse who got it has since married another. *Leveridge v. Leveridge* (N. J.) *supra*.

An original bill in equity to set aside a decree of divorce for fraud in procuring it is not a bill of review in the ordinary sense and meaning of the term, and hence statutes forbidding bills of review to be allowed in divorce cases, or limiting the time within which they may be brought, do not apply. *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94, on second appeal (1914) 257 Mo. 317, 165 S. W. 783.

The rule which precludes filing a bill of review to set aside a decree of divorce after the statutory time to appeal from it has elapsed has no application to *ex parte* decrees obtained by fraud and imposition upon the court, the public, and the defrauded spouse. *Jones v. Jones* (1913) 82 N. J. Eq. 558, 89 Atl. 29, and on second appeal (1914) 83 N. J. Eq. 571, 91 Atl. 819.

A bill in equity to set aside a divorce, alleging that the defendant wilfully and knowingly misrepresented his own residence to confer jurisdiction, falsely charged the complainant with desertion, and fraudulently and falsely set up that the complainant was an absentee whose whereabouts were unascertainable, thus successfully preventing the complainant, who had a good defense, from appearing and defending, is a bill of review, and not an original bill to set aside the decree for fraud, and to make it good against a demurrer it is essential that leave of the court to file it be first obtained and then pleaded. *Kearns v. Kearns* (1905) 70 N. J. Eq. 483, 65 Atl. 464.

The power of the courts in Wisconsin to vacate judgments by bill of review for fraud or upon other than jurisdictional grounds is said to have been terminated by the enactment of the Wisconsin Code of Practice, so that, since its adoption, such relief has been obtainable only under and conformably to the statute (Stat. 1898, § 2832). *Uecker v. Thiedt* (1907) 133 Wis. 148, 113 N. W. 447; *Routledge v. Patterson* (1911) 146 Wis. 226, 131 N. W. 346.  
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## VII. Rules restrictive of equitable relief from divorces.

### a. In general.

The rules under which litigants are allowed to seek relief in chancery against the judgments of other courts are very strict and inflexible, since, were they otherwise, the jurisdiction of courts of equity would soon supplant that of all other tribunals. *Watts v. Gayle* (1852) 20 Ala. 825; *De Soto Coal, Min. & Development Co. v. Hill* (1914) 188 Ala. 667, 65 So. 988; *McAdams v. Windham* (1915) 191 Ala. 287, 68 So. 51.

The peace and interests of society require the power to disturb the decrees and judgments of courts of competent jurisdiction, and to reopen controversies which it is the policy of the law to quiet, to be exercised with strictness and caution. *Waldrom v. Waldrom* (1884) 76 Ala. 285.

The equity powers of a court to give relief against a judgment will only be exercised to protect or enforce a substantial right without which the result would be contrary to good conscience. *Van Buren v. Posteraro* (1909) 45 Colo. 588, 132 Am. St. Rep. 199, 102 Pac. 1067.

A judgment will not be disturbed by a court of equity merely because it was unjust. *Cantwell v. Kimmerle* (1913) 179 Ill. App. 66.

Or merely because the court, had it decided the cause itself, would have come to a different conclusion. *Ibid*.

A court of chancery will not take jurisdiction of a bill to declare null a decree of divorce simply because it is void on its face. *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706.

The reason is that a void decree is already a nullity "under all circumstances and for all time." *Martin v. Martin* (1911) 173 Ala. 106, 55 So. 632.

### b. Where a remedy at law for relief from a divorce exists.

#### 1. The rule.

A court of equity usually refuses to entertain a bill for relief against a judgment when the plaintiff has open a complete and adequate remedy at law. *Kidwell v. Masterson* (1826) 3 Cranch, C. C. 52, Fed. Cas. No. 7,758; *Furnald v. Glenn* (1893) 56 Fed. 372; *Hanson v. Ralston* (1912) 168 Ill. App. 163; *Schilling v. Quinn* (1912) 178 Ind. 443, 99 N. E. 740; *Chalmers v. Haek* (1841) 19 Mo. 124; *Johnston v. Paul* (1876) 23 Minn. 46; *Wieland v. Shillock* (1876) 23 Minn. 227; *Bicknell v. Field* (1840) 8 Paige

(N. Y.) 440; Evans v. Taylor (1886) 28 W. Va. 184.

A judgment or decree procured by fraud is open to attack in equity only when there is no means at law of obtaining adequate relief from it. Bowsman v. Anderson (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270.

Where there is a complete and adequate remedy at law to one against whom a judgment was had by means of a conspiracy and perjury in a motion for a new trial, a bill in equity to set aside or restrain the enforcement of the judgment will not lie. Standard Fashion Co. v. Thompson (1910) 137 App. Div. 588, 122 N. Y. Supp. 300.

One who complains in equity of a judgment, and who had an adequate remedy at law for his grievance by an appeal which he took and abandoned, or suffered to be dismissed for failure to prosecute it, is entitled to no relief. Miller v. Owens (1913) 55 Colo. 88, 133 Pac. 141.

The neglect of a party to a divorce suit to appeal from an order denying an application to continue the trial beyond the term, when a statute gives the right to appeal, requires the denial of a motion, made after the time to appeal has expired, to vacate the decree, upon the same facts and grounds urged in support of the application to continue. Richards v. Richards (1913) 24 Idaho, 87, 132 Pac. 576.

An action to set aside a judgment of divorce is not maintainable by one against whom it was rendered, and who had previously moved to vacate it, and had the motion denied, because the remedy by appeal from the denial of the motion had not been exhausted and was an adequate one. McCord v. McCord (1901) 24 Wash. 529, 64 Pac. 748; Winstone v. Winstone (1905) 40 Wash. 272, 82 Pac. 268.

If a statute gives a complete and adequate remedy to vacate or modify a judgment for fraud or mistake in its procurement by a proceeding instituted for the purpose in the court which rendered it, a bill in equity to obtain the same relief will not lie. Dale v. Bland (1910) 93 Ark. 286, 124 S. W. 1026.

If one who seeks relief against a judgment has an adequate and specific remedy by statute by a motion to vacate it or an appeal from it, of which he has not availed himself nor has been deprived, a court of equity will not entertain his suit. Bilby v. Stuart (1913) 39 Okla. 451, 135 Pac. 931.  
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## 2. The exceptions.

Although a remedy to set aside a decree of divorce obtained by fraud may in many cases exist at law or have been provided by statute, yet if, in a given case, it is unavailable, inapplicable, or inadequate, and the right to relief exists, a court of equity may give appropriate relief. Smithson v. Smithson (1893) 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300.

Independent of remedies conferred by statutes, not exclusive in terms, a suit in equity lies for relief against an unjust judgment. Wolf v. Sahn (1909) 55 Tex. Civ. App. 564, 120 S. W. 1114, rehearing denied (1909) 55 Tex. Civ. App. 572, 121 S. W. 561.

A remedy provided by statute, but not made exclusive, giving relief by motion to set aside a judgment of a court of law on the ground of surprise, accident, mistake, or fraud, is co-ordinate and cumulative with the remedy by bill in equity. Renfro Bros. v. Merryman (1881) 71 Ala. 195.

In attacking a judgment for fraud, the statutory remedy is cumulative, not exclusive. Michael v. American Nat. Bank (1911) 84 Ohio St. 370, 38 L.R.A. (N.S.) 220, 95 N. E. 905.

A statute or statutes prescribing remedies and regulating the practice when judgments are sought to be opened or set aside do not take away remedies in cases not specifically covered by their terms, unless they expressly say so; but leave them to be pursued according to the practice of courts of law and equity prevalent before their enactment. Smithson v. Smithson (1893) 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300.

Statutes prescribing grounds and procedure for obtaining new trials, not exclusive in terms, do not, as a rule, impair the inherent power of courts over their own judgments during the terms at which they are rendered. Richardson v. Howard (1915) — Okla. —, 151 Pac. 887.

The power of a court of equity to set aside a judgment of divorce procured by fraud is not restricted by a statute allowing a new trial to be granted within one year after entry of a fraudulent judgment, where the fraud remained undiscovered for that time, and could not have been discovered within it by any reasonable diligence. Wood v. Wood (1907) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

The mere fact that a statute gives a party defeated in an action at law a



right, for a limited time, to apply to the court which rendered judgment against him, to open or set aside such judgment, or to grant a new trial, does not, where the statutory remedy is not expressly made exclusive, bar a complainant in a suit in equity to annul a judgment obtained by a fraud practised upon him by his adversary, on any theory that his remedy at law was adequate. *Evans v. Wilhite* (1910) 167 Ala. 587, 52 So. 845, on second appeal (1912) 176 Ala. 287, 58 So. 262.

A petition to set aside a divorce for fraud in obtaining it, while the usual method of proceeding in Pennsylvania, is not the exclusive remedy. *Wilt v. Wilt* (1899) 2 Dauphin Co. Rep. (Pa.) 100.

The Iowa statute (Code, § 4091) providing for a new trial upon petition within one year where a final judgment was procured by fraud does not give an exclusive remedy so as to deprive a court of equity of its jurisdiction to grant new trials where fraud was practised to obtain judgment, and the fraud was not discovered before a year had passed. *Tollefson v. Tollefson* (1908) 137 Iowa, 151, 114 N. W. 631.

A provision of the New York Code (§ 135, subdiv. 5) made it mandatory upon the court to allow a defendant against whom publication had been ordered, or his representatives, upon an application showing sufficient cause, made any time before judgment, to defend the action, and, provided further, that, except in an action for divorce, he or they might be allowed to come in and defend after judgment, within a year after notice and within seven years after it was rendered, on such terms as might be just. The general term of the supreme court construed the exception as depriving the court of power to open a decree of divorce and allow the defendant to defend where service had been made by publication, but, on appeal from this decision, the court of appeals held this view an erroneous one, and said that the statute was meant to enlarge the power of the courts in other than divorce cases, and not to curtail in any respect the power inherent in courts over their own decrees in divorce suits, as it existed before the Code was enacted. *Brown v. Brown* (1874) 58 N. Y. 609, reversing (1874) 1 Hun, 443.

*c. Where the seeker of relief from a divorce has been at fault or negligent.*

None is entitled to the aid of a court L.R.A.1917B.

of equity when that aid was made necessary by his own fault. *Cantwell v. Johnson* (1911) 236 Mo. 575, 139 S. W. 365.

He who seeks to set aside a judgment taken against him on the ground that it was obtained by fraud, duress, accident, mistake, or surprise is bound, as a condition of obtaining relief, to show that it was not suffered by his own fault or negligence. *Duckworth v. Duckworth* (1859) 35 Ala. 70; *Weems v. Weems* (1882) 73 Ala. 462; *Waldrom v. Waldrom* (1884) 76 Ala. 285; *Foshee v. McCreary* (1898) 123 Ala. 493, 26 So. 309; *Evans v. Wilhite* (1910) 167 Ala. 587, 52 So. 845; *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293; *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706; *Henley v. Chabert* (1914) 189 Ala. 258, 65 So. 993; *McAdams v. Windham* (1915) 191 Ala. 287, 68 So. 51; *Pearce v. Olney* (1850) 20 Conn. 544; *Day v. Hurchman* (1913) 65 Fla. 186, 61 So. 445; *Clark v. Ramsey* (1915) 143 Ga. 729, 85 S. E. 869; *Wierich v. De Zoya* (1845) 7 Ill. 385; *Miller v. Barto* (1910) 247 Ill. 104, 93 N. E. 140; *Hollister v. Sobra* (1914) 264 Ill. 535, 106 N. E. 507; *Maher v. Title Guarantee & T. Co.* (1901) 95 Ill. App. 365; *Hanson v. Ralston* (1912) 168 Ill. App. 163; *Kossakowski v. Shuman* (1912) 172 Ill. App. 436; *McCormick v. McCormick* (1910) 82 Kan. 31, 107 Pac. 546; *Kent v. Ricards* (1850) 3 Md. Ch. 396; *Holbrook v. Holbrook* (1874) 114 Mass. 568; *Payne v. O'Shea* (1884) 84 Mo. 129; *Einstein v. Strother* (1916) — Mo. App. —, 182 S. W. 122; *Smith v. Smith* (1907) 72 N. J. Eq. 5, 65 Atl. 986; *Bowsman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270; *Roberts v. Roberts* (1896) 19 R. I. 349, 33 Atl. 872; *Puckett v. Griffith* (1913) 128 Tenn. 565, 162 S. W. 581; *Patrucio v. Selkirk* (1913) — Tex. Civ. App. —, 160 S. W. 635; *McDonald v. McDonald* (1904) 34 Wash. 293, 75 Pac. 865; *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757; *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404; *Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

When fraud, accident, mistake, or surprise is a ground for equitable relief against a judgment, the complainant must enter court with a cause of action unmixed with his own fault or negligence. *Cantwell v. Johnson* (1911) 236 Mo. 575, 139 S. W. 365.

To invoke successfully the interposition of a court of equity against a judgment or decree of another court, it is not enough that a wrong has been done, but it must be manifest that the wrong occurred by accident, surprise, fraud, or

acts of the opposite party without fault or neglect of the wronged party. *Waldrom v. Waldrom* (1884) 76 Ala. 285.

A concurrence of injustice committed and of the complaining litigant's freedom from fault or negligence is an indispensable condition to the exercise of jurisdiction by a court of equity to set aside or annul a judgment or decree of another court. *Ibid.*

It is a well-settled doctrine that a court of equity will not interfere with the judgment of a court of law or the decree of a court of probate, detract from its conclusiveness, or reopen the litigation involved in its rendition, unless on facts or grounds of which the party complaining could not have availed himself when the decree or judgment was rendered because of accident or the fraud or act of his adversary, unmixed with fault or negligence on his own part. *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293.

To have a judgment set aside in a suit brought for the purpose, grounded on a fraud which prevented a defense when there was a meritorious one, the complainant must allege and prove that the wrong, through no lack of diligence, was not discovered during the term at which the decree was granted. *McConkey v. McConkey* (1916) — *Tex. Civ. App.* —, 187 S. W. 1100.

A wife alleging fraud by her husband in obtaining a divorce from her in a suit brought in her home county, of which she had due notice, is bound to show, before the decree will be set aside, that she was without fault or negligence, and not lacking in diligence, when it was granted. *Sperry v. Sperry* (1907) — *Tex. Civ. App.* —, 103 S. W. 419.

A defendant in a divorce suit who, after entering a general appearance, neglected for three months to employ counsel within the state and convenient to the place of trial, to represent her at the trial, and then, toward the end of the term, applied on the ground of unpreparedness for, and was refused, a continuance, has not been sufficiently diligent to be entitled to relief from the decree granted at the trial. *Richards v. Richards* (1913) 24 Idaho, 87, 132 Pac. 576.

*d. Where the seeker of relief from a divorce has been dilatory.*

As in other cases, a court of equity will grant no relief from a judgment to a suitor who has slept upon his rights. *Clark v. Ramsey* (1915) 143 Ga. 729, 85 S. E. 869; *Richards v. Richards* (1913) L.R.A.1917B.

24 Idaho, 87, 132 Pac. 576; *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017; *Treat v. Merchant's Life Assn.* (1912) 167 Ill. App. 371; *Holbrook v. Holbrook* (1874) 114 Mass. 568; *Nichols v. Nichols* (1874) 25 N. J. Eq. 60; *Smith v. Smith* (1907) 72 N. J. Eq. 5, 65 Atl. 986; *Gans v. Gans* (1910) 77 N. J. Eq. 309, 76 Atl. 234; *Catts v. Catts* (1908) 35 Pa. Super. Ct. 293; *Nagle v. Nagle* (1910) 43 Pa. Super. Ct. 442; *Sperry v. Sperry* (1907) — *Tex. Civ. App.* —, 103 S. W. 419; *Meisenheimer v. Meisenheimer* (1909) 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159; *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404; *Cooper v. Cooper* (1916) — *Wash.* —, 158 Pac. 1007.

Negligent delay to assail it in time is often fatal to an attack upon a judgment. *O'Rourke v. Lawrence* (1913) 132 La. 710, 61 So. 764.

Whoever would have a judgment set aside on the ground that it was obtained by fraud, duress, accident, mistake, or surprise must act diligently in seeking relief, and the rule requiring diligence and prompt action in attacking judgments upon such grounds is the same respecting decrees of divorce as other judgments and decrees. *McNeil v. McNeil* (1909) 95 C. C. A. 485, 170 Fed. 289; *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134; *Hendley v. Chabert* (1914) 189 Ala. 258, 65 So. 993; *Hereu v. Hereu* (1899) 6 Ariz. 270, 56 Pac. 871; *Corney v. Corney* (1910) 97 Ark. 117, 133 S. W. 813; *Barnes v. Willis* (1913) 65 Fla. 363, 61 So. 828; *Sloan v. Sloan* (1882) 102 Ill. 581; *French v. Thomas* (1911) 252 Ill. 65, 96 N. E. 564; *Maher v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365; *Smith v. Smith* (1914) 186 Ill. App. 540; *Earle v. Earle* (1883) 91 Ind. 27; *Nicholson v. Nicholson* (1887) 113 Ind. 131, 15 N. E. 223; *Re Brigham* (1900) 176 Mass. 223, 57 N. E. 328; *Zoellner v. Zoellner* (1881) 46 Mich. 511, 9 N. W. 831; *McElrath v. McElrath* (1913) 120 Minn. 380, 44 L.R.A.(N.S.) 505, 139 N. W. 708; *Brockman v. Brockman* (1916) — *Minn.* —, 157 N. W. 1086; *Yorston v. Yorston* (1880) 32 N. J. Eq. 495; *Watkinson v. Watkinson* (1904) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326; *Givernaud v. Givernaud* (1912) 81 N. J. Eq. 66, 85 Atl. 830; *Singer v. Singer* (1863) 41 Barb. (N. Y.) 139; *Robertson v. Robertson* (1880) 9 Daly (N. Y.) 44; *Whittley v. Whittley* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078; *Standard Fashion Co. v. Thompson* (1910) 137 App. Div. 588, 122 N. Y. Supp. 300;

*Bidwell v. Bidwell* (1905) 139 N. C. 402, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55; *Patrucio v. Selkirk* (1913) — *Tex. Civ. App.* —, 160 S. W. 635; *McConkey v. McConkey* (1916) — *Tex. Civ. App.* —, 187 S. W. 1100; *Karren v. Karren* (1902) 25 *Utah*, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465; *Ferry v. Ferry* (1894) 9 *Wash.* 239, 37 Pac. 431; *Peyton v. Peyton* (1902) 28 *Wash.* 278, 68 Pac. 757; *Douglas v. Teller* (1909) 53 *Wash.* 695, 102 Pac. 761; *Uecker v. Thiedt* (1907) 133 *Wis.* 148, 113 N. W. 447.

*e. Where complainant contested the divorce on grounds relied upon for relief from the decree.*

A court will never set aside or annul a judgment or decree for any matter which was actually presented and considered in rendering it. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

Matters which the court granting a decree had to consider in granting it afford no ground to support an attack upon it. *Cheever v. Kelly* (1915) 96 *Kan.* 269, 150 Pac. 529.

A bill in equity to reopen and review a previous judgment upon grounds relating to the original cause of action and the defense thereto is bad on demurrer, because these matters are all concluded by the judgment attacked. *Corney v. Corney* (1913) 108 *Ark.* 415, 159 S. W. 20.

A retrial of a divorce suit, fully heard and decided upon the merits, cannot be had under the guise of proceedings to set aside the decree granted, on the ground of its procurement by fraud, by means of perjured testimony. *Folsom v. Folsom* (1874) 55 N. H. 78.

A complaint in equity to set aside a divorce cannot re-try the charges upon which that divorce was granted. *Wilt v. Wilt* (1899) 2 *Dauphin Co. Rep. (Pa.)* 100.

*f. Where complainant might have litigated matters relied on for relief from the divorce and did not.*

It is no ground for relief in equity that a judgment is wrong in law or fact or both, if the party complaining of it had an opportunity to and failed to make his defense. *Hagan v. Chicago* (1913) 259 *Ill.* 249, 102 N. E. 185; *Mushbaugh v. East Peoria* (1913) 260 *Ill.* 27, 102 N. E. 1027.

A party who was regularly served with process in an action, and did not defend it, can have no relief in equity L.R.A.1917B.

from a judgment rendered against him in the action, where he was not prevented from defending it by fraud or accident, unmixed with his own negligence. *Day v. Hurchman* (1913) 65 *Fla.* 186, 61 So. 445.

No rule is said to be better established than that a court of equity will not give relief against a judgment or decree in respect of a matter as to which the complainant could have had redress in the previous litigation, and was not prevented from obtaining it by accident, fraud, or the conduct of his adversary, unmixed with his own fault or negligence. *Duckworth v. Duckworth* (1859) 35 *Ala.* 70.

To maintain a bill in equity to enjoin a judgment at law upon defenses which might have been, but were not, interposed to present the judgment, the complainant must show that the failure to prevent such defenses was attributable to fraud, accident, surprise, or the act of his adversary. *Weems v. Weems* (1882) 73 *Ala.* 462.

It is a general rule that a court of equity will not open the judgment of another court to let the defeated litigant make a defense which might have been made in the action which culminated in the judgment. *Rittenberry v. Wharton* (1912) 176 *Ala.* 390, 58 So. 293.

Anything that might have been set up in a suit which went to judgment, to prevent such judgment, cannot be set up as ground for annulling that judgment, unless it was not and could not have been discovered so as to be available until after judgment was rendered. *Boudreaux v. Lower Terrebonne Ref. & Mfg. Co.* (1910) 127 *La.* 98, 53 So. 456.

Equity will refuse relief from a judgment to one who might easily have prevented it, and obtained all he was entitled to by appearing and asking for it in the action which resulted in the judgment. *Hanson v. Ralston* (1912) 168 *Ill. App.* 163.

Upon an application addressed to the discretion of the court, pursuant to an authorizing statute, to have made absolute a decree of divorce granted three years previously, to a wife from her husband, founded upon his gross habitual drunkenness and wanton failure to provide for and maintain her, where he had been personally served with process and had appeared, but had withdrawn his appearance and voluntarily defaulted, supported by proof that, during the three years that had elapsed, the parties

had continuously lived apart, the decree will not be opened, no fraud in obtaining it being alleged, to allow the defendant to contest on the merits, and adduce evidence to disprove the wife's charges against him upon which the decree was founded. *Whiting v. Whiting* (1874) 114 *Mass.* 494.

A final decree of divorce, untainted by any fraud whatever, in a suit really contested, with the litigants appearing by adverse counsel, granted upon a consideration by the court of the pleadings and proofs on both sides, to the wife, pursuant to an understanding that further opposition would not be made if she would, as she did, take such decree without costs and alimony, cannot afterwards, at the instance of the husband, be set aside upon the mere ground that he was ignorant of the law, and did not know that, by statute, such decree entitled his wife at once to dower in his lands. *Orth v. Orth* (1888) 60 *Mich.* 158, 37 *N. W.* 67.

*g. Where complainant fails to show a defense against the divorce.*

Inasmuch as one who had no defense to an action is not damnified by a judgment rendered in it against him, no matter by what means, because judgment would have gone against him in due course anyway, ordinarily, one seeking in a court of equity or otherwise to set aside a judgment against him, entered in an action in which he was regularly brought into court, on the ground that it was obtained by fraud, duress, accident, mistake, or surprise which prevented him from making his defense, is bound as a prerequisite to getting relief to show that he had and has a valid and meritorious defense to the cause of action upon which the judgment he complains of rests. *White v. Crow* (1883) 110 *U. S.* 183, 28 *L. ed.* 113, 4 *Sup. Ct. Rep.* 71; *Hendley v. Chabert* (1914) 189 *Ala.* 258, 65 *So.* 993; *Womack v. Womack* (1904) 73 *Ark.* 281, 83 *S. W.* 937, 1136; *Simpson & W. Furniture Co. v. Moore* (1910) 94 *Ark.* 347, 126 *S. W.* 1074; *Smith v. Minter* (1915) 120 *Ark.* 255, 179 *S. W.* 341; *Pearce v. Olney* (1850) 20 *Conn.* 544; *Clark v. Ramsey* (1915) 143 *Ga.* 729, 85 *S. E.* 869; *Van Gilder v. Ringer* (1911) 163 *Ill. App.* 105; *Treat v. Merchants' Life Asso.* (1912) 167 *Ill. App.* 371; *Kossakowski v. Shumann* (1912) 172 *Ill. App.* 436; *Way v. Lamb* (1863) 15 *Iowa.* 79; *Carr v. Carr* (1892) 92 *Ky.* 552, 36 *Am. St. Rep.* 614, 18 *S. W.* 453; *Westman v. Carlson* (1910) 86 *Neb.* 847, 126 *N. W. L.R.A.* 1917B.

515; *Blank v. Blank* (1887) 107 *N. Y.* 91, 13 *N. E.* 615; *Batzer v. Halliday* (1915) 31 *N. D.* 361, 153 *N. W.* 994; *Bowsman v. Anderson* (1912) 62 *Or.* 431, 123 *Pac.* 1092, 125 *Pac.* 270; *Sperry v. Sperry* (1907) — *Tex. Civ. App.* —, 103 *S. W.* 419; *Wade v. Wade* (1915) — *Tex. Civ. App.* —, 180 *S. W.* 643; *McConkey v. McConkey* (1916) — *Tex. Civ. App.* —, 187 *S. W.* 1100.

A court of equity will not disturb a judgment at law, however defective or dubious the methods taken to obtain it, unless the litigant against whom it was rendered had a valid and sufficient defense to the action. *Hussey v. Gourley* (1910) 153 *Ill. App.* 501.

To set aside a judgment at law through a bill in equity it must appear that he against whom the judgment was rendered was deprived of either a meritorious defense or a just cause of action. *Treat v. Merchant's Life Asso.* (1912) 167 *Ill. App.* 371.

To succeed in setting aside, in a suit brought for the purpose, a decree of divorce for fraud or unfairness in preventing a defense, the complaining suitor is bound to show that there was and is a meritorious defense. *McConkey v. McConkey* (1916) — *Tex. Civ. App.* —, 187 *S. W.* 1100.

When a plaintiff's right to annul his marriage was indisputable, and the defendant's total lack of any defense to the action is clearly established, a decree of annulment will not be set aside on motion, on the ground that it was granted by default induced by a fraud which prevented a defense. *Everett v. Morrison* (1892) 66 *Hun.* 632, 50 *N. Y. S. R.* 33, 21 *N. Y. Supp.* 328.

A mere general allegation that a defendant seeking to set aside a judgment of divorce has a meritorious defense to the cause of action upon which it rests is insufficient to warrant relief. *Wade v. Wade* (1915) — *Tex. Civ. App.* —, 180 *S. W.* 643.

A defendant who seeks to set aside a judgment of divorce against him must not only aver a meritorious defense to the cause of action upon which it rests, but he must specifically state the facts which support that defense. *Ibid.*

A decree of divorce grounded upon more than one cause of action may not be set aside unless a meritorious defense, with facts stated as its basis, to each cause of action, is set up; because, if to any cause of action there is no defense, that cause will be sufficient to uphold the decree. *Ibid.*

Before a court will set aside a decree

of absolute divorce granted by default upon personal service of process, and allow the defendant to come in and defend the suit, it must be made plain that the defendant had a good defense to the action, and what that defense is must appear by a proposed answer. *Maguire v. Maguire* (1902) 75 App. Div. 534, 78 N. Y. Supp. 312. O'Brien, J., dissenting, contended for a less rigid and technical rule in divorce suits because of the public concern.

It is essential to the maintenance of a bill in equity to enjoin a judgment at law that the complainant allege and prove a good and meritorious defense to the cause of action, or to such part of it as he seeks to litigate by the bill. *Weems v. Weems* (1882) 73 Ala. 462.

A decree granted by default, annulling a marriage, will not be set aside in an action brought for the purpose, alleging a fraud in obtaining it through misrepresentation and deceit that induced the defendant to refrain from consulting counsel and making a defense to the action to annul, when the defendant neither alleges nor proves that there was any defense. *Blank v. Blank* (1887) 107 N. Y. 91, 13 N. E. 615.

An application to open a default in a divorce suit and to set aside the decree where a defendant was personally served with process must be supported by proof of a meritorious and legal defense. *Phelps v. Phelps* (1838) 7 Paige (N. Y.) 150.

One who had no defense to a divorce suit cannot have a decree taken in it by the opposite party by default upon constructive service set aside or nullified for irregularities or defects in the papers and proceedings. *Carr v. Carr* (1892) 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453.

One who seeks relief in equity on technical grounds against a judgment must show a just and meritorious defense, making it at least a possibility that the judgment, if a new trial is had, will be a different one. *Van Buren v. Posteraro* (1909) 45 Colo. 588, 132 Am. St. Rep. 199, 102 Pac. 1067.

The failure of a party applying to vacate a decree of divorce rendered against him to make out a good defense on the merits to the divorce action justifies a denial of his application. *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017.

A woman who in her petition to set aside a divorce obtained by her husband on the ground of her adultery, fails to show any defense to the suit, and

when it appears that there were good grounds for granting him a divorce, should be refused relief where she had due notice and full knowledge of all the proceedings while they were pending, and stayed away from the hearing because, as she alleged, her husband's statements led her to believe her adultery made it unsafe for her to attend. *Taylor v. Taylor* (1913) 52 Pa. Super. Ct. 388.

Proceedings to vacate judgments are, in Washington, original ones, regulated by statute, by which they may not be set aside until it has been adjudged that there is a valid defense to the action in which the judgment was rendered. *Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

In a bill in equity to set aside a decree of divorce obtained by default without personal service of process, upon the ground that it was procured by a fraud upon the court, committed by the successful party in falsely swearing to the existence of facts which did not exist, and were essential to the jurisdiction of the court, it is unnecessary for the complainant to show any defense to the alleged ground of divorce. *Corney v. Corney* (1906) 79 Ark. 289, 116 Am. St. Rep. 80, 95 S. W. 135.

If an affidavit to set aside a decree of divorce granted by default without a personal service contains sufficient denials of material matters alleged in the complaint, and sets forth a good defense on the merits, if its averments are true, there is no necessity for accompanying it with an affidavit of merits. *McBlain v. McBlain* (1888) 77 Cal. 507, 20 Pac. 61.

A motion to vacate a judgment and for a new trial in a divorce suit does not require the support of an affidavit of merits, where the decree was taken ex parte, in the absence of the defendant and his counsel, after issue had been joined and the cause was awaiting trial, and was transferred without notice from the forum in which it was expected to be heard to another. *Cottrell v. Cottrell* (1890) 83 Cal. 457, 23 Pac. 531.

An affidavit of merits has no place in a proceeding to set aside, upon facts establishing either collusion of the parties or else that the aggrieved party was grossly misled and deceived by the other, a decree of divorce rendered for want of an answer to the complaint. *Mulkey v. Mulkey* (1893) 100 Cal. 91, 34 Pac. 621.

An affidavit of merits, while not material as such, which contains specific denials of the allegations of the complaint, may take the place of a proposed

answer, in some circumstances, upon a motion to set aside a decree of divorce entered on default for want of an answer, where the facts disclosed show either collusive conduct of the parties or gross deception by the successful one of the other. *Ibid.*

**VIII. Perjury committed in obtaining divorce as ground for relief.**

It is a general rule that presenting fabricated evidence or perjured testimony upon a trial where the falsity might or should have been exposed and refuted is not such a fraud in obtaining a judgment or decree as will warrant its nullification.

**U. S.**—United States v. Throckmorton (1878) 98 U. S. 61, 25 L. ed. 93; Vance v. Burbank (1879) 101 U. S. 514, 25 L. ed. 929; Hilton v. Guyot (1895) 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; United States v. Beebe (1900) 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371; Cotzhausen v. Kerting (1886) 29 Fed. 821; Andes v. Millard (1895) 70 Fed. 515; Ritchie v. McMullen (1897) 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; United States v. Gleeson (1898) 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; Nelson v. Meehan (1907) 12 L.R.A.(N.S.) 374, 83 C. C. A. 597, 155 Fed. 1.

**Ala.**—Duckworth v. Duckworth (1859) 35 Ala. 70; Cromelin v. McCauley (1880) 67 Ala. 542; Noble v. Moses Bros. (1883) 74 Ala. 604; Peterson v. Blanton (1884) 76 Ala. 264; Rittenberry v. Wharton (1912) 176 Ala. 390, 58 So. 293; De Soto Coal, Min. & Development Co. v. Hill (1914) 188 Ala. 667, 65 So. 988; Hendley v. Chabert (1914) 189 Ala. 258, 65 So. 993.

**Ark.**—Scott v. Penn (1900) 68 Ark. 492, 60 S. W. 235; James v. Gibson (1904) 73 Ark. 440, 84 S. W. 485; Boynton v. Ashabranner (1905) 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Parker v. Bowman (1907) 83 Ark. 508, 104 S. W. 158; Bank of Pine Bluff v. Levi (1909) 90 Ark. 166, 118 S. W. 250; Stewart v. Stewart (1911) 101 Ark. 86, 141 S. W. 193; Hall v. Cox (1912) 104 Ark. 303, 149 S. W. 80.

**Cal.**—Pico v. Cohn (1891) 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; Steen v. March (1901) 132 Cal. 616, 64 Pac. 994; Sohler v. Sohler (1902) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; Dane v. Layne (1909) 10 Cal. App. 366, 101 Pac. 1067; Davies v. Hibernia Sav. & L. Soc. (1913) 21 Cal. App. 444, 132 Pac. 462. L.R.A.1917B.

**Idaho**—Donovan v. Miller (1906) 12 Idaho, 600, 9 L.R.A.(N.S.) 524, 88 Pac. 82, 10 Ann. Cas. 444.

**Ill.**—Ames v. Snider (1870) 55 Ill. 498; Cairo & St. L. R. Co. v. Holbrook (1879) 92 Ill. 297; Kretschmar v. Ruprecht (1907) 230 Ill. 492, 82 N. E. 836; Hollister v. Sobra (1914) 264 Ill. 535, 106 N. E. 507; Guthrie v. Doud (1889) 33 Ill. App. 68; Kingman v. Kingman (1895) 61 Ill. App. 134; Johnson v. Anna Bldg. & L. Asso. (1907) 133 Ill. App. 213.

**Ind.**—Riley v. Murray (1856) 8 Ind. 354; Pepin v. Lautman (1901) 28 Ind. App. 74, 62 N. E. 60; Walker v. State (1908) 43 Ind. App. 605, 86 N. E. 502.

**Iowa**—Cottle v. Cole (1866) 20 Iowa, 481; Heathcote v. Haskins (1888) 74 Iowa, 566, 38 N. W. 417; Wood v. Wood (1906) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; Tollefson v. Tollefson (1908) 137 Iowa, 151, 114 N. W. 631; Richards v. Moran (1908) 137 Iowa, 220, 114 N. W. 1035; Hedrick v. Smith (1908) 137 Iowa, 625, 115 N. W. 226; Kwentsky v. Sirovy (1909) 142 Iowa, 385, 121 N. W. 27; Mengel v. Mengel (1909) 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899; Gelwicks v. Gelwicks (1913) 160 Iowa, 675, 142 N. W. 409.

**Kan.**—Beakley v. Barclay (1907) 75 Kan. 462, 10 L.R.A.(N.S.) 230, 89 Pac. 906; Electric Plaster Co. v. Blue Rapids City Twp. (1910) 81 Kan. 730, 25 L.R.A.(N.S.) 1237, 106 Pac. 1079; McCormick v. McCormick (1910) 82 Kan. 31, 107 Pac. 546; Garrett Biblical Inst. v. Minard (1910) 82 Kan. 338, 108 Pac. 80; Miller v. Miller (1913) 89 Kan. 151, 130 Pac. 681; Cheever v. Kelly (1915) 96 Kan. 269, 150 Pac. 529.

**La.**—Gusman v. Hearsey (1876) 28 La. Ann. 709, 26 Am. Rep. 104; Perry v. Rue (1879) 31 La. Ann. 287; Rowe v. Chicago Lumber & C. Co. (1898) 50 La. Ann. 1258, 24 So. 235.

**Md.**—Maryland Steel Co. v. Marney (1900) 91 Md. 360, 46 Atl. 1077.

**Mass.**—Greene v. Greene (1854) 2 Gray, 361, 61 Am. Dec. 454; Holbrook v. Holbrook (1874) 114 Mass. 568; Zeitlin v. Zeitlin (1909) 202 Mass. 205, 23 L.R.A.(N.S.) 569, 132 Am. St. Rep. 490, 88 N. E. 762.

**Mich.**—Miller v. Morse (1871) 23 Mich. 365; Codde v. Mahiat (1896) 109 Mich. 186, 66 N. W. 1093; Steele v. Culver (South Haven & E. R. Co. v. Culver) (1909) 157 Mich. 344, 23 L.R.A.(N.S.) 564, 122 N. W. 95.

**Mo.**—Neun v. Blackstone Bldg. & L.

Asso. (1899) 149 Mo. 74, 50 S. W. 436; Wabash R. Co. v. Mirrieles (1904) 182 Mo. 126, 81 S. W. 437; Cantwell v. Johnson (1911) 236 Mo. 575, 139 S. W. 365; Lieber v. Lieber (1911) 239 Mo. 1, 143 S. W. 458; Springfield Traction Co. v. Dent (1911) 159 Mo. App. 220, 140 S. W. 606; Blass v. Blass (1916) — Mo. App. —, 186 S. W. 1094.

**N. H.**—Demerit v. Lyford (1853) 27 N. H. 541; Folsom v. Folsom (1874) 55 N. H. 78.

**N. J.**—Wilson v. Anthony (1907) 72 N. J. Eq. 836, 66 Atl. 907.

**N. Y.**—Woodworth v. Van Buskirk (1815) 1 Johns. Ch. 432; Ross v. Wood (1876) 8 Hun, 185, affirmed in (1877) 70 N. Y. 8; Verplanck v. Van Buren (1877) 11 Hun, 328, reversed for other reasons in (1879) 76 N. Y. 247; Gitler v. Russian Co. (1908) 124 App. Div. 273, 108 N. Y. Supp. 793; Standard Fashion Co. v. Thompson (1910) 137 App. Div. 588, 122 N. Y. Supp. 300; Woodruff v. Johnston (1892) 29 Jones & S. 348, 19 N. Y. Supp. 861; Hoskins v. Nichols (1905) 48 Misc. 465, 96 N. Y. Supp. 926; Whittley v. Whittley (1908) 60 Misc. 201, 111 N. Y. Supp. 1078.

**Ohio**—Michael v. American Nat. Bank (1911) 84 Ohio St. 370, 38 L.R.A.(N.S.) 220, 95 N. E. 905.

**Okla.**—Thornton v. Peery (1898) 7 Okla. 441, 54 Pac. 649; Brown v. Trent (1912) 36 Okla. 239, 128 Pac. 895.

**Or.**—Friese v. Hummel (1894) 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458.

**Pa.**—Kountz's Appeal (1878) 2 Walk. 458; Latimer v. Dean (1899) 31 Pittsb. L. J. N. S. 192.

**R. I.**—White v. White (1913) — R. I. —, 86 Atl. 552.

**S. D.**—Reeves v. Reeves (1909) 24 S. D. 435, 25 L.R.A.(N.S.) 574, 123 N. W. 869.

**Tex.**—Moor v. Moor (1901) — Tex. Civ. App. —, 63 S. W. 347.

**Utah**—Cantwell v. Thatcher Bros. Bkg. Co. (1915) — Utah, —, 151 Pac. 986.

**Vt.**—Camp v. Ward (1897) 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747; French v. Raymond (1909) 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324.

**Wash.**—Robinson v. Robinson (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288; Robertson v. Freebury (1915) 87 Wash. 558, L.R.A.1916B, 883, 152 Pac. 5; Cooper v. Cooper (1916) — Wash. —, 158 Pac. 1007.

**W. Va.**—Farmers & S. Leaf Tobacco Warehouse Co. v. Pridemore (1904) 55 W. Va. 451, 47 S. E. 258.

That prejudiced testimony suborned L.R.A.1917B.

by the successful party was given to procure the judgment on the trial of a divorce suit affords no sufficient ground for setting aside the decree. Zeitlin v. Zeitlin (1909) 202 Mass. 205, 23 L.R.A.(N.S.) 569, 132 Am. St. Rep. 490, 88 N. E. 762.

Although a decree of divorce was obtained by fraud and false testimony, it cannot, in Ohio, if the court which granted it had jurisdiction of the subject and the parties, be set aside on an original bill filed at a subsequent term. Parish v. Parish (1859) 9 Ohio St. 534, 75 Am. Dec. 482; Neil v. Neil (1883) 38 Ohio St. 558; Knapp v. Thomas (1883) 39 Ohio St. 377, 48 Am. Rep. 462.

An absolute divorce obtained by a husband against his wife upon the ground of her adultery cannot be successfully attacked by her and set aside in a subsequent suit brought by her against him to procure a divorce in her favor, grounded upon his desertion, and based upon allegations that his decree was got by perjured testimony suborned by him, and through his collusive fraud with the false witnesses. Greene v. Greene (1854) 2 Gray (Mass.) 361, 61 Am. Dec. 454.

Inasmuch as an action for divorce will not survive the death of one of the parties to it, after the death of the successful party a decree of divorce entered on default and attacked on the ground that it was procured by perjured testimony, without personal service of process, cannot be set aside to permit a defense to be interposed and tried. Kirschner v. Dietrich (1895) 110 Cal. 502, 42 Pac. 1064.

A separate action cannot be maintained to set aside a judgment of a court of competent jurisdiction on the ground that it was procured by false testimony, where the court which rendered it has ample power to give adequate relief from it upon an application in the same suit. Johnston v. Paul (1876) 23 Minn. 46; Wieland v. Shillock (1876) 23 Minn. 227.

A reason given for the refusal of courts to set aside judgments rendered upon trials of issues of fact by tribunals which fully heard the testimony of both litigants, where it is alleged that the judgments were obtained by means of false testimony on the trial and subornation of perjury by the successful litigant, is that, in a large proportion of all cases tried, it might plausibly be contended that some part of the material testimony was untrue, and that in a great many cases it might be charged and strongly supported that the prevailing party had knowingly given or procured

others to give false testimony upon the issues involved. *Zeitlin v. Zeitlin* (1909) 202 *Mass.* 205, 23 *L.R.A.(N.S.)* 569, 132 *Am. St. Rep.* 490, 88 *N. E.* 762.

The general rule that a judgment will not be set aside because it was obtained by means of perjury has not been accepted as a sound one in a line of cases in Texas. *Bell v. Walnitzch* (1873) 39 *Tex.* 132; *Overton v. Blum* (1878) 50 *Tex.* 423; *McMurray v. McMurray* (1887) 67 *Tex.* 666, 4 *S. W.* 357; *Dickinson v. Dickinson* (1911) — *Tex. Civ. App.* —, 138 *S. W.* 205.

In Louisiana an action to annul a decree of divorce has been held to be maintainable on the ground that it was obtained by means of false testimony given by the witnesses in behalf of the successful party, provided it is alleged and clearly proved that the perjury was not discovered until within one year before the action to annul was brought. *Emuy v. Farr* (1910) 125 *La.* 825, 51 *So.* 1003.

In Nebraska countenance has been given in sundry cases to the doctrine that obtaining a judgment by means of wilful and intentional perjury in order to make out a cause of action or establish a defense on a trial constitutes such a fraud as entitles the defeated litigant to have the judgment set aside. *Hard v. Hard* (1897) 51 *Neb.* 412, 70 *N. W.* 1122; *Barr v. Post* (1899) 59 *Neb.* 361, 80 *Am. St. Rep.* 680, 80 *N. W.* 1041; *City Sav. Bank v. Carlon* (1910) 87 *Neb.* 266, 127 *N. W.* 161; *Koop v. Acken* (1911) 90 *Neb.* 77, 35 *L.R.A.(N.S.)* 782, 132 *N. W.* 721; *Wunrath v. People's Furniture & Carpet Co.* (1915) 98 *Neb.* 342, 152 *N. W.* 736.

In North Carolina a judgment procured by false testimony knowingly and corruptly given is deemed to have been obtained by fraud, and may be set aside or otherwise nullified in equity, provided the perjurer has been convicted of the crime. *Peagram v. King* (1823) 9 *N. C.* (2 *Hawks*,) 605, 11 *Am. Dec.* 793; *Burgess v. Lovengood* (1856) 55 *N. C.* (2 *Jones, Eq.*) 457; *Dyche v. Patton* (1857) 56 *N. C.* (3 *Jones, Eq.*) 332; *Moore v. Gulley* (1907) 144 *N. C.* 81, 10 *L.R.A.(N.S.)* 242, 56 *S. E.* 681; *Mottu v. Davis* (1910) 153 *N. C.* 160, 69 *S. E.* 63.

The decision of Green, J., at special term of the city court of New York, in *Wieser v. Times Realty & Constr. Co.* (1910) 131 *N. Y. Supp.* 337, was one of the few instances reported of setting aside a judgment entered on the verdict of a jury after a contested trial, and *L.R.A.* 1017B.

after an affirmance on appeal, because of the confessed perjury on the trial of an important witness in testifying to a material part of the successful litigant's case. The perjury was flagrant and undenied. The learned judge, righteously indignant, gave way to his indignation, but cited no authorities and ignored the general rule.

If any fraud, sufficient to justify the conclusion that a different result would have been produced if it had not existed, extrinsic or collateral to the issues, accompanied false swearing or perjury by which a judgment was procured, such judgment may be set aside as fraudulent. *Wood v. Wood* (1906) 136 *Iowa*, 128, 12 *L.R.A.(N.S.)* 891, 125 *Am. St. Rep.* 223, 113 *N. W.* 492.

The general rule forbidding the setting aside of a judgment or decree of a court of competent jurisdiction because it was obtained by means of manufactured evidence and false testimony was examined, and exceptions to it were mentioned and limits to its application stated in a recent decision of the Wisconsin supreme court. *Boring v. Ott* (1909) 138 *Wis.* 260, 19 *L.R.A.(N.S.)* 1080, 119 *N. W.* 865.

There are, it has been said, authorities holding that a judgment obtained by perjured testimony may be set aside in equity; but, it was added, this is not believed to be the law, and the reason given was that "to investigate the character of testimony upon which a judgment was obtained would be to retry the issues submitted in the trial at which the judgment was obtained and the result would be that there would be no end to the litigation." *Brown v. Trent* (1912) 36 *Okla.* 239, 128 *Pac.* 895.

Actions to set aside judgments which had been procured by perjury or subornation of perjury were authorized by statute (*Gen. Stat.* 1878, chap. 66, § 285) in Minnesota. *Bomsta v. Johnson* (1888) 38 *Minn.* 230, 36 *N. W.* 341.

The text of this statute appears in *Spooner v. Spooner* (1879) 26 *Minn.* 137, 1 *N. W.* 838.

This statute was declared to be derogatory to the well-established and salutary principle and policy of the common law which forbids the retrial of issues once determined by final judgment, and, therefore, an enactment which should not be so construed as to extend its operation beyond its most obvious import. *Stewart v. Duncan* (1889) 40 *Minn.* 410, 42 *N. W.* 89.

Although in Minnesota an action to set aside a judgment which had been pro-



cured by perjury or subornation of perjury was expressly authorized by this statute, it has been decided that an action to set aside a judgment will not lie in virtue of it where the pleadings disclosed a fact to be proved, so that the adverse litigant knew what the pleader would attempt to prove, and was under no necessity of depending on the pleader to prove the fact as he claimed it, and the perjury was committed in proving such fact. *Hass v. Billings* (1889) 42 Minn. 63, 43 N. W. 797; *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; *Watkins v. Landon* (1897) 67 Minn. 136, 69 N. W. 711; *O'Brien v. Larson* (1898) 71 Minn. 371, 74 N. W. 148; *Geisberg v. O'Laughlin* (1903) 88 Minn. 431, 93 N. W. 310; *Moudry v. Witzka* (1903) 89 Minn. 300, 94 N. W. 885; *Bisseberg v. Ree* (1906) 99 Minn. 481, 109 N. W. 1115; *Hayward v. Larrabee* (1908) 106 Minn. 210, 130 Am. St. Rep. 606, 118 N. W. 795; *Major v. Leonard* (1911) 115 Minn. 439, 132 N. W. 915; *McElrath v. McElrath* (1913) 120 Minn. 380, 44 L.R.A.(N.S.) 505, 139 N. W. 708.

This statute was, it has been said, never intended to excuse a litigant from exercising proper diligence in preparing for trial and learning the facts of which evidence was available. *Wann v. Northwestern Trust Co.* (1913) 120 Minn. 493, 139 N. W. 1061.

While perjury on the part of a plaintiff respecting a fact not exclusively or peculiarly within his knowledge, for example, that the defendant was physically impotent to bear children, is not enough, of itself, to sustain an action under this statute to set aside a decree of divorce obtained by him by means of false testimony, yet, when such perjury was a part of a fraudulent scheme of his to divorce his wife and prevent her from opposing him, it is a circumstance which adds weight to the attack on the decree when associated with other impeaching proof. *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460.

***IX. Admission of incompetent or prejudiced testimony as ground for relief from divorce.***

A defendant who made default in a divorce suit after being regularly served, and well knowing the pendency of the action, cannot overturn the decree rendered on the ground that the chief witness for the plaintiff gave exaggerated testimony. *O'Brien v. D'Hemecourt* (1907) 118 La. 996, 43 So. 654.

The fact, if true, that the chief wit-

ness for a plaintiff in a divorce suit was biased against the defendant, and gave exaggerated and unjust testimony, will not warrant setting aside the decree where there was other unobjectionable and unassailed testimony which gave ample corroboration. *Ibid.*

It is no ground for setting aside a decree of divorce rendered in regular proceedings after due service against a defendant by default, that, in taking proof of the plaintiff's charges, an incompetent piece of evidence was erroneously admitted, when without it there was ample testimony properly received to sustain the decree, and the error was not prejudicial. *Ibid.*

A decree of divorce will not be set aside because improper testimony respecting the defendant's identity was admitted, when there was other unobjectionable testimony in to prove it. *Robertson v. Robertson* (1880) 9 Daly (N. Y.) 44.

***X. Insufficiency of evidence to warrant divorce as a basis of attack.***

That the evidence was insufficient to warrant a judgment of divorce is not sufficient to sustain an action to annul the decree. *Emuy v. Farr* (1910) 125 La. 825, 51 So. 1003; *Miller v. Bearb* (1914) 134 La. 893, 64 So. 822.

A decree of divorce which rested upon some substantial testimony will not, after several months have passed, be set aside on the ground that it was not supported by sufficient testimony. *Robertson v. Robertson* (1880) 9 Daly (N. Y.) 44.

After the denial of a motion for a new trial upon the ground that the evidence was insufficient to sustain the verdict, the defeated party cannot avoid the judgment by moving to set it aside upon the same ground. *Treat v. Treat* (1915) 170 Cal. 337, 150 Pac. 57.

A motion to set aside a judgment, entered after a verdict on a trial, does not call in question the competency or sufficiency of the evidence upon which it rests. *Penn v. McGhee* (1909) 6 Ga. App. 631, 65 S. E. 686.

The ordinary remedy of one aggrieved by a judgment of divorce that rests upon insufficient evidence is an appeal, and not a motion to vacate the decree. *Wiemer v. Wiemer* (1911) 21 N. D. 371, 130 N. W. 1015.

Although a judgment of divorce cannot rest upon a defendant's acknowledgment that the charges stated in the complaint are true, without other proof, nevertheless a divorce granted upon such evidence, recognized and invoked by both

parties in subsequent judicial proceedings, and acquiesced in for more than thirty years, will not be treated as a nullity in proceedings for administering the estate of the deceased husband, for the purpose of determining whether certain property should or should not be included as a part of such estate. *Weigel's Succession* (1866) 18 La. Ann. 49.

The quantum and probative force of the evidence upon which a decree of divorce was granted will not be examined upon a bill in equity to set the decree aside, except in so far as it may tend to establish fraud in procuring the divorce. *Wilt v. Wilt* (1899) 2 Dauphin Co. Rep. (Pa.) 100.

A decree of divorce obtained without proof of the facts alleged, by default brought about through the payment of money to defendant to induce the putting in of an insufficient defense, and allowing it to be stricken out because it raised no issue, is properly set aside for fraud and collusion in its procurement, even at the suit of the defendant, and notwithstanding his reprehensible conduct. *True v. True* (1861) 6 Minn. 458, Gil. 315.

#### *XI. Burden of proof where divorces are attacked.*

A burden rests upon whoever seeks to set aside a judgment or decree of proving facts and establishing grounds sufficient to warrant the court in annulling it. *Waldrom v. Waldrom* (1884) 76 Ala. 285; *Corney v. Corney* (1913) 108 Ark. 415, 159 S. W. 20; *Re James* (1893) 99 Cal. 374, 37 Am. St. Rep. 60, 35 Pac. 1122; *Penn v. McGhee* (1908) 6 Ga. App. 631, 65 S. E. 686; *Van Sickle v. Harmeyer* (1912) 172 Ill. App. 218; *Ellis v. White* (1883) 61 Iowa, 644, 17 N. W. 28; *Erickson v. Erickson* (1914) — Iowa, —, 147 N. W. 737; *Carr v. Carr* (1892) 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453; *Miller v. Bearb* (1914) 134 La. 893, 64 So. 822; *Sperry v. Sperry* (1907) — Tex. Civ. App. —, 103 S. W. 419; *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757.

The burden is on the party who institutes the proceeding to set aside a decree of divorce to show that it ought not to have been granted, and to establish grounds for vacating it. *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017.

Whoso would overturn a final judgment of divorce, acted upon by the spouse who procured it, must make out most clearly a right to the relief sought. L.R.A.1917B.

*Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

If, for example, a decree of divorce is charged to have been collusive, the burden of proving the collusion must be sustained by the spouse who attacks it on that ground. *Hopkins v. Hopkins* (1875) 39 Wis. 167.

And if a decree of divorce is sought to be set aside because, during the pendency of the suit in which it was granted, the spouse who obtained it condoned the other's offenses by cohabiting as before, the burden of proving such cohabitation and condonation rests upon the assailant of the decree. *Morton v. Morton* (1897) 117 Cal. 443, 49 Pac. 557; *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404.

One bringing suit to set aside a judgment taken against him is bound to show that he was wholly free from negligence in preparing for trial and learning the facts of which evidence was available. *Wann v. North Western Trust Co.* (1913) 120 Minn. 493, 139 N. W. 1061.

The burden rests upon a litigant who seeks to set aside a judgment taken against him for want of a defense, of showing that he was prevented from making his defense when he had a good one by fraud, accident, or the conduct of his adversary, unmixed with negligence on his part. *Clark v. Ramsey* (1915) 143 Ga. 729, 85 S. E. 869.

To entitle a spouse against whom a judgment of divorce has been rendered to have it set aside in a suit brought for the purpose, it is necessary to allege and prove circumstances of unfairness or fraud operating to prevent a defense or fair trial. *McConkey v. McConkey* (1916) — Tex. Civ. App. —, 187 S. W. 1100.

It is elementary that fraud will not be presumed when parties do not stand in fiduciary relations. *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534.

The burden is on everyone who seeks to set aside a judgment or decree on the ground that it was obtained by fraud of proving the fraud charged. *Davis v. Hibernia Sav. & L. Soc.* (1913) 21 Cal. App. 444, 132 Pac. 462; *Clark v. Ramsey* (Ga.) supra; *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017; *Hopkins v. Hopkins* (1875) 39 Wis. 167.

A charge of fraud in obtaining a judgment of divorce must, in order to sustain a bill in equity to set it aside, be established by the clearest and most satisfactory evidence. *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017; *Whiting v. Whiting* (1874) 114 Mass.

494; *Holbrook v. Holbrook* (1874) 114 *Mass.* 568; *Watkinson v. Watkinson* (1904) 68 *N. J. Eq.* 632, 69 *L.R.A.* 397, 60 *Atl.* 931, 6 *Ann. Cas.* 326; *Wiemer v. Wiemer* (1911) 21 *N. D.* 371, 130 *N. W.* 1015; *Sperry v. Sperry* (1907) — *Tex. Civ. App.* —, 103 *S. W.* 419; *McConkey v. McConkey* (*Tex.*) *supra*; *McDonald v. McDonald* (1904) 34 *Wash.* 293, 75 *Pac.* 865; *Douglas v. Teller* (1909) 53 *Wash.* 695, 102 *Pac.* 761.

Fraud will not be imputed when the facts and circumstances out of which it is supposed to arise are fairly and reasonably consistent with honesty of purpose. *McDonald v. Pearson* (*Ala.*) *supra*.

A decree of divorce will not be set aside by the court after the term at which it was granted without clear proof that the applicant for relief against it was prevented by the fraud of the adverse party, or by an imposition upon the court, from being heard in the suit which resulted in the decree upon some matter constituting, if established, a good defense. *Whiting v. Whiting* (1874) 114 *Mass.* 494; *Holbrook v. Holbrook* (1874) 114 *Mass.* 568.

A decree of divorce challenged for fraud in obtaining it, and which the party complaining of it had a full opportunity to resist, should not be set aside upon very weak and fairly negatived evidence. *Catts v. Catts* (1908) 35 *Pa. Super. Ct.* 293.

A refusal to set aside a judgment alleged to have been taken in violation of an agreement of counsel to continue a pending case, relied upon by his adversary, who was, in consequence, absent, will not be disturbed where the agreement was denied and the testimony respecting the making of it was conflicting, because fraud must be clearly established. *Beck v. Jackson* (1911) 160 *Mo. App.* 427, 140 *S. W.* 919.

Whether a fraud was or was not committed in obtaining a divorce is a question of fact for the determination of the court in the first instance in proceedings to set aside a decree upon that ground, and its decision, when resting upon evidence, cannot be disturbed on appeal. *Miller v. Miller* (1914) 37 *Nev.* 257, 142 *Pac.* 218.

Fraud in procuring a decree of divorce pro confesso after service of process by publication only is not established by strongly contradicted testimony relating to the plaintiff's length of residence requisite to confer jurisdiction. *Whittaker v. Whittaker* (1894) 151 *Ill.* 266, 37 *N. E.* 1017. *L.R.A.* 1917B.

An order granting a wife's motion to set aside a divorce granted her husband was reversed and the judgment was reinstated in *McCanna v. McCanna* (1914) 28 *N. D.* 30, 147 *N. W.* 718; because the supreme court, after examining the testimony, found that the wife's charges that the decree had been procured by fraud, deceit, and coercion, that she had not been personally served with process, that the attorney who appeared for her acted without authority, and that the evidence upon which the decree was based was insufficient, were all unfounded and untrue.

One who attacks a decree of divorce regular on its face, granted by a court of competent jurisdiction by default, after service by publication, on the ground that the allegations of the petition and the affidavit for publication were knowingly false and untrue, and hence that the decree was procured by fraud, is bound to show by affirmative and positive averments actual ignorance of the proceedings in the divorce suit while they were pending. *Larimer v. Knoyle* (1890) 43 *Kan.* 338, 23 *Pac.* 487.

After a lapse of forty years, a marriage contracted with another man by a woman previously married to a man living at the time of the second marriage is presumed to be legal by reason of a valid divorce from her former husband, so as to put the burden of proving the contrary upon a party questioning the validity of the second marriage. *Howton v. Gilpin* (1902) 24 *Ky. L. Rep.* 630, 69 *S. W.* 766.

One who seeks annulment of his marriage to a divorced woman has the burden of proving not only that her former husband was living when the marriage took place, but that her decree of divorce from him was void. *Hall v. Hall* (1910) 139 *App. Div.* 120, 123 *N. Y. Supp.* 1056.

Rights originally founded in fraud may and do, through difficulty of proving the fraud, become unassailable by ordinary legal methods. *United States v. Throckmorton* (1878) 98 *U. S.* 61, 25 *L. ed.* 93.

Forasmuch as the burden which rests upon a party who attacks in equity a judgment on the ground that it was procured by fraud, of establishing the fraud charged, is a heavy one, he ought to be as unhampered as possible in presenting proof of the fraud. *Davis v. Hibernia Sav. & L. Soc.* (1913) 21 *Cal. App.* 444, 132 *Pac.* 462.

The proof of fraud to impeach a judgment or decree in equity, while necessar-

ily required to be clear and convincing, is not required to establish the fraud beyond all reasonable doubt. *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534.

In proceedings to vacate a decree of divorce where a valid defense to the suit is established, had under the statute of Washington (Rem. & Bal. Code, §§ 465 et seq.), the court may first hear and determine the grounds for setting aside or modifying the decree before passing upon the validity of the defense. *Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

**XII. Attacks on divorces based on illegal service of process.**

Many attacks upon judgments of divorce have been based upon the charge that the spouse against whom the decree was granted never had a day in court, because never brought before the court by any legal service of process. If the complaining spouse has never waived the objection and never been estopped to raise it, such a charge, if well founded and established before a court having power and jurisdiction to determine it in an appropriate suit or proceeding, seasonably instituted, is fatal to the judgment.

In a divorce suit a legal service of process of some sort, either personal or constructive, in conformity to an authorizing statute, is essential. *Stephens v. Stephens* (1884) 62 Tex. 337; *Weatherbee v. Weatherbee* (1866) 20 Wis. 499.

If no legal service, either personal or constructive, in compliance with a statute, was made in a divorce suit, the decree granted therein cannot stand. *Stephens v. Stephens* (Tex.) supra.

One who can demonstrate that a judgment or decree asserted as conclusive against him was obtained in a suit of the pendency of which he had neither actual nor constructive notice or knowledge, and to which he had a meritorious defense, may obtain relief from it in a court of equity. *McAdams v. Windham* (1915) 191 Ala. 287, 68 So. 51.

A judgment of divorce founded on a service of process on the defendant personally, outside the limits of the state, without any order for publication, and without the entry of any appearance, is void and may be set aside at any time, notwithstanding the defendant in writing waived any other service, and admitted due service. *Weatherbee v. Weatherbee* (Wis.) supra.

A provision in a statute for substituted service of process to begin suits by leaving a copy with some member of the

defendant's family, over fourteen years old, at his domicile, when he is absent from the state, but is a resident thereof, as the first service in order after personal service, does not apply to divorce suits against a spouse residing permanently in the state, but temporarily absent from it, because such a suit interrupts the marital relation so that such service is less likely to give notice than one by publication and mailing to the temporary postoffice address, the next service allowed by the statute; hence, a decree of divorce granted to a wife from her husband upon a service by publication and mailing of summons and complaint to the defendant at his sojourning place in another country is not void. *McFarlane v. Cornelius* (1903) 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

A decree of divorce obtained by a wife from her husband while he was confined in the penitentiary on a conviction for felony, upon a service of process by the sheriff by leaving a copy of it at his residence with the wife herself (a legal service in ordinary cases), was refused annulment by the Georgia supreme court, after the husband's marriage to another woman and death, in a contest between his widow and son by his first marriage, to administer his estate. *McLeod v. McLeod* (1915) 144 Ga. 359, 87 S. E. 286.

A motion by a defendant to set aside a decree of divorce obtained against him by his wife upon a service of process and notice made by order of the court without the state, upon him personally, grounded upon his assertion that he was never served, must be denied where the proof of service was full, complete, and satisfactory, and his affidavits to the contrary were shown to be false. *Provost v. Provost* (1892) 46 N. Y. S. R. 366, 18 N. Y. Supp. 896.

**XIII. Attacks based on false returns of personal service of process in divorce suits.**

It is a general rule that a return by a public officer duly authorized by law to serve legal process, of personal service of process upon a defendant, is conclusive, and a judgment following and founded upon it is not open to attack on the ground that such return was really false. *Ellis v. Nuckols* (1911) 237 Mo. 290, 140 S. W. 867.

This rule, while generally recognized and applied, has not commanded universal approval, even with respect of ordinary judgments; and on occasions when assented to in ordinary cases, decrees of

divorce have been esteemed to constitute exceptions to its application.

One against whom a judgment or decree has been rendered on default, and who, in fact, was never served with process in the suit, and did not know it was pending, may in a proper proceeding, at a proper time, and before a competent tribunal, be relieved from the judgment notwithstanding a false return of a public officer that the process was duly served. *Wells, F. & Co. v. W. B. Baker Lumber Co.* (1913) 107 Ark. 415, 155 S. W. 122.

A divorce granted by default against an absent defendant upon a false return of a personal service, clearly proved never to have been made, is obtained by a fraud upon the court and defendant, and must be set aside on the latter's petition. *Stephens v. Stephens* (1884) 62 Tex. 337.

The rule which makes unquestionable the return of a public officer of service of process being grounded in public policy based upon the idea that it is better for an injured party to seek compensation by suit against the officer for a false return than to impugn the verity of judicial records ought not and cannot be rightfully applied in an application to set aside a decree of divorce entered by default, and made the very next day, before any actual change in the status of the parties had occurred, and based upon incontrovertible proof that the process had not in fact been served on the defendant. *Brown v. Brown* (1871) 59 Ill. 315.

The reason why a party against whom a decree of divorce has been entered by default, and who applies immediately, before any new rights have supervened or any change in the plaintiff's circumstances has occurred, to set aside the decree and for permission to appear and defend, on the ground that no process was served, is allowed to impeach the sheriff's return of service, contrary to the general rule which makes a public officer's return unimpeachable and relegates the aggrieved party to a suit for damages against the officer for making a false return, is that in a divorce suit the damage is irreparable and the remedy by action inadequate, since no money compensation can measure the loss of a spouse and the care and companionship of children. *Ibid.*

A delay of eleven years by a former wife, who, all the time, knew that her husband had been granted a divorce from her, in bringing a bill in equity to set aside the decree on the ground of a con-

spiracy between the plaintiff and the sheriff to make a fraudulent and false official return of personal service of process upon her, where both the sheriff and the former husband have died in the interim, constitutes laches requiring the dismissal of the bill. *Barnes v. Willis* (1913) 65 Fla. 363, 61 So. 828.

A former wife whose husband, through an official return, false in fact, of personal service of process upon her, obtained by default a divorce from her providing for the payment of a stated sum monthly by him to her as permanent alimony, who, on learning that the decree had been granted, forewent an attack upon it in consideration of the husband's promise to pay her monthly a considerably larger sum than the decree awarded, is thereby estopped from maintaining suit for damages from the false return against the officer and his surety, begun because the husband failed to keep his promises. *Morgan v. Fidelity & D. Co.* (*Morgan v. Williams*) (1912) 66 Wash. 649, 38 L.R.A.(N.S.) 292, 120 Pac. 106.

#### *XIV. Need of conforming to statute in making constructive service of process on defendant spouses in divorce suits.*

Failure strictly to comply with all the requirements of the statute authorizing constructive service of the initiating process in divorce suits by publication when personal service cannot be made is fatal to the validity of a decree obtained by default. *Miller v. Miller* (1914) 37 Nev. 257, 142 Pac. 218; *Wortman v. Wortman* (1863) 17 Abb. Pr. (N. Y.) 66; *Dallas v. Luster* (1914) 27 N. D. 450, 147 N. W. 95; *Rodgers v. Nichols* (1905) 15 Okla. 579, 83 Pac. 923; *Richardson v. Howard* (1915) — Okla. —, 151 Pac. 887.

A decree of divorce entered by default after a service only by publication is properly set aside upon a subsequent direct application to vacate it where the affidavit for publication was fatally defective in form and substance. *Patterson v. Patterson* (1896) 57 Kan. 275, 46 Pac. 304.

A decree of divorce entered by default in a suit in which the defendant was served only by publication, and did not appear, is a nullity unless the affidavit to procure substituted service contained every fact required by the statute to be stated in it. *Atkins v. Atkins* (1879) 9 Neb. 191, 2 N. W. 466.

A decree of divorce against a nonresident defendant where notice was given only by publication and mailing, if granted by default, should, upon seasonable

application, be set aside, and the suit should be dismissed upon proof that the statute authorizing service by publication or conferring jurisdiction in such cases was departed from in one or more particulars, because a strict compliance with the statute is prerequisite to a valid decree. *Smith v. Smith* (1854) 4 G. Greene (Iowa) 266; *Pinkney v. Pinkney* (1854) 4 G. Greene (Iowa) 324.

That a wife suing for a divorce by guardian ad litem because she was then an infant did not in person verify the petition in the suit, and did not allege in that petition absence of collusion, restraint, and bad faith, when a mandatory statute required the petition in a divorce suit to contain such allegations, and required also that it be verified by the plaintiff, were sufficient reasons for holding null a decree of divorce granted her upon such petition, in a subsequent action of ejectment in which the right to recover possession of the land involved depended upon the validity of the divorce. *Hinkle v. Lovelace* (1907) 204 Mo. 208, 11 L.R.A.(N.S.) 730, 120 Am. St. Rep. 698, 102 S. W. 1015, 11 Ann. Cas. 794.

A decree of divorce obtained by default by a man from his wife without notice to her save constructively by publication is rightly set aside in an original action brought for the purpose by her against him, upon evidence establishing the insufficiency of his affidavit to uphold the substituted service, and the falsity of his charge that she had wilfully deserted him, as the ground of divorce in his favor, coupled with proof that his cruel and inhuman treatment, specifically shown, had really driven her from home. *Hard v. Hard* (1897) 51 Neb. 412, 70 N. W. 1122.

An affidavit to obtain authority to publish the summons in a divorce suit, which utterly fails to show any diligent effort to find the defendant within the state and make a personal service, and neither states the defendant's residence nor any efforts to learn it, gives the court no jurisdiction of the defendant's person. *Yorke v. Yorke* (1893) 3 N. D. 343, 55 N. W. 1095.

A decree of divorce rendered in an action commenced by publication of summons only, and not defended, should be set aside where the affidavit to procure the order for such service, while stating the fact that defendant did not reside within the state, omitted to state, as the statute required, that efforts to find and serve the defendant within the state had been duly made and were without

success. *Wortman v. Wortman* (1863) 17 Abb. Pr. (N. Y.) 66.

The discretion of the court is properly exercised in opening a decree of divorce entered by default, and allowing the defendant to defend the action on the merits, upon the application of a wife who had in fact no notice of the proceedings, and was served by publication only, where contradictory assertions disputed as to whether or not she left home of purpose to separate permanently from her husband, or by his consent, in confidence of his unabated affection, and where, too, the affidavit to obtain an order to publish was made by the attorney on information and belief, merely stating in formal language that her residence was unknown, was not within the state, and could not, with reasonable inquiry, be ascertained, and set forth no effort to learn it, while circumstances pointed to the fact that her destination was known and her postoffice address might easily have been ascertained. *Smith v. Smith* (1871) 3 Or. 363.

A decree of divorce obtained by a woman from her husband by default after a constructive service of process by publication may be adjudged a nullity in an action of ejectment, where the right of the plaintiff to recover the land involved depends upon its validity, because, along with other reasons, the woman failed to comply with a mandatory statute in making the necessary proof to authorize the substituted service. *Hinkle v. Lovelace* (1907) 204 Mo. 208, 11 L.R.A.(N.S.) 730, 120 Am. St. Rep. 698, 102 S. W. 1015, 11 Ann. Cas. 794.

A decree of divorce granted to a wife against her husband by default, after a service by publication only, was held void in *Hinkle v. Lovelace* (Mo.) supra, upon several grounds, of which the first was approved only by a majority of the court, with three of its members in dissent, although they concurred upon the other grounds. The court divided upon the question of the invalidity of the decree because the affidavit upon which the service by publication was based averred in the alternative words of the statute in point that the defendant was a nonresident of the state, or had absconded or absented himself from his usual place of abode in the state, so that the ordinary process of the law could not be served upon him. The majority held that the alternative allegations nullified each other upon the theory that he could not have been at once a nonresident and have left his usual residence in the state. Hence they concluded that the publica-

tion was unsupported by the affidavit. The opinion of the dissenting judges was not reported.

No error is committed by a court to which an application to set aside a decree of divorce is made, grounded upon fatal defects and omissions in form and substance in the affidavit for service by publication, in denying the plaintiff's motion to amend the affidavit, or to replace it with a new one, to be filed *nunc pro tunc*. *Patterson v. Patterson* (1896) 57 Kan. 275, 46 Pac. 304.

It is unnecessary for the complainant in a suit in equity to set aside a divorce founded upon a service by publication charged to have been illegal to appear or offer to appear generally and submit to the jurisdiction of the court in the divorce suit. *Atkinson v. Atkinson* (1913) 43 Utah, 53, 17 L.R.A.(N.S.) 499, 134 Pac. 595.

It is equally unnecessary for the complainant in such a case to set up a meritorious defense to the divorce action. *Ibid*.

A statute authorizing service of process in divorce suits by publication of notice in a newspaper when the defendant's residence is unknown and cannot be ascertained by the use of due diligence means by "residence" a regular and permanent place of abode, as distinguished from whereabouts, when the defendant is sojourning temporarily or traveling elsewhere, so that his exact location at any given time may be unknown and unascertainable. *Spinney v. Spinney* (1895) 87 Me. 484, 32 Atl. 1019.

The circumstance that an affidavit to procure an order of publication of notice of the commencement of a divorce suit against a nonresident defendant was made by the plaintiff instead of by a disinterested person, as the law required, is not sufficient to warrant the setting aside of a naked decree of divorce where the defendant, at the time the action was brought, was and for a long time before had been, a nonresident of the state, and the proceedings in other respects were regular and met all statutory requirements. *Day v. Nottingham* (1903) 160 Ind. 408, 66 N. E. 998.

An application to set aside a divorce granted by default after a service by publication, for failure to aver in the affidavit to procure the order to publish efforts made to find defendant within the state, unaccompanied by any prayer for leave to answer, or by any showing of a meritorious defense, should be denied where the affidavit showed the defendant's abode to have been for a long L.R.A.1917B.

time and down to within a few days of its date in another state, and was otherwise sufficient to warrant judicial action. *Peterson v. Peterson* (1902) 15 S. D. 462, 90 N. W. 136.

When the court grants a motion of a defendant served only constructively by publication ordered upon an affidavit so defective that it gave no jurisdiction over the person, after a general appearance without an objection to the lack of jurisdiction, and sets aside a decree of divorce on the ground that it was obtained by fraud and was not supported by the evidence, it is not warranted in dismissing the action for divorce in toto, but only in opening it to allow the defendant to contest it on the merits. *Yorke v. Yorke* (1893) 3 N. D. 343, 55 N. W. 1095.

After a court has vacated a decree of divorce previously granted, because of fatal defects and omissions in the affidavit for publication of the summons, and denied the plaintiff's motion to substitute a new and sufficient affidavit *nunc pro tunc*, and then has given the plaintiff leave to restore the cause to the calendar for trial on the merits, the plaintiff has no cause of complaint that the suit is dismissed when regularly reached for trial, and no evidence to sustain it is offered. *Patterson v. Patterson* (1896) 57 Kan. 275, 46 Pac. 304.

A divorce granted upon constructive service by publication and mailing is not void because the order directing publication did not, in direct terms, specify the time within which the defendant was required to appear and answer, when it did direct publication for six consecutive weeks, and required an appearance and answer on or before the last day of publication, and a statute then provided that a defendant served by publication should appear and answer in the action on or before the last day of the time prescribed for publication in the order. *McFarlane v. Cornelius* (1903) 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

A requirement by statute of proof of publication of a summons pursuant to an order to publish in an action against an absent defendant to be made by the affidavit of the printer within six months after the last day of publication is not mandatory but directory, and a decree of divorce granted after such a service is not void because the printer's affidavit of publication was not made until nine months after publication was completed. *Ibid*.

A defendant in a divorce suit, served only by publication, over whose person

the court acquired no jurisdiction because of fatal defects in the affidavit to procure authority to make such service, who appears generally after judgment, and, without objecting to the lack of jurisdiction, moves to set aside the decree on the ground that it was obtained by fraud and is unsupported by the evidence, waives the defective service. *Yorke v. Yorke (N. D.) supra*.

**XV. Misnomers of parties as grounds for attacking divorces.**

As a general rule an accurate description of the parties to divorce suits by their full names in proceedings relating to the service of process is essential to validity, but this rule has its exceptions. *McDermott v. Gray (1906) 198 Mo. 266, 95 S. W. 431*.

The designation on the record of a divorce suit of both parties to it by parts only of their respective names, and these the least known, when associated with the plaintiff's false affidavit of the nonresidence and unknown whereabouts of the defendant, has been held to be evidence of fraud sufficient to warrant setting aside a decree obtained by default without actual notice, and when there existed a meritorious defense. *Clay v. Robertson (1912) 30 Okla. 758, 120 Pac. 1102*.

A decree of divorce otherwise regular, rendered in proceedings which conformed to the statutes of the state, is not invalidated merely because a middle initial was inserted in the defendant's name, and none belonged there, where there is no evidence whatever that the defendant was in any way misled or injured by the presence of the superfluous letter. *Harrison v. Harrison (1851) 19 Ala. 499*.

The legality of a decree of divorce is not affected in such wise as to invalidate a deed subsequently made by the wife because her Christian names in it are wrongly written or misspelled, where she is plainly identified and the husband's name is correctly given, and both parties ever recognized and acquiesced in the decree as divorcing them, during more than a score of years. *Howton v. Gilpin (1902) 24 Ky. L. Rep. 630, 69 S. W. 766*.

Despite the general rule that, in proceedings leading to and completing service in divorce suits, an accurate description of the parties by their full names is essential to their validity, a decree of divorce granted to a wife from her husband by a court of competent jurisdiction, sitting in a place where he had long

lived and was well known, in a suit giving his true surname, but the initials only of his Christian names, which he used in applying for his marriage license and constantly in his business transactions, cannot be invalidated by the heirs of the deceased second husband of the divorced wife in a suit respecting her property rights as widow. *McDermott v. Gray (Mo.) supra*.

Fraud in procuring a judgment of divorce on substituted service is not established by showing that the defendant was named as such by the second only of her two Christian names, when that name was the one by which commonly she was known. *Douglas v. Teller (1909) 53 Wash. 695, 102 Pac. 761*.

A court of equity, at the suit of the heirs at law of one who died intestate, will not set aside a decree of divorce granted to the widow of the deceased from a former husband merely because, in her suit for divorce, both she and her then husband were misnamed, where there was no fraud or collusion, and the decree was entered after the defendant had appeared and was heard, reciting the true names. *Richardson v. King (1912) 157 Iowa, 287, 135 N. W. 640*.

**XVI. Questioned domicile of spouse granted divorce.**

A domestic attack upon a foreign divorce usually is predicated upon a lack of jurisdiction over the persons of the spouses divorced because of their nonresidence in the divorce forum. Such cases lie outside the scope of this note. They have been presented, anyway, in the primary note to Benton's Succession, 59 L.R.A. 135, entitled, "Conflict of laws on subject of divorce," and in the supplementary case note to Sammons v. Pike, 23 L.R.A.(N.S.) 1254, on "Impeaching decree of divorce rendered in other state on the ground of nonresidence or domicile of the person in whose favor it was granted," so that if the scope of the present note were broader, it would not be necessary to repeat work already well done.

Ordinarily a decree of divorce granted to a plaintiff who is an actual bona fide resident of the state and jurisdiction in which the suit is brought, at the time of bringing it, and who honestly conforms to all the statutory requirements throughout the procedure, is unassailable and conclusive. *Loud v. Loud (1880) 129 Mass. 14; Sodini v. Sodini (1905) 94 Minn. 301, 110 Am. St. Rep. 371, 102 N. W. 861; Hester v. Hester (1912) 103 Miss. 13, 60 So. 0, Ann. Cas. 1915B, 428;*



Werz v. Werz (1881) 11 Mo. App. 26; Provost v. Provost (1892) 46 N. Y. S. R. 366, 18 N. Y. Supp. 896; Wiemer v. Wiemer (1911) 21 N. D. 371, 130 N. W. 1015.

A doubt has been expressed of the power of the court in New York to allow a defendant to come in and defend a divorce suit after a decree had been regularly granted by default upon a constructive service by publication, untainted by any fraud. Denton v. Denton (1871) 41 How. Pr. (N. Y.) 221.

A wife who was sojourning, of her own volition, out of the state, and who refused to accept personal service of notice of, or to appear and defend, her husband's suit for divorce when apprised by letter of his purpose to bring and prosecute it, and who charges no fraud whatever, cannot, after the decree has been granted upon service by publication, have it set aside upon the ground that she was an actual resident of the state all the time, and only temporarily away from home on a visit. Lewis v. Lewis (1908) 138 Iowa, 593, 116 N. W. 698.

A defendant in a divorce suit begun by publication, who has actual knowledge of its pendency a month before a decree is entered, and in ample time to appear and defend, is guilty of negligence and want of diligence, and cannot have relief after judgment, from the decree taken in regular course. McDonald v. McDonald (1904) 34 Wash. 293, 75 Pac. 865.

A defendant in a divorce suit who knew it had been commenced and was pending, and who did not appear in or defend it, where the proceedings in it were in all respects regular upon their face, has no standing after a decree has been granted upon default, after a substituted service by publication, to maintain an action in another state to recover alimony out of the plaintiff's estate. McCormick v. McCormick (1910) 82 Kan. 31, 107 Pac. 546.

The fact that a marriage was celebrated in a state the laws of which made it indissoluble, and between persons domiciled there at the time, does not render invalid a decree of divorce between them, rendered in another state, pursuant to the laws thereof, after they had removed to and acquired a permanent legal residence in the latter state, notwithstanding the defeated spouse before the suit was instituted had deserted the home and returned to the former state, there permanently to remain. Harrison v. Harrison (1851) 19 Ala. 499. L.R.A.1917B.

A divorce obtained by one who did not have an actual and bona fide residence within the state, and for the length of time prior to beginning the action, required by and in conformity to a mandatory statute, is void. Dickinson v. Dickinson (1911) — Tex. Civ. App. —, 138 S. W. 205.

A false allegation of domicile within the territorial jurisdiction of the court by a man bringing suit for a divorce from his wife, coupled with his wilfully false oath that he did not know her residence, of purpose to make only a constructive service, and to keep her ignorant of the proceedings, constitutes a fraud which invalidates the decree granted him. Holmes v. Holmes (1874) 63 Me. 420.

For a plaintiff in a divorce suit falsely to represent, when he has it not, that he has and has had, for the statutory length of time previous to bringing his suit, an actual bona fide residence within the state and county where he brings it, is to perpetrate a fraud upon the court for which the divorce obtained may be set aside. Dickinson v. Dickinson (Tex.) supra.

If the record in a divorce suit on its face shows jurisdiction, it may, nevertheless, be shown aliunde, upon a motion to set aside the decree and for a new trial under a statute providing for such a motion, that, in fact, the plaintiff, when the suit was begun, did not have an actual bona fide residence within the state and county for the length of time required by an express statute respecting divorce suits. Ibid.

When the jurisdiction of a court to entertain a suit for and to grant a divorce is made by statute to depend upon the domicile of the plaintiff, a false statement that the plaintiff has such domicile within the court's jurisdiction, made for the purpose of hiding the proceedings from the defendant and of deceiving the court into entertaining them, constitutes a fraud on the court which authorizes setting aside the decree obtained from it. Sampson v. Sampson (1916) 223 Mass. 451, 112 N. E. 84.

The supreme court of Kansas has held, however, that the false assertion of residence in a foreign state for the length of time required by the statutes thereof to give its courts jurisdiction of a divorce suit by a plaintiff suing a lunatic spouse, and making only constructive service by publication, is a fraud to be contested in the suit, and not an extrinsic one for which the decree granted in it can be successfully attacked and nulli-

filed. *Miller v. Miller* (1913) 89 Kan. 151, 130 Pac. 681.

The taking up of a temporary residence in a county where a plaintiff is not generally known, for the express purpose of gaining a colorable domicile there, in order to bring a secret suit for divorce, is one of the badges of fraud. *Whitcomb v. Whitcomb* (1877) 46 Iowa, 437; *Crow v. Crow* (1914) 40 Okla. 455, 139 Pac. 122.

A decree of divorce granted upon substituted service to a man who had deserted his wife many years previously, by a court in a jurisdiction in which he had not, although the statute required him to have, a bona fide residence, but where he merely sojourned, living in concealment under an assumed name, when his real home was in another state, is invalid for his fraud in procuring it, and will be set aside in a suit in equity brought by his divorced wife, if her property rights have been cut off by the decree, notwithstanding he had married another woman, and died before the bill was filed to set the decree aside. *Lawrence v. Nelson* (1901) 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84.

The mere establishing of a nominal and fictitious residence by renting lodgings and occupying them only about one night every month within the territorial jurisdiction of a divorce court to gain an ostensible residence therein for the requisite statutory time as a part of a fraudulent scheme to divorce his wife upon a lying charge of desertion, supported by perjured testimony, when he had sent her away for her health, and wilfully swore falsely that he did not know and could not learn her residence, so as to serve her only constructively by publication, vitiates for fraud a divorce granted to him. *Nickerson v. Nickerson* (1883) 13 W. N. C. (Pa.) 210.

A decree of divorce granted ex parte in a suit between subjects of a foreign country having their actual domicile therein, upon false representation of residence within the jurisdiction of the divorce court, is void. *Kellow v. Kellow* (1886) 1 Lehigh Valley L. Rep. (Pa.) 202.

A finding upon conflicting evidence in a controversy over the validity of a divorce that the plaintiff in the divorce suit had, when he brought it, resided within the state for the length of time required by statute to entitle him to maintain it, should not be disturbed on appeal. *Re James* (1893) 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122. L.R.A.1917B.

The mere fact that a husband having a domicile within the state which he had established and maintained for a decade and a half, left it to sojourn for a few months in another state, with no purpose to change his permanent abode, does not make him guilty of any fraud in alleging on oath in his suit for divorce from his wife, that he was, and for the length of time required by law had been, a resident of the state so as to give the court jurisdiction. *Watkinson v. Watkinson* (1904) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326.

A decree of divorce granted to a non-resident defendant, brought regularly into court by a resident plaintiff, will not be set aside at the latter's instance because of a statute forbidding divorces to parties not residents for a stated previous length of time. *Newman v. Newman* (1910) 27 Okla. 381, 112 Pac. 1007.

Under the statutes of the state of Florida, the circumstance that a wife seeking relief from a judgment divorcing her, procured by her husband upon default, after constructive service of process by publication, with incidental alimony or maintenance, does not reside within the state, affords the husband no defense if he is a bona fide resident of the state. *Miller v. Miller* (1894) 33 Fla. 453, 24 L.R.A. 137, 15 So. 222; *Shrader v. Shrader* (1895) 36 Fla. 502, 18 So. 672.

The validity of a divorce between spouses who voluntarily appeared and submitted themselves to the jurisdiction of the court which granted it cannot afterwards be attacked by either upon the ground that the court had no jurisdiction of them because they were not residents of the state. *Moor v. Moor* (1901) — Tex. Civ. App. —, 63 S. W. 347.

A wife in whose favor a decree of divorce is granted upon a cross bill in her husband's suit cannot, several years afterwards, have it set aside on the ground that the court had no jurisdiction because both parties resided without the state. *Ferry v. Ferry* (1894) 9 Wash. 239, 37 Pac. 431.

#### *XVII. Fraud as ground of attack on divorces.*

##### *a. In general.*

Most of the attacks on judgments and decrees are founded upon charges that they were obtained by fraud. Indeed, it is safe to say that fraud in one or more of its protean forms practised on a litigant, the court, or both, constitutes the

basis of more assaults upon decrees of divorce in particular than do all other invalidating grounds whatever except possibly the lack of jurisdiction to render the judgments assailed. Then, too, of all attempts to impeach and set aside judgments, those based upon fraud are the most frequently successful.

It is admitted as beyond question that fraud vitiates judgments as well as the most solemn contracts and documents. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

The judgments of courts constitute no exception to the rule that fraud vitiates every transaction. *Noble v. Moses Bros.* (1883) 74 Ala. 604; *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534; *Woodruff Place v. Gorman* (1912) 179 Ind. 1, 100 N. E. 296; *Harding v. Alden* (1832) 9 Mo. 140, 23 Am. Dec. 549; *Brown v. Trent* (1912) 36 Okla. 239, 128 Pac. 895; *Johnson v. Filtseh* (1913) 37 Okla. 510, 138 Pac. 165; *Bowsman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270.

It is elemental that fraud vitiates all that it touches; and the fact that it has been crystalized into a judgment does not change the rule. *Gorman v. Johnson* (1910) 46 Ind. App. 672, 91 N. E. 971.

Neither judgments at law nor decrees in equity escape from the operation of the rule that fraud will vitiate any, even the most solemn, transaction. *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94; on second appeal (1914) 257 Mo. 317, 165 S. W. 783.

A judgment of a court of competent jurisdiction, although generally conclusive between the parties to it, may be impeached and set aside if it was obtained by fraud, contrivance, or covin; the maxim that no one shall be permitted to aver against a record does not apply where fraud can be shown. *Woodruff Place v. Gorman* (1912) 179 Ind. 1, 100 N. E. 296.

The rule that a court of equity will not reopen a judgment of another court to enable the defeated litigant to make a defense which might have been made in the action which culminated in the judgment is subject to the important and logical qualification that he must not have been prevented by the fraud of his adversary, unmixed with his own fault or neglect, from making such defense. *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293.

The supreme court of New Hampshire repudiated the doctrine sanctioned by some text-writers (vide, 3 Cowen & L.R.A.1917B.

*Hill's Phillips*, Ev. 610, note) that no party or privy to a judgment may impeach it for fraud. *Tebbetts v. Tilton* (1855) 31 N. H. 287.

And for reasons afterwards pronounced entirely satisfactory. *Adams v. Adams* (1872) 51 N. H. 388, 12 Am. Rep. 134.

As one jurist has put it, in the affairs of men there is no place under the sun where fraud should be permitted to take sanctuary and claim immunity from pursuit, discovery, and punishment. The solemn judgments of courts of justice of any degree afford it no sanctuary. *Cantwell v. Johnson* (1911) 236 Mo. 575, 139 S. W. 365.

A decree of divorce which was obtained by fraud is voidable rather than void at the instance of the defrauded party upon a direct attack. *Smithson v. Smithson* (1893) 37 Neb. 535, 40 Am. St. Rep. 504, 56 N. W. 300.

A court of equity, untrammelled by restrictive legislation, has original and independent jurisdiction upon a bill filed for the purpose to set aside any ordinary judgment or decree on the ground that it was obtained through fraud practised by the successful litigant upon the defeated complainant. *Ex parte Smith* (1859) 34 Ala. 455; *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534; *Evans v. Wilhite* (1910) 167 Ala. 587, 52 So. 845; on second appeal (1912) 176 Ala. 287, 58 So. 262; *Rittenberry v. Wharton* (Ala.) supra; *Tribble v. Patton* (1913) 180 Ala. 258, 60 So. 863; *Flood v. Templeton* (1907) 152 Cal. 148, 13 L.R.A. (N.S.) 579, 92 Pac. 78; *Davis v. Hibernia Sav. & L. Soc.* (1913) 21 Cal. App. 444, 132 Pac. 462; *Pearce v. Olney* (1850) 20 Conn. 544; *Wierich v. DeZoya* (1845) 7 Ill. 385; *French v. Thomas* (1911) 252 Ill. 65, 96 N. E. 564; *Stodgell v. Garnett* (1910) 159 Ill. App. 301; *Woodruff Place v. Gorman* (1912) 179 Ind. 1, 100 N. E. 296; *Gorman v. Johnson* (1910) 46 Ind. App. 672, 91 N. E. 971; *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27; *Boudreaux v. Lower Terrebonne Ref. & Mfg. Co.* (1910) 127 La. 98, 53 So. 456; *Harding v. Alden* (1832) 9 Mo. 140, 23 Am. Dec. 549; *Kent v. Ricards* (1850) 3 Md. Ch. 396; *Barr v. Packard Motor Car Co.* (1912) 172 Mich. 299, 137 N. W. 697; *Geisberg v. O'Laughlin* (1903) 88 Minn. 431, 93 N. W. 310; *Payne v. O'Shea* (1884) 84 Mo. 129; *Ellis v. Nuckols* (1911) 237 Mo. 290, 140 S. W. 867; *Moore v. Gamble* (1852) 9 N. J. Eq. 246; *Brown v. Trent* (1912) 36 Okla. 239, 128 Pac. 895; *Johnson v. Filtseh* (1913)

37 *Okla.* 510, 138 *Pac.* 165; *Bowsman v. Anderson* (1912) 62 *Or.* 431, 123 *Pac.* 1092, 125 *Pac.* 270; *Wolf v. Sahm* (1909) 55 *Tex. Civ. App.* 564, 120 *S. W.* 1114, rehearing denied in (1909) 55 *Tex. Civ. App.* 572, 121 *S. W.* 561.

The power and right of courts of equity to set aside judgments procured by fraud, though once doubted, has long been unquestioned. *Gorman v. Johnson* (1910) 46 *Ind. App.* 672, 91 *N. E.* 971.

It is now "well settled." *Johnson v. Filtzsch* (1913) 37 *Okla.* 510, 138 *Pac.* 165.

"Well established and clearly defined." *Bowsman v. Anderson* (1912) 62 *Or.* 431, 123 *Pac.* 1092, 125 *Pac.* 270.

A court of chancery has undoubtedly power to look into the judgment or decree of any court and to cancel or vacate it if it finds such judgment or decree to have been obtained by fraud. *French v. Thomas* (1911) 252 *Ill.* 65, 96 *N. E.* 564.

The undoubted power of a court of equity to relieve the victim of a fraud; to vacate deeds, contracts, and other instruments obtained by fraud; to undo any and all transactions hurtful to the complaining party when infected by fraud,—extends to annulling the judgments and decrees of courts which have been procured by fraud. *McDonald v. Pearson* (1896) 114 *Ala.* 630, 21 *So.* 534.

An attack upon a judgment for fraud in procuring it is a direct attack of which courts of equity take jurisdiction. *Brown v. Trent* (1912) 36 *Okla.* 239, 128 *Pac.* 895.

No well-considered case can be found, it has been said, in which the jurisdiction of courts of equity in suits attacking judgments for fraud in procuring them has been denied. *Ibid.*

In the absence of a statute giving a complete remedy at law, a court of equity is the appropriate forum for granting relief against fraud in the procurement of judgments. *Corney v. Corney* (1913) 108 *Ark.* 415, 159 *S. W.* 20.

A fraud which gave an unfair advantage to the litigant who prevailed in an action will afford ground for relief against the judgment in a court of equity. *Einstein v. Strother* (1916) — *Mo. App.* —, 182 *S. W.* 122.

A decree of divorce is, in this respect, on the same footing as other judgments and decrees; it is vitiated by fraud. *Daniels v. Benedict* (1892) 50 *Fed.* 347; *Re Smith* (1906) 74 *Kan.* 452, 87 *Pac.* 189; *Lieber v. Lieber* (1911) 239 *Mo.* 1, 143 *S. W.* 458; *Dorrance v. Dorrance* (1912) 242 *Mo.* 625, 148 *S. W.* 94, on second appeal (1914) 257 *Mo.* 317, 165 *L.R.A.* 1915:B.

*S. W.* 783; *DeGraw v. DeGraw* (1879) 7 *Mo. App.* 121; *Adams v. Adams* (1871) 51 *N. E.* 388, 12 *Am. Rep.* 134; *Rodgers v. Nichols* (1905) 15 *Okla.* 579, 83 *Pac.* 923; *Allen v. Maclellan* (1849) 12 *Pa.* 328, 51 *Am. Dec.* 608; *Nickerson v. Nickerson* (1883) 13 *W. N. C. (Pa.)* 210; *Wilt v. Wilt* (1899) 2 *Dauphin Co. Rep. (Pa.)* 100; *McMurray v. McMurray* (1887) 67 *Tex.* 665, 4 *S. W.* 357.

An action is maintainable to annul a decree of divorce on the ground that it was obtained by fraud and imposition practised on the court and the party against whom it was granted. *Rodgers v. Nichols* (1905) 15 *Okla.* 579, 83 *Pac.* 923.

The policy and letter of the law agree in guarding divorces against fraud. *McBlain v. McBlain* (1888) 77 *Cal.* 507, 20 *Pac.* 61; *Cottrell v. Cottrell* (1890) 83 *Cal.* 457, 23 *Pac.* 531.

When, by a successful fraud practised upon the court, a decree of divorce has been obtained, the courts, upon its discovery, have the right and owe the duty to the public and the party wronged of setting it aside and pronouncing it a nullity. *Earle v. Earle* (1883) 91 *Ind.* 27.

Upon the application of the aggrieved spouse in a direct proceeding for the purpose, a decree of divorce may be set aside, where it was procured by a fraud, in spite of a public policy adverse, as a rule, to disturbing divorces. *Day v. Nottingham* (1903) 160 *Ind.* 408, 66 *N. E.* 998.

A court from which a litigant has obtained a decree in his favor by fraud and imposition will not be slow to set it aside when the injured litigant is diligent in invoking its aid to that end. *Nicholson v. Nicholson* (1888) 113 *Ind.* 131, 15 *N. E.* 223.

The power of a court which granted by default, after a constructive service by publication, a judgment of divorce, to open it and let in the defendant to defend, has been declared to be beyond question when it is shown that the decree was obtained by fraud. *Denton v. Denton* (1871) 41 *How. Pr. (N. Y.)* 221.

A judgment or decree of divorce may be attacked and vacated for fraud in procuring it, in a court of equity. *Maheer v. Title Guarantee & T. Co.* (1901) 95 *Ill. App.* 365.

As a general proposition, courts of chancery have the same power to adjudge decrees of divorce null or invalid that they have in other cases of fraudulent and void judgments. *Shrader v. Shrader* (1895) 36 *Fla.* 502, 18 *So.* 672.

The power of the court to set aside, upon a bill in equity, a divorce obtained by fraud, has been asserted to be well settled. *Wilt v. Wilt* (1899) 2 Dauphin Co. Rep. (Pa.) 100.

The state being interested in divorce suits, courts will not sanction prosecutions fraudulently set on foot or conducted in bad faith. *Olmstead v. Olmstead* (1889) 41 Minn. 297, 43 N. W. 67.

Because of the interest of the state in divorce suits the courts will promptly annul decrees obtained in prosecutions fraudulently instituted, or conducted in bad faith. *Ibid.*

And, legislation not interfering, an original bill in equity to impeach and annul a decree of divorce may, in a proper case, be successfully maintained upon the ground of fraud in instituting and carrying on the divorce suit and procuring such decree. *Golden v. Golden* (1893) 102 Ala. 353, 14 So. 638; *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706; *Corney v. Corney* (1906) 79 Ark. 289, 116 Am. St. Rep. 80, 95 S. W. 135; *Rawlins v. Rawlins* (1881) 18 Fla. 345; *Shrader v. Shrader* (1895) 36 Fla. 502, 18 So. 672; *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795; *Wood v. Wood* (1906) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Bryant v. Austin* (1884) 36 La. Ann. 808; *Foxwell v. Foxwell* (1914) 122 Md. 263, 89 Atl. 494; *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84; *True v. True* (1861) 6 Minn. 458, Gil. 315; *Young v. Young* (1871) 17 Minn. 181, Gil. 153; *Mansfield v. Mansfield* (1858) 26 Mo. 163; *Lieber v. Lieber* (1911) 239 Mo. 1, 143 S. W. 458; *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94, on second appeal (1914) 257 Mo. 317, 165 S. W. 783; *DeGraw v. DeGraw* (1879) 7 Mo. App. 121; *McDonald v. McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850; *State ex rel. Happel v. District Ct.* (1908) 38 Mont. 166, 35 L.R.A. (N.S.) 1098, 129 Am. St. Rep. 636, 99 Pac. 291; *Doughty v. Doughty* (1876) 27 N. J. Eq. 315; *Britton v. Britton* (1889) 45 N. J. Eq. 88, 15 Atl. 266; *Voorhees v. Voorhees* (1890) 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; affirmed in (1890) 47 N. J. Eq. 315, 14 L.R.A. 366, 20 Atl. 676; *Denton v. Denton* (1871) 41 How. Pr. (N. Y.) 221; *Blank v. Blank* (1887) 107 N. Y. 91, 13 N. E. 615; *Monroe v. Monroe* (1893) 66 Hun, 635, 50 N. Y. S. R. 237, 21 N. Y. Supp. 655; *Nickerson v. Nickerson* (1883) 13 W. N. C. (Pa.) 210; *Wilt v. Wilt* (1899) 2 Dauphin Co. Rep. (Pa.) 100; *State v. Watson* (1898) L.R.A. 1917B.

20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193, 11 Am. Crim. Rep. 24; affirmed in (1900) 179 U. S. 679, 45 L. ed. 383, 21 Sup. Ct. Rep. 915; *Elmgren v. Elmgren* (1903) 25 R. I. 177, 55 Atl. 322; *Reeves v. Reeves* (1909) 24 S. D. 435, 25 L.R.A. (N.S.) 574, 123 N. W. 869; *Stephens v. Stephens* (1884) 62 Tex. 337; *McMurray v. McMurray* (1887) 67 Tex. 665, 4 S. W. 357; *Dickinson v. Dickinson* (1911) — Tex. Civ. App. —, 138 S. W. 205; *Johnson v. Coleman* (1868) 23 Wis. 452, 99 Am. Dec. 193.

In Pennsylvania the ordinary procedure to set aside a decree of divorce for fraud in obtaining it is by petition. *Wilt v. Wilt* (1899) 2 Dauphin Co. Rep. (Pa.) 100.

But this method is not exclusive. *Ibid.*

Fraud practised in obtaining a judgment, including one for divorce, was a cause named in a statute of Iowa (Code, § 4091), for which district courts were authorized at later terms to vacate or modify judgments or grant new trials. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

A right of action in cases in which there was fraud in invoking the jurisdiction of the court or in preventing the defense of the action, to set aside a judgment, has been given by statute (Gen. Stat. 1913, § 7910) in Minnesota. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

An action under the Minnesota statute to set aside a judgment alleged to have been procured by fraud has an equitable character, and the court has the power and is charged with the duty to award such relief in it as the facts and ends of justice may require in any particular case. *Geisberg v. O'Laughlin* (1903) 88 Minn. 431, 93 N. W. 310.

An agreement by a divorced wife to acquiesce in and refrain from attacking an illegal and fraudulent decree obtained against her by her husband is void, as contrary to public policy. *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191.

The general policy of Indiana is adverse to disturbing judgments of divorce for any reason but fraud upon the jurisdiction of the court, according to the view expressed in the case of *Keller v. Keller* (1894) 139 Ind. 38, 38 N. E. 337.

#### *b. Nature of fraud which vitiates a divorce.*

A fraud which will warrant the overturning of a judgment in any case must be an actual, intentional, and wilful one,

not merely a constructive or legal fraud. *Wagner v. Beadle* (1910) 82 **Kan.** 468, 108 **Pac.** 859.

The nature of a fraud in procuring a judgment, to warrant relief from it in a court of equity, must be such as was the product of a bad mind and wholly inconsistent with honest purposes. *Noble v. Moses Bros.* (1883) 74 **Ala.** 604.

Fraud in the sense used to justify equitable interference with a judgment or decree has its common and direct meaning of the perpetration of an intentional wrong, or the breach of a duty growing out of a fiduciary relation. *Bowsman v. Anderson* (1912) 62 **Or.** 431, 123 **Pac.** 1092, 125 **Pac.** 270.

A mere standing upon his legal rights by a plaintiff in a divorce suit does not warrant the setting aside of a decree in his favor. *Richards v. Richards* (1913) 24 **Idaho**, 87, 132 **Pac.** 576.

It is a rule sometimes spoken of as well-settled or established that the only fraud for which a court of equity is warranted in setting aside a judgment or decree is a fraud which was practised to procure that judgment or decree; a fraud in its concoction; one that brought about its rendition. *Cromelin v. McCauley* (1880) 67 **Ala.** 542; *Noble v. Moses Bros.* (**Ala.**) *supra*; *McDonald v. Pearson* (1896) 114 **Ala.** 630, 21 **So.** 534; *Rittenberry v. Wharton* (1912) 176 **Ala.** 390, 58 **So.** 293; *De Soto Coal, Min. & Development Co. v. Hill* (1914) 188 **Ala.** 667, 65 **So.** 988; *Hendley v. Chabert* (1914) 189 **Ala.** 258, 65 **So.** 993; *Hall v. Cox* (1912) 104 **Ark.** 303, 149 **S. W.** 80; *Hollister v. Sobra* (1914) 264 **Ill.** 535, 106 **N. E.** 507; *Jones v. Brinker* (1854) 20 **Mo.** 87; *Lewis v. Williams* (1873) 54 **Mo.** 200; *Payne v. O'Shea* (1884) 84 **Mo.** 129; *Murphy v. De France* (1890) 101 **Mo.** 151, 13 **S. W.** 756; *F. G. Oxley Stave Co. v. Butler County* (1894) 121 **Mo.** 614, 26 **S. W.** 367; *Nichols v. Stevens* (1894) 123 **Mo.** 96, 45 **Am. St. Rep.** 514, 25 **S. W.** 578, 27 **S. W.** 613; *Moody v. Peyton* (1896) 135 **Mo.** 489, 58 **Am. St. Rep.** 604, 36 **S. W.** 621; *Hamilton v. McLean* (1897) 139 **Mo.** 678, 41 **S. W.** 224; *Bates v. Hamilton* (1898) 144 **Mo.** 1, 66 **Am. St. Rep.** 407, 45 **S. W.** 641; *Fears v. Riley* (1899) 148 **Mo.** 49, 49 **S. W.** 836; *Lieber v. Lieber* (1911) 230 **Mo.** 1, 143 **S. W.** 458; *Cross v. Gould* (1908) 131 **Mo. App.** 585, 110 **S. W.** 672; *Springfield Traction Co. v. Dent* (1911) 159 **Mo. App.** 220, 140 **S. W.** 606; *Einstein v. Strother* (1916) — **Mo. App.** —, 182 **S. W.** 122.

The fraud for which a judgment may L.R.A.1917B.

be vacated or enjoined must be in its procurement,—in its concoction,—in the very act itself. *Cantwell v. Johnson* (1911) 236 **Mo.** 575, 139 **S. W.** 365.

A fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment, and not merely have induced or brought about a condition upon the real existence of which the court acted as the ground of its decree. *Uecker v. Thiedt* (1907) 133 **Wis.** 148, 113 **N. W.** 447, and on second appeal (1909) 137 **Wis.** 634, 119 **N. W.** 878; *Routledge v. Patterson* (1911) 146 **Wis.** 226, 131 **N. W.** 346.

A fraud which affected only the cause of action, and which might have been met and frustrated in defending the action, affords no ground for setting aside the judgment. *Einstein v. Strother* (1916) — **Mo. App.** —, 182 **S. W.** 122.

That a cause of action was vitiated by fraud affords no ground, after a judgment has been rendered, for the interposition of a court of equity to prevent the enforcement of the judgment. *Rittenberry v. Wharton* (1912) 176 **Ala.** 390, 58 **So.** 293.

When an alleged fraud consists only in a cause of action carried into judgment, it is not such an one as entitles the defeated litigant to impeach the judgment for fraud in its procurement. *Hall v. Cox* (1912) 104 **Ark.** 303, 149 **S. W.** 80.

A fraud entering into and vitiating a cause of action affords no ground in equity for relief from the judgment in the action unless the defeated litigant was prevented from defending the action and exposing the fraud. *Hollister v. Sobra* (1914) 264 **Ill.** 535, 106 **N. E.** 507.

A fraud which was tried in the action that resulted in a judgment is not such an one as will warrant the setting aside of that judgment. *Adams v. Adams* (1872) 51 **N. H.** 388, 12 **Am. Rep.** 134.

The judgments and decrees of courts deciding between parties before them and subject to their jurisdiction in trials where the claims of both sides have been presented and considered, although these claims may have been fraudulent, are not open to inquiry in ordinary legal ways. *United States v. Throckmorton* (1878) 98 **U. S.** 61, 25 **L. ed.** 93.

Through the protection which the law throws around rights once established by formal judicial proceedings in tribunals legally established, notwithstanding the rights thus established may be founded

in fraud, they are sometimes immune to attacks by the usual and common methods. *Ibid.*

When everything alleged as fraud in a bill to set aside a decree of divorce was involved in the issue tendered by the defendant in the divorce suit, and was therein tried and found to be untrue, the bill cannot be maintained. *Richardson v. Stowe* (1890) 102 Mo. 33, 14 S. W. 810.

A fraud which entitles a party to impeach a judgment must not consist of any false or fraudulent act or testimony, the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment that is thus assailed, but it must be one extrinsic of the matter tried in the cause,—one practised upon the court in the procurement of the judgment. *Bank of Pine Bluff v. Levi* (1909) 90 Ark. 166, 118 S. W. 250.

If a cause of action is vitiated by fraud, such fraud constitutes a defense to be interposed to prevent a judgment or decree. *Rittenberry v. Wharton* (Ala.) *supra*.

A fraud which entered into and vitiated a cause of action is one that must be combated in the action brought upon that cause. *Hollister v. Sobra* (Ill.) *supra*.

There must be an end to litigation in the interest of the state and for the repose of society; therefore when the help of a court of equity is asked to undo what has already been done and adjudged by a court, fraud in the cause of action itself, in false allegations or false testimony, will not suffice. Such fraud was within the issues on the merits. The complainant had his day in court and the question is foreclosed. *Cantwell v. Johnson* (1911) 236 Mo. 575, 139 S. W. 365.

The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, relate to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the judgment or decree was rendered.

**U. S.**—*United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank* (1879) 101 U. S. 514, 25 L. ed. 929.

**Ala.**—*Harrison v. Harrison* (1851) 19 Ala. 499; *Cromelin v. McCauley* (1880) 67 Ala. 542; *Noble v. Moses Bros.* (1883) 74 Ala. 604; *Peterson v. Blanton* (1884) 76 Ala. 264; *McDonald v. Pearson* (1896) 114 Ala. 630, 21 So. 534; *Rittenberry v. L.R.A.* 1017B.

*Wharton* (1912) 176 Ala. 390, 58 So. 293; *DeSoto Coal, Min. & Development Co. v. Hill* (1914) 188 Ala. 667, 65 So. 988; *Hendley v. Chabert* (1914) 189 Ala. 258, 65 So. 993.

**Ark.**—*Bank of Pine Bluff v. Levi* (1909) 90 Ark. 166, 118 S. W. 250; *Hall v. Cox* (1912) 104 Ark. 303, 149 S. W. 80.

**Cal.**—*Sohler v. Sohler* (1901) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Dane v. Layne* (1909) 10 Cal. App. 366, 101 Pac. 1067.

**Ill.**—*Cairo & St. L. R. Co. v. Holbrook* (1879) 92 Ill. 297; *Burton v. Perry* (1893) 146 Ill. 71, 34 N. E. 60; *Pratt v. Griffin* (1906) 223 Ill. 349, 79 N. E. 102; *Hollister v. Sobra* (1914) 264 Ill. 535, 106 N. E. 507.

**Ind.**—*Pepin v. Lautman* (1901) 28 Ind. App. 74, 62 N. E. 60.

**Iowa.**—*Cottle v. Cole* (1866) 20 Iowa, 481; *Heathcote v. Haskins* (1888) 74 Iowa, 566, 38 N. W. 417; *Wood v. Wood* (1906) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Graves v. Graves* (1906) 132 Iowa, 199, 10 L.R.A.(N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1104; *Tollefson v. Tollefson* (1908) 137 Iowa, 151, 114 N. W. 631; *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27; *Mengel v. Mengel* (1909) 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899; *Richardson v. King* (1912) 157 Iowa, 287, 135 N. W. 640.

**Kan.**—*Electric Plaster Co. v. Blue Rapids Twp.* (1910) 81 Kan. 730, 25 L.R.A.(N.S.) 1237, 106 Pac. 1079; *McCormick v. McCormick* (1910) 82 Kan. 31, 107 Pac. 546; *Garrett Biblical Institute v. Minard* (1910) 82 Kan. 338, 108 Pac. 80; *Miller v. Miller* (1913) 89 Kan. 151, 130 Pac. 681; *Cheever v. Kelly* (1915) 96 Kan. 269, 150 Pac. 529.

**La.**—*Perry v. Rue* (1879) 31 La. Ann. 287; *Rowe v. Chicago Lumber & Coal Co.* (1898) 50 La. Ann. 1258, 24 So. 235.

**Md.**—*Maryland Steel Co. v. Marney* (1900) 91 Md. 360, 46 Atl. 1077.

**Mass.**—*Greene v. Greene* (1854) 2 Gray, 361, 61 Am. Dec. 454.

**Mich.**—*Miller v. Morse* (1871) 23 Mich. 365.

**Mo.**—*Smith v. Sims* (1883) 77 Mo. 269; *Payne v. O'Shea* (1884) 84 Mo. 129; *Murphy v. De France* (1890) 101 Mo. 151, 13 S. W. 756; *Richardson v. Stowe* (1890) 102 Mo. 33, 14 S. W. 810; *Neun v. Blackstone Bldg. & L. Asso.* (1899) 149 Mo. 74, 50 S. W. 436; *Wabash R. Co. v. Mirrieles* (1904) 182 Mo. 126, 81 S. W. 437; *Walther v. Null* (1911) 233 Mo. 104, 134 S. W. 993; *Cantwell v. Johnson* (1911) 236 Mo. 575, 139 S. W.

365; *Lieber v. Lieber* (1911) 239 Mo. 1, 143 S. W. 458; *Springfield Traction Co. v. Dent* (1911) 159 Mo. App. 220, 140 S. W. 606.

**N. H.**—*Adams v. Adams* (1872) 51 N. H. 388, 12 Am. Rep. 134.

**N. Y.**—*Ross v. Wood* (1877) 70 N. Y. 8.

**N. C.**—*Burgess v. Lovengood* (1856) 55 N. C. (2 Jones, Eq.) 457.

**Ohio.**—*Michael v. American Nat. Bank* (1911) 84 Ohio St. 370, 38 L.R.A.(N.S.) 220, 95 N. E. 905.

**Okla.**—*Brown v. Trent* (1912) 36 Okla. 239, 128 Pac. 895.

**Or.**—*Friese v. Hummel* (1894) 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458.

**Penn.**—*Latimer v. Dean* (1899) 31 Pittsb. L. J. N. S. (Pa.) 192.

**S. D.**—*Reeves v. Reeves* (1909) 24 S. D. 435, 25 L.R.A.(N.S.) 574, 123 N. W. 869.

**Tex.**—*Moor v. Moor* (1901) — Tex. Civ. App. —, 63 S. W. 347.

**Vt.**—*Camp v. Ward* (1896) 69 Vt. 286, 60 Am. St. Rep. 929, 37 Atl. 747; *French v. Raymond* (1909) 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324.

**Wash.**—*Robertson v. Freebury* (1915) 87 Wash. 558, L.R.A.1916B, 883, 152 Pac. 5; *Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

**Wis.**—*Uecker v. Thiedt* (1907) 133 Wis. 148, 113 N. W. 447, on second appeal (1909) 137 Wis. 634, 119 N. W. 878.

It is well settled that fraud relating to transactions antecedent to a judgment, such as would have constituted a good defense to the rendition of the judgment, but not connected with the proceedings by which it was obtained, is insufficient to justify relief under the head of the equitable powers of a court of chancery. *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293.

A wife who obtained a divorce from her husband because of a voluntary separation of the pair, continued for five years, cannot, after the husband's death and the lapse of several years, maintain an action to set aside the decree on the ground that the husband fraudulently misrepresented his property and financial condition to induce the wife to agree to articles of separation, where he neither appeared in the divorce suit nor did ought to promote the rendition of the decree. *Uecker v. Thiedt* (1907) 133 Wis. 148, 113 N. W. 447.

The reason is that the separation actually took place and continued for the statutory time, regardless of whether the agreement to live apart grew out of

fraud or duress; so that no fact was misstated and no imposition practised to gain the decree.

The doctrine of this case was reasserted and controlled the decision in the like case, brought for the same relief, and based upon very similar grounds, of *Routledge v. Patterson* (1911) 146 Wis. 226, 131 N. W. 346.

If it is established that a judgment was obtained by some extrinsic or collateral fraud by which the court rendering it was imposed upon, the judgment may be attacked and set aside. *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27.

Judgments and decrees are impeachable for those frauds only which are extrinsic to the merits of the case, and by which the court has been imposed upon or misled into rendering a false judgment. *Rittenberry v. Wharton* (Ala.) *supra*.

The fraud for which one may impeach a judgment taken against him must be a fraud extrinsic to the subject matter of the cause in which the judgment was rendered. *Bank of Pine Bluff v. Levi* (1909) 90 Ark. 166, 118 S. W. 250.

An extrinsic or collateral fraud such as justifies a court of equity in setting aside a judgment has been defined to mean some act or conduct of the prevailing party which prevented a fair submission of the controversy to the court that rendered the judgment. *Electric Plaster Co. v. Blue Rapids Twp.* (1910) 81 Kan. 730, 25 L.R.A.(N.S.) 1237, 106 Pac. 1079; *Garrett Biblical Institute v. Minard* (1910) 82 Kan. 338, 108 Pac. 80.

*c. Falsity of affidavit to obtain leave to serve process by publication in divorce suits.*

A common fraud that frequently has been held to warrant, when clearly proved, the setting aside of a decree of divorce granted by default upon a service of process only constructive by publication, on the ground that it was fraudulently obtained, is where the plaintiff, in order to get the authority to serve the defendant by advertisement, knowingly and wilfully made a false affidavit that the defendant's residence and whereabouts were unknown and could not with diligence be ascertained.

This fraud was conspicuous in the following cases: *Shrader v. Shrader* (1895) 36 Fla. 502, 18 So. 672; *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795; *Whetstone v. Whetstone* (1871) 31 Iowa, 276; *Leathers v. Stewart* (1911)



108 *Mo.* 96, 76 *Atl.* 16, *Ann. Cas.* 1913B, 366; *Carley v. Carley* (1856) 7 *Gray (Mass.)* 545; *Geisberg v. O'Laughlin* (1903) 88 *Minn.* 431, 93 *N. W.* 310; *Dorrance v. Dorrance* (1912) 242 *Mo.* 625, 148 *S. W.* 94, on second appeal in (1914) 257 *Mo.* 317, 165 *S. W.* 783; *Britton v. Britton* (1889) 45 *N. J. Eq.* 88, 15 *Atl.* 266; *Voorhees v. Voorhees* (1890) 46 *N. J. Eq.* 411, 19 *Am. St. Rep.* 404, 19 *Atl.* 172, affirmed in (1890) 47 *N. J. Eq.* 315, 14 *L.R.A.* 366, 20 *Atl.* 676; *Dyott v. Henderson* (1916) 85 *N. J. Eq.* 338, 97 *Atl.* 35; *Metzler v. Metzler* (1907) 132 *Wis.* 601, 113 *N. W.* 49.

That a husband suing for divorce knew the whereabouts of his wife and concealed them of purpose to prevent knowledge of the pendency of the suit from reaching her, and, in consequence, she was not notified of its pendency, and had no opportunity to appear in and defend it, is such a fraud, *suppressio veri*, as will justify the setting aside of a decree of divorce granted on default. *Stewart v. Stewart* (1911) 101 *Ark.* 86, 141 *S. W.* 193.

A false affidavit of a man petitioning for a divorce, in respect of the residence of his wife, she not being implicated, constitutes such a fraud upon the court as warrants the setting aside of the decree obtained by him upon it. *Elmgren v. Elmgren* (1903) 25 *E. I.* 177, 55 *Atl.* 322.

Proof that a defendant in a divorce suit had no notice of its pendency, and that the plaintiff therein, well knowing her residence, caused notice of it to be published in a newspaper which he had every reason to believe neither she nor her friends would see, of purpose to conceal from her knowledge of the proceedings, and thereupon obtained his divorce by fraud and perjury, however regular and complete may appear the record upon its face, justifies the court in setting aside the decree on defendant's motion after discovering the fraud. *Adams v. Adams* (1872) 51 *N. H.* 388, 12 *Am. Rep.* 134.

A decree of divorce granted *ex parte* to a wife, based upon a service by newspaper publication only, which never came to the knowledge of the husband, and was authorized by the wife's affidavit, which was false in fact, if not wilfully so, that she had used due diligence to ascertain her husband's residence and had been unable to learn it, should be set aside upon his timely application, properly made. *Spinney v. Spinney* (1895) 87 *Me.* 484, 32 *Atl.* 1019.

If, upon a wife's suit in equity to open *L.R.A.* 1917B.

a decree of divorce obtained by her husband upon default, after constructive service of process, and for leave to come in and defend the action, it appears that the husband committed a fraud upon the court by falsely swearing to nonexistent facts upon which depended the jurisdiction of the court to entertain his action and grant the decree, the decree so obtained will be annulled in toto and the divorce action will be dismissed. *Corney v. Corney* (1906) 79 *Ark.* 289, 116 *Am. St. Rep.* 80, 95 *S. W.* 135.

This fraud is usually associated with other frauds, but always is a prominent factor in the result, when present.

In *Crouch v. Crouch* (1872) 30 *Wis.* 667, a wife was guilty of this fraud in suing her husband for a divorce where the proof was that he was merely absent from home, traveling on business, and all the time regularly and constantly corresponding with her.

In *Bryant v. Austin* (1884) 36 *La. Ann.* 808, a husband guilty of this fraud had sent his wife to visit her parents in another state, of purpose to bring suit against her for divorce, and to keep her ignorant of it by a service only constructive.

In that case, *Manning, J.*, in concurring with his colleagues in the judgment of the court, said: "The declaration of *Bryant*, in answer to the question of the attorney appointed to defend his absent wife from whom he was seeking a divorce, that he did not know where she was, when he did know, would not be, to my mind, sufficient of itself and without any other circumstance to turn the scale in ordinary suits. But, in the interest of public order, I recognize that suits for divorce against absent spouses who have only technical, and not actual, notice of the existence of the suit, should be confined to the strictest rules, and that the rights of such absent defendants should be jealously guarded."

In *Boyd's Appeal* (1861) 38 *Pa.* 241, affirming *Smith v. Smith* (1859) 3 *Phila.* 489, a husband guilty of this fraud falsely charged his wife with desertion, where, with his consent and approval, she had returned to, and for two years sojourned with, her father and his family.

In *Nickerson v. Nickerson* (1883) 13 *W. N. C. (Pa.)* 210, the plaintiff had sent his wife abroad to recover her health and educate their child, had corresponded with her as a loving husband, and had constantly and continually sent her money for expenses, and then, for the purpose of asserting a nominal and fictitious residence for the requisite statu-

tory period within the territorial jurisdiction of the divorce forum, had rented lodgings which he occupied only about one night each month, and followed this by furnishing perjured testimony that his wife had wilfully deserted him.

In *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548, a husband sent his wife outside of the state, ostensibly on a temporary visit, wrote her while she was away frequent letters, now and then remitted money to her as a faithful spouse, sued her for divorce in her absence, concealed from her the pendency of the suit, and for several years the existence of the decree he had obtained, and finally misstated the jurisdiction in which he got it expressly to make her search for the record of it fruitless.

In *Rodgers v. Nichols* (1905) 15 Okla. 579, 83 Pac. 923, a husband guilty of such fraud was shown to have, all the time he was suing his wife for divorce, kept up a regular correspondence with her, to have visited and openly resided for a considerable time in her home as her husband, and, after getting the decree, to have continued to correspond with her as her husband until he died, and that the wife was ignorant of the proceedings until his death disclosed them, because no notice was ever mailed to her or otherwise came to her knowledge.

In *Johnson v. Coleman* (1868) 23 Wis. 452, 99 Am. Dec. 193, the proof was that a husband's charge that his wife had deserted him was wilfully false, the truth being that the pair had voluntarily separated under written articles; that he knew perfectly well all the time where she resided; and that she was ignorant of the entire proceedings because the summons was never served on her, either personally or through the mails, as the law required.

In *Everett v. Everett* (1884) 60 Wis. 200, 18 N. W. 637, a husband guilty of this particular fraud had twice before sued his wife for divorce and both times had abandoned his suit upon her appearing to defend, and, on his third attempt, published the summons in an obscure newspaper printed in a foreign language, of purpose to conceal from his wife all knowledge of the proceedings.

In *Hague v. Hague* (1916) 79 Or. 646, 156 Pac. 277, a husband guilty of this fraud had deserted his wife in a distant state, and on two prior occasions had brought suit for divorce against her, making the same charges, both of which he had abandoned upon her appearing

to defend, the second while disobeying an order requiring him to pay her alimony pendente lite. In that case, after the decree was set aside, a trial on the merits demonstrated that the peccant husband had no cause of action.

In *Holmes v. Holmes* (1874) 63 Me. 420, in addition to this fraud the plaintiff wilfully and falsely asserted that he had a domicile within the territorial jurisdiction of the court, to induce it to take cognizance of his suit for divorce against his wife, and more effectually to conceal from her its pendency.

In *Wanamaker v. Wanamaker* (1873) 10 Phila. (Pa.) 466, a divorce obtained by a man from his wife without notice to her, after the return nihil of the subpoena upon a service by advertisement published in an obscure place in a weekly newspaper, by direction of the libellant's attorney, of purpose to have it unseen, coupled with the omission to serve notice personally on the wife, as directed by the court, of the time and place for taking testimony before a commissioner, when all the time the wife lived in the same county, and her abode was well known to her husband, his relatives, and the neighbors, was set aside on the ground that it had been procured by fraud.

In *Clay v. Robertson* (1912) 30 Okla. 758, 120 Pac. 1102, the plaintiff, besides being guilty of this fraud, had designated on the record both parties to the suit by parts only of their names, and these the least known.

Allegations in a petition for setting aside a judgment of divorce rendered against the petitioner upon service by publication and default, that she departed from the state to take up her residence in a distant city by his direction and consent, upon the understanding that the two would resume housekeeping together elsewhere as soon as he could get established in business again; that she was in entire ignorance that any divorce suit was begun or contemplated until after the decree accidentally came to her notice; that the summons and complaint, if mailed at all, were purposely sent to a wrong address, when her true one was known to the husband, who wrote her upwards of three dozen letters, several of them containing remittances of money, and many of them after he had commenced suit, none containing any reference to divorcing her, are sufficient to warrant opening the judgment to admit her to defend the suit on the ground that the decree was procured by fraud.

Chaney v. Chaney (1909) 56 Wash. 145, 105 Pac. 229.

A judgment of divorce rendered in favor of a wife and awarding her all the community property, real and personal, rendered upon constructive service after official returns by sheriffs of inability to find and serve the husband within their respective counties, ought to be set aside upon the husband's petition, presented in conformity with and within the time limited by a statute in that behalf, charging that the wife knew all the time his actual residence and postoffice address in one of such counties, and fraudulently concealed it, and without imposing conditions requiring prepayment of counsel fees and alimony, where the husband has not the means to pay, and the wife is not financially needy, because the court owes it to itself to investigate the charges of fraud upon it, irrespective of the rights of the parties. *Pringle v. Pringle* (1909) 55 Wash. 93, 104 Pac. 135.

A fraud charged upon a plaintiff in obtaining a decree of divorce upon a service by publication, in that he swore to a wrong postoffice address of the defendant, and caused the summons and complaint to be mailed there of purpose to keep the suit from coming to the knowledge of his wife, and with intent to prevent her from appearing and defending the action, when he well knew her right address, is not established by proof that the address given by him and to which the summons and complaint were mailed had formerly been the postoffice address of the defendant, and was actually only a few miles from her residence on a farm, and that it was wrong only because a nearer postoffice had been established after the plaintiff had left the state. *McDonald v. McDonald* (1904) 34 Wash. 293, 75 Pac. 865.

That a plaintiff suing for a divorce falsely deposed in an affidavit to procure service by publication on the defendant that the residence of the latter was unknown to the affiant, when at the time and for a long time before it the defendant in fact actually resided in another state, is not such a fraud as warrants the setting aside of the divorce afterwards granted the plaintiff, where the statute respecting constructive service does not require the disclosure of the defendant's actual residence, and had been fully complied with so as to give all the notice required by law, because no legal injury was suffered by defendant from the false statement in the affidavit. *Day v. Not-*

*tingham* (1902) 160 Ind. 408, 66 N. E. 998.

A motion to set aside a divorce granted by default against one who actually resided without the state, upon a service made by publication only, grounded upon the charge that the statement in the plaintiff's affidavit to obtain authority to publish the summons, that the residence of defendant could not, with reasonable diligence, be ascertained, was false and amounted to a fraud upon the court, if denied upon conflicting testimony, some of which showed honest efforts, unsuccessfully made in good faith by the plaintiff to learn defendant's address, will not be granted on appeal, since it was addressed to the sound discretion of the court, and it cannot be said that such discretion was abused by the denial. *Scribner v. Scribner* (1904) 93 Minn. 195, 101 N. W. 163.

In *Blass v. Blass* (1916) — Mo. App. —, 186 S. W. 1094, a decree of divorce granted a man in Missouri from his absent wife, left behind in California, upon a service by publication only, based upon his affidavit that he did not know her address, withstood an attack by the divorced wife after the man's marriage to a second woman, his divorcee from her and marriage to a third, with whom he was living and by whom he had issue. The first wife attacked the decree on the ground that it had been obtained by fraud, in that her husband had not resided for the requisite length of time in Missouri when he brought suit, and that his charge that she had deserted him was false and supported by perjured testimony, and further, that he well knew her address in California, and misrepresented facts to procure publication and escape the mailing of process running against her. The court examined the facts and found the charges of fraud and perjury not supported by evidence. It was shown that the man had lived for the requisite statutory antecedent time in good faith in Missouri, that he left California after telling his wife he intended to reside thereafter in St. Louis, and gave her a railroad ticket to follow him there, and afterwards wrote her several letters which brought no replies, and the last of which were registered and returned undelivered. She never answered his letters nor used the railroad ticket. The proceedings in the divorce suit were regular in all respects and fully conformed to statutory requirements. The court, while holding the wife's charges not established, invoked the principle that perjury com-

mitted to obtain a judgment is no ground for setting it aside, and deemed it unnecessary to decide the point that, anyway, the right to relief was barred by the statute of limitations and laches.

A divorce obtained by a wife from her husband who deserted her and left the country several years before cannot be said to have been obtained by fraud upon the court by reason of her statement, in applying for an order for constructive service by publication upon him, that he had gone to South America, and she had no definite information as to his residence, where she afterwards recalled that he had announced a purpose to go to the capital of Brazil, and notice of the action was mailed, addressed to him at that city. *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056.

Untruthful statements in an affidavit to obtain authority to make service by publication in a divorce suit do not entitle a defendant who actually knew of the bringing and pendency of the suit, and refused to appear in and defend it, to avoid the decree granted by default. *McCormick v. McCormick* (1910) 82 Kan. 31, 107 Pac. 546.

*d. Fraudulent service of process in divorce suits.*

A decree of divorce obtained by a man from his wife by default, upon a sworn personal service upon her of a copy of the summons and complaint, will be set aside and wholly annulled with the entire proceedings in the action for fraud, upon proof that the papers were concealed in a sealed packet, represented as containing a present for the mother of the wife, to be delivered by her unopened at the end of a long ocean voyage, handed to her on the vessel a few hours before it left port, and that the real nature of the package was not discovered until the wife was well out to sea, and at a time when it was not possible for her to return, even if she had had the necessary money for expenses, before the time to appear and answer would have expired. *Bulkley v. Bulkley* (1858) 6 Abb. Pr. (N. Y.) 307.

In *Young v. Young* (1871) 17 Minn. 181, Gil. 153, a decree of divorce granted a husband from his wife after she had been personally served with process, upon the ground of her adultery, was set aside because the court was of the opinion that the plaintiff's conduct amounted to a fraud upon the state and the defendant, in that she was served on the eve of her departure to Canada for medical

treatment, and her whereabouts were kept secret from her parents, and during the pendency of the suit the pair kept up a friendly correspondence with each other, and the husband remitted money to his wife from time to time. And this relief was granted the wife notwithstanding she was fully aware all the time of the purpose of the husband to prosecute the suit for divorce, and his intention never again to live with her, and her admission that the charge that she had committed adultery was true, and where the only defense she set up was that her adultery had been committed with the connivance of her husband, and that he had condoned her fault.

A wife divorced by default while absent in Europe with her husband's consent may, on her return home, and at a later term of court, have the decree set aside on the ground that it was obtained by fraud and surprise, where in fact she had no actual knowledge that a suit for divorce had been brought against her, notwithstanding she had been personally served with process by a deputy sheriff on the eve of her departure, upon proving that her knowledge of the English language was too imperfect for her to comprehend the meaning of what was read to her, and that she was told by her husband, when she asked of him what it meant, that it amounted to nothing. *Gechter v. Gechter* (1878) 51 Md. 187.

The conduct of a husband in sending his wife to a foreign land and leaving her there destitute, for the fraudulent purpose of obtaining a divorce from her in a suit which she was thus prevented from defending, coupled with the delivering to her, along with the summons, of a written promise to pay her a stated alimony if a decree was granted him,—a promise which he had no intention of keeping, and which she was led to think a part of the judicial proceeding,—and in deceiving her into believing that because she had borne no children, her barrenness constituted a legal ground of divorce; and then, after her departure, in alleging and proving by false testimony, upon her default, that she was impotent,—amounts altogether to such fraud in procuring a judgment of divorce as will suffice to sustain an action by the wife, seasonably brought, to set aside the decree. *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460.

An abortive service by mail, under an order for the publication of a summons in a divorce suit brought against a non-resident of the state whose home address

was well known, not in fact effected because the plaintiff fraudulently omitted to prepay the postage, with intent that the defendant should be kept in ignorance of the pendency of the suit, is such a fraud practised upon both the defendant and the court as requires the decree granted by default to be annulled in a direct action brought for the purpose by the defendant. *Morton v. Morton* (1891) 16 Colo. 358, 27 Pac. 718.

The fact that a defendant was imprisoned in a state prison under a sentence for a term of years when personally served with process in a divorce suit affords no ground for setting aside a decree of divorce granted by default in the suit upon an application for such relief, made immediately after the prisoner's discharge, unaccompanied by any proof of a deprivation of any legal and meritorious defense. *Phelps v. Phelps* (1838) 7 Paige (N. Y.) 150.

A defect in the affidavit of service of summons and complaint upon the defendant in a divorce suit does not warrant setting the decree aside in a case where the record shows indubitably that they were actually personally served. *Robertson v. Robertson* (1880) 9 Daly (N. Y.) 44.

That a wife against whom her husband by regular proceedings was granted a divorce was ignorant and illiterate will not suffice to support her action to annul the decree, where she understood the purpose of the summons served upon her, and the husband took no advantage of her ignorance and illiteracy to impose upon her. *Miller v. Bearb* (1914) 134 La. 893, 64 So. 822.

The motion of a literate and intelligent woman to open a judgment of absolute divorce entered against her by default, unsupported by any affidavit of merits, unaccompanied by any proposed answer, or any denial of the truth of the charges of her misconduct in the complaint, grounded only upon the general statement that she has a good and valid defense, without setting forth what it is, and the excuse for her default that the person who served her with process told her to throw the papers away, as her husband was only "bluffing," is properly denied. *Maguire v. Maguire* (1902) 75 App. Div. 534, 78 N. Y. Supp. 312, O'Brien, J., dissenting.

***e. Fraudulent concealment of pendency of divorce suit from defendant spouse.***

If a defendant never had knowledge

of a pending action or suit, and was kept in ignorance of it by the conduct of the plaintiff until judgment was rendered against him, the fraud is such as will sustain a new suit to vacate and annul the judgment. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

A decree obtained through a resort to an actual intentional artifice to prevent the party against whom it was rendered from having any knowledge of the pendency of the suit is properly set aside, on the ground that it was procured by fraud. *Frisbie v. Chase* (1913) 161 Iowa, 133, 140 N. W. 842.

To conceal from the defendant spouse the pendency of a suit for divorce, and, while keeping her in absolute ignorance, to procure an attorney to appear in it and represent her without her knowledge or authority, renders the decree obtained voidable for fraud at the instance of the injured spouse. *Elliott v. Wohlfrom* (1880) 55 Cal. 384.

Notwithstanding a public policy averse, as a rule, to disturbing judgments of divorce, a decree of divorce may be set aside on the application of an aggrieved spouse in a direct proceeding for that end where the applicant was kept in ignorance of the pendency of the divorce suit by the trickery of the adversary. *Day v. Nottingham* (1902) 160 Ind. 408, 66 N. E. 998.

A husband's conduct after sending his wife out of the state to visit her relatives in temporarily sojourning in a neighboring county where he was not so extensively known, for the express purpose of gaining a colorable residence to bring suit for divorce; his false representation and affidavit to procure substituted service upon her by publication; his concealment from her of all knowledge of the pendency of the divorce suit, while all the time he was in friendly correspondence with her; his manufacturing of testimony and falsification of the report of it as grounds for divorce,—all together constitutes such a gross fraud on his part in procuring the divorce as to constrain the court, upon the application of the wife, seasonably made after learning the facts, to set aside and annul the decree. *Whitcomb v. Whitcomb* (1877) 46 Iowa, 437.

A decree of divorce entered by default after a service by publication only will be set aside by the court which rendered it upon a petition presented at a subsequent term, setting up fraud in its procurement, where the fraud alleged is

admitted by demurrer or established by proof, and consists in an imposition upon the court to induce it to take jurisdiction, and a concealment of the pendency of the proceedings to prevent an appearance and defense. *Edson v. Edson* (1867) 108 *Mass.* 590, 11 *Am. Rep.* 393.

In the absence of any inhibitory legislation a court of equity, upon a bill by a wronged wife, filed for the purpose, is warranted in setting aside a decree of divorce obtained by her husband in ex parte proceedings by means of a gross fraud upon her by sending her out of the state and keeping her in ignorance of the suit, and preventing her from appearing and defending herself against unfounded charges. *Mansfield v. Mansfield* (1858) 26 *Mo.* 163.

A husband who sends his wife and child to Europe; accompanies them on and pays the expenses of the journey to the port of departure; buys their tickets for the ocean passage; promises soon to join them on the other side; returns home and begins suit for divorce upon the alleged ground that she has deserted him; has service made by publication only; keeps corresponding with her all the time as if faithful,—is guilty of such fraud in obtaining a decree as warrants a court of equity in setting it aside upon the suit of the wife, brought with diligence after she learned the facts. *Tollefson v. Tollefson* (1908) 137 *Iowa*, 151, 114 *N. W.* 631.

A case made by a plaintiff wife in an action to set aside a divorce obtained against her by her husband, showing that while he resided in a place where both parties were well known, and where the bringing of a divorce suit by either could not possibly be kept from the knowledge of the other, he, for the fraudulent purpose of keeping her ignorant of the proceedings, went into another jurisdiction, began by substituted service and prosecuted a suit for divorce, and obtained a decree by default, based on charges which were untrue, and which he knew to be false,—various facts and circumstances being established which tended to show his bad faith and intent to deceive both his wife and the courts,—*prima facie* entitles her to relief, and is, at all events, good upon a general demurrer by him to the evidence. *Crow v. Crow* (1914) 40 *Okla.* 455, 139 *Pac.* 122.

**f. Fraudulent institution and prosecution of divorce suit by one spouse in name of the other.**

The jurisdiction of a court of equity L.R.A.1917B.

to set aside judgments of courts of law which were obtained by fraud extends to the setting aside of a judgment rendered in favor of the complainant through the defendant's fraud. *Barr v. Packard Motor Car Co.* (1912) 172 *Mich.* 299, 137 *N. W.* 697.

It is a fraud alike upon the wife and the court for a husband, anxious to be divorced, to bring and prosecute a suit against himself in the name, but without the knowledge, of his wife, and the decree thereby obtained will summarily be set aside upon due application. *Olmstead v. Olmstead* (1889) 41 *Minn.* 297, 43 *N. W.* 67.

A husband who procures a suit for a divorce to be instituted against himself in the name of his wife, but without her knowledge or consent, and then appears and facilitates the entry of a decree, commits such a fraud upon her and the court as warrants a court of equity in annulling the divorce judgment. *Brown v. Grove* (1888) 116 *Ind.* 84, 9 *Am. St. Rep.* 823, 18 *N. E.* 387.

The charge that a divorce suit brought and prosecuted to judgment in the name of a wife, against her husband, was instituted without her authority, consent, or knowledge, and hence that the decree granted in it was obtained by fraud, and ought, for that reason, to be set aside, is not sustained by such clear and satisfactory proof as is always required in such cases, when the wife's testimony to her alleged ignorance of the entire proceedings has been squarely contradicted by the attorney who acted in her behalf, and he has been corroborated by documentary evidence over her signature of the payment to and acceptance by her of alimony awarded her by the decree. *Ellis v. White* (1883) 61 *Iowa*, 644, 17 *N. W.* 28.

A wife cajoled and bribed into bringing suit to annul her marriage by the false representation of her husband's attorney, confirmed by the advice of her own, that her marriage was invalid for lack of a preliminary license, may have the judgment obtained therein by suppressing and keeping from the knowledge of the court that rendered it vital facts establishing the validity of the marriage, set aside. *Davidson v. Ream* (1916) 97 *Misc.* 89, 161 *N. Y. Supp.* 73.

**g. Acts and conduct which prevent defenses of divorce suits as fraud.**

There is an admitted exception to the general rules of law framed to promote social repose in cases where the successful litigant has done something whereby

there was in fact no real adversary trial or decision of the issue in the action or suit. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

Equity will interfere in behalf of one against whom a judgment has been rendered who had a good defense to the action, but no opportunity to make it, because he was prevented from presenting it by the fraud or misconduct of his adversary. *Pearce v. Olney* (1850) 20 Conn. 544; *Davis v. Hibernia Sav. & L. Soc.* (1913) 21 Cal. App. 444, 132 Pac. 462; *Kent v. Ricards* (1850) 3 Md. Ch. 396.

Any intentional act or misconduct in one who has brought an action or suit, designed and having effect to prevent his adversary from making a defense, amounts to a fraud warranting a court of equity in setting aside the judgment or decree obtained. *Womack v. Womack* (1904) 73 Ark. 281, 83 S. W. 937, 1136; *Elliott v. Wohlfrom* (1880) 55 Cal. 384; *Young v. Young* (1871) 17 Minn. 181, Gil. 153.

If an unsuccessful litigant has, by his opponent's fraud or deceit, been prevented from fully exhibiting his case, so that no real trial or hearing was had, he may maintain a new suit to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. *United States v. Throckmorton* (U. S.) supra.

A court of equity may disregard or enjoin the enforcement of an unconscionable judgment for new causes such as fraud, accident, or mistake, which deceived or misled the court into making a wrong decree, or which prevented the beaten litigant from putting in a meritorious defense that was not presented to the court which rendered the judgment. *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134.

A spouse prevented by the trickery of the other spouse from appearing in and defending a divorce suit may, in a direct proceeding for the purpose, have a decree of divorce which was granted therein set aside despite a public policy averse, as a rule, to disturbing divorces. *Day v. Nottingham* (1902) 160 Ind. 408, 66 N. E. 998.

A spouse who, by fraud, was persuaded to refrain from defending a divorce suit, has sufficient ground to support a bill in equity to set aside the decree therein granted by default. *Scanlan v. Scanlan* (1890) 41 Ill. App. 449.

The act of the successful party in keeping the unsuccessful one away from

court when the action was tried, so that no real contest took place, is such a fraud as will entitle the defeated litigant to maintain a suit to set aside and annul the judgment or decree. *United States v. Throckmorton* (U. S.) supra.

A decree of divorce obtained ex parte by a man from his wife upon a ground wholly fictitious, and by fraudulently inducing her not to defend, will be set aside summarily upon the petition of the wife, presented as soon as the facts were discovered by her, notwithstanding the time to appeal from the decree has passed. *Jones v. Jones* (1913) 82 N. J. Eq. 558, 89 Atl. 29, and on second appeal (1914) 83 N. J. Eq. 571, 91 Atl. 819.

A husband who assures his wife that process served upon her in his suit for divorce as she is about temporarily to leave the country with his consent, on a business journey, is meaningless and unimportant, and who thus forestalls her appearing and defending, commits a fraud upon her which entitles her, in proper proceedings and upon due plea and proof of the facts, upon her return, to set aside a decree divorcing her by default while she was absent abroad. *Gechter v. Gechter* (1878) 51 Md. 187.

The conduct of a husband in procuring a decree of divorce through persuading his wife, while she was sojourning in another state, to sign a written waiver of service of summons and a consent to submit the cause for trial, in reliance upon his promise not to use them without giving her notice in advance and an opportunity to appear and defend herself, constitutes such a fraud in obtaining a decree in violation of his promise, and through an attorney employed by him to appear for the wife, as warrants a court in setting the decree aside. *McDonald v. McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850.

An allegation in a petition for a new trial under the Iowa Statute (Code, § 4091) authorizing the court to vacate a judgment for fraud, averring the concealment and misrepresentation by the prevailing party of certain facts peculiarly within his knowledge, which, if known to and established by the defeated party, would have brought about a contrary result, is sufficient on demurrer. *Griffith v. Merchants' Life Asso.* (1910) 148 Iowa, 727, 127 N. W. 1079.

A judgment of a court of competent jurisdiction cannot be attacked and set aside on the ground that the defeated litigant was misled by the statements of his adversary, and thereby prevented from making his defense, unless there

were good reasons why he should have been misled. *Penn. v. McGhee* (1908) 6 Ga. App. 631, 65 S. E. 686.

Relief by virtue of the Minnesota statute, (Gen. Stat. 1913, § 7910), giving a right of action to set aside a judgment obtained by fraud which prevented a defense, depends upon the application of equitable principles. *Brockman v. Brockman* (1916) — *Minn.* —, 157 N. W. 1086.

*h. Promises of plaintiff to abandon suit for divorce.*

A judgment obtained by a fraudulent promise and misrepresentation of the plaintiff to the defendant, which induced the latter not to appear and answer in the suit, will not be permitted to stand. *Lawrence v. Lawrence* (1911) 145 Ky. 61, 140 S. W. 36.

For a husband who has brought suit for divorce to lead his wife to believe that he will not prosecute it, and thereby to induce her, in reliance upon his assurances, to refrain from defending, is such a fraud in obtaining the decree he afterwards takes without giving her notice and opportunity to contest as entitles her to maintain a bill in equity to set aside the judgment. *Womack v. Womack* (1904) 73 Ark. 281, 83 S. W. 937, 1136.

An assurance of a husband to his wife that he has abandoned, or a promise by him to her that he will have dismissed, a suit for divorce which he had brought against her, made of purpose to lead her to refrain from defending, and believed and relied upon by her, she in consequence not defending the suit, amounts to a fraud in obtaining a decree of divorce afterwards granted to him which entitles her to have it set aside upon a prompt and proper application for such relief. *Scanlan v. Scanlan* (1890) 41 Ill. App. 449; *Nicholson v. Nicholson* (1887) 113 Ind. 131, 15 N. E. 223; *Jones v. Jones* (1914) 83 N. J. Eq. 571, 91 Atl. 819, affirmed in (1915) 84 N. J. Eq. 479, 93 Atl. 580.

This is only an application to divorce suits of a doctrine applying to judgments generally.

A false representation by a husband to his wife that a suit for divorce which he had brought against her had been discontinued and abandoned, made of purpose and having the effect to prevent her from appearing and defending, because she believed and relied upon his statements, constitutes a fraud sufficient to sustain her suit to set aside the decree obtained by the husband. *Sampson* L.R.A.1917B.

*v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84.

When a defeated litigant was induced by a false promise of compromise by his adversary to keep away from the trial and refrain from contesting, the deception will sustain a new suit to set aside and annul the judgment in the old one. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

An actual fraud in procuring a judgment such as will constitute ground for relief in equity by bill to set aside such judgment has been practised by the party who obtained it when, by his divers promises and agreements, which he never intended to perform, he has induced the other party to refrain from interposing a defense to the action which resulted in such judgment, and to suffer it to be taken by default. *Flood v. Templeton* (1907) 152 Cal. 148, 13 L.R.A.(N.S.) 579, 92 Pac. 78.

An application to set aside a verdict and judgment alleged to have been obtained by a fraud practised on the defendant, and for leave to come in and defend, made at the same term of court, supported by allegations of diligence, a meritorious defense, and readiness for instant trial on the merits, and by testimony that the plaintiff was a son of a codefendant sued as partner of the applicant, in whose presence and with whose implied consent the father represented and promised that the action would be withdrawn and definitely abandoned, thus inducing the applicant to refrain from defending, and that the claim was unfounded, is properly granted. *Moore v. Moore* (1913) 139 Ga. 597, 77 S. E. 820.

It is a fraud on the defendant, entitling him to relief through a bill in equity from a judgment taken against him by default, after the plaintiff had promised to and assured him that he would dismiss the case, and had thereby induced the defendant to refrain from defending it. *Wierich v. DeZoya* (1845) 7 Ill. 385.

A promise by a plaintiff to dismiss his action against the defendant, upon which the latter relies, and which induces him to refrain from making a defense, is such a fraud in procuring a judgment as entitles him to maintain a bill in equity to set the judgment aside. *Stodgell v. Garnett* (1910) 159 Ill. App. 301.

Promises and agreements respecting future acts, made as inducements to acquiesce in a decree settling amounts and terms of payment and security for alimony, intelligently comprehended at



the outset, not subsequently kept, and, even if never meant to be kept, do not constitute such a fraud as will support a bill in equity to set aside the decree. *Van Sickle v. Harmeyer* (1912) 172 Ill. App. 218.

*l. Misconduct of plaintiff's attorney in divorce suit.*

A defendant who had a good defense and purposed to make it to an action brought against him, but refrained from interposing it because the conduct of the plaintiff's attorney led him and was intended to lead him to believe the suit had been abandoned and would not be prosecuted, will be relieved in equity from a judgment taken against him for want of a defense. *Pearce v. Olney* (1850) 20 Conn. 544.

The promises of the attorney for the plaintiffs, made to the defendant upon receiving from him security for the payment of the claim in suit, not to prosecute the action further, and to withhold the entry of judgment; his further promise to vacate the judgment taken if defendant objected to it, coupled with assurances to refrain from enforcing it until the security obtained had been exhausted and a deficit had resulted, upon which promises and assurances the defendant had in good faith relied, so that he took no proceedings either to prevent the judgment or to set it aside, constitute sufficient grounds for the interposition of a court of equity to stay the collection and prevent the enforcement of the judgment. *Kent v. Ricards* (1850) 3 Md. Ch. 396.

The violation of an agreement of counsel to continue a pending case by taking a judgment in the absence of his adversary, who was relying upon such agreement, would, if proved, amount to a fraud which would justify setting the judgment aside. *Beck v. Jackson* (1911) 160 Mo. App. 427, 140 S. W. 919.

A judgment obtained by a plaintiff without notice to the defendant, and in violation of an honest agreement between the parties that the trial of the cause should be adjourned, should be set aside on the ground that it was procured by a fraudulent breach of faith. *Binsse v. Barker* (1832) 13 N. J. L. 263, 23 Am. Dec. 720.

When the trial of a case in which a good defense has been pleaded is, upon agreement and motion of the attorneys for both parties, continued beyond the term, by order of the court, and, in reliance upon the continuance, the defendant, his counsel and witnesses, had left L.R.A. 1917B.

the court room for their homes, a judgment taken at such term by the plaintiff in the defendant's absence, and without his knowledge, by inducing the court to set aside the order for continuance, will be set aside by a court of equity upon a bill brought for the purpose. *Evans v. Wilhite* (1912) 176 Ala. 287, 58 So. 262.

The taking of a judgment for divorce in violation of an agreement by counsel for the spouse who got it amounts to a fraud which justifies setting the decree aside, irrespective of whether or not the client knew aught of the agreement or its breach. *McConkey v. McConkey* (1916) — Tex. Civ. App. —, 187 S. W. 1100.

The breaking by counsel in a divorce suit, in order to take a decree out of turn, and without notice to his adversary, of an oral agreement he had made respecting the procedure, constitutes a fraud which may warrant the setting aside of the decree despite the fact that such agreement could not have been enforced, because unwritten. *Ibid.*

A statement by counsel for a plaintiff that his client desires the case to be dismissed, and may give any direction he sees fit, does not constitute a fraud sufficient to warrant setting aside the judgment, because it does not excuse the defendant from either defending the action or procuring it to be formally dismissed. *Penn v. McGhee* (1908) 6 Ga. App. 631, 65 S. E. 686.

It is no ground for setting aside, on motion, a decree of divorce granted in an action in which issue had been joined by an answer demanding affirmative relief, that the plaintiff's attorney served a notice of dismissal, when afterwards, upon stipulation of both parties, the cause was restored to the trial calendar. *La Fond v. La Fond* (1907) 102 Minn. 344, 113 N. W. 896.

*k. Fraud practised on court to obtain divorce.*

Any deception practised by a party to a divorce suit on the court in which it is brought or pending, in any matter affecting its jurisdiction, or its discretion to proceed or not to the final determination of the cause, is sufficient to invalidate a decree of divorce on the ground that it was procured by fraud. *Dunham v. Dunham* (1896) 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841, affirming (1895) 57 Ill. App. 475.

Nothing is more clearly settled, according to the Maine supreme court in *Holmes v. Holmes* (1874) 63 Me. 420, than that the court has power and the

right to set aside a decree of divorce obtained by fraud and imposition upon the court and the injured spouse.

The concealment from a court to whom application is made for a decree of divorce by the applicant that a prior action has been brought and is pending against her at her domicile to dissolve her marriage is such a fraud upon the second court as will invalidate its decree. *Dunham v. Dunham* (Ill.) supra.

When the adulteries of a wife upon which her husband grounds his action for an absolute divorce were committed in carrying out a conspiracy between him and her paramour, and by his consent, connivance, procurement, and privity, he is barred of legal redress, and the decree which he gets is vitiated by a fraud on the court, and it will be set aside when the facts become known. *Helmes v. Helmes* (1898) 24 Misc. 125, 52 N. Y. Supp. 734.

A judgment annulling a marriage granted in an action where the court was misled by the suppression of vital facts, done either of purpose to achieve a result different from what would have been produced had they been presented, or else under an innocent but mistaken belief that they would not affect the result, warrant the setting of the judgment aside for fraud practised upon the court, which, had it known the whole truth, would not have rendered the judgment. *Davidson v. Ream* (1916) 97 Misc. 89, 161 N. Y. Supp. 73.

When a fraud has been perpetrated upon the court to induce it to take jurisdiction where it in fact has none, of the parties to a divorce suit, an original bill may be filed later by the wronged party to set aside and annul the divorce granted in such suit. *Fritz v. Fritz* (1899) 9 Ohio S. & C. P. Dec. 275.

The rule established in *Parish v. Parish* (1859) 9 Ohio St. 534, 75 Am. Dec. 482, and approved in *Neil v. Neil* (1883) 38 Ohio St. 558, and *Knapp v. Thomas* (1883) 39 Ohio St. 377, 48 Am. Rep. 462, that a decree of divorce granted by a court which had jurisdiction, even by substituted service which gave in fact no notice, although obtained by a fraud and false testimony, cannot be set aside on an original bill filed at a later term, is limited to cases where there was jurisdiction, and does not apply where the court was cheated into taking jurisdiction when it had none. "In *Parish v. Parish* (Ohio) supra," said the court, "it is expressly found that the court had jurisdiction of the subject matter and of the parties. In the case at L.R.A.1917B.

bar there was no case before the court of which it might take jurisdiction. A decision of that case, while it may be, not having been reversed, authority for the proposition that when a court has jurisdiction of the subject matter and of the parties the decree taken in a divorce case will not be set aside by reason of the fraud of either, yet it is not authority for the proposition, however broad its language, that a court has no power to set aside a decree for divorce obtained by fraud upon the jurisdiction of the court."

A right of action, not absolute, but depending upon equitable principles, to set aside a judgment procured by a fraud in invoking the jurisdiction of the court, has been conferred by a Minnesota statute (Gen. Stat. 1913, § 7910). *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

#### *XVIII. Duress as ground of attack on divorces.*

In sundry judicial opinions, duress as a ground for annulling a judgment has been bracketed with fraud. Thus it has been said that a fraud or duress, if practised in the very act of obtaining a judgment, justifies setting that judgment aside. *Pfaffner v. Krapfel* (1869) 28 Iowa, 27; *Whetstone v. Whetstone* (1870) 31 Iowa, 276; *Cowin v. Toole* (1871) 31 Iowa, 513; *Warthen v. Himstreet* (1900) 112 Iowa, 605, 84 N. W. 702.

And further, that a fraud or duress which warrants the setting aside of a decree or judgment must have been such an one as really prevented the unsuccessful litigant from having a trial. *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27.

The association is justified by several decisions respecting decrees of divorce, in some of which the decrees have been overthrown, and in the others, which escaped, duress was a recognized good ground of attack.

The bringing of a suit for divorce against a wife by her husband, and the taking of a decree therein on the ground of desertion, by her assent, procured by his paid agents' solicitation at a time when she was in ill health and greatly enfeebled in mind and body, and upon payment to her of a sum of money direly needed for her temporary support, followed by a judgment of divorce on false charges of adultery, of which she was kept in ignorance, amounts to such fraud and duress in obtaining the decree as will justify a court of equity in annulling it

on those grounds. *Daniels v. Benedict* (1892) 50 Fed. 347.

A bill in equity to set aside and annul a decree of divorce obtained by a husband may be maintained by the wife, upon proof that she never had any notice of the suit, and that during its pendency, at the instigation of the husband, she was kept in prison and under duress until after he had succeeded in obtaining the decree, so that she had no opportunity to appear and defend. *Golden v. Golden* (1893) 102 Ala. 353, 14 So. 638.

That a wife was compelled to waive service of the summons in her husband's divorce suit by threats and intimidation while a physical and mental wreck, under treatment in a hospital, affords ground for relief in equity from a decree of divorce obtained by him upon false charges, supported by perjured testimony, while she was incapable of making a defense. *Butler v. Butler* (1912) 34 Okla. 392, 125 Pac. 1127.

A decree of divorce granted to a husband, for the alleged adultery of his wife, where the action was undefended on the merits because, at his solicitation, she signed, unread, a letter prepared by him to an attorney he had selected, and whom she never knew or met, which directed that an answer be filed in the case, and nothing more, the signing being induced by his threats to withhold support and his promises to pay her a large sum of money and deal justly by her, she being destitute of means, and where the fact that she was charged with marital infidelity was carefully concealed from her,—must, upon her petition to set aside the decree, be considered to have been granted and enrolled in circumstances which justified the court, in the exercise of a sound discretion, in vacating it. *Galloway v. Galloway* (1915) 125 Md. 511, 94 Atl. 97.

In a suit by a former wife to set aside a divorce granted to her husband in an action wherein she was represented by counsel, but which she did not contest, founded upon allegations that she was coerced to refrain from defending by false charges of adultery threatened to be proved by perjured testimony, and not presented, so that the decree should rest, as it did, upon mutual dislike, incompatibility of temper, and antagonistic tastes and habits, making life together too burdensome to be borne,—the husband has a right to show that she had been guilty of adultery, or at least that there was such strong evidence of her guilt as to justify an honest belief of it which he entertained, in order to L.R.A.1917B.

negative her allegations of false charges and threatened perjury, and consequently of any legal coercion or duress. *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757.

Coercion and duress which will sustain an attack upon a judgment of divorce by the spouse subjected to it must be such as brought about the rendering of the decree, and not simply such as created a condition the real existence of which was the ground of that decree. *Uecker v. Thiedt* (1909) 137 Wis. 634, 119 N. W. 878.

A court of equity has jurisdiction to set aside a judgment rendered in the complainant's own favor through the misconduct of the defendant. *Barr v. Packard Motor Car Co.* (1912) 172 Mich. 299, 137 N. W. 697.

Hence, a wife who may have been coerced, constrained, and intimidated into suing her husband for divorce, and deceived, cajoled, and imposed upon also by him, may, after a decree is granted, have it set aside in a proper case in a court of equity.

The court will, upon motion by a wife, set aside a decree of divorce granted her against her husband when it is shown that she was induced by fraud, deceit, and duress on his part to bring the action against him, and that he supplied the testimony and furnished proof of his own infidelity to be freed from her. *Lake v. Lake* (1908) 124 App. Div. 89, 108 N. Y. Supp. 964.

A wife unduly influenced, constrained by duress, and imposed upon by her husband to bring suit and obtain a divorce from him, may afterwards, by original action or supplemental petition, in the same court, have the decree set aside and its provisions respecting alimony revised and enlarged. *Holt v. Holt* (1909) 23 Okla. 639, 102 Pac. 187.

A petition to the court, presented by a woman against the executors of her former husband, alleging that a decree of divorce from her on the ground of adultery, granted to the testator in his lifetime in a suit begun by him a dozen years before, was obtained by fraud on his part, with her collusion, induced by duress, and praying that the decree be set aside and annulled, should be dismissed for her laches in presenting it, if for no other reason, when it appears that she was regularly and personally served with process at the outset, that she appeared to defend and filed a cross bill, that she agreed to accept a money payment in lieu of defending, and purposely suffered default; that, repudiating her

agreement, she again appeared by leave of the court to defend, and again suffered a default, in consideration of a sum of money paid her; and that, during a period of two years, she was living in another state, free from any possible duress. *Re Brigham* (1900) 176 *Mass.* 223, 57 *N. E.* 328.

In a contest by a divorced wife with the widow by a subsequent marriage of her husband as to who of the twin should be appointed administratrix of his estate and share therein as widow, evidence offered to impeach and avoid the decree of divorce granted the former, that she had been forced by duress consisting of ill treatment, abandonment, and withholding of means to procure the necessities of life, which made her no free agent, to bring and prosecute the suit, is properly excluded. *Re Ellis* (1893) 55 *Minn.* 401, 23 *L.R.A.* 287, 43 *Am. St. Rep.* 514, 56 *N. W.* 1056.

A wife who, after appearing by an attorney in a suit brought for divorce by her husband, abandons her defense in consideration of his withdrawing charges of adultery made against her and taking a decree upon less objectionable grounds, and settling her claims upon his property by the payment and acceptance of money and property aggregating several thousands of dollars in amounts and values, cannot, after the lapse of several years, maintain an action to set aside the divorce as fraudulently obtained, in that she was coerced into abandoning her defense and accepting an inadequate settlement by false charges of adultery, threatened to be supported by perjured testimony. *Tausick v. Tausick* (1909) 52 *Wash.* 301, 100 *Pac.* 757.

Allegations by a former wife that she was urged, cajoled, and persuaded by her husband to sue him for divorce through an attorney employed and paid by him, upon his representation that his business interests required and would be promoted by their judicial separation, coupled with threats to flee the state in case of refusal, and promises to remarry in a few months after she obtained a decree, do not establish a case of fraud and duress, in the absence of any showing that her mental or physical state was not normal, that will warrant a court in setting aside a decree obtained by her, but simply make out a plain case of collusion, for which she, as a guilty party, is not entitled to any relief. *Robinson v. Robinson* (1914) 77 *Wash.* 663, 51 *L.R.A. (N.S.)* 534, 138 *Pac.* 288.

That a wife was coerced and con-

strained by duress to agree with her husband upon articles of separation, and deceived by him in respect of the value and amount of his property, so that she accepted an inadequate sum in settlement of her claims for alimony and upon her husband's estate, will not support her action, brought after his death and her discovery of the truth, to set aside a divorce she obtained from her husband in an undefended suit grounded upon the separation. *Uecker v. Thiedt* (1907) 133 *Wis.* 148, 113 *N. W.* 447, on second appeal (1909) 137 *Wis.* 634, 119 *N. W.* 878.

*Routledge v. Patterson* (1911) 146 *Wis.* 226, 131 *N. W.* 346, in which a judgment of divorce was attacked on similar grounds, followed this decision.

A woman against whom a decree of divorce has been granted by an imposition of her husband upon her weakness and credulity may later attack the judgment and prove that she was imposed upon and deceived to such an extent that she did not really stand in court as a defendant at liberty to exercise her rights. *O'Rourke v. Lawrence* (1913) 132 *La.* 710, 61 *So.* 764.

#### *XIX. Accident or mistake as ground for relief from divorces.*

Accident or mistake which prevented a beaten litigant from making a defense when he had one of merit, or which misled the court into making a wrong judgment, are among the causes for which it is said a court of equity will relieve from an unconscionable judgment. *Horton v. Stegmyer* (1910) 99 *C. C. A.* 332, 175 *Fed.* 756, 20 *Ann. Cas.* 1134.

An accident, misfortune, or mistake, if unavoidable and not due to negligence, in consequence of which, by preventing a defense, a judgment or decree was taken, affords ground in equity for setting it aside at the suit of one who diligently seeks to be relieved. *Renfro Bros. v. Merryman* (1881) 71 *Ala.* 195; *Weems v. Weems* (1882) 73 *Ala.* 462; *Waldrom v. Waldrom* (1884) 76 *Ala.* 285; *Evans v. Wilhite* (1910) 167 *Ala.* 587, 52 *So.* 845, on second appeal (1912) 176 *Ala.* 287, 58 *So.* 262; *Morton v. Morton* (1887) 117 *Cal.* 443, 49 *Pac.* 557; *Clark v. Ramsey* (1915) 143 *Ga.* 729, 85 *S. E.* 869; *Miller v. Barto* (1910) 247 *Ill.* 104, 93 *N. E.* 140; *Kent v. Ricards* (1850) 3 *Md. Ch.* 396; *Foxwell v. Foxwell* (1912) 118 *Md.* 471, 84 *Atl.* 552, on second appeal (1914) 122 *Md.* 263, 89 *Atl.* 494; *Whitlock Cordage Co. v. Hine* (1915) 125 *Md.* 96, 93 *Atl.* 431; *Galloway v. Galloway* (1915) 125 *Md.* 511, 94 *Atl.* 97;

Payne v. O'Shea (1884) 84 Mo. 129; Cantwell v. Johnson (1911) 236 Mo. 575, 139 S. W. 365; Ellis v. Nuckols (1911) 237 Mo. 290, 140 S. W. 867; Einstein v. Strother (1916) — Mo. App. —, 182 S. W. 122; Adams v. Adams (1872) 51 N. H. 388, 12 Am. Rep. 134; Scripture v. Scripture (1893) 70 Hun, 432, 24 N. Y. Supp. 301; Bowsman v. Anderson (1912) 62 Or. 431, 123 Pac. 1092, 125 Pac. 270; McMurray v. McMurray (1887) 67 Tex. 665, 4 S. W. 357.

Although in Maryland, as a general rule, a final decree may be revised, annulled, or reversed after enrollment only by a bill of review or one impeaching it for fraud, there is a recognized exception where a cause has not been heard on the merits, and the aggrieved litigant petitions to set aside the decree, charging that it was entered by mistake, surprise, or in circumstances which satisfy the court that it should be vacated. Foxwell v. Foxwell (1912) 118 Md. 471, 84 Atl. 552, on second appeal (1914) 122 Md. 263, 89 Atl. 494; Whitlock Cordage Co. v. Hine (1915) 125 Md. 96, 93 Atl. 431; Galloway v. Galloway (1915) 125 Md. 511, 94 Atl. 97.

District courts in Iowa were authorized by statute (Code, § 4091) to vacate or modify judgments (divorce decrees included) and grant new trials at subsequent terms for unavoidable casualties or misfortunes which prevented the prosecution or defense of the action, and for other stated causes. Wood v. Wood (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

#### XX. Attacks on collusive divorces.

Collusion between husband and wife to get divorced really constitutes a fraud upon the court before which they bring the suit.

All judgments and decrees, it has been said, may be vacated for collusion properly pleaded and proved. Harding v. Alden (1832) 9 Me. 140, 23 Am. Dec. 549.

When facts are brought to the attention of the court which granted a divorce, showing it to have been obtained by collusion, the court should investigate and determine the truth of the charge, to the end that the decree may be either vacated or confirmed. E. B. v. E. C. B. (1858) 8 Abb. Pr. (N. Y.) 44.

Both the letter and the policy of the law concur in guarding divorce suits against collusion. McBlain v. McBlain (1888) 77 Cal. 507, 20 Pac. 61; Cottrell v. Cottrell (1890) 83 Cal. 457, 23 Pac. 531.

Any divorce obtained by collusion will L.R.A.1917B.

be set aside upon a seasonable and proper application, for reasons of public policy. Singer v. Singer (1863) 41 Barb. (N. Y.) 139.

The courts annul collusive decrees of divorce on grounds of public policy when seasonably applied to in good faith, untainted by an expected personal advantage to the applicant. Johnson v. Johnson (1913) 182 Ala. 376, 62 So. 706.

A collusive divorce will be set aside in the interest of the state when brought to the knowledge of the court. McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200.

Because of the interest of the state in suits for divorce the courts never sanction those collusively instituted, and promptly annul decrees obtained by collusion. Olmstead v. Olmstead (1889) 41 Minn. 297, 43 N. W. 67.

A collusive decree of divorce obtained pursuant to a corrupt agreement between the parties to suppress evidence which, if disclosed, would have led the court to refuse such decree, will be promptly annulled. Winder v. Winder (1910) 86 Neb. 495, 125 N. W. 1095.

A decree of divorce obtained by a husband pursuant to a collusive agreement with his wife which he persuaded her to enter into by misrepresentations and promises to give her an opportunity to defend will be annulled by the court when brought to its attention in the wife's suit to set the decree aside as having been fraudulently obtained, because a collusive divorce is contrary to public policy. McDonald v. McDonald (1913) 175 Mo. App. 513, 161 S. W. 850.

A decree of divorce granted *ex parte* and *pro confesso*, without hearing any evidence to establish the truth of the charges made in the complainant, after defendant's answer has been stricken out for failure to set up any defense, is properly set aside and annulled on motion by defendant showing collusion. True v. True (1861) 6 Minn. 458, Gil. 315.

It is error in a court to refuse to vacate a decree of divorce and admit the spouse against whom it was granted to come in and defend the suit, upon an application made at the same term, and based upon indubitable evidence of a collusive agreement between the litigants that no resistance should be made, in consideration of a money payment. Danforth v. Danforth (1883) 105 Ill. 603.

Although a collusive agreement between husband and wife to be divorced, when no breach of marital duty had been

committed, would be a fraud upon the court, which could not be judicially sanctioned, yet, a judgment of divorce alleged to have been procured by collusion will not be set aside unless the collusive agreement is clearly proved. *Hopkins v. Hopkins* (1875) 39 Wis. 167.

The courts will refuse to grant a decree of divorce when collusion appears, but they do not necessarily set aside decrees collusively obtained after a long time has elapsed, at the instance of one of the parties to the corrupt agreement. *Hubbard v. Hubbard* (1893) 19 Colo. 13, 34 Pac. 170.

Neither of the guilty parties to a collusive decree of divorce is entitled, as a matter of strict right, to set it aside on the ground of collusion. *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706.

A spouse who obtained a divorce on grounds which did not exist, pursuant to a collusive agreement to suppress the truth, cannot have it set aside. *Robinson v. Robinson* (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288.

No public policy requires the setting aside of a decree of divorce collusively obtained, after several years have elapsed and an innocent third person has married the divorced spouse, and would suffer distress or disgrace by the annulment of the decree. *Singer v. Singer* (1863) 41 Barb. (N. Y.) 139.

A divorce obtained by a man through the co-operation and collusion of his wife in suppressing facts and presenting false testimony will not be set aside at her suit after a year of delay by her, knowing he had, in the meantime, married another woman. *Karren v. Karren* (1902) 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465.

A divorce obtained by a collusive agreement not to defend the suit, in consideration of a promise to pay money, never kept, will not be set aside in equity after the lapse of five years and the marriage of the spouse who obtained it to another. *Whittle v. Whittle* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078.

A decree of divorce obtained through collusion, corruptly and intelligently entered into for a promised money payment, will not be interfered with on the score of public morals, at the instance of an unrepentant spouse, cheated out of the base reward. *Hubbard v. Hubbard* (1893) 19 Colo. 13, 34 Pac. 170.

A decree of divorce will not be set aside upon a petition which discloses merely that it was the outcome of collusion between the parties, for in such a case the court will leave the parties

as it found them, and will hold them bound by the collusive decree. *Newman v. Newman* (1910) 27 Okla. 381, 112 Pac. 1007.

The petition of a husband to vacate a decree of divorce obtained against him by his wife, awarding her alimony and the custody of the children, which alleges that although he had a good defense, he refrained from making it, and agreed to allow her to take a decree in reliance upon broken promises by her and her attorney to waive all claim for alimony and upon his property, must be dismissed, because, on its own showing, the decree was collusive, and courts do not relieve against collusion for the mere sake of property rights. *Erdman v. Erdman* (1914) 43 Okla. 172, 141 Pac. 965.

A judgment of divorce obtained by a woman from her husband, to which she was legally entitled, will not be set aside because of collusion between her attorney and the defendant, to which she was no party, and of which she had no knowledge. *Harft v. Harft* (1883) 16 N. Y. Week. Dig. 461.

A divorce obtained by a woman from her husband, pursuant to a collusive agreement between the pair by which he employed an attorney to bring a suit for her against him, will not be set aside afterwards on his application. *Moor v. Moor* (1901) — Tex. Civ. App. —, 63 S. W. 347.

A collusive decree of divorce obtained by testimony as to grounds which in fact did not exist will not be set aside at the instance of the spouse who procured it, and who would not have got it if the truth had been told. *Robinson v. Robinson* (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288.

A wife who obtained from her husband, pursuant to an agreement with him, a divorce, to qualify her to testify in his behalf as a witness upon his trial for crime, relying upon his promise to remarry her when all was over, and in so doing deceived her attorneys and the court in the divorce suit, cannot, because the husband broke his promise and married another woman, have the decree set aside. *Henderson v. Henderson* (1916) 32 N. D. 520, 156 N. W. 245.

A mere agreement to compromise and settle the pecuniary and property interests and issues involved in a divorce, made by husband and wife, who dealt with each other at arm's length, each through independent and adverse counsel acting and advising their respective clients in good faith, and careful to avoid any collusion, respecting the dissolution

of the marriage, is not contrary to public policy nor any ground for setting aside a decree of divorce subsequently granted in the suit. *Hudson v. Hudson* (1914) 176 Mo. App. 69, 162 S. W. 1062.

An agreement by a wife not to oppose her husband's suit for divorce if he would withdraw charges of adultery and pay her a stated sum of money is not a ground of opening the decree he obtained by performing the conditions in full. *Neely v. Neely* (1884) 9 Ohio Dec. Reprint, 201.

The statute of North Dakota defining collusion in a divorce case (Rev. Codes 1905, § 4058) as an agreement between husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting grounds for divorce, for the purpose of enabling the other to obtain a divorce, is not violated when, in an adversary action, the wife consents, in consideration of a substantial payment of money for her support and maintenance, to abandon her defense and allow the husband to prove his case if he can. *Wiemer v. Wiemer* (1911) 21 N. D. 371, 130 N. W. 1015.

In an action by a divorced wife to recover dower as if her former husband were actually dead, in lands owned by him during coverture, where the record of the divorce disclosed that alimony had been agreed upon by the parties and paid by the husband to the wife, the husband cannot be permitted to impeach the validity of the decree of divorce on the ground that it was granted the wife by his collusion, through which the court was imposed upon and led to grant a judgment in violation of statute. *Davis v. Davis* (1873) 61 Me. 395.

One who comes into a court of equity seeking relief against a judgment must enter, as in other cases, with clean hands. A decree of divorce will never be set aside for fraud in procuring it, by a court of equity, at the suit of one who was guilty of the fraud. *Van Slyke v. Van Slyke* (1915) 186 Mich. 324, 152 N. W. 921.

Upon the well-settled principle that in a court of justice one cannot complain of a wrong done by himself or of a wrong done by another in which he was a partaker, one cannot attack a decree of divorce upon the ground that it was obtained through a fraud committed by himself. *Dow v. Blake* (1893) 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

One who was himself a party to a fraud in obtaining a judgment will not be heard in proceedings to set it aside L.R.A.1917B.

on account of that fraud. *Adams v. Adams* (1872) 51 N. H. 388, 12 Am. Rep. 134.

A divorce procured by a fraud upon the defeated spouse cannot afterwards be successfully attacked by the person or by anyone in privity with the person who perpetrated the fraud, on the ground that it was obtained by a fraud. *Elliott v. Wohlfrom* (1880) 55 Cal. 384.

The application of a man to set aside a decree of divorce obtained against him by his wife, pursuant to their collusive agreement, by which he employed an attorney to get it for her, will be denied for his own fraudulent participation. *Moor v. Moor* (1901) — Tex. Civ. App. —, 63 S. W. 347.

A decree of divorce will not be set aside at the instance of the spouse who obtained it, after several years of acquiescence, upon the ground that the court which granted it was imposed upon in respect of the residence of the parties, where the applicant to vacate it was a participant in the imposition, if any was practised. *Ferry v. Ferry* (1894) 9 Wash. 239, 37 Pac. 431.

#### XXI. Attacks based on condonation pending the divorce suit.

A husband bringing suit for divorce, who continues during its pendency to cohabit with the defendant wife, all the time telling her that he had dropped his suit, is guilty of such a fraud in obtaining the decree as entitles the wife to have it set aside in an appropriate proceeding brought by her for the purpose. *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84.

If a husband, during the pendency of his action for a divorce, renews his marital relation and cohabits again with his wife, assuring her that he has abandoned the action, and afterwards takes judgment against her for want of a defense, she is entitled to maintain a bill in equity to set aside the decree on the ground of a condonation of the alleged cause of action upon which it was founded. *Womack v. Womack* (1904) 73 Ark. 281, 83 S. W. 937, 1136.

A husband who obtains a decree of divorce by default while living and cohabiting with his wife and deceitfully assuring her that all would be well, and persuading her to refrain from appearing and defending his suit, commits such a fraud as entitles the wife to relief in a proper proceeding in a court of equity to nullify the decree. *Rawlins v. Rawlins* (1881) 18 Fla. 345.

Testimony proving that a husband,

after bringing a suit for divorce against his wife, assured her that he would not prosecute it, and that, while it was pending, the parties lived together and occupied the same bed as before, although contradicted, is sufficient to sustain a decree in equity setting aside, at the instance of the wife, a divorce against her on the ground that it was procured by fraudulently persuading her not to defend. *Scanlan v. Scanlan* (1890) 41 Ill. App. 449.

When a divorce on the ground of desertion has been obtained by a man from his wife without notice to her and without her knowledge, and the facts prove beyond dispute that her absences from home were with his consent and approval, that while she was away he kept up more or less regularly a friendly correspondence with her, and that he resumed and continued, for considerable periods of time, marital relations with her, the decree is properly set aside at her instance. *Fidelity Ins. Co.'s Appeal* (1880) 93 Pa. 242, affirming *Peterson v. Peterson* (1878) 6 W. N. C. 449.

A divorce will not be granted to a spouse who sues for it on the ground of adultery and then condones the offense by resuming marital relations with the guilty spouse; and if a husband seeking a divorce from his wife condones her offenses and again cohabits with her after a hearing of his suit has been had and a decree nisi granted, the decree will not be made an absolute one, but, instead, will be set aside, and his suit will be dismissed. *Krussman v. Krussman* (1910) 2 Boyce (Del.) 25, 78 Atl. 642.

A final decree of absolute divorce in favor of a man, against his wife, will be set aside on proof that, after he had obtained an interlocutory decree, and before the entry of the final one, he condoned the offense of the wife by voluntarily taking her back to his home and cohabiting with her as her husband. *Cary v. Cary* (1911) 144 App. Div. 846, 129 N. Y. Supp. 444.

Cohabitation between husband and wife during the pendency of his suit against her for divorce is a sufficient reason for her belief that he had abandoned the suit, and a justification for her not appearing to make a defense. *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404.

To warrant, however, the setting aside of a decree of divorce on the ground that, during the pendency of the suit for it, the husband condoned his wife's offenses by cohabiting with her, and thus leading her to think he had abandoned

the suit, the alleged cohabitation must be fairly proved; and when the wife admits that it did not take place, her attack on the decree obtained by her husband, grounded upon a supposed condonation, necessarily fails. *Ibid.*

The circumstance that a husband continued, during the pendency of his suit for divorce, to live at the common home of himself and wife, where he occupied a separate room apart from her, does not prove a fraud or deception upon his part inducing her to believe that the suit had been abandoned, and operating to prevent her from appearing and defending it. *Ibid.*

Condonation by a wife of cruel and inhuman treatment by her husband affording sufficient cause for divorce, so as to defeat her action, cannot be established by proof merely that, after the offenses were committed, and until she brought suit, she continued to live with her husband, without additional evidence of a reconciliation and express forgiveness. *Morton v. Morton* (1897) 117 Cal. 443, 49 Pac. 557.

That, during the pendency of a divorce suit brought by the wife against the husband for his fault, she condoned his offenses by again cohabiting with him as before, while constituting a reason for refusing her a decree if pleaded and proved in defense, affords no ground for setting aside a decree obtained by her after a hearing and verdict, and after the husband remarried and died, at the instance of his son by his first wife, in a contest with his second wife over the administration of his estate. *McLeod v. McLeod* (1915) 144 Ga. 359, 87 S. E. 286.

In a suit for divorce on the ground of adultery, condonation is a defense to be set up to prevent a decree, and it is not sufficient to support a bill in equity to set aside the decree four years after it was granted. *Watkinson v. Watkinson* (1904) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326.

In an action brought four and a half years after a divorce was granted, and after a new marriage on the faith of it had been entered into by the spouse who obtained it, by the former husband, against the divorced wife, based upon an alleged fraud, inducing a belief in the plaintiff that the wife had abandoned her suit, predicated upon an occasional and intermittent cohabitation while the couple were continuously living separate and apart in different homes, to set aside the decree, wherein no meritorious defense was satisfactorily shown, no representation that the suit had been or prom-



ise that it would be dismissed was made, no fraud of any sort until after the husband had been three months in default was asserted, the husband is legally charged with notice of the decree and with negligence in asserting his supposed right to have it annulled, and therefore should be denied relief, on account of laches. *Brockman v. Brockman* (1916) — *Minn.* —, 157 N. W. 1086.

**XXII. Adultery of plaintiff as ground for relief from a divorce.**

Evidence that a man who, in petitioning for a divorce from his wife, falsely averred that he had always been a kind and affectionate husband, was then living in open adultery with another woman, whom he afterwards married, warrants the court in setting aside the decree granted him, on the ground that it was obtained by fraud and deceit. *Kellow v. Kellow* (1886) 1 *Lehigh Valley L. Rep.* (Pa.) 202.

It is held that when a defendant has once been admitted to defend a divorce suit opened under the Virginia statute (Code, § 3233) after judgment without personal service or appearance, it is legal error to refuse permission, in the absence of any showing of negligence, to amend the cross bill so as to set up recent and additional adulteries of the plaintiff. *Willard v. Willard* (1900) 98 *Va.* 465, 36 *S. E.* 518.

A wife sued by her husband for divorce, and personally served with process in the action, who has a good defense in the criminal intimacy of the husband with another woman, and knows it in ample time to set it up in answer, is negligent to such an extent in not doing so as to estop her from obtaining as a right an annulment of the decree after it has been granted. *Faulkner v. Faulkner* (1916) 90 *Wash.* 74, 155 *Pac.* 404.

A charge that the spouse who obtained a divorce had been guilty of adultery and of secretly cohabiting with a third person, named as a co-conspirator in prosecuting the divorce suit, which might have been, but was not, set up as a defense, and which, if established, would have prevented the granting of the divorce, affords no ground for setting aside the decree. *Cooper v. Cooper* (1916) — *Wash.* —, 158 *Pac.* 1007.

A wife suing in equity to set aside a decree of divorce obtained by her husband after he had resumed marital relations with her, and fraudulently persuaded her to refrain from defending by belief in his assurances that he would abandon his action, shows a meritorious *L.R.A.* 1917B.

defense sufficient to maintain the bill when the testimony establishes wrongdoing in both spouses, justifying a divorce for either if innocent, under the well-settled principle that no relief will be granted to either party when both are equally at fault. *Womack v. Womack* (1904) 73 *Ark.* 281, 83 *S. W.* 937, 1136.

A stipulation by a wife, withdrawing her answer in a divorce suit by her husband, under the persuasions of her seducer, whom the husband had employed for the purpose of debauching her, will be vacated upon her application, and the decree obtained by her husband upon default will be annulled, and leave will be given to her to defend the action for the purpose of showing that the adultery which he charges her with was committed with his consent, connivance, privity, and procurement. *Helmes v. Helmes* (1898) 24 *Misc.* 125, 52 *N. Y. Supp.* 734.

A decree of divorce in favor of a wife, granted her because of her husband's adultery, clearly established, will not be set aside on the ground that she was an adulteress in marrying another man and living with him as his wife, under a sincere belief that previously she had been legally divorced from her former husband. *Robertson v. Robertson* (1880) 9 *Daly* (N. Y.) 44.

**XXIII. Misconduct of counsel for defeated spouse as ground for relief from divorce.**

If an attorney regularly employed to represent the beaten party in an action or suit corruptly sold out his client to the successful adversary, the defeated litigant may have the judgment or decree set aside in a new suit. *United States v. Throckmorton* (1878) 98 *U. S.* 61, 25 *L. ed.* 93.

A wife whose attorney, without authority, and in violation of his duty, withdrew her answer and suffered a judgment to be taken against her by default in her husband's divorce suit, has a legal right to have the decree set aside and the case opened for defense upon her motion, promptly made, for that relief. *Nichells v. Nichells* (1895) 5 *N. D.* 125, 33 *L.R.A.* 515, 57 *Am. St. Rep.* 540, 64 *N. W.* 73.

A wife living in the home established by her husband in another state, sued for a divorce, and asserting a full and complete defense on the merits, who immediately on receiving a copy of the summons and complaint through the mails, pursuant to an order of publication, consults an attorney at her home, and

through him employs local counsel to defend the suit, and diligently instructs him in time, is entitled to have set aside on motion, under the provisions of the Montana statute (Code Civ. Proc. § 116), a decree of divorce granted her husband by default, due to the abandonment of her defense and refusal longer to act for her of the counsel she had retained to represent her because she would not assent to a settlement respecting alimony which he had arranged. *Simpkins v. Simpkins* (1894) 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759.

The fact that the attorney for a wife who really was too ill to attend the trial of her husband's suit for a divorce from her and make a defense did not, when asking a postponement of the trial for that reason, present legal proof of her illness, is not a sufficient reason for denying her motion, seasonably and diligently made, to open the case and be heard. *Henderson v. Henderson* (1903) 83 App. Div. 449, 82 N. Y. Supp. 444.

The sudden illness of counsel employed to defend an action, provided it was unknown to the defendant, which prevented him from making the defense, may be deemed such an accident or misfortune as will warrant opening a judgment taken against the defendant by default. *Clark v. Ramsey* (1912) 138 Ga. 727, 75 S. E. 1128.

The discretion of a court of equity has been exercised to open a decree of divorce obtained by a husband from his wife upon slight evidence and her failure to answer, through the neglect or misfortune of her counsel, when she had a good defense, where neither the interest of the public nor innocent third persons could be affected, there having been no remarriage, notwithstanding the wife was chargeable with laches and a willingness to refrain, for a consideration from opposing her husband's suit. *Richardson v. Richardson* (1904) 67 N. J. Eq. 437, 58 Atl. 820.

A litigant does not meet the requirement of diligence necessary to be shown in order to set aside a judgment taken against him for want of a defense by proof that he employed an attorney to defend and the latter failed him, but he must go beyond that and prove that he himself did everything he could do to hold his attorney to his duty. *Clark v. Ramsey* (1915) 143 Ga. 729, 85 S. E. 869.

That the deposition of a material witness for the defense had not been filed, and hence was unavailable to the defendant at the trial, which resulted in a judgment against him, constitutes merely

an oversight of counsel, and affords the defendant no sufficient ground for attacking such judgment as having been taken by surprise, mistake, or accident. *Blood v. Beadle* (1880) 65 Ala. 103.

Mere negligence of counsel in defending a divorce suit, where they are not corrupt, is insufficient to authorize a court of equity to vacate the decree. *Corney v. Corney* (1910) 97 Ark. 117, 133 S. W. 813.

The negligence of an attorney for one of the parties to a divorce suit in not notifying his client of the time set for trial of the action, when the adverse party is in no wise responsible for the neglect, does not afford a ground for setting aside the decree. *Winstone v. Winstone* (1905) 40 Wash. 272, 82 Pac. 268.

The failure of counsel for a defendant wife in a divorce suit to take the depositions of her witnesses because of lack of money to defray the expense; or to either apply for a court order requiring the husband to furnish the needed money, or for leave to submit oral testimony, for the purpose of establishing recriminatory charges, is mere negligence of counsel; and when unaccompanied by proof that they deliberately and corruptly betrayed their client, not a fraud, surprise, accident, or mistake such as will sustain a bill of equity to set aside the divorce decree. *Corney v. Corney* (Ark.) supra.

An error of judgment by an attorney, or a misunderstanding of his client's wishes in consenting to dismiss an appeal, does not amount to a fraud upon the client which will sustain a suit to set aside a judgment of divorce. *Meisenheimer v. Meisenheimer* (1909) 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

A court of equity will not disturb a judgment of a court of law because an accident or misfortune or a mistake concerning the proper practice prevented the taking of an appeal from it and a review of it by an appellate court. *Van Gilder v. Ringer* (1911) 163 Ill. App. 105.

If an attorney, without authority or fraudulently, assumed to act for an unsuccessful litigant, and connived at his defeat, such litigant may for that reason maintain a suit to set aside and annul the judgment or decree rendered against him. *United States v. Throekmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

It is not a ground for setting aside a decree of divorce obtained by a wife from her husband after personal service on him on the ground of his adultery, which he confessed but avoided by asserting a condonation of his offense, that

the solicitor who appeared in his behalf and upon the taking of proofs acted without his authority, where neither the wife nor her solicitor had any act, part, or knowledge in the unauthorized appearance. *Hoffmire v. Hoffmire* (1838) 3 Edw. Ch. (N. Y.) 173 affirmed in (1838) 7 Paige, 60, 32 Am. Dec. 611.

A wife's denial of the authority of her attorney of record to appear for her in her husband's divorce suit is not sustained where she personally verified her answer and knew the purpose of the suit. *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757.

#### **XXIV. Newly discovered evidence as ground for opening decrees of divorce.**

If, after a decree of a court of chancery has become final, new evidence is discovered, a bill of review on that ground provides a remedy. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

If evidence has been discovered since a trial and judgment, which would, if presented, have had a material bearing upon the result, appropriate relief may be had by a motion for a new trial. *Ibid.*

While a litigant may be bound to know what facts are in issue so as to be prepared on a trial to prove or disprove the cause of action or defense, he is not bound to know what witnesses will be called by his adversary, nor whether or not they are qualified to testify; and hence cannot be charged with negligence in not discovering before judgment the incompetency of the only witness called to sustain his opponent's cause of action, and who falsely testified to his own competency. *Wood v. Wesley* (1912) 75 Misc. 521, 135 N. Y. Supp. 876, affirmed in (1912) 151 App. Div. 897, 135 N. Y. Supp. 1150.

An application of the beaten litigant to open a divorce suit for the purpose of submitting additional evidence all the time in the applicant's possession and known to be needed should be denied. *Smith v. Smith* (1907) 72 N. J. Eq. 5, 65 Atl. 986.

A court of equity will not set aside a judgment or decree for the purpose of letting in newly discovered evidence which is merely cumulative, and which, if admitted, would not be of controlling effect. *Woodward v. Donovan* (1912) 167 Ill. App. 503.

When a wife has defended her husband's suit for divorce on account of her cruel and abusive treatment of him by L.R.A.1917B.

setting up condonation in an act of marital intercourse at a stated time, by him denied, with other evidence supporting his denial, and the court, after hearing both sides fully, and considering the conflicting evidence, has found as a fact that the asserted condonation never took place, and has granted the husband a decree nisi, the circumstance that afterwards, at a date consistent with the alleged condoning intercourse, the wife gave birth to a child said to have been thereby begotten, while warranting the court in reviewing the whole case upon a subsequent application to make the decree nisi an absolute one, does not, as a matter of law, give rise to a conclusive presumption of error in finding there had been no condonation. *Koffman v. Koffman* (1906) 193 Mass. 593, 79 N. E. 780.

That a statute enacted after a decree of divorce had been regularly granted without any fraudulent taint removed the disqualification of parties in divorce suits to testify as witnesses in their own behalf, to disprove the charges against them, affords no sufficient ground for setting aside a decree of divorce granted a husband for the adultery of his wife, in order that she might testify to her innocence. *Holbrook v. Holbrook* (1874) 114 Mass. 568.

#### **XXV. Attacks grounded on lunacy of divorced spouse.**

An unjust and unconscionable judgment taken in a suit begun and prosecuted against a defendant of unsound mind and so physically infirm as to be unable to attend court will, where the incapacity, mental and bodily, continued until his death, be set aside at the suit of his administrator. *Southern Nat. L. Ins. Co. v. Ford* (1913) 151 Ky. 476, 152 S. W. 243. "It would be monstrous," said the court in that case, "to say that a man whose mental and physical condition was such as to prevent him from appearing and making defense should be bound by the terms of a plainly unjust and unconscionable judgment against him."

A motion to set aside a decree of divorce grounded upon allegations of inhuman cruelty, granted to a husband for default of an answer, against a wife who, within a month afterwards, was judicially adjudged insane, made by her guardian, should be granted on grounds of public policy and as an act of justice to an unfortunate lunatic. *Cohn v. Cohn* (1890) 85 Cal. 108, 24 Pac. 659.

A court of chancery, upon a bill filed

by the legal representative of the person and estate of an insane woman, will set aside and annul a decree of divorce from her husband, granted in a suit brought and prosecuted in her name at a time when she was a lunatic, under treatment for her mental disease in an insane asylum in another state, wholly irrespective of the question of whether or not the divorce proceedings were instituted in her behalf by her friends, or fraudulently connived by her husband to obtain his own freedom from the bonds of matrimony, on the all-sufficient ground that the insanity of the wife deprived her of legal capacity to sue for or consent to a divorce. *Bradford v. Abend* (1878) 89 Ill. 78, 31 Am. Rep. 67.

A decree of divorce obtained by default, after constructive service, by a husband from an insane wife whom he had committed to an asylum without the state, is void because she is not a non-resident, and is under his control, incapable of appearing and defending herself. *Newcomb v. Newcomb* (1877) 13 Bush (Ky.) 544, 26 Am. Rep. 222.

A petition to set a divorce aside, averring that the petitioner, the wife, was, when the suit was begun, while it was pending, and when the decree was made, a physical and mental wreck by the acts of her husband, under treatment in a hospital, and incapable of making her defense, which was complete and meritorious; that the charges against her were not true, and were sustained by false testimony, and that she had been compelled to waive service of the summons by force, threats, and intimidation, —sets forth good grounds for the relief sought. *Butler v. Butler* (1912) 34 Okla. 392, 125 Pac. 1127.

A divorce granted in one state in regular proceedings conforming to all the statutory requirements, to a man from his insane wife, cannot be successfully attacked and overthrown in an action by ejectment in another state, brought by the lunatic's guardian after the death of the husband and the lapse of more than twenty-five years, during which he had been married to and raised a family of children by another woman. *Miller v. Miller* (1913) 89 Kan. 151, 130 Pac. 681.

A delay by a wife who was personally served with the summons and complaint in her husband's suit for divorce, of fourteen years, in seeking an annulment of the decree he had obtained by fraud and false testimony, where he had died in the interval and she had for nine years known that the decree had been granted, L.R.A.1917B.

is such laches on her part as to bar her from any relief, notwithstanding she was, most of the time, mentally deranged, and claimed to have been to the very last ignorant of the fraud and perjury charged. *McElrath v. McElrath* (1913) 120 Minn. 380, 44 L.R.A.(N.S.) 505, 139 N. W. 708.

For errors in proceedings against lunatics which do not appear on the record, or when the lunacy does not so appear, an Iowa statute (Code, § 4091) which is held to embrace divorce suits authorizes district courts at later terms to vacate or modify judgments or grant new trials. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

A lunatic divorced in Nebraska through a fraud was, when the lunacy was not disclosed by the record, given a remedy by virtue of a statute (Civ. Code, § 602) held to embrace divorce suits, which empowered district courts to vacate or modify their judgments or orders after the terms had expired, for errors in the proceedings. *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

An action in equity, where there is no adequate remedy at law, affords the only remedy to set aside a decree of divorce, valid on its face, entered upon default, without any personal service, against a defendant who had been adjudged a lunatic before the suit was brought, and who was actually insane while it was pending, and when the decree was granted. *State ex rel. Happel v. District Ct.* (1908) 38 Mont. 166, 35 L.R.A.(N.S.) 1098, 129 Am. St. Rep. 636, 99 Pac. 291.

#### XXVI. Attacks grounded on infancy of divorced spouse.

Errors in proceedings against minors when such errors or the minority do not appear on the record afford, with others, a cause by the Iowa statute (Code, § 4091), which embraces divorce suits, for district courts at later terms to modify or vacate judgments or grant new trials. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

An infant divorced by fraud in Nebraska, if the infancy did not appear on the record, was given a remedy by a statute (Civ. Code, § 602) authorizing district courts to vacate or modify, after the expiration of their terms, their judgments or orders, for errors in the proceedings. *Wisdom v. Wisdom* (1888) 24

**Neb.** 551, 8 Am. St. Rep. 215, 39 N. W. 594.

A divorce granted against an infant wife cannot be set aside upon the application of her mother, upon the allegation that it was collusive, and asking to be appointed guardian ad litem to defend the suit. *E. B. v. E. C. B.* (1858) 8 Abb. Pr. (N. Y.) 44.

**XXVII. Attacks on divorces resting upon infirmities of pleadings in divorce suits.**

**a. False averments in initial pleading of suit for divorce.**

Evidence which demonstrates the entire falsity and wholly fictitious character of the alleged cause of action to annul a marriage for alleged fraud, duress, and want of consent, will sustain a bill in equity to set aside a decree of divorce granted without notice other than constructive to the defendant. *Doughty v. Doughty* (1876) 27 N. J. Eq. 315.

It, however, has been doubted whether the mere fact of knowingly bringing an unfounded action for divorce is such a fraud on the court that the decree rendered in it must be set aside as one procured by means of a fraudulent act, practice, or representation, within the meaning of the pertinent Minnesota statute. *McElrath v. McElrath* (1913) 120 Minn. 380, 44 L.R.A.(N.S.) 505, 139 N. W. 708.

A statement by a man in his petition for a divorce from his wife that he had at all times demeaned himself as a kind and affectionate husband, shown to have been wilfully false, by proof that he was then living in open adultery with another woman, whom he later married, justifies setting aside the decree granted him as fraudulently obtained. *Kellow v. Kellow* (1886) 1 Lehigh Valley L. Rep. (Pa.) 202.

Allegations of desertion, shown to be false, in one case by proof that there had been a voluntary separation under written articles, and in another that the defendant's absence from home was merely temporary, while traveling on business, where divorces were obtained by default after merely constructive services by publication, authorized upon affidavits wilfully false respecting the abode and unknown whereabouts of the defendants, have been held to warrant the setting aside of decrees on the ground that they were obtained by fraud. *Johnson v. Coleman* (1868) 23 Wis. 452, L.R.A.1917B.

99 Am. Dec. 193; *Crouch v. Crouch* (1872) 30 Wis. 667.

A like decision has been made where, upon charges of desertion, a divorce was granted by default to a husband after a service only constructive, by publication, and based upon his wilfully false affidavit of ignorance of his wife's residence, where the proof showed that she had merely returned to her father's home, with the consent and approval of her husband. *Boyd's Appeal* (1861) 38 Pa. 241, affirming *Smith v. Smith* (1859) 3 Phila. 489.

The fact that the averments in a petition for a divorce were untrue does not warrant the setting aside of a decree granted by default upon a constructive service by publication where the defendant had actual notice of the bringing and pendency of the divorce action, and deliberately declined to appear and defend. *McCormick v. McCormick* (1910) 82 Kan. 31, 107 Pac. 546.

**b. Defects in initial pleadings in divorce suits.**

A complaint in a divorce suit sufficient to inform the court and the defendant what relief is demanded and the facts upon which the claim to that relief is based is good enough to give the court jurisdiction of the subject matter. *Re James* (1893) 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

According to several decisions, a decree of divorce will not be set aside because the initial pleading in the suit omitted allegations which it should have contained.

A court of equity will not interfere with a judgment of divorce rendered by a court which had complete jurisdiction, simply because the petition for divorce did not contain the allegation that the application was made in good faith, notwithstanding such an allegation was by law mandatory in such cases. *Mengel v. Mengel* (1909) 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899.

An objection in an action respecting property the title to which depends upon the validity of a decree of divorce previously granted, that the complaint in the divorce suit did not state facts sufficient to warrant a dissolution of the marriage, is not well founded, and does not make the decree unavailable as void, because the court which granted it necessarily adjudged the complaint good, and its ruling cannot be reviewed in a later and independent action. *McFarlane v. Cornelius* (1903) 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

A decree of divorce granted to a man in his lifetime, from his wife, on the ground that she had deserted him, cannot be successfully attacked and avoided in a suit by her, claiming to be his lawful widow, to establish her alleged homestead right in certain lands of which he died seised, and based on the theory that the court which granted the divorce was not authorized to do it because there was no averment that the desertion charged was "without reasonable cause." *Rush v. Moore* (1877) — Tenn. —, 48 S. W. 90.

A judgment will not be set aside for defects in the pleadings which were curable by amendment of a verdict, and were not pointed out before the judgment was rendered. *Penn v. McThee* (1908) 6 Ga. App. 631, 65 S. E. 686.

Irregularities and defects in a petition for divorce which might have been corrected by the court to which it was presented, and which did not affect the court's jurisdiction, afford no ground for setting aside the decree. *Gelwicks v. Gelwicks* (1913) 160 Iowa, 675, 142 N. W. 409.

The omission in a petition for divorce of an averment required by positive statute respecting the residence in good faith within the jurisdiction of the petitioner does not nullify a decree subsequently granted her which is regular upon its face, and was rendered after the defendant had appeared generally, and made no objection to the form of the petition, there being no pretense of either fraud or collusion in the case. *Richardson v. King* (1912) 157 Iowa, 287, 135 N. W. 640.

The fact that a husband suing for a divorce a vinculo matrimonii on the ground of his wife's desertion did not set forth in his bill that the wife previously had procured in the state to which she fled a divorce a mensa et thoro from him, constituting a ground of defense or a bar to his suit, does not constitute such a fraud as to invalidate the decree he afterwards obtained. *Harrison v. Harrison* (1851) 19 Ala. 499.

Forasmuch as a court of competent jurisdiction, having regularly obtained jurisdiction of the parties, may rightfully grant an absolute divorce upon the ground of adultery, where the couple have previously been divorced a mensa et thoro on the ground of desertion, the fact that, in a husband's suit for divorce from his wife on account of her alleged adultery, he did not disclose to the court that she had previously been granted a limited divorce from him on

the ground that he had abandoned her, does not render the decree obtained by him a nullity. *Foxwell v. Foxwell* (1912) 118 Md. 471, 84 Atl. 552.

But when subsequently, upon the petition of the wife to open the last decree, and for leave to defend the suit, it is established that the court which granted it had no knowledge of the prior decree, and that its existence was wilfully concealed from the court, a proper case of fraud on the court is made out which warrants granting the prayed-for relief. *Foxwell v. Foxwell* (1914) 122 Md. 263, 89 Atl. 494.

A wife is not aggrieved in a legal sense by the provisions in a decree of divorce granted her husband by default, after personal service of process upon her, which award her alimony and a share of his property, so as to obtain by appeal a reversal of the judgment on the ground that the complaint of the husband did not ask for any relief respecting alimony and a division of his estate. *Lessig v. Lessig* (1908) 136 Wis. 403, 117 N. W. 792.

Divorce being in Missouri entirely a statutory proceeding, the failure of the plaintiff to set forth in the petition the facts respecting the residence of the parties and the locus of the offense charged, which the statute requires to be stated therein, is fatal to the validity of the decree when directly attacked by a motion in arrest of judgment. *Robinson v. Robinson* (1910) 149 Mo. App. 733, 129 S. W. 725.

The case is otherwise when the decree is collaterally attacked on this ground in a suit by a second spouse to annul his marriage. *Werz v. Werz* (1881) 11 Mo. App. 26.

#### *c. Omitted verifications to initial pleadings in divorce suits.*

A chancery rule forbidding a default regularly entered in a divorce case to be opened after six months have elapsed from the personal service of process on the defendant does not apply to a decree of divorce granted by default upon a bill the oath to which omitted the allegation required by a mandatory statute of the nonexistence of collusion, since, in the absence of such an averment, a default cannot be regularly taken, and hence may be set aside in a proper case at any time. *McWilliams v. Lenawee* Circuit Judge (1905) 142 Mich. 226, 105 N. W. 611.

A divorce granted by default after a constructive service by publication, to a wife who, being under age, prosecuted

the suit by a guardian or next friend, has, however, been held void because the affidavit which a statute mandatorily required to be appended to petitions in divorce cases to the effect that the facts stated in them were true and that the complaint was not made out of levity, by collusion, under constraint or fear, merely to obtain a separation, but was made in sincerity and truth, for the causes stated, was not made and sworn to by the wife in person but by the next friend or guardian instead, for the reason that she alone, and not he, knew the real truth respecting the facts mentioned in the statute. *Hinkle v. Lovelace* (1907) 204 Mo. 208, 11 L.R.A.(N.S.) 730, 120 Am. St. Rep. 698, 102 S. W. 1015, 11 Ann. Cas. 794.

In the last case the court cited *McCraney v. McCraney* (1857) 5 Iowa, 254, 68 Am. Dec. 702, and referred to it as a case which sustained the doctrine that a statute requiring allegations of absence of collusion, etc., in petitions for divorce or their verifications, was not so mandatory as to make the failure to comply with it fatal to a decree of divorce. The cited decision was criticized by the Missouri court as follows: "This case is against the great weight of authority in this country, and it seems to us to be against the letter and spirit of our statute upon the subject in hand, and is contrary to sound public policy, and for these reasons we refuse to follow it."

The failure of one suing for a divorce to verify her petition, pursuant to a mandatory statute, will not invalidate a decree obtained by her after her husband had appeared and failed to object that the petition was unverified. *Richardson v. King* (1912) 157 Iowa, 287, 135 N. W. 640.

**XXVIII. Errors and irregularities of procedure in divorce suits as bases of attack.**

In matrimonial suits in courts of equity if the substantive rights of the parties are protected, methods of procedure are largely discretionary with the trial court, and a strict conformity to rigid rules is not essential. *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795.

A court of equity cannot review a judgment at law to correct legal errors committed in rendering it. *Van Gilder v. Ringer* (1911) 163 Ill. App. 105.

Matter which shows only that a judgment was erroneous will not support an action to annul it. *Boudreaux v. Lower* L.R.A.1917B.

*Terrebonne Ref. & Mfg. Co.* (1910) 127 La. 98, 53 So. 456.

There is a remedy by writ of error when a court has been mistaken in the law in rendering a judgment; and if, in a court of chancery an erroneous decree has been made, an opportunity to correct the error is offered by an appeal to a higher tribunal. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

A judgment merely erroneous will not be set aside by a court of equity, neither will a court of equity disturb a judgment simply because it was irregular. *Cantwell v. Kimmerle* (1913) 179 Ill. App. 66.

Errors and irregularities in practice in a divorce suit, even if grave enough to require a reversal of the decree on appeal, do not invalidate that decree upon a subsequent collateral attack. *Re James* (1893) 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

Errors committed, omissions of findings of fact, and other defects in the record of proceedings in a divorce suit, even important enough to require a reversal of the judgment upon a regular appeal from it, render it voidable only, not void, and do not require the setting aside of the decree after it has been granted, in an independent and direct proceeding brought for the purpose of vacating it. *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404.

A prior judgment cannot be successfully attacked by bill in equity to set it aside for errors, irregularities, or even wrongdoing in the proceedings leading up to it, where the court was legally organized and had jurisdiction of the subject matter, and the complaining party had legal notice of the litigation and an opportunity to be heard. *Day v. Hurchman* (1913) 65 Fla. 186, 61 So. 445.

Irregularities, errors, failure to comply with statutory requirements, and the like, not going to the jurisdiction of the court, of which the defendant in a divorce suit might have taken advantage to prevent a decree, but to which, without collusion or fraud, he omitted to object, although he appeared generally, cannot be available to the heirs at law of the plaintiff's second husband, after his death, in a suit in equity to set aside the decree and annul the second marriage. *Richardson v. King* (1912) 157 Iowa, 287, 135 N. W. 640.

An irregularity or defect in a service by publication in a divorce suit which possibly gave the court no jurisdiction of the defendant is cured when the de-

fendant comes in and moves to set aside the judgment upon the double ground that the affidavit for publication was insufficient and that the petition failed to state a cause of action, because the urging of the second ground necessarily implies a general appearance in the action, and per se confers jurisdiction of the person. *Pratt v. Pratt* (1914) 41 Okla. 577, 139 Pac. 261.

The transfer, hearing, and decision of a motion to vacate a decree of divorce, from one to another county, and before a different judge of a court of general jurisdiction, pursuant to written stipulation and waiver of technical objections made by counsel for both parties, for mutual convenience, does not affect the validity of the order denying the motion on the merits, duly entered in the proper county. *Meisenheimer v. Meisenheimer* (1909) 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

That a divorce suit was called for trial out of its regular order, in a different court room from that designated and devoted to the trial of causes, without notice to counsel for or the spouse against whom a decree was made, are facts sufficient to authorize the setting aside of the judgment, although they do not, strictly speaking, render it a nullity, being rather irregularities of procedure than jurisdictional defects. *McConkey v. McConkey* (1916) — Tex. Civ. App. —, 187 S. W. 1100.

The doctrine of the cases immediately above has been modified in some jurisdictions by statutes. In Nebraska (Civ. Code, § 602) and Iowa (Code, § 4091) district courts have been empowered to vacate or modify judgments and grant new trials of actions at later terms for errors in proceedings against infants or lunatics when the errors or the status of the defendants do not appear on the face of the record. These statutes apply to decrees and suits for divorce. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

The inadvertence of a court in rendering a judgment in a divorce suit without giving any consideration to the question of an allowance to the wife to cover her expenses and attorney's fees in the action constitutes a sufficient reason for the court to set aside the decree during the term at which it was rendered, upon due application, for the purpose of pass-

ing upon the question of such an allowance. *Foote v. Foote* (1913) 53 Ind. App. 673, 102 N. W. 393.

While an order setting aside a decree of divorce, made by the court which granted it, during the same term, is erroneous and unauthorized if no notice of the application to vacate it was given to the opposite party, nevertheless it will stand where such party elects to come in afterwards and be heard upon the merits. *Ficener v. Ficener* (1887) 8 Ky. L. Rep. 867, 3 S. W. 597.

A court which has granted an absolute judgment of divorce in proceedings in all respects regular and in due form, reserving nothing for future adjudication, and completely disposing of the entire subject, is without the power to vacate the decree and restore the case to the docket of its own motion and within a week of granting it, solely upon the ground that the man who got it had, in the meantime, married another woman. *Bentz v. Bentz* (1900) 21 Ky. L. Rep. 1225, 54 S. W. 715.

A decree of divorce altered without authority, either by a court or a stranger, after its terms had been settled and passed, may be challenged like any other altered instrument as not binding upon the parties in interest. *Kwentsky v. Sirovy* (1909) 142 Iowa, 385, 121 N. W. 27.

After a decree of divorce rendered at the end of a trial has been prepared, signed by the presiding judge, and spread upon the records of the court as the judgment in the case, and several days have elapsed, a material alteration in its terms, made by the judge who signed it, upon an ex parte application of the attorneys who obtained it, without any notice to or hearing of the adverse litigant, is without authority of law, notwithstanding the term had not expired; and the changed decree, so far as it is altered, is a nullity. *Ibid.*

A judgment of divorce granted a plaintiff on the coming in of a referee's report in favor of a defendant after a trial of issues where a defense was interposed must be set aside as having been rendered inadvertently; since it is only in cases where no defense has been interposed, and the referee, taking proofs, has reported adversely, that the court has power to refuse confirmation and grant the decree if the facts proved so warrant, notwithstanding the conclusion of the referee. *Merrill v. Merrill* (1871) 11 Abb. Pr. N. S. (N. Y.) 74.



**XXIX. Defects in post-judgment procedure in divorce suits.**

Although the Constitution and laws of a state make it the duty of a party in whose favor a decree of divorce has been rendered to deliver to the legislature a transcript of it and the proceedings in the suit, to the end that it may be confirmed by statute, such a decree is not invalid because the law confirmatory of it was not enacted at the next session of the legislature after it was rendered, where neither the Constitution nor the acts passed pursuant thereto have prescribed the time within which the legislature must act to give validity to such decree. *Harrison v. Harrison* (1851) 19 Ala. 499.

The defendant in a divorce suit in which a decree was granted but never formally signed and entered cannot successfully resist the entry of or vacate a decree entered nunc pro tunc, where both he and his former wife each remarried upon the faith of the divorce and in reliance on its validity. *Sease v. Johnson* (1906) 130 Ill. App. 35.

A decree of divorce irregularly filed of record, in violation of a rule of court forbidding it to be entered until the costs have been paid, is not open to attack in another suit in another court and jurisdiction, between one of the parties and a new spouse, for a dissolution of the later marriage, predicated upon the theory that the earlier one had not been legally dissolved. *Baker v. Baker* (1904) 26 Pa. Super. Ct. 553.

The probative force and effect of a sealed and duly certified copy of a judgment of divorce, made by the clerk of the court which granted it, to the effect that it was a true copy of a decree regularly entered, and made within a short time of the date of entry, is not impaired by a certificate from his successor in office, many years afterwards, to the effect that he had been unable to find in the court's records any record of such decree, and that by neglect or error the then clerk failed to transcribe it, as required by law, because the failure of the clerk to discharge his clerical duties with respect of recording the original decree, which was in fact granted, did not and could not nullify it. *Douglas v. Teller* (1909) 53 Wash. 695, 102 Pac. 761.

**XXX. Opening decrees of divorce taken by default.****a. Discretion of court to grant relief.**

An application grounded upon allega-  
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tions of mistake, inadvertence, surprise, and excusable neglect, to open a decree of divorce entered on default, and for leave to come in and defend the action, is addressed to the sound discretion of the court. *Morton v. Morton* (1897) 117 Cal. 443, 49 Pac. 557; *Bowman v. Bowman* (1872) 64 Ill. 75.

The exercise of the discretion of the court upon an application for relief from a default and a decree of divorce entered thereon on a bill taken pro confesso is reviewable on appeal. *Bowman v. Bowman* (Ill.) supra.

But unless that discretion plainly has been abused, the decision of the court granting or denying the application will not be disturbed on appeal. *Morton v. Morton* (Cal.) supra; *Darwin v. Darwin* (1915) 27 Idaho, 303, 149 Pac. 467; *Jones v. Jones* (1908) 37 Mont. 155, 94 Pac. 1056; *Howell v. Howell* (1911) 89 Neb. 243, 131 N. W. 216; *McCord v. McCord* (1901) 24 Wash. 529, 64 Pac. 748.

The denial of a wife's application to vacate a decree of divorce obtained by her husband against her by default, brought about by his promise, relied upon by her, to pay her a sum of money, which he afterwards repudiated and did not pay, is discretionary, and not the subject of review in the appellate courts. *Melvin v. Melvin* (1904) 73 N. H. 602, 58 Atl. 835.

No abuse of discretion in denying a motion to open a decree of divorce entered on default because of alleged mistake, inadvertence, surprise, and excusable neglect, such as must appear to warrant the interference of an appellate court, exists where the supporting and opposing testimony as to facts conflicted. *Morton v. Morton* (Cal.) supra.

The discretion of the court in granting a motion to open a default and set aside a decree of divorce made a few days before, while the defendant and her witnesses were all in attendance in court and ready for trial, and her counsel departed upon the assumption that the case on trial ahead would take up the entire day, because of the assurance of the counsel engaged in that trial and a misunderstanding of statements of the trial judge, cannot be said to have been abused. *Jones v. Jones* (1908) 37 Mont. 155, 94 Pac. 1056.

The discretion of the court which had granted a decree of divorce was not abused by setting it aside at the same term to hear further evidence. *Howell v. Howell* (1911) 89 Neb. 243, 13 N. W. 216.

Neither is it an abuse of discretion

to deny an application to open a case and be heard on the merits where a decree of divorce had been granted by default after a personal service of process, and the testimony on such application was conflicting. *Darwin v. Darwin* (1915) 27 Idaho, 303, 149 Pac. 467.

In that case, however, Budge, J., of the court, while admitting the rule upon which the conclusion rested to be sound in actions other than for divorce, dissented from the conclusion, because he insisted that the public interest required more liberality in opening defaults in divorce suits.

Notwithstanding the public interest, one court has gone farther, and held that a decision denying an application to set aside, in order to come in and defend, a divorce granted by default upon a constructive service, no fraud being charged or lack of jurisdiction appearing, did not constitute an abuse of discretion requiring a reversal on appeal. *McCord v. McCord* (1901) 24 Wash. 529, 64 Pac. 748.

It is an abuse of discretion in the legal sense for a court which granted a decree of divorce by default, where there had been no personal service, to deny the defendant's motion to open the case, answer the bill, and have his day in court, made at the same term and upon a showing sufficient to create doubts of the propriety of the decree. *Nihell v. Nihell* (1911) 161 Ill. App. 589.

It is an abuse of discretion in a court at special term, upon granting a motion by a wife to set aside a decree of divorce obtained by her husband by default after a disputed personal service of the summons, to impose as a condition the payment of heavy costs, when she was wholly unable to pay, and dependent upon her husband for support, because terms so onerous are not "such as justice requires," within the meaning of the statute (Code Civ. Proc. § 724), allowing defaults to be opened. *Fox v. Fox* (1911) 143 App. Div. 483, 127 N. Y. Supp. 989 (Burr, J., dissenting), rehearing denied in (1911) 144 App. Div. 906, 128 N. Y. Supp. 1123.

The right to have a judgment obtained by fraud annulled is not an absolute one, and the court may, in any given case, upon such equitable considerations as the circumstances demand, set it aside conditionally. *Geisberg v. O'Laughlin* (1903) 88 Minn. 431, 93 N. W. 310; *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

A husband has no absolute right upon a petition presented as soon as a divorce a mensa et thoro has been granted to his L.R.A.1917B.

wife against him, on account of his cruelty to her, which caused her to flee from him, to an annulment or suspension of the decree upon his unconditional offer to receive back and well-treat his wife afterwards, but the court, in its discretion, may deny his petition, or, in a proper case, grant it. *Breinig v. Breinig* (1856) 26 Pa. 161.

A motion by a wife to open a judgment of divorce rendered against her by default after personal service of the summons upon her, made a year after the decree was granted, is addressed to the discretion of the court, and the decision upon it, reached upon conflicting affidavits, is not reviewable on appeal. *Lessig v. Lessig* (1908) 136 Wis. 403, 117 N. W. 792.

#### *b. Liberality the rule.*

In some of the states the courts strongly incline toward liberality in setting aside decrees of divorce granted by default. It has been said that the courts are and ought to be, because of the public interest in matrimonial controversies, more liberal in affording relief from decrees of divorce granted by default than from judgments and decrees in other cases unaffected by public policy. *McBlain v. McBlain* (1888) 77 Cal. 507, 20 Pac. 61; *Wadsworth v. Wadsworth* (1889) 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 640.

The courts should be as liberal in opening defaults in suits to annul marriages, and for the same reasons, as they are in divorce suits. *Wadsworth v. Wadsworth* (Cal.) supra.

The reasons for setting aside or annulling decrees entered by mistake, surprise, or in circumstances such as satisfy courts that they should be vacated, are asserted to be more forceful in divorce suits than in other litigations because of the public interest and policy. *Foxwell v. Foxwell* (1913) 122 Md. 263, 89 Atl. 494.

Ordinarily an application to set aside a decree of divorce entered upon a default, if not unduly delayed, and founded upon an alleged good defense, where the rights of no third persons are involved, will be granted upon terms. *Weidner v. Weidner* (1895) 85 Hun, 432, 32 N. Y. Supp. 894.

The rule that a default will not be opened to permit the interposition of a defense not meritorious is not rigidly applied in actions for absolute divorces because of their effect upon the status of the litigants and their offspring. *Hamilton v. Hamilton* (1898) 29 App. Div. 331, 51 N. Y. Supp. 365.

The rules governing the opening of judgments taken by default in ordinary actions respecting mere pecuniary liability are not to be applied in divorce cases with the same rigor. *Henderson v. Henderson* (1903) 83 App. Div. 449, 82 N. Y. Supp. 444.

The strict rules respecting the opening of default judgments ought not to be applied in divorce suits because of the well-known vigilance of the courts to prevent collusion, and because of the public interest to preserve the matrimonial status. *Fox v. Fox* (1911) 143 App. Div. 483, 127 N. Y. Supp. 989, rehearing denied in (1911) 144 App. Div. 906, 128 N. Y. Supp. 1123.

A divorce granted for default of an answer, to a husband from his wife, on the ground of her adultery, should be set aside to allow her to defend upon her motion, promptly made, where no injustice can result, and it is set up that the wife's failure to answer was due to a mistake of her attorney respecting her wishes, and his opinion that her defense of a foreign divorce in her favor, and her marriage on the faith of it to her alleged paramour, was not valid, even where it turns out that her divorce was void because the court which granted it had no jurisdiction over her husband. *Hamilton v. Hamilton* (N. Y.) *supra*.

The law, it has been said, encourages defenses in divorce suits, and, in a case where the marriage took place abroad, and the charges relate to conduct in another state, and the wife is defendant and lives in a distant state, and was not found or served within the jurisdiction, and where she appears at the earliest possible time before the court has adjourned after making an *ex parte* decree by default, not only to defend on the merits, but offering to show that the husband had practised a fraud upon the jurisdiction of the court by claiming a local residence not his, she ought to be encouraged and helped by the exercise of every legitimate judicial power. *Bostwick v. Bostwick* (1889) 73 Tex. 182, 11 S. W. 178.

*c. Delays by agencies for transmitting papers.*

As a general rule, a litigant prosecuting or defending an action in good faith against whom a judgment has been taken by default because of the failure of a pleading or other paper to arrive in time to prevent it, where it was duly mailed, properly addressed and prepaid, in good season, or shipped by express, or transmitted from baggage-master to baggage-

master of a regular railroad (methods of transmission in general use and usually safe and reliable), and was delayed on the way, is entitled to have the judgment set aside. *Malone v. Big Flat Gravel Min. Co.* (1892) 93 Cal. 384, 28 Pac. 1063; *Clark v. Oyharzabal* (1900) 129 Cal. 328, 61 Pac. 1119; *Loeb v. Schmith* (1868) 1 Mont. 87; *Boyd v. Williams* (1903) 70 N. J. L. 185, 56 Atl. 135; *Corning v. Tripp* (1844) 1 How. Pr. (N. Y.) 14; *Williams v. Richmond & D. R. Co.* (1892) 110 N. C. 466, 15 S. E. 97; *Chicago, R. I. & P. R. Co. v. Reese* (1910) 26 Okla. 613, 110 Pac. 1071; *Chicago, R. I. & P. R. Co. v. Eastham* (1910) 26 Okla. 605, 30 L.R.A.(N.S.) 740, 110 Pac. 887.

This rule has been recognized and applied in a divorce case.

The failure of a postmaster at the place where an answer in a divorce action, duly sealed and addressed to the clerk of the court, with the proper postage prepaid, was mailed in time to be delivered, pursuant to an order of court requiring it to be filed upon a day fixed, to send out the mail from his office as promised, is such an accident as entitles the defendant, who had been reasonably diligent on his own part, to an order, at once applied for, setting aside a decree of divorce entered by default. *Walrad v. Walrad* (1894) 55 Ill. App. 668.

A judgment of divorce granted *ex parte* for default of an answer in a cause taken up out of regular order upon the docket at a trial term, where the defendant was not a resident of the state, and had been served outside of it, should be set aside, upon an application of defendant, made the same day, tendering a meritorious defense and praying a continuance upon sufficient grounds. *Bostwick v. Bostwick* (1889) 73 Tex. 182, 11 S. W. 178.

*d. Excuses for absence from trials.*

A bill in equity to set aside a judgment on the ground of fraud, alleging that the trial was, by agreement of the parties, adjourned for the term, and that the successful party, after the departure of the complainant and his attorney from the court room, misrepresented fraudulently to the court the facts, procured an order canceling the continuance, and obtained judgment by a default, is good upon demurrer. *Evans v. Wilhite* (1910) 167 Ala. 587, 52 So. 845.

That a divorce suit at issue regularly, and ready for trial, was transferred to another forum without notice to the defendant, and there tried *ex parte*, affords

ground for setting aside the decree and ordering a new trial on motion promptly made for the purpose *Cottrell v. Cottrell* (1890) 83 Oal. 457, 23 Pac. 531.

A decree of divorce granted to a man from his wife on the ground of her adultery, by default at trial term for failure on her part to appear for trial after joining issue and setting up a good defense on the merits, where she had moved and been refused a postponement after presenting proof of the absence in Europe of a material witness in her behalf, and her own inability to be present because of a serious personal illness, should be opened upon her motion seasonably made thereafter, upon such terms as are just, notwithstanding the plaintiff had, in the meantime, married another woman. *Scripture v. Scripture* (1893) 70 Hun, 432, 24 N. Y. Supp. 301.

A decree of divorce granted at trial term on account of the defendant's failure to appear at trial, after an application to postpone, upon a physician's certificate of illness, rejected for lack of verification on oath, should be set aside on motion promptly made, accompanied by indisputable evidence that the defendant was in fact actually too ill to attend the trial. *Henderson v. Henderson* (1903) 83 App. Div. 449, 82 N. Y. Supp. 444.

The case of *Jewell v. Jewell* (1904) 96 App. Div. 633, 89 N. Y. Supp. 166, bore a marked similarity to *Henderson v. Henderson* (N. Y.) supra, and the default taken at the trial was set aside on proof that the wife was in a sanatorium, actually confined to her bed, with her leg in a plaster cast on account of chronic inflammation of the knee.

A judgment of divorce taken by default at trial term against a wife unable to appear for trial on account of illness, and after the denial of an application by her counsel for a postponement, will be set aside on her motion, promptly made, where there had been three previous trials of the case and disagreements of the jury each time, showing the merit of the defense. *Mott v. Mott* (1909) 134 App. Div. 569, 119 N. Y. Supp. 483.

A public announcement by a trial court toward the end of a trial term that all civil cases would be continued and all the parties to them might go to their homes, while sufficient to justify a court of equity in setting aside a judgment afterwards taken against an absent defendant who had a good defense and was not in default, is not sufficient to relieve a defendant who was already in L.R.A.1917B.

default when the announcement was made, because the continuance neither excused the default nor deprived the plaintiff of his right to judgment. *National Fertilizer Co. v. Hinson* (1893) 103 Ala. 532, 15 So. 844.

The refusal of a trial court to continue the trial of a divorce suit beyond the term upon an application made after the cause had been reached for trial, toward the end of the term, because of a neglect to employ local counsel in time and a consequent unpreparedness for trial, affords no ground for setting aside a decree of divorce after the party to whom the divorce was granted has remarried. *Richards v. Richards* (1913) 24 Idaho, 87, 132 Pac. 576.

The order of a trial judge refusing to open a default and set aside a decree granted in a divorce suit upon a motion by the defeated spouse, grounded upon an alleged but disputed oral consent to put the case over the term, will not be disturbed on appeal where the record shows that the beaten litigant was present in person and testified in his own behalf when the decree was granted, without applying for a postponement or objecting to going on in the absence of his counsel, or asking leave to engage other counsel, and where the testimony established good grounds for the decree. *Erickson v. Erickson* (1914) — Iowa, —, 147 N. W. 737.

In Iowa for many years appeals to the supreme court were held to lie from judgments entered by default, and more recently the practice in such cases has been regulated by statute. By one enactment (Code, § 3790) default judgments void for jurisdictional defects may be set aside on such terms as seem to the courts to be just. If a default judgment of divorce is absolutely void for want of jurisdiction, the defendant, it is said, may attack it, either directly or collaterally, at any time. By another statute (Code, § 4105) a judgment or order cannot be reversed for an error which could have been corrected in the lower court until a motion therein to correct it has been made and overruled. By another section (Code, § 4106) the supreme court was empowered on appeal to review and reverse any judgment or order of the superior or district court, although no motion for a new trial had been made therein. The apparent conflict between these sections has been reconciled by construing the latter one to apply only to cases of judgments entered after a trial of the issues, and not to default judgments. The other section has

been held to cover decrees of divorce entered by default after service by publication, and hence to preclude a review by appeal in the supreme court of a decree attacked for irregular service without any preliminary motion in the lower court to set aside the service. *Belknap v. Belknap* (1912) 154 Iowa, 213, 134 N. W. 734.

*e. Terms of relief.*

Unless a statute requires terms to be imposed by way of payment of costs or otherwise as a condition of opening a judgment taken by default in a divorce suit, the court need not impose terms upon granting the motion. *Cottrell v. Cottrell* (1890) 83 Cal. 457, 23 Pac. 531. If the terms imposed as a condition of opening a decree of divorce entered upon default are unjust or unreasonable, in the light of all the circumstances, they will be mitigated on appeal. *Weidner v. Weidner* (1895) 85 Hun, 432, 32 N. Y. Supp. 894.

The failure of one who obtained leave to defend an action for divorce after judgment had been granted against him by default, to meet the terms prescribed as a condition for the relief given, leaves the decree in full force. *Howatt v. Howatt* (1913) 158 App. Div. 28, 142 N. Y. Supp. 908.

**XXXI. Application and effect of legislation concerning suits for divorce in attacking decrees.**

The jurisdiction of courts in divorce suits has been said to rest wholly upon statute; and if the legislature has not conferred it in any given case, it does not exist. *Baugh v. Baugh* (1877) 37 Mich. 59, 26 Am. Rep. 495.

It has also been said that it is a general principle of the law of divorce in this country that the courts of either law or equity possess no powers except such as are conferred by statute; and, therefore, authority for the action of a court in that class of cases must be found in the statute and cannot be looked for elsewhere. *Hopkins v. Hopkins* (1875) 39 Wis. 167.

The idea thus expressed has had a great influence upon courts when construing and interpreting statutes providing for setting aside or opening judgments, in respect of their application to decrees of divorce.

A petition for a review of a final judgment which dismissed a libel for a divorce in order that the libellant might have a new trial was held, in *Lucas v. Lucas* (1854) 3 Gray (Mass.) 136, be- L.R.A.1917B.

yond the judicial power to entertain, because it was said the power to review depended upon statute, and the Massachusetts statute conferring authority to grant reviews in all civil actions—the only statute in point—did not embrace libels for divorces, which, while in a sense civil actions, were different in essentials from all other legal controversies.

A general statute regulating practice in chancery, and allowing, under stated conditions, nonresident defendants not personally served the right to appear and defend, was, in *Owens v. Sims* (1866) 3 Coldw. (Tenn.) 544, held not to apply to divorce suits, and for this reason, and also because no other statute authorized a divorce suit to be revived after one spouse had died, a wife's application to open a decree of divorce obtained against her by her husband in his lifetime upon substituted service by publication which in fact gave her no notice was denied.

An Iowa statute (Rev. 1860, § 3160) not quoted in the report, but referred to as one providing that a defendant served only by publication, and not appearing, against whom a judgment had been rendered, within the next two years might come into court and move to have the action retried, was held, in *Gilruth v. Gilruth* (1866) 30 Iowa, 226, to have no application to divorce suits; but the court added: "It does not follow, however, that the defendant is without remedy of some kind if in fact she has suffered injury from the wrongful acts of the plaintiff. But it is not our province to advise or even suggest what the same may be."

This statute in its later form (Code, § 3796) was again held not to apply to divorce suits, in the case of *Tollefson v. Tollefson* (1908) 137 Iowa, 151, 114 N. W. 631.

In Indiana, in the middle of the nineteenth century, a statute in force allowed chancery decrees entered after service of process by publication only to be opened in order to permit the defense of the suit any time during five years. A contemporary statute provided that the practice and proceedings in divorce suits should be the same, with certain specified exceptions, as in other cases in chancery.

These statutes were held in *McJunkin v. McJunkin* (1851) 3 Ind. 30, not applicable in divorce suits. In that case a wife divorced in October, 1845, by a default decree entered in a suit commenced by publication only, applied at

the next term of the court, in February, 1846, for leave to come in and defend and to open the decrees on the ground that she had never had notice of the bringing of the action, nor any knowledge whatever that a suit was pending. Her application was denied upon an affidavit of the husband that he had married again since the decree, and that the allegations of the wife's proposed answer were not true. No question of fraud was raised in that case.

The question of setting aside for fraud a decree of divorce was adverted to, but left undecided, in the next case, *Wooley v. Wooley* (1859) 12 Ind. 663. In that case, the application was made to set aside the decree under a statute authorizing the court in certain cases to grant relief within one year against judgments suffered through mistake, inadvertence, surprise, or excusable negligence. The application was seasonably made, but granted in part after the year expired, and the order was reversed for that reason.

In *McQuigg v. McQuigg* (1859) 13 Ind. 294, an application was made to set aside a decree of divorce for fraud in obtaining it through a false averment by the plaintiff of a bona fide residence in the state when he was only a temporary sojourner for the sole purpose of procuring a divorce. Three years had elapsed and a remarriage had taken place since the decree was entered. The application was denied for want of power, the court holding that the equitable power to set aside judgments of superior courts by bill in chancery for fraud, or by complaint in the nature of such a bill, had been entirely superseded by the Indiana statutes relating to the vacating of judgments, and that relief could be had only under such statutes and by methods thereby given, and these did not cover cases of fraud.

In *Hoffman v. Hoffman* (1860) 15 Ind. 278, the facts and questions of law being similar, the decision of the court followed *McQuigg v. McQuigg* (Ind.) *supra*, without discussion or comment.

Tacit approval of these doctrines was given by the court in *Rindge v. Rindge* (1864) 22 Ind. 35, in refusing an application of a man to open a decree of divorce granted him against his wife in order to get more favorable terms respecting alimony and property given to her by the judgment.

In *Gage v. Clark* (1864) 22 Ind. 163, the court reiterated, upon the authority of *McQuigg v. McQuigg* (Ind.) *supra*, that "the modes of vacating judgments

in the higher courts are pointed out by statute and must be severally followed."

The decision in *Ewing v. Ewing* (1865) 24 Ind. 468, followed upon the same doctrine. In that case the court held that there were but two sections of the Indiana Code which authorized a new trial or relief against a judgment after the term at which the judgment was rendered; one, allowing the court, in its discretion, to grant relief any time within one year from a judgment rendered through mistake, inadvertence, surprise, or excusable neglect, and the other where causes for a new trial are discovered after judgment, and application for relief is made not later than the second term after the discovery; and neither of these applied to decrees of divorce.

Then came the case of *Willman v. Willman* (1877) 57 Ind. 500, with a departure from the then hitherto-accepted doctrines. In that case, while the court said it was a well-settled rule of law that there can be no proceedings to review a judgment of divorce, yet that rule had a practical application only to cases in which the decree was valid, and did not prevent the annulment of a decree void for want of jurisdiction of either the subject matter or the parties.

The doctrine that the statutes provided the only means of setting aside judgments in Indiana received a rude shock in *Nealis v. Dicks* (1880) 72 Ind. 374, where it was held that the power and right of courts of equity to set aside judgments procured by fraud were unquestionable, and that they were possessed fully by the courts of Indiana, and not restricted by the statutes.

This case was followed by that of *Cavanaugh v. Smith* (1882) 84 Ind. 380, in which it was declared to be well settled that a judgment may be attacked for fraud, and that such an attack may be made in some of the methods established by the rules of equity. The latter case was one in which a decree of divorce was attacked on the ground that it was procured by means of a false return of service of process on a nonresident defendant.

Then came the case of *Earle v. Earle* (1883) 91 Ind. 27, in which the court, while refusing to set aside a decree of divorce procured by a gross fraud on the court and the complainant because of the latter's inexcusable laches in delaying for fifteen years to bring a bill in equity to annul it, where a remarriage of the defendant had occurred in the meantime, nevertheless concluded that such a bill was maintainable notwithstanding

standing and despite the statutes on the subject of opening judgments and forbidding reviews of decrees of divorce. In that case the court re-examined the whole question and reviewed the previous decisions in point expressly to overrule such as conflicted with the stated conclusion.

The substance of the opinion in this case, which is an epochal one, may worthily be given. According to its author the complaint presented a case of a deliberate determination to defraud and injure the complainant, and to prostitute the courts of the state to accomplish that end. The court in one county, which had jurisdiction of the parties, being used as a decoy to fix her attention while the court in another county was misled and deceived by a false return of service of process and false statements as to residence, if by no other fraud, into rendering the decree of divorce. The case made by the complaint, it was said, was one calling loudly for relief if it could be granted consistent with well-settled rules of law. It was admitted that in Indiana the policy had been not to review or disturb decrees of divorce,—a rule adopted by the legislature and the courts from considerations of public policy. But, it was said, this did not sanction upholding decrees rendered in fraud of the courts; that every consideration demanded that fraud upon litigants should be rebuked; that courts should purge their records of all judgments and decrees procured by deception, fraud, or perjury; that the considerations of public policy forbidding the review of decrees of divorce applied only when the decrees were in fact rendered by courts having jurisdiction of the subject and parties. The opinion continued: The courts of this state cannot review judgments of divorce; this is prohibited by statute. In some of the earlier cases it seems to have been held that, in order to obtain relief from a judgment, the statute must be followed, and that the mode therein pointed out is exclusive of all others, and that, as it is provided that judgments of divorce cannot be reviewed, there is no remedy.

There were then cited and commented upon the cases lending support to this doctrine, some of them being distinguished from the instant case, and it was added: "It may be said that the uniform ruling of this court has been that a judgment of divorce cannot be reviewed under the section of the Code authorizing such a proceeding in ordinary actions, and that new trials after the

term at which decrees may have been rendered cannot be had in divorce cases under the section of the Code authorizing such new trials in ordinary civil actions." Also, that "from the cases above examined, the former rulings seem to have been that no relief could be had from judgments in any case except in the manner pointed out in the Code, and that, as no mode is provided by statute in divorce cases, no relief from such judgments could be had."

While this was so, the later, and what were thought to be the better-considered cases of *Willman v. Willman* (1877) 57 Ind. 500, and *Nealis v. Dicks* (1880) 72 Ind. 374, departed from the path the others had followed, the first in holding the rule that divorce cases cannot be reviewed to be limited to valid judgments, and in drawing a distinction between a proceeding to review and one to vacate and set aside a judgment, and the second in holding that the statute concerning reviewing judgments was not restrictive of judicial power to set them aside to the causes and modes specified, and the exclusion of others, but that the courts have the power and right to annul them for fraud in obtaining them. And the more recent case of *Cavanaugh v. Smith* (1882) 84 Ind. 380, was pronounced well considered and equally strong on the same side. "These late cases," said the court, continuing, "supported as they are by reason and a very full citation of authorities, establish the doctrine in this state that judgments obtained by fraud upon the court may be successfully assaulted for that reason, and that in such assault the grounds and mode pointed out in the statute are not exclusive." And inasmuch as the authorities without the state make no distinction between divorce and other judgments, and no reason exists why there should be any such distinction, the court concluded that there was no reason for a distinction in Indiana, and therefore, "where by deceit and fraud a court is deceived into assuming jurisdiction and entering decrees dissolving the marital tie . . . every consideration of public policy and regard for innocent children require that the court, upon the discovery of such fraud, shall protect itself and the public therefrom, . . . that when such a wrong has been consummated in the obtaining of decrees of divorce the courts have the right and owe the duty to set them aside and declare them null and void."

The court, having reached this conclusion, did not hesitate to take the logical

step and declare that, so far as the case of *McQuigg v. McQuigg* (1859) 13 Ind. 294, and those that had followed it, conflicted with this conclusion, they should be overruled.

The overruling of the *McQuigg* Case was confirmed in *Powell v. Powell* (1885) 104 Ind. 23, 3 N. E. 639.

The Indiana statute (Burns's Anno. Stat. 1901, § 1042) which provides that a party against whom a divorce shall have been granted without other notice than a publication in a newspaper may, within two years, have the decree opened and be allowed to defend, is held to have no application to a case where the party who obtained the divorce died in the meantime, and neither alimony nor property rights were affected by the decree. *Day v. Nottingham* (1903) 160 Ind. 408, 66 N. E. 998.

In *Kansas* the course of judicial opinion was markedly similar. In that state it was held at first that a decree of divorce entered by default after a service only constructive by publication, against a defendant actually residing out of the country, where such service had been legally made without any trick, falsehood, or imposition of any sort, and where every step pointed out by statute had been fairly and correctly taken, pursuant to the act authorizing service of notice in divorce cases to be made upon a nonresident defendant by publication in a newspaper for a stated length of time, and through the postoffice by mailing a copy of the petition and of the published notice, properly addressed, to the defendant, and inclosed in a sealed and prepaid envelop,—was in all respects a legal and valid judgment which could not be set aside by motion under a statute authorizing judgments in suits "without other service than by publication in a newspaper" to be vacated, because the provision for mailing and a compliance with its requirements took divorce cases out of the application of the statute, notwithstanding proof that the published notice never came under the eye of the defendant and the mail matter never reached the addressee until after the decree had been entered. *Lewis v. Lewis* (1875) 15 Kan. 181.

This case was at first distinguished and limited by a decision that a decree of divorce entered by default after a service solely by publication in a newspaper, without any mailing whatever, because the plaintiff had filed an affidavit to the effect that no other service could be made, should, in virtue of the statute, be set aside, with leave to come in and L.R.A.1917B.

defend, on motion of the defendant, made within the prescribed time, showing a meritorious defense, and accompanied by proof of actual ignorance of the proceedings. *Hemphill v. Hemphill* (1888) 38 Kan. 220, 16 Pac. 457.

The decision in *Lewis v. Lewis* (Kan.) supra, was mildly criticized as "supported by some rather artificial reasoning" in *Blair v. Blair* (1915) 96 Kan. 757, 153 Pac. 544, where a divorced wife who sought, after thirty years, to set aside a decree based upon a substituted service, was denied relief because there was no property to be reached in the state of Kansas, and the husband had married another woman and died, leaving property in Missouri, where the second wife and her children by him lived, and could not be served with process personally in Kansas, and where a statute of Kansas gave only two years in which to obtain such relief on petition. Anent this, in the later case, contra to the doctrine of the earlier one, the court said: "If Blair were alive, and had not remarried and the conditions of the statutory remedy were complied with, no reason is apparent why it should not be available to the plaintiff. If he were alive, and, within the time allowed for vacating the judgment, he had remarried, there is still no reason why the remedy should not be available. The statute does not make an exception of divorce decrees or of divorce decrees in case a second marriage occur, and the statute itself is notice of power retained over the decree for a limited time. If the views already expressed be sound, that property rights flowing from the marital status may be recognized and protected although the status itself has been withdrawn from the jurisdiction of the court, Blair's death ought not to prevent the plaintiff from invoking the statutory remedy."

The doctrine of the *Lewis* Case was repudiated in the opinion of the court in *Bell v. Bell* (1916) 97 Kan. 616, 156 Pac. 778, where the way was open to distinguish it, had the court been minded to do so. The decision in the *Bell* Case was that the then general statute of Kansas respecting setting aside judgments entered on default after constructive service by publication, upon an application made within two years for leave to come in and defend, applied to decrees of divorce obtained by means of a false affidavit to procure authority to serve by publication, notwithstanding a new marriage had taken place on the faith of the decree. The court, in its opinion, referred to the case before it as one



wherein the real question for determination was whether or not a decree of divorce was governed by a different rule, on account of public policy and the consequences involved, from that governing other judgments entered after constructive service by publication and on default obtained by means of fraud, and which by general statute might be set aside upon petition presented within two years. In the case at bar the spouse who had fraudulently obtained the divorce under attack had married another and had begotten a child by the second marriage, so that all the deplorable consequences had ensued the contemplation of which had so appalled the court in the Lewis Case as to lead it to deny, through "artificial reasoning," relief to the wronged wife.

The case of *Blair v. Blair* (1915) 96 Kan. 757, 153 Pac. 544, was cited in the Bell Case and therein said to have set at rest the question by deciding that the statute concerning the opening of judgments made no exception of divorces, or of decrees of divorce where second marriages had occurred, and was in itself notice that the power to vacate judgments of divorce as well as other judgments was retained for the time limited in the statute.

The supreme court of Nebraska, on the authority of *McJunkin v. McJunkin* (1851) 3 Ind. 30, and *Lewis v. Lewis* (1875) 15 Kan. 181, held a general statute of that state (Code, § 82, Gen. Stat. 536) which provided for opening judgments taken on constructive service inapplicable to divorces, and affirmed on writ of error a denial of a divorced wife's motion, seasonably made, to set aside the decree granted her husband by default on such a service, and for leave to answer and defend his suit on the merits. *O'Connell v. O'Connell* (1880) 10 Neb. 390, 6 N. W. 467.

An early statute of Missouri (Rev. Codes 1845, p. 426), which gave the circuit court, sitting as a court of chancery, jurisdiction in cases of divorce and alimony, and provided that the like process and proceedings should be had in those as in other equity causes; and an act regulating chancery practice (Rev. Codes 1845, art. 6, §§ 1-4, p. 851), which provided that a decree rendered against a defendant not summoned, who did not appear, might be set aside by bill of review filed within a stated time and verified by affidavit showing it to be against equity, were held applicable to decrees in divorce suits, and, conformably to such ruling, a decree granted to a husband

was set aside on the divorced wife's bill strictly answering the statute, notwithstanding he had contracted a second marriage. *Smith v. Smith* (1854) 20 Mo. 166, Scott, J., dissenting.

It was afterwards decided, in sustaining a demurrer to the petition in the cause for failure to state a cause of action, in *Childs v. Childs* (1882) 11 Mo. App. 395, that, because of inhibitory legislation in Missouri, an original action would not lie in that state to set aside a divorce granted by default upon constructive service only by publication, and based on charges that the decree was obtained by fraud and falsehood.

In holding the demurrer good, Thayer, J., at nisi prius, took occasion to say; From the facts alleged by the plaintiff this would appear to be a case where a court of equity ought to interfere and set aside the original decree of divorce on the ground that the same was procured by fraud; but our statute respecting divorce has apparently barred the door to such relief. Section 2184 of the Revised Statutes of 1879 limits the right of appeal from a decree of divorce to the term at which the decree was rendered, and the right to sue out a writ of error to sixty days after the entry of the decree. Section 2185 (as if to close the way to all redress in matters of divorce where an appeal is not taken or a writ of error is not sued out in time) provides that "no petition for review of any judgment for divorce rendered in any case arising under this chapter shall be allowed, any law or statute to the contrary notwithstanding." This proceeding is clearly a petition for review of the judgment or decree of divorce.

. . . The statute went into force in May, 1856, and has been incorporated into each subsequent revision. I am of the opinion, continued Judge Thayer, that the legislature intended by § 2185 of the divorce act to prohibit courts from entertaining petitions for review (based on any ground) after the lapse of the term at which the decree was rendered. They probably foresaw that persons once divorced might contract new relations by marriage with innocent third parties, and that to allow such decrees to be impeached, even for fraud, years or even months after they were rendered, would be productive of more harm than good. This ruling will not prevent the courts from setting aside decrees of divorce at any time, under the authority of *Cole v. Cole* (1877) 3 Mo. App. 571, where the record on its face shows that the court had no jurisdiction over the case and

that the decree is a nullity; but where it is sought to impeach decrees of this character by evidence aliunde and for matter not apparent on the face of the record, the courts, in my opinion, have no power under the statute to proceed.

On appeal from Judge Thayer's decision sustaining the demurrer, Thompson, J., for the court of appeals, said: We concur in the foregoing opinion and adopt it as our opinion in this case.

. . . We will add, however, that, taking the facts stated in this petition to be true,—and the demurrer admits them to be true,—we regard this as a very hard case. It is the case of a woman whose husband, after having repeatedly repelled her from him, has finally abandoned her and left her and an infant daughter of their marriage for years in another state, without any support, until, in a state of extreme destitution, she places her cause in the hands of an attorney of this city, where her husband resides, only to find that he had been two years divorced from her in a proceeding of which she was wholly ignorant, of which he might easily have notified her, and that he is engaged in business and possessed of ample means of supporting her and their child. The learned counsel for this lady does not use strong language when he says that she stands here claiming a high and solemn equity at our hands. We regret that the legislature has prohibited us from listening to her petition. We would open the door of the circuit court to her if the lawmaking power had not barred it against her.

Five years later, the Missouri supreme court, in a case precisely like that, refused for the same reasons to grant relief from a decree of divorce which it characterized as having been procured by deception, fraud, and a systematic course of conduct on the part of the man who got it to keep his wife ignorant of his purpose and proceedings. As in the Childs Case, the decree had been granted by default ex parte, upon a service by publication only, but, unlike the Childs Case, the man had not married again and no rights of innocent third persons were involved. *Salisbury v. Salisbury* (1887) 92 Mo. 683, 4 S. W. 717.

There followed and were decided the same way *Hansford v. Hansford* (1889) 34 Mo. App. 262, and *Smith v. Smith* (1892) 48 Mo. App. 612, neither of which differed essentially from the Childs and Salisbury Cases.

Soon afterwards it was decided that when a statute provides that an interlocutory judgment entered by default

may be set aside for good cause and upon such terms as shall be just, any time before a final judgment shall be rendered, and another statute regulates the proceedings to set aside final judgments, an application of a defendant served only by publication, made after the entry of a final judgment of divorce, to set aside the interlocutory decree, is too late, and must be denied. *Burnes v. Burnes* (1895) 61 Mo. App. 612.

Then came the case of *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94, on second appeal (1914) 257 Mo. 317, 165 S. W. 783, in which it was declared that the legislature had no power to deprive the courts of the right to set aside decrees of divorce for fraud in procuring them, under a state Constitution which, in express words, conferred upon them, as did Missouri's, general jurisdiction at law and in equity.

A statute, said the court in that case, which attempted to deprive one divorced by a judgment concocted in fraud and granted in a cause which the court was induced to take jurisdiction of by the plaintiff's perjury, without any notice to the defendant, of every possible remedy to upset it, would be unconstitutional and void for divesting the defendant of marital rights without due process of law.

The facts in that case were very like those in the Childs and Salisbury Cases. In each case there was an original petition addressed to the equity side of the court, praying that a decree of divorce be set aside, with leave to defend, on the ground that it had been procured by falsehood and fraud. In each case the question involved was whether or not the Missouri legislation barred the petitioner from the relief sought. In the first two cases that question was decided in the affirmative. On the first appeal in the third case, it was, with only one of the judges dissenting, decided in the negative.

It is worth while to give a brief consideration to the prevailing opinion, by Brown, C., adopted by the majority in banc as that of the court. After citing the prohibitory and restrictive legislation respecting reviews of judgments in divorce cases, the learned commissioner deftly cut away the foundation of the previous decisions by saying: That the petition in this case is not a petition for review under any reasonable definition of that term is evident. It neither corresponds to the definition of "bill of review" as formerly used in chancery practice, nor to the definition of "petition for

review" as used in the practice act of which the practice relating to divorce and alimony forms a part. Proceeding, the opinion in the Salisbury Case was quoted from extensively and its inconsistency with an opinion by its author in a later case was pointed out and coupled with a statement that the court now could not reconcile the two, and must assume that the views of the judge who wrote both had, between time, undergone a change. The conclusion was: "We think that the gross frauds charged in the petition and admitted by the demurrer render the judgment of divorce which it seeks to set aside void as between the parties thereto, and that it should, upon the facts stated, be set aside in equity. We are also of the opinion that the statute invoked by defendant, forbidding the allowance of a petition for review in such cases, is not applicable to an original suit of this character, and was not intended to so apply. . . . If there is anything in the case of *Salisbury v. Salisbury* (1887) 92 Mo. 683, 4 S. W. 717, inconsistent with these views, it is, to that extent, disapproved."

The case having been remanded and tried on the merits, the fraud charged was established by the evidence, and the decree of divorce accordingly was set aside, and the defendant appealed. On this appeal the court, in affirming the judgment, said: We decline to recede from the rules of law announced in our majority opinion when this case was here upon the first appeal. If § 2381, Rev. Stat. 1909, forbidding a petition for the review of a judgment for divorce, is intended to prohibit relief in equity against such frauds as were perpetrated upon the circuit court and upon the plaintiff in obtaining the divorce granted to defendant, then clearly such section is unconstitutional. The power of courts to grant equitable relief against frauds is as firmly interwoven in our system of jurisprudence as the power to grant relief at law. The people having expressly conferred equitable powers upon the courts of this state by the very Constitution which calls courts into existence, the general assembly cannot withdraw or unreasonably restrict such powers without violating the organic law. . . . For the general assembly to undertake to nail up the doors of the courts of equity by saying to them that whatever may be done under the forms of the divorce statutes is too sacred to be inquired into is an unthinkable anomaly.

That § 2381, Rev. Stat. 1909, said Rob-L.R.A.1917B.

ertson, P. J., writing afterwards in *McDonald v. McDonald* (1913) 175 Mo. App. 513, 161 S. W. 850, does not prohibit an action to have a decree of divorce annulled by reason of alleged fraud in its procurement has been settled in the case of *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94.

It was held in Ohio in the case of *Parish v. Parish* (1859) 9 Ohio St. 534, 75 Am. Dec. 482, that a bill in equity filed by a wife to set aside a decree of divorce procured by her husband, alleged to have been obtained by fraud and perjury, setting forth that the husband had, to confer jurisdiction on the court, falsely represented himself as a resident of the county, and suborned false witnesses to prove his residence; that the wife had never been served with notice of or had any knowledge of the bringing or pendency of the divorce suit; that the husband purposely procured the suppression of exchanges of newspapers publishing the notice with those of the wife's home, with intent to conceal from her the proceedings; that he took depositions secretly for the same object; and that he wickedly and corruptly suborned false witnesses to establish by perjury the charges he had made against her as a ground for divorce,—could not be maintained.

The court based its opinion upon the ground that the existing Ohio statute conferring jurisdiction in divorce cases on the courts of common pleas forbade an appeal from a decree of divorce and declared that it should be final and conclusive, and constituted a principle of public policy that judgments directly affecting the matrimonial status by dissolving the marriage bond so that new alliances could be contracted with innocent persons should never be reopened. And it relied upon the authority of *Greene v. Greene* (1854) 2 Gray (Mass.) 361, 61 Am. Dec. 454, in which the supreme judicial court of Massachusetts threw out a bill in equity to annul an absolute divorce alleged to have been procured by perjured testimony of the complainant's adultery.

The Parish Case was disapproved by the Maine supreme court in *Adams v. Adams* (1871) 51 N. H. 388, 12 Am. Rep. 134, which said that, as to its reasoning, "we cannot subscribe, and we think it is opposed both to principle and authority."

The Parish Case was also disapproved by the supreme court of Nebraska, which refused to agree with its reason in almost the same words that the Maine supreme court had used. *Wisdom v. Wisdom*

(1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

And the Parish Case was again cited, examined, and disapproved by the supreme court of North Dakota in rendering a contrary decision in the case of *Yorke v. Yorke* (1893) 3 N. D. 343, 55 N. W. 1095.

Constrained by the decision in *Parish v. Parish* (1859) 9 Ohio St. 534, 75 Am. Dec. 482, Johnson, J., in *Rine v. Hodgson* (1883) 9 Ohio Dec. Reprint, 104, sustained a demurrer to a bill brought by a man against the next of kin of his deceased wife to set aside a divorce granted her from him after service by publication, alleging that she was, at the time, an imbecile, devoid of mental capacity, under care of her relatives, who his instituted and carried through the divorce proceedings in her name, she unwilling and not understanding their effect and purpose, which was solely to cut him off from his rights as husband in her estate.

But this decision was reversed on appeal (1884) 9 Ohio Dec. Reprint, 275, because the court distinguished *Parish v. Parish* (Ohio) *supra*, by limiting that decision to cases in which jurisdiction had been really acquired in the divorce suit over the defendant's person, and by holding that in the case at bar the court never had jurisdiction of the person of the nominal plaintiff because her mental condition made her incapable of conferring jurisdiction.

A general statute of Ohio (Rev. Stat. § 5335) in force at the time of the decision, and which applied to any judgment of the court of common pleas rendered upon a service by publication, and provided for opening it any time during five years, was by *Abernathy, J.*, reluctantly held, in *VanDerveer v. VanDerveer* (1893) 11 Ohio Dec. Reprint, 828, to require the granting of a motion by the defendant so served, and made in time, to open a judgment of divorce and be let in to defend, since the court could find no statute making any exception even by implication in divorce cases, and, although personally opining it to be against public policy to open judgments of divorce, where another marriage had taken place, he felt powerless to deny a right given by statute.

Regarding the case of *VanDerveer v. VanDerveer* (Ohio) *supra*, it was held in *Solomon v. Solomon* (1904) 26 Ohio C. C. 307, that the general statute (Rev. Stat. § 5355), which was very similar in terms to, if not identical with, the statute in the earlier case, did not apply

in divorce cases, because these were in a class by themselves, and involved matters of public policy, and were governed by different principles.

An opinion in accord with *Solomon v. Solomon* (Ohio) *supra*, was expressed in *Casto v. Casto* (1907) 10 Ohio C. C. N. S. 265, 30 Ohio C. C. 93, and *Casto v. Casto* (1907) 10 Ohio C. C. N. S. 268, 30 Ohio C. C. 96, where the application to set aside the divorce was grounded upon allegations of no notice of the proceedings, and there was a failure of the applicant to prove satisfactorily want of notice.

Then, after an elaborate review of the cases in point, the circuit court of Mercer county, in *Mulligan v. Mulligan* (1908) 11 Ohio C. C. N. S. 585, 31 Ohio C. C. 89, reversing the court below, held good on demurrer an amended petition brought to set aside for fraud and perjury in obtaining it a divorce granted upon substituted service. The court refused to follow *Parish v. Parish* (1859) 9 Ohio St. 534, 75 Am. Dec. 482, and held that the statute (Rev. Stat. § 5355) did apply to judgments of divorce as well as to other judgments rendered upon service by publication. It condemned the theory that public policy required divorces, however tainted by fraud, to be absolutely unassailable in order not to disturb second marriages contracted on the strength of them, and insisted that true public policy required the greater protection of the wronged wife than of the affinity or paramour who supplanted her.

Because of legislation originally enacted in 1816, forbidding a writ of error to issue to reverse any decree of divorce from the marriage contract, the court of appeals of Kentucky has held that it has no power to disturb a judgment which dissolves the bonds of matrimony, whether right or wrong, warranted or unwarranted by the facts, in so far as the divorce alone is concerned; but it may and does review the provisions respecting alimony and property rights in decrees of divorce. *Maguire v. Maguire* (1838) 7 Dana (Ky.) 181; *Bourne v. Simpson* (1849) 9 B. Mon. (Ky.) 454; *Meyar v. Meyar* (1860) 3 Met. (Ky.) 298; *Bristow v. Bristow* (1899) 21 Ky. L. Rep. 481, 51 S. W. 819; *Green v. Green* (1913) 152 Ky. 486, 153 S. W. 775.

The legislative restriction upon the court of appeals was not originally extended to the trial courts, for it was held that a court which had granted a decree of divorce might afterwards, upon a seasonable application and upon a

proper showing, grant a new trial at a later term, in virtue of a general statute empowering courts to grant new trials after judgments by default upon constructive service. *Meyar v. Meyar* (1860) 3 Met. (Ky.) 298.

Later, in *McCracken v. McCracken* (1901) 109 Ky. 766, 60 S. W. 720, and in accord with the decisions in the cases of *Bristow v. Bristow* (1899) 21 Ky. L. Rep. 481, 51 S. W. 819, and *Bentz v. Bentz* (1900) 21 Ky. L. Rep. 1225, 54 S. W. 715, the opinion was expressed that a divorce could not be set aside by the court which granted it, even during the same term, except upon the petition of both spouses, under the statute (Civ. Code, § 426) then in force.

In that case, as one gathers the facts from the report, a wife applied to set aside a decree obtained by her husband, upon the ground that she had been led by him to believe that the suit had been abandoned, and did not learn otherwise until after judgment. She claimed that she had a good defense and had employed attorneys to answer, and that they had failed her. The court opened the decree, let the wife in to defend, and, on the final hearing, dismissed the suit, with leave to the husband to appeal to the court of appeals. On that appeal the court considered the appellant's objection to setting aside the decree well taken, and the order setting it aside erroneous because of the statute and the previous decisions respecting it, but, it added: "If, however, this is not so, we are still of the opinion that the appellant showed himself entitled to a divorce, and that a judgment divorcing him from the appellee should have been entered under the evidence finally introduced and presented to the court. It therefore follows that the order complained of was erroneous, and that the judgment dismissing the appellant's petition was also erroneous."

A court which has rendered a decree of divorce has not, in Kentucky, the power, at a subsequent term, upon an application by one party against the opposition of the other, to set the decree aside upon the ground that the attorney for the beaten party was in court every day of the term, and did not know that the cause was submitted, heard, or that judgment had been rendered, until the term had expired, when the only statute empowering the court to set aside divorces requires united application by both parties. *Hendrix v. Hendrix* (1903) 25 Ky. L. Rep. 632, 76 S. W. 165. L.R.A.1917B.

The Kentucky statute (Civ. Code, § 344) which provides for the granting of new trials when grounds for them are discovered after the term at which the verdicts were found or decisions were rendered, when applications are made not later than the second terms after discoveries, and within three after final judgments, does not apply to decrees of divorce, so far as they dissolve the bonds of matrimony. *Droste v. Droste* (1910) 138 Ky. 53, 127 S. W. 506.

The only power a court has in Kentucky to annul a decree of divorce which it has granted, after the term at which it granted it, is by virtue of the statute (Civ. Code, § 426) providing for such action upon the verified petition of both parties. *Ibid.*

The Washington statute (Bal. Codes & Stat. § 4880) which provided that if the summons was not served personally on the defendant, he should, on application showing sufficient cause, be allowed to defend the action any time before judgment, and, except in divorce suits, any time within one year after judgment, on such terms as might be just, was construed by the supreme court to take away the power of the court which granted a decree of divorce upon substituted service by publication and for default of appearance and answer, to let a wife in to defend after judgment, if the jurisdiction of the court to grant the decree existed and no fraud had been practised on the court or defendant. *Metler v. Metler* (1903) 32 Wash. 494, 73 Pac. 535. The decision was grounded upon the familiar statement that the legislature intended to limit the right to defend divorce suits after judgment, because a decree affected the status of the parties both in respect of themselves and the public; and as the right to marry again ensued, grievous injury might result to innocent third persons if the decree could be disturbed.

An application to open a judgment of divorce granted by default upon service by publication, and grounded upon a charge that the plaintiff, well knowing the true postoffice address of the defendant, fraudulently named another, with intent to prevent the summons and complaint from coming to her knowledge by mail, and of purpose to deprive her of the opportunity to defend the suit, constitutes an exception to the statute construed in *Metler v. Metler* (Wash.) supra, and therein held to deny power to the court to vacate decrees of divorce granted where jurisdiction existed and fraud was not alleged. *McDonald v.*

McDonald (1904) 34 Wash. 293, 75 Pac. 865.

The Washington statute (Bal. Codes & Stat. § 4880) which was held in Metler v. Metler (Wash.) supra, to preclude the setting aside of divorces rendered on constructive service, was held not to deprive the court from opening a decree of divorce so rendered which had been procured by a fraudulent imposition on the court and the defendant which prevented knowledge of the suit and the making of any defense before judgment. Chaney v. Chaney (1909) 56 Wash. 145, 105 Pac. 229.

A general statute empowering a superior court after term time to vacate or modify a judgment or order for fraud practised by the party who obtained it, upon petition of the injured party, setting up the grounds and verified, embraces decrees of divorce irrespective of whether process was served personally or constructively, and regardless of a special statute permitting judgments entered in suits other than for divorce, upon substituted service, to be set aside within a year. Ibid.

In several states statutes authorizing judgments in general to be set aside in certain circumstances have been held to embrace decrees of divorce.

A general statute permitting any final decree in chancery, entered without other service of process than by publication, to be opened within a stated time to allow a defense to be made, applies to decrees of divorce. Lawrence v. Lawrence (1874) 73 Ill. 577.

In virtue of that statute a decree of divorce made upon a service only by publication does not become absolute until the expiration of the time named in the statute, and must be opened on a proper application and sufficient proof by the defeated spouse, notwithstanding the successful one remarried during the interval. Ibid. In this case three of the members of the court dissented; two of them taking the ground that the general statute respecting chancery decrees did not apply in divorce cases, and the third, while questioning its application, contending that, even if it did apply to decrees of divorce, inasmuch as it provided for opening decrees only upon terms such as should appear to be just, it would not be just to set aside a decree where a remarriage had taken place and the second wife was innocent, and would necessarily be thereby injured.

The Minnesota statute (Gen. Stat. 1913, § 7910) giving a right of action to set aside a judgment procured by fraud L.R.A.1917B.

in invoking the jurisdiction of the court or in preventing a defense embraces decrees of divorce. Brockman v. Brockman (1916) — Minn. —, 157 N. W. 1086.

The general statutes of Nebraska (Civ. Code, § 602) and Iowa (Code, § 4091), empowering district courts to vacate or modify their judgments or grant new trials at later terms for errors in proceedings against infants or lunatics where the errors or status do not appear by the record, have been held to apply to decrees and suits of divorce. Wisdom v. Wisdom (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594; Wood v. Wood (1907) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

A statute of Nevada (Rev. Laws, § 5084) gives a right to a defendant, available in divorce cases, to move to set aside and to have vacated a judgment rendered within the preceding half year upon a substituted service by publication and mailing which gave no actual notice, and it is immaterial whether or not any fraud was committed to obtain the decree. Miller v. Miller (1914) 37 Nev. 257, 142 Pac. 218.

A statute of Oklahoma authorizing original actions to set aside judgments, unlike, it is said, statutes in other jurisdictions where the contrary has been decided, has been held to be so worded as to have application to new actions to vacate or modify decrees of divorce upon sufficient grounds, instead of confining relief to proceedings in the suits for divorce. Holt v. Holt (1909) 23 Okla. 639, 102 Pac. 187.

A Texas statute (Rev. Stat. 1895, art. 1375) which provided that in cases where judgment was rendered on service by publication, and the defendant did not appear in person or by an attorney of her own selection, a new trial might be granted for good cause upon an application supported by the applicant's affidavit, was held to embrace decrees of divorce. Bracht v. Bracht (1908) — Tex. Civ. App. —, 107 S. W. 895.

By a statute of Virginia (Code 1873, chap. 166, § 16), which applied as well to decrees of divorce as to other judgments, a defendant who was not served personally with process and who did not appear in the action became entitled to have the cause restored and reheard any time before the end of a five-year period, provided he was not served with a copy of the judgment more than a year before it ended. Cralle v. Cralle (1884) 79 Va. 182.

By a later statute of Virginia (Code,

§ 3233) an absentee spouse divorced without a personal service of process and without having appeared, and who petitioned for a rehearing within a year, was given a legal right to come in and answer to the end that any injustice that had been done by the decree might be corrected. *Willard v. Willard* (1900) 98 Va. 465, 36 S. E. 518.

A constitutional provision in Louisiana gave the supreme court jurisdiction of appeals from judgments of divorce, and, as a necessary consequence, of appeals from actions to annul judgments of divorce, these being only variant modes of revising or reversing judgments. *Bryant v. Austin* (1884) 36 La. Ann. 808.

The Nebraska Constitution (art. 1, § 24), in providing that the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise, should not be denied, and the statute (Code, § 675) giving either litigant the right to appeal from judgments, decrees, and final orders in equity actions, made by district courts, to the supreme court, were held to give or preserve the right to review decrees of divorce by the supreme court as in other cases. *Brotherton v. Brotherton* (1881) 12 Neb. 72, 10 N. W. 543.

A provisional decree of divorce granted in a suit begun by personal service under a statute then in force, allowing such a divorce for utter desertion, subject to be made absolute in case the parties continue for five years to live separately, where the desertion charged had occurred and continued for only a year before the suit was brought, is unauthorized by law and null when the statute had been repealed before the decree was granted, and replaced by a new statute which authorized a divorce absolute to be granted for utter desertion which had continued for three years previous to the beginning of proceedings, and consequently must be set aside upon the petition of the defeated spouse. *Wales v. Wales* (1875) 119 Mass. 89.

Under a Massachusetts statute (Act of 1870, chap 404) a decree of divorce might be had for causes which previously would have entitled the libellant to a decree of divorce from bed and board. It was in fact equivalent to such a decree, and did not dissolve the bond of matrimony until it was made absolute by the court by a new decree upon a new petition, after the couple had continued to live apart for a stated number of years. The decree nisi (so-called) was conclusive upon the parties in the absence of an impeaching fraud, and barred L.R.A.1917B.

a suit by the unsuccessful spouse for a divorce from the successful one upon any grounds set up in defense and adjudicated adversely. It left the marital obligation subsisting until it was made absolute, and for a breach of that obligation, occurring in the intervening time, the innocent spouse might maintain a suit against the guilty one for an absolute divorce. *Edgerly v. Edgerly* (1873) 112 Mass. 53.

#### XXXII. *Effect on attacks on divorces of death of spouse granted decree.*

The death of a spouse who procured a divorce by means of a palpable fraud will not defeat proceedings to vacate and annul the decree. *Leathers v. Stewart* (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366.

The death, in and of itself alone, is no bar to an action to set aside the decree so obtained. *Bomsta v. Johnson* (1888) 38 Minn. 230, 36 N. W. 341.

An action to annul a decree of divorce obtained by a clear and palpable fraud by default, on a service of process only constructive, if promptly brought after the facts have been discovered, may be successfully maintained by a wronged wife against the executor of the guilty husband, after his death. *Bryant v. Austin* (1884) 36 La. Ann. 808.

A decree of divorce entered in a suit of which apparent jurisdiction was conferred on the court by a fraud may be annulled notwithstanding the spouse who obtained it is dead. *Rodgers v. Nichols* (1905) 15 Okla. 579, 83 Pac. 923; *Clay v. Robertson* (1912) 30 Okla. 758, 120 Pac. 1102.

After the death of one or both parties to a divorce, if property rights are directly affected the decree may be attacked by appeal or otherwise, the same as any judgment. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A.(N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

The right of a spouse aggrieved by a decree of divorce obtained by fraud, or fraudulently prevented from learning of the pendency of the divorce proceedings, or from appearing in them and defending, to have that decree set aside, may, and in some instances does, survive the death of the other spouse. *Day v. Nottingham* (1903) 160 Ind. 408, 66 N. E. 998.

But an action for divorce, brought by a wife against her husband, involving naught save a dissolution of the marriage, in which neither alimony is asked nor any property interests are affected, ending in a decree in her favor, adjudg-

ing that she pay the costs, is so wholly in rem that it dies with her person; and therefore an action to set aside the decree will not lie after she is dead. *Ibid.*

A court will not set aside for a fraud in procuring it a decree of divorce for sentimental reasons alone, where no property rights are involved, after the remarriage and death of the spouse to whom it was granted. *Lawrence v. Nelson* (1901) 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84.

But if property rights have been invaded or taken away from the wronged spouse by such a decree, the death of the spouse who obtained it will be no bar to a suit in equity or other appropriate proceeding to set it aside. *Ibid.*

A divorced wife, after the husband's death, in a suit to partition lands of which he died seised, may, for the purpose of reaching and recovering her interest as widow in such lands, have set aside and annulled the judgment of divorce upon the ground that it was obtained by fraud and imposition on the husband's part. *Daniels v. Benedict* (1892) 50 Fed. 347.

In Ohio, it has been held that a judgment of divorce, even if it was obtained by fraud and perjury, may not afterwards be overturned in so far as it dissolved the marriage, but, if the court which rendered it did not have jurisdiction of the defendant,—the wife,—and assumed by the decree to cut her off from her property rights, she may, in order to establish such property rights, be relieved from the judgment after her husband's death. *Bay v. Bay* (1912) 85 Ohio St. 417, 98 N. E. 199.

In Wisconsin a former wife has been held entitled to maintain a suit in equity to set aside a decree of divorce fraudulently taken against her by her husband in his lifetime, after his death, against his administrator and heirs, in order to establish her rights in and to recover her share of the real and personal property of the deceased, as his lawful widow. *Johnson v. Coleman* (1868) 23 Wis. 452, 99 Am. Dec. 193.

In Kentucky a decree of divorce procured by a husband after only a constructive service of process on his wife, by default, at a time when she was insane and confined in an asylum without the state, to which he had committed her, was held to be void and to constitute no defense to a bill in equity brought by the wife's next friend (she being incurably insane), after the death of the husband, against his second wife and her children by him, to recover dower and a L.R.A.1917B.

distributive share in his estate, and to set aside, so far as necessary to that end, his last will and testament. *Newcomb v. Newcomb* (1877) 13 Bush. (Ky.) 544, 26 Am. Rep. 222.

A defrauded spouse may bring a bill in equity in the state of New Jersey to enforce any civil right apparently taken away by a fraudulent decree of divorce, in a case where the decree itself cannot be attacked by a bill of review because the spouse who obtained it is dead. *Givernaud v. Givernaud* (1912) 81 N. J. Eq. 66, 85 Atl. 830.

In that state also it is held that, inasmuch as death dissolves a marriage, and therefore there can be no rehearing of a divorce suit after the spouse who procured it has died, appropriate relief against a decree obtained by a husband in an ex parte proceeding without personal service or appearance, by an intentionally fraudulent and false affidavit, to procure publication, may be had by bill in equity brought by the wife after his death, against his heirs and representatives, to reach and recover a share in his estate. *Dyott v. Henderson* (1916) 85 N. J. Eq. 338, 97 Atl. 35.

An action in the nature of a bill of revivor in which all the heirs at law and other persons interested in the real estate which belonged to a man who, in his lifetime, obtained a decree of divorce, and afterward died, has been said to be the only mode in New York by which the wife may obtain appropriate relief against the decree on the ground of fraud and irregularity in obtaining it, and her share and interest in the property left by the deceased. *Watson v. Watson* (1874) 1 Hun (N. Y.) 267.

In North Dakota an action to set aside a divorce for failure to comply with the statute in making constructive service by publication, brought after the death of a husband who obtained it, may be maintained by the divorced wife against his heirs, representatives, and other persons interested in his estate, to establish the plaintiff's status as his widow for the purpose of contesting his will, on the ground of fraud and undue influence. *Dallas v. Luster* (1914) 27 N. D. 450, 147 N. W. 95.

A divorced wife may, in Wisconsin, it is said, after the death of her former husband, maintain a suit in equity against his heirs and personal representatives, to annul the judgment of divorce in a proper case on sufficient grounds, in order to get the status of his widow and reach a widow's share in the deceased's



estate. *Moyer v. Koontz* (1899) 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50.

It was held by Brown, J., of the New York supreme court, in *Rundle v. Van Inwegan* (1886) 9 N. Y. Civ. Proc. Rep. 328, that a wife domiciled in New Jersey, whose husband left her permanently to take up his domicile in Indiana, where, without personal service upon her, and without her appearing, he afterwards obtained a divorce from her, was his lawful widow and entitled to dower in his real estate, notwithstanding she had married another man upon the faith of the validity of the divorce, had issue by him, and was suing in his name as wife.

In Kansas, however, it has been held that the fact that the statements in the petition for a divorce and in the affidavit for service of the summons by publication and to dispense with mailing were false, and so known to be by the plaintiff, does not, they being sufficient on their face, make a decree subsequently obtained so absolutely void that it can be successfully attacked by the spouse against whom it was rendered after the death of the party who got it, in an action to annul the latter's last will and to recover the property and estate thereby devised and bequeathed. *Larimer v. Knoyle* (1890) 43 Kan. 338, 23 Pac. 487.

In Washington it has been held that a judgment of divorce could not be disturbed after the death of the spouse who obtained it, despite the fact that it took away property rights; because, it was said, divorce is a purely personal action, which does not survive the death of either litigant; and, therefore, in the case at bar there existed no party interested to defend an action to set aside the decree. *Dwyer v. Nolan* (1905) 40 Wash. 459, 1 L.R.A.(N.S.) 551, 111 Am. St. Rep. 919, 82 Pac. 746, 5 Ann. Cas. 890.

In a contest between a divorced wife and her successor, over the administration of the estate of the deceased husband, the decree of divorce obtained by him by default upon a constructive service cannot be successfully attacked in California because of a defective or imperfect complaint in the action in which it was granted. *Re James* (1893) 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122.

A court, in a suit by a divorced woman to recover a widow's share in the estate of her deceased former husband, will not annul the decree of divorce he obtained against her upon a constructive service, grounded on a fatally defective

affidavit, and entered by a default prematurely taken, where the evidence she adduces conclusively establishes that good, meritorious, and sufficient grounds existed to sustain the decree. *Carr v. Carr* (1892) 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453.

A divorce obtained by a man from his wife upon sufficient evidence, in open court, in proceedings regular in form, upon a constructive service by publication, cannot, after the lapse of many years, another marriage by him, and his death, leaving children born of the new marriage, be overthrown on the ground that it was obtained by fraud, in a suit by the divorced wife and her daughter, against the widow and her children, for an accounting and division of the deceased's estate, and to cancel a deed he made to defendants while living, alleged to be in fraud of the plaintiffs' rights. *Hester v. Hester* (1912) 103 Miss. 13, 60 So. 6, Ann. Cas. 1915B, 428.

A wife who causelessly deserted her husband and lived in adultery for years with another man, and who, upon learning that her husband had obtained a decree of divorce from her, married her paramour and afterwards continuously cohabited with him as his wife, will not be permitted, after her first husband's death, successfully to attack the validity of the decree of divorce for the purpose of acquiring his estate, even where, in proper circumstances, that decree might be adjudged void for lack of due service of process. *Arthur v. Israel* (1890) 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81.

A woman divorced from her husband by a court of competent jurisdiction which had jurisdiction of him cannot, after the lapse of several years, in a controversy respecting her dower in his lands, attack the validity of the divorce granted her on the ground that she procured the subpoena to her husband to be issued in vacation, and but a fortnight before the term, when the statute required an interval of a month, because, assuming that she is not estopped by years of acquiescence, the objection rests upon an irregularity that does not make the decree void, but leaves it open merely to a direct assault in the court which granted it. *Multimore v. Multimore* (1861) 40 Pa. 151.

That a wife voluntarily separating from her husband, and entering into articles of separation with him, was induced by his fraud and deceit, having no means of knowing the value and amount of his property, to accept a sub-

stantial but grossly disproportionate and inadequate sum of money in complete settlement and satisfaction of all her claims for alimony and upon the husband's estate, does not constitute such a fraud as will enable her, after the husband's death, and discovery of the truth respecting his estate, to maintain an action to set aside a decree of divorce from her husband obtained by her in a suit brought for the purpose, upon the ground of the separation, undefended by the husband, for the purpose of getting a larger share of his estate as his widow. *Uecker v. Thiedt* (1907) 133 Wis. 148, 113 N. W. 447.

This case was followed in *Routledge v. Patterson* (1911) 146 Wis. 226, 131 N. W. 346, in which a divorce was attacked upon similar grounds and for a like purpose.

For a divorced wife to maintain a suit in equity against the heirs and representatives of her former husband after his death, to annul the divorce granted him, for the purpose of establishing her status as his widow and reaching a widow's share in his estate, it is essential that there be within the state some property to be affected when none of the heirs or representatives is a resident, or can be served with process, except constructively, by publication. *Moyer v. Koontz* (1899) 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50.

Inasmuch as a divorce suit abates with the death of either spouse, a decree may not legally be granted after one of them has died, and, if inadvertently or erroneously granted, will, upon petition, be set aside and held for naught. *Dunham v. Dunham* (1913) 82 N. J. Eq. 395, 89 Atl. 281.

**XXXIII. Effect on attacks on divorces of new marriage by spouse granted decree.**

If, after a decree of divorce has been granted in Kentucky, and before it is set aside, either party contracts another marriage, the power of the court to vacate the decree it granted is at an end, even when the application to set it aside is made at the same term. *Droste v. Droste* (1910) 138 Ky. 53, 127 S. W. 506.

But Kentucky in this respect appears to be unique.

The right of one injured by a decree of divorce procured by a fraud, or fraudulently prevented from learning of the pendency of the divorce suit, or from appearing and defending it, to have the decree obtained set aside, may and in some cases does survive the remarriage L.R.A.1917B.

of the party who obtained the divorce. *Day v. Nottingham* (1902) 160 Ind. 408, 66 N. E. 998.

It is almost universally held throughout the United States that the marriage to another spouse of one who obtained by fraud a divorce from the former spouse is not of itself a sufficient reason for denying relief to the latter in a suit or other proceeding to set aside the tainted decree. *Scanlan v. Scanlan* (1891) 41 Ill. App. 449; *Maher v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365; *Lawrence v. Nelson* (1901) 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84; *Holmes v. Holmes* (1874) 63 Me. 420; *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84; *True v. True* (1861) 6 Minn. 458, Gil. 315; *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086; *Smith v. Smith* (1854) 20 Mo. 166; *Wisdom v. Wisdom* (1888) 24 Neb. 551; *Miller v. Miller* (1914) 37 Nev. 257, 142 Pac. 218; *Wortman v. Wortman* (1863) 17 Abb. Pr. (N. Y.) 66; *Kellow v. Kellow* (1886) 1 Lehigh Valley L. Rep. (Pa.) 202.

Especially where the perpetrator of the successful fraud hastily contracted a new marriage after obtaining the divorce. *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191; *Simpkins v. Simpkins* (1914) 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759.

The hasty marriage of a man who had procured a decree of divorce from his wife by default, occasioned by the unfaithful betrayal of her rights by her attorney, to his alleged paramour, furnishes no reason for denying the wife's motion, promptly made, to set aside the decree and open the case for her defense. *Nichells v. Nichells* (1895) 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

The petition of a wife to set aside a decree of divorce obtained by her husband by grossly fraudulent means, clearly proved, cannot be defeated by his marriage after procuring the decree, to another woman, where the marriage took place so soon after the decree was granted that no speed or diligence of the wronged wife in applying to vacate the decree could have prevented it. *Whitcomb v. Whitcomb* (1877) 46 Iowa, 437.

The remarriage of the successful party to a decree of divorce is not of itself an answer to an attack on the decree in equity, on the ground of fraud in obtaining it and condonation during the pendency of the divorce action, where the complainant has been guilty of no laches and was actually contesting the validity

of the decree when the second marriage took place. *Womack v. Womack* (1904) 73 Ark. 281, 83 S. W. 937, 1136.

The fact that a husband who obtained by a plain and clearly proved fraud upon both the court and his wife a decree of divorce afterwards married another and an innocent woman, by whom he had children, will not avail to defeat a bill of review, brought after the lapse of years, to set aside the fraudulent decree, where the complainant shows the highest diligence on her part, and clearly explains and excuses her seeming laches. *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548.

The marriage to another woman of a man who, by means of a false return of personal service, obtained a divorce from his absent wife by default, will not prevent the setting aside of the decree. *Stephens v. Stephens* (1884) 62 Tex. 337.

When a man has, after obtaining a divorce from his wife by default, upon her failure to appear for trial, well knowing the existence of good reasons to excuse the default, married another woman, his second marriage is not a reason sufficient to justify refusing the defaulting first wife leave and opportunity to contest, on the merits, his right to a divorce. *Scripture v. Scripture* (1893) 70 Hun, 432, 24 N. Y. Supp. 301.

The fact that one who obtained a divorce by fraud afterwards contracted and had issue by a new marriage with an innocent third person is not a bar to a suit to set the divorce aside. *Allen v. Maclellan* (1849) 12 Pa. 328, 51 Am. Dec. 608; *Bomsta v. Johnson* (1888) 38 Minn. 230, 36 N. W. 341.

The power of a court to set aside a decree of divorce cannot be taken away by the act of the party who procured it, in marrying again. *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191.

The power of a court to set aside, upon good grounds, a decree of divorce, is not impaired by the subsequent marriage of the spouse to whom it was granted, even where a child has been born, the fruit of the second marriage. *Medina v. Medina* (1896) 22 Colo. 146, 43 Pac. 1001.

Reasons of public policy and regard to the consequences which might ensue to innocent persons from the exercise of the power to invalidate a decree of divorce after it had become *res judicata* are insufficient grounds for denying that the power exists. *Edson v. Edson* (1867) 108 Mass. 590, 11 Am. Rep. 393.

The circumstance that one who has ob-

tained a decree of divorce upon constructive service and by default has married again is not sufficient to prevent the opening of the decree and the granting of a new trial in a proper case, upon a seasonable application, in virtue of an authorizing general statute. *Meyar v. Meyar* (1860) 3 Met. (Ky.) 298. As the court put it: With the consequences that may result to others from the judgment complained of we have nothing to do. If wrong has been done, it is attributable alone to appellant's conduct.

The marriage to another woman and the procreation of children by her of a husband who had procured a decree of divorce by constructive service and default from his insane wife while she was under his control in an asylum without the state is not an insurmountable obstacle to nullifying the decree through a suit in equity. *Newcomb v. Newcomb* (1877) 13 Bush (Ky.) 544, 26 Am. Rep. 222.

The fact that a woman who procured a divorce upon unfounded charges that her husband had deserted her, when he was merely traveling on business, and procured an illegal order for publication of the summons, upon a false affidavit that she knew not his whereabouts, when she was in constant and regular correspondence with him all the time,—married and had a child by another man,—will not suffice to defeat the wronged husband's motion to set aside the decree of divorce, on the ground that it was obtained by fraud. *Crouch v. Crouch* (1872) 30 Wis. 667.

The fact that a man who, by a wilfully false affidavit to publish the summons in a suit for divorce, and its publication in a newspaper printed in German, of purpose to keep it from his wife's knowledge, obtained a decree of divorce by default from his wife, within a year afterwards married another woman, presumably innocent, will not defeat the motion of his first wife to set aside the fraudulent decree, where she had no knowledge of its existence until more than a year after the second marriage, and moved as soon as she could acquire the means. *Everett v. Everett* (1884) 60 Wis. 200, 18 N. W. 637.

The marriage of a husband in the face of a clause forbidding him to marry again, in a decree of divorce obtained from him by his wife, affords no reason for denying her application to set aside the decree in her favor, upon the ground that she was misled, deceived, and coerced by him into bringing the suit, for the corrupt purpose on his part of

gaining freedom from her. *Lake v. Lake* (1908) 124 App. Div. 89, 108 N. Y. Supp. 964.

The Iowa supreme court, after holding in *Rush v. Rush* (1877) 46 Iowa, 648, 26 Am. Rep. 179, a petition to set aside a divorce procured by fraud, good on demurrer, notwithstanding it did not allege that the defendant had not married again, denied an application for a rehearing, and filed a supplemental opinion, in which it said: In overruling the demurrer we were of the opinion that the court below did not err. . . . If it is true that the defendant was not a resident of M— county, then the court did not acquire jurisdiction, and the authorities are abundant . . . that where there is a lack of jurisdiction through the fraud of the plaintiff in the action for divorce, the decree may be declared void. What would be the effect of fraud on the part of the plaintiff in the action if the court had acquired jurisdiction it was not necessary for us to determine, and it is proper that the decision should be limited strictly to the question raised. (1878) 48 Iowa, 701.

That a woman was granted permission to marry again in a decree of divorce which she fraudulently procured by false testimony which imposed upon the court neither precludes the court from setting the decree aside after notice and hearing at the same term, nor requires her intended second husband to have notice of and opportunity to be heard in the proceedings, in the absence of explicit proof that an actual marriage ceremony had been performed. *Todhunter v. DeGraff* (1914) 164 Iowa, 567, 146 N. W. 66.

Although a new marriage to another spouse of one who succeeded in obtaining a divorce by a fraud or other means which prevented a defense to the suit is not of itself sufficient to defeat a suit in equity or other appropriate proceeding to set aside the decree, it is always a factor, and an important one, in determining whether or not relief from the decree shall be granted. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086; *Leveridge v. Leveridge* (1911) — N. J. Eq. —, 79 Atl. 422.

A stronger case to vacate a divorce is ordinarily required where the successful party has remarried than if the status of the parties has remained unchanged. *Richards v. Richards* (1913) 24 Idaho, 87, 132 Pac. 576; *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App 548; *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017.

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While a second marriage and issue by it of one who obtained a divorce do not of themselves preclude a court of equity from setting the divorce aside when properly impeached for fraud and collusion, yet they are circumstances to make the court hesitate and scrutinize closely the evidence tainting the decree. *Whittley v. Whittley* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078.

The fact that a husband divorced in a suit brought in the wife's name married again and has children alive by the second wife is a circumstance to be taken into account in estimating the sufficiency and weight of contradicted testimony adduced by the first wife to excuse her apparent laches in delaying seven years to bring a suit in equity to annul the decree. *Sloan v. Sloan* (1882) 102 Ill. 581.

It is admittedly proper and right for a court in which a decree of divorce is attacked for fraud or other misconduct in procuring it to act with caution and protect as far as possible an innocent third person who may have married the spouse who obtained the divorce. *Earle v. Earle* (1883) 91 Ind. 27; *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84; *Nichols v. Nichols* (1874) 25 N. J. Eq. 60.

The courts manifest a justifiable reluctance to annul decrees of divorce after the spouses who have obtained them have, on the faith of them, contracted new marriages with innocent third persons. *Maier v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365; *Bomsta v. Johnson* (1888) 38 Minn. 230, 36 N. W. 341; *Dunn v. Dunn* (1834) 4 Paige (N. Y.) 425; *Scripture v. Scripture* (1893) 70 Hun, 432, 24 N. Y. Supp. 301.

Although a delay of about a month, even without explanation or excuse, by a wife in applying to set aside a decree of divorce obtained by her husband on default, and for leave to come in and defend his suit, where she was personally served, but irregularly, because outside the state, and where an official copy of the decree was exhibited to her immediately after it was granted, was held too short to warrant the court in denying her application and ordering the decree to stand as conclusive, still, inasmuch as the husband had, in the intervening time, contracted another marriage with an innocent woman on the faith of the decree, equity allowed it to stand until the determination of the suit and the establishment of the divorced wife's defense, to protect the rights of the second wife. *Dunn v. Dunn* (1834) 4 Paige (N. Y.) 425.

When a man has married again after obtaining a decree of divorce from his first wife by default, if she makes a seasonable motion to be allowed to defend his suit, and shows a good defense upon the merits and a good excuse for failing to appear for trial, the judgment against her will be opened on just terms and the case heard on the merits; but, out of regard for the innocent second wife, the decree will be allowed to stand to abide the event, and cohabitation with her in the meantime cannot be esteemed adulterous. *Scripture v. Scripture* (1893) 70 Hun, 432, 24 N. Y. Supp. 301.

While a court may have the power in its discretion to set aside a decree of divorce in the public interest, where a fraud which prevented a defense has been charged, and a meritorious defense existed, yet where there was a personal service of process, conflicting testimony concerning the alleged fraud, negligence in not setting up a defense, and a second marriage of the successful spouse after a lapse of time sufficient in law to make remarriage lawful, a refusal to vacate the decree is no abuse of judicial discretion, and not the subject of review on appeal. *Faulkner v. Faulkner* (1916) 90 Wash. 74, 155 Pac. 404.

The circumstances that a man who had obtained a divorce from his wife, and had its validity affirmed in an independent adversary suit subsequently brought, in reliance upon two judgments in his favor, in good faith married and had offspring by another woman, apparently contributed to the defeat of his divorced wife in a subsequent action for support and maintenance, based on allegations that the divorce was obtained by fraud and its benefits accepted under duress. *Bidwell v. Bidwell* (1905) 139 N. C. 402, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55.

Reasons of public policy and regard to the consequences which may ensue to innocent third persons from overturning decrees of divorce after they have become *res judicata*, while forceful, are, however, nothing more than considerations moving courts to exercise their power to set aside divorces with great caution, and only in cases where the rights of the aggrieved are quite clear and have been insisted upon in due season, without an imputation of negligence. *Edson v. Edson* (1867) 108 Mass. 590, 11 Am. Rep. 393.

A court has little reluctance in annulling a decree of divorce obtained by a man pursuant to a corrupt understand-

ing with his wife to suppress evidence which, if disclosed, would have moved the court to refuse the decree, in case of a second marriage by him to another woman in *pari delicto* with him in the enterprise. *Winder v. Winder* (1910) 86 Neb. 495, 125 N. W. 1095.

A paramour who conspired with a man to obtain a divorce from his wife at the same time that she was procuring one from her husband does not, by marrying him as soon as both decrees have been granted, gain any equity worthy of judicial consideration against the wronged wife, seeking to set aside the divorce against her on the ground that it was obtained by fraud. *Wisdom v. Wisdom* (1888) 24 Neb. 551, 8 Am. St. Rep. 215, 39 N. W. 594.

It is quite as proper and important in a court before which a divorce is attacked to protect a wronged husband or wife and their innocent children against a fraudulent decree as it is to protect an innocent third person who may have married the spouse who obtained the tainted decree. *Earle v. Earle* (1883) 91 Ind. 27.

A court, it has been well said, cannot suffer itself to be used fraudulently by a man reckless of his initial marriage obligations, as an instrumentality for wronging his first wife, merely to protect his second wife. *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84.

The wrong suffered by and the hardship to a second wife of a man who obtained a decree of divorce from his first wife by a plain fraud upon her and the court are no greater and require no higher consideration than the wrong suffered by and the hardship to the first wife when she attacks the decree in equity and establishes both the fraud and her own diligence. *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548.

As one court has remarked, a legal wife at least is as much entitled to have her status preserved as an unfortunate and possibly duped woman who mistakenly thought herself to be the second wife, to have her status justified and established. *Sampson v. Sampson* (Mass.) supra.

According to one court the marital rights of a lawful wife divorced by fraudulent means are at least equal to those of another woman, however innocent herself, who afterwards married the husband, and the first wife cannot be robbed of her rights by fraud, nor can the recreant husband profit by his fraud and the innocence of another

woman whom he married. *McConkey v. McConkey* (1914) — *Tex. Civ. App.* —, 187 S. W. 1100.

The second wife of a man divorced by fraud from his first one, it has been said, is no more placed in extremis than is any woman who innocently marries a married man. Her misfortune is imputable to nothing but the guilt of her husband, or, perhaps, to a carelessness of her own. On the other hand, if a decree fraudulently obtained cannot be vacated, then the court can be used by a reckless man as an instrumentality to deprive an innocent wife of a support from her husband, of the right to dower in his estate, of the possession of her children, besides stamping her name, it may be, with an unmerited disgrace. Such a retribution should not fall upon her, at least. *Holmes v. Holmes* (1874) 63 *Mo.* 420.

#### XXXIV. Attacks on parts of decrees of divorce.

##### a. Generally.

Attacks upon decrees of divorce which do not question their validity and rightfulness so far as they dissolve the marriage, but merely seek to annul or materially to change other parts of them, notably their provisions respecting divisions of property between the spouses, the payment of alimony, and the custody and support of the children, have been frequently made with varying degrees of success and failure.

An early decision in Iowa declared that if a decree of divorce was voidable for fraud, its infirmity was total, and therefore a bill in equity which sought to set it aside only so far as it affected the property rights of the complainant, and left it unassailed as a dissolution of the marriage, could not be maintained. *McCraney v. McCraney* (1857) 5 *Iowa*, 233, 68 *Am. Dec.* 702.

This case was criticized by the supreme court of Missouri upon another point; it was said to be against the great weight of authority in the United States in sanctioning the doctrine that a statute commanding petitions or their verifications in divorce suits to allege the absence of collusion, etc., was not so mandatory as to invalidate a divorce granted without conformity to its requirements. *Hinkle v. Lovelace* (1907) 204 *Mo.* 208, 11 *L.R.A.*(N.S.) 730, 120 *Am. St. Rep.* 698, 102 S. W. 1015, 11 *Ann. Cas.* 794.

In other states where suits have been brought or other proceedings have been instituted to change or annul parts of

decrees of divorce without affecting them so far as they dissolved marriages, the courts have either granted in whole or in part, or refused the relief sought upon other grounds than acquiescence in the assailed judgment as a dissolution of marriage.

##### b. In respect of alimony.

A decree of divorce which omits, as a result of the defendant's fraud, to allow the plaintiff alimony granted in a suit wherein alimony was a part of the prayed-for relief, may be opened and made to award alimony without affecting the dissolution of the marriage. *Re Smith* (1906) 74 *Kan.* 452, 87 *Pac.* 189.

While by statute the Kentucky court of appeals is powerless to disturb a decree of divorce so far as it operates to dissolve the marital relation, yet, if, in granting such a decree, the court does not make a suitable provision for the wife,—allowing her nothing at all, too little, or too much,—an appeal will lie from that part of the decree, and the court of appeals may, at the instance of the litigant aggrieved by it, examine and reverse it if wrong has been done. *Bourne v. Simpson* (1849) 9 *B. Mon.* (Ky.) 454.

A decree of divorce obtained by default upon service by publication, so far as it awards alimony out of the defendant's property, may be successfully attacked and set aside by bill in equity upon proof that the awarded alimony was based upon fraud and perjury respecting the ownership of the property. *Klaes v. Klaes* (1897) 103 *Iowa*, 689, 72 *N. W.* 777.

A bill in equity by a divorced wife lies to set aside the decree for alimony awarded her husband, and to annul a mortgage given by him to secure his attorney's fees and advances, where such award was obtained by means of false testimony that the mortgaged real estate had been purchased with the husband's money, and the legal title taken in the wife's name. *Ibid.*

A man estopped by afterwards marrying another woman from attacking the validity of a divorce dissolving his marriage to his former wife by a decree she obtained in a foreign state by default, upon a constructive service, is not estopped from contesting the validity of an amendment made to that decree, without notice to him, without his knowledge, and after his second marriage had taken place, by which alimony was awarded to his former spouse, and

a personal judgment against him for the amount of it was rendered. *Hekking v. Pfaff* (1898) 43 L.R.A. 618, 33 C. C. A. 328, 50 U. S. App. 484, 91 Fed. 60.

An unreasonable and excessive allowance of alimony in a decree of divorce is not a ground for annulling the judgment, because an application to reduce it affords a sufficient remedy. *O'Brien v. D'Hemecourt* (1907) 118 La. 996, 43 So. 654.

A judgment for alimony in a divorce suit will not be vacated by a court of equity on the ground that it rested upon false testimony. *Mengel v. Mengel* (1909) 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899.

A defense to an action to recover alimony that so much of the decree of divorce as awarded alimony was procured by a fraud of the plaintiff upon the court, acquiesced in by defendant because of false representations to him by the plaintiff respecting the state of her health, is bad on demurrer for the reason that the alleged fraud consisted of matters which the court had to consider in granting the decree. *Cheever v. Kelly* (1915) 96 Kan. 269, 150 Pac. 529.

A decree of divorce awarding alimony, granted to a wife for the husband's fault, pursuant to his agreement, when not in anywise affected by mistake or fraud, cannot, after the term at which it was granted has expired, be modified on the husband's motion. *Stanfield v. Stanfield* (1908) 22 Okla. 574, 98 Pac. 334.

A decree of divorce rendered by default upon a service by publication only, without any appearance by the defendant, containing no reservation of jurisdiction over the subject of costs and alimony, may not be altered, amended, or modified so as to impose on the defendant an obligation to pay alimony or costs, notwithstanding a statute empowering a court or judge to set aside, alter, or modify a decree of divorce at any time after making it, so as to provide for appointing trustees to care for and have the custody of minor children, or for the maintenance of either party. *McFarlane v. McFarlane* (1903) 43 Or. 477, 73 Pac. 203, 75 Pac. 139.

The statutory prohibition in Indiana against reviewing decrees and proceedings in divorce suits renders actions to review judgments in attachment for alimony not maintainable, irrespective of the consideration that the attachment is not an independent but merely a provisional remedy in aid of the suit. L.R.A.1917B.

*Keller v. Keller* (1894) 139 Ind. 38, 38 N. E. 337.

*c. In respect of division of property.*

A decree of divorce granted by default to a woman from her husband upon a constructive service by publication only, upon the ground of desertion, awarding her as alimony color of title to a slave owned by him, may be avoided by him on the ground that it was obtained by fraud, conspiracy and false testimony, in a later action to recover the possession or value of the slave, brought by him against the wife and her grantees of such slave, charging them with having knowingly participated in the fraud and conspiracy. *Plummer v. Plummer* (1859) 37 Miss. 185, Handy, J., dissenting.

A judgment of divorce containing provisions awarding alimony, and apportioning community property, granted upon the false testimony of the husband, wilfully designed to undervalue, and conceal the quantity and worth of his possessions, where the wife could not, by any reasonable diligence, ascertain the amount and value of the community property, and was compelled to depend wholly upon the husband's testimony,—should be set aside at her suit, as having been fraudulently obtained. *McMurray v. McMurray* (1887) 67 Tex. 665, 4 S. W. 357.

When a wife had the opportunity to discover an alleged fraud of her husband respecting the values of his properties divided between her and him by a decree of divorce, and had full knowledge of all the items composing his estate, her delay for three years to move to set aside the decree is laches sufficient to bar her from relief. *Ferry v. Ferry* (1894) 9 Wash. 239, 37 Pac. 431.

It is not a ground for setting aside a judgment for divorce that the husband concealed from the court and his wife community property, since such property retains its community character, and the wife's rights in it are unaffected by the decree. *Meisenheimer v. Meisenheimer* (1909) 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

A divorce granted, to a wife upon her cross bill in her husband's suit will not be set aside on the ground that he committed a fraud upon her by undervaluing his property, or that she was awarded a smaller share of it than she should have had, when such property consisted of sundry pieces of real estate, all known to her, and the true value of

which she might easily have ascertained. *Ferry v. Ferry* (Wash.) supra.

*d. In respect of custody and support of children.*

A portion of a decree of divorce awarding the custody of a minor child of the marriage thereby dissolved to the spouse who obtained it may be shown to have been obtained by fraud of the successful party in a proceeding of habeas corpus by the other spouse, to recover possession of the child. *Milner v. Gatlin* (1915) 143 Ga. 816, L.R.A.1916B, 977, 85 S. E. 1045, Atkinson, J., dissenting.

So much of a decree of divorce as awarded to a husband the custody of the minor children of the marriage, and which was procured by his deception and fraud upon the wife, may be set aside at her suit, and the right to the custody of the children may be re-examined and again determined. *Trammell v. Trammell* (1904) — Tex. Civ. App. —, 80 S. W. 119.

The provisions of a decree of divorce requiring the payment of stated sums of money for the support of the children of the dissolved marriage may, in a proper action or proceeding, subsequently brought, be modified so as to reduce such sums, upon proof that a change in the circumstances and ability of the party ordered to pay them has occurred since the decree was made. *Julian v. Julian* (1916) — Ind. App. —, 111 N. E. 196.

A decree of divorce awarding the successful spouse the custody of the children of the marriage, granted where the defendant had due notice, full opportunity to be heard, and was heard, is final and not open to any change or modification upon a subsequent application, so long as no change occurs in the circumstances in which it was granted, and where the only existing statute empowering the court to modify such a decree in respect of the custody of children limits the power to cases in which circumstances render changes expedient. *Youde v. Youde* (1907) 136 Iowa, 719, 114 N. W. 190.

A decree of divorce granted a wife after her petition had been amended by consent, and when the husband had appeared, but failed wilfully to answer, awarding the custody of a child of the marriage and reasonable alimony to the wife, should not be set aside and changed upon a subsequent application by the husband, where the only statute that applies to such cases requires a joinder of both parties in a petition to vacate a L.R.A.1917B.

decree of divorce. *Bristow v. Bristow* (1899) 21 Ky. L. Rep. 481, 51 S. W. 819.

It is not a ground for setting aside a judgment of divorce, and allowing a wife to come in and answer after default on personal service, that it in terms "wholly" releases the husband from his duty and obligation to support and educate the children of the marriage, when a statute is in force, authorizing the courts, from time to time, to revise and alter decrees of divorce in respect of the care, custody, education, and maintenance of the children of the dissolved marriage. *Lessig v. Lessig* (1908) 136 Wis. 403, 117 N. W. 792.

*e. To cancel prohibition against a new marriage.*

A husband who has been forbidden to marry again in a decree of divorce obtained by his wife after due notice to him and an opportunity to defend on the ground that he had abandoned her for some years because of his religious belief and opinion that marriage was unlawful and void,—a condition of mind which rendered him unfit for the matrimonial state,—should not be granted leave to marry again on his subsequent petition for modification of the decree in that particular, without proof of recantation. *Child's Case* (1872) 109 Mass. 406.

*XXXV. Need of preliminary motion for relief before attacking decree of divorce.*

It is said to be settled law in Alabama that any attempt to impeach and annul a judgment other than by a direct appeal or a direct proceeding in the court which rendered it, before the term at which it was rendered expired, is a collateral attack; but, in that association, it was added that this, of course, does not deny the well-settled jurisdiction of equity to review judgments founded on fraud, accident, or mistake. *Johnson v. Johnson* (1913) 182 Ala. 376, 62 So. 706.

It has been doubted in the same state whether any excuse is necessary for not applying for relief against a decree to the court which made it, before resorting to equity to set it aside; but the doubt was expressed in a case where the excuse made was ample. *Rittenberry v. Wharton* (1912) 176 Ala. 390, 58 So. 293.

But then again, the same court has held that a complainant in equity, to set aside a judgment at law on the ground of fraud, accident, or surprise, being bound to show due diligence, must show as a condition of obtaining relief



that application was made to be relieved from the judgment, to the court which rendered it, during the term, or else set forth a valid reason for not making such an application. *Hendley v. Chabert* (1914) 189 Ala. 258, 65 So. 993.

A bill in equity to set aside a decree fraudulently procured does not want equity in failing to allege an application for relief to the court which made it, where the evidence establishes that such an application was deferred until it was too late to make it, in reliance upon repeated promises by the successful litigant to do justice notwithstanding the decree. *Rittenberry v. Wharton* (Ala.) *supra*.

The possibility that a judgment of divorce would have been set aside for want of jurisdiction upon motion is not a bar to a suit in equity to annul it for fraud. *Johnson v. Coleman* (1868) 23 Wis. 452, 99 Am. Dec. 193.

A court which granted a divorce will not set it aside on motion grounded upon the charge that it was procured by fraud, after the spouse who obtained it has died, but will leave the applicant to an action in the nature of a bill of review, in which the heirs at law and representatives of the decedent, and others interested in the real estate, may be made parties. *Watson v. Watson* (1874) 47 How. Pr. (N. Y.) 240; *Groh v. Groh* (1901) 35 Misc. 354, 71 N. Y. Supp. 985.

A decree of divorce obtained by a man since deceased cannot be set aside upon motion by the divorced wife, charging fraud and irregularity, upon notice to the administrator, no matter how clearly it may appear that the movant may be entitled to the relief sought if the facts stated by her are established. *Watson v. Watson* (1874) 1 Hun (N. Y.) 267.

#### **XXXVI. Renewed attacks on divorces after failure of prior ones.**

A motion to vacate a decree of divorce, made after the denial of a motion to continue the trial which resulted in the decree, and rested upon the same grounds as were relied upon to support the motion to continue, must, in turn, be denied. *Richards v. Richards* (1913) 24 Idaho, 87, 132 Pac. 576.

A suit to annul a judgment of divorce by one previously defeated in a motion to set aside the decree, and based upon grounds known to the plaintiff at the time the motion was made, some of which were, and all of which might have been, used to support the motion, cannot be maintained. *Meisenheimer v. Meisen-* L.R.A.1917B.

*heimer* (1909) 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

An original action by a husband against his wife, to annul a decree divorcing her from her former husband, is barred by the pendency of a suit previously brought by her against him for a divorce, in which he set up the defense that he had been induced to marry her by the false pretense that her divorce from her former husband was valid, and prayed by way of cross bill that such divorce be annulled upon the same grounds. *Van Slyke v. Van Slyke* (1914) 183 Mich. 536, 150 N. W. 114.

Once a judgment of divorce rendered after an appearance and defense has been attacked and declared valid in an independent contested suit in another jurisdiction it is not open to another attack in another action, based on the theory that it was fraudulently obtained. *Bidwell v. Bidwell* (1905) 139 N. C. 402, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55.

A wife who began and abandoned proceedings to annul a decree of divorce obtained by her husband by default on a constructive service, pursuant to a money settlement made under advice of counsel, was defeated in a later attack on the decree, based upon the alleged fact that it had been obtained by a fraud which she had not discovered until within the preceding six months. *Peyton v. Peyton* (1902) 28 Wash. 278, 68 Pac. 757.

Allegations in a bill in equity brought to reopen and set aside a judgment on appeal, of the supreme court, by which a decree in chancery which set aside a previous decree of divorce was reversed and the bill dismissed, setting forth, in substance, that the appellant had wrongfully and fraudulently smuggled into the record an ante-dated answer and cross bill "redundant in new matter," not stated or shown to be material, where the opinion of the supreme court discloses that the reversal was based upon the evidence taken on the trial, and not upon the pleadings fall short of showing the procurement of the judgment of reversal and dismissal attacked by fraud and imposition upon the court, and hence are insufficient to sustain the bill. *Corney v. Corney* (1913) 108 Ark. 415, 159 S. W. 20.

The dismissal on the merits, after a contested hearing, of a wife's complaint against her husband for a divorce, because of her failure to prove sufficient grounds to warrant a decree, does not

revive and reinstate a previous decree obtained by her after an *ex parte* hearing upon a service by publication only, afterwards set aside by an order giving the husband leave to answer, from which no appeal was taken, where the wife subsequently dismissed the suit for the purpose of beginning anew. *Cheyney v. Cheyney* (1910) 163 Mich. 598, 128 N. W. 780.

The denial of a motion to set aside a decree granted by default, annulling a marriage, is no bar to a subsequent action to set aside the decree on the ground that it was obtained by fraud. *Blank v. Blank* (1887) 107 N. Y. 91, 13 N. E. 615; *Monroe v. Monroe* (1893) 66 Hun, 635, 50 N. Y. S. R. 237, 21 N. Y. Supp. 655.

Although a petition by a complaining wife who had been divorced *a mensa et thoro* from her husband on the ground that he had deserted her, to set aside a subsequent decree obtained by him against her on the ground of her adultery, may not warrant the court in annulling the decree, yet, when such petition contains averments, though vague and general in form, of surprise, mistake, and fraudulent concealment of the earlier decree from the court which granted the latter, the dismissal of the petition may be accompanied by leave and be without prejudice to another and appropriate proceeding to obtain the desired relief. *Foxwell v. Foxwell* (1912) 118 Md. 471, 84 Atl. 552.

After the case had been remanded in accord with this decision, the petition was amended and the charges made in it were tried on the merits, with the result that the husband's decree was set aside, and, upon his appeal, this result was affirmed, in (1914) 122 Md. 263, 89 Atl. 494.

**XXXVII. Attacks on divorces by other persons than divorced spouses.**

**a. In general.**

The party aggrieved by a decree of divorce is the only party who can attack it in any way. *Alderson v. Bell* (1868) 9 Cal. 321; *Elliott v. Wohlfrom* (1888) 55 Cal. 384; *Re Newman* (1888) 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887.

It is for the legislature alone to determine to what extent public policy requires the right of any person other than the husband and wife to intervene in a divorce suit. *Baugh v. Baugh* (1877) 37 Mich. 59, 26 Am. Rep. 495.

**b. By strangers.**

If in any circumstances a judgment of L.R.A.1917B.

divorce can be annulled or opened at the suit of a stranger, a court is not called upon to interfere with it at the instance of those to whom its effects are of too remote and indirect a character to be legally harmful. *Tyler v. Aspinwall* (1901) 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

A judgment of divorce, wholly void, may be attacked and nullified by any litigant whose rights it affects, in any action to establish those rights. *Kwentsky v. Sirový* (1909) 142 Iowa, 385, 121 N. W. 27; *Plummer v. Plummer* (1859) 37 Miss. 185.

**c. By second spouses.**

The second husband of a divorced wife cannot have his own marriage to her annulled on the ground that she was, when he married her, still the lawful wife of her former husband, and her decree was invalid by the failure of her petition to allege her residence in the county where she brought her suit. *Werz v. Werz* (1881) 11 Mo. App. 26.

The husband of a divorced woman has no cause of action to annul his marriage upon the ground that the divorce she obtained from her former husband was procured by fraud and collusion. *Ruger v. Heckel* (1881) 85 N. Y. 483.

Certainly not when he married her with knowledge of her former marriage and divorce suit. *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056.

A man who interested himself in and promoted the suit of a woman against her husband for a divorce, intending to marry her after she had procured a decree, cannot, after he has married her, maintain a suit to set aside her divorce, on the ground that she obtained it through a fraud on the court, which consciously or unintentionally he aided and abetted her in perpetrating. *Van Slyke v. Van Slyke* (1915) 186 Mich. 324, 152 N. W. 921.

A decree of divorce granted to a woman in regular proceedings by default, after a personal service, pursuant to statute, without the state, cannot be attacked by her second husband in his action for a divorce from her for alleged adultery, with counter charges by her of adultery and cruel treatment by him. *Sodini v. Sodini* (1905) 94 Minn. 301, 110 Am. St. Rep. 371, 102 N. W. 861.

An action by the second husband of a divorced woman to annul his marriage to her cannot be maintained upon the theory that the divorce granted her by a foreign court, which had jurisdiction over both the subject-matter and her

and her former husband, was tainted with fraud so as to be invalid, because, in obtaining it, she had suppressed the fact that she had previously, in another suit, been refused a divorce, because she had been therein proved to have been guilty of adultery herself. *Bater v. Bater*, L. R. [1906] P. (Eng.) 209, 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408, 4 Ann. Cas. 854.

A motion by a defendant after cross appeals from a decree of divorce have been perfected, to remand the cause to the court below, with permission to him to amend his answer by setting up as an additional defense that his marriage to the plaintiff was void for the alleged reason that when it took place she was really the lawful wife of another man, then living, from whom she had been divorced by a decree invalid in law, being addressed to the discretion of the court, is properly denied on the ground of laches, where, notwithstanding his averment that he did not discover the invalidity of his wife's divorce from her former husband until after the appeals were taken, the record contradicts him by statements in his answer implying previous knowledge on his part, and by showing that his solicitor in the pending cause had appeared and contested the wife's decree as prosecuting attorney of the county, in behalf of an interested minor child, and had therefore full personal knowledge from the beginning of all the pertinent facts. *Robson v. Robson* (1910) 161 Mich. 293, 126 N. W. 216.

The widow of a man divorced in his lifetime is not entitled to maintain against his former wife a bill in equity to set aside the decree of divorce. *Smith v. Smith* (1914) 186 Ill. App. 540.

#### *d. By paramours.*

Unless some statute gives a right to a corespondent in a divorce to appear therein and contest the charges, the court has no power, upon a motion after judgment, to set aside the decree and open the case to allow the corespondent to disprove the charges. *Quigley v. Quigley* (1887) 45 Hun (N. Y.) 23.

A woman charged as paramour of an adulterous husband whose answer in his wife's action for divorce had been stricken out for failure to obey an order of court directing him to pay alimony cannot, by joining him in an application made while he continued in contempt of court for his disobedience, have the decree of divorce granted the wife set aside to enable her to disprove the charges upon which the decree was based. *Ibid.* L.R.A.1917B.

Although by statute the right may have been given to a corespondent to appear in a divorce suit to disprove charges of adultery, an application by one to stay the entry of an interlocutory decree in a wife's action for divorce until the issues raised by the applicant's proposed answer can be tried and determined, grounded solely upon the affidavit of an attorney, unsupported by the client's own denial of the charges, must be denied. *Stafford v. Stafford* (1915) 170 App. Div. 172, 156 N. Y. Supp. 25.

A defendant, in an action by a wronged husband for criminal conversation with his wife, cannot attack a decree of divorce obtained by the plaintiff from his wife, and offered in evidence to make her competent as a witness to prove the marriage and the offense charged, for the purpose of disqualifying her from testifying, at least, upon any ground falling short of making the decree wholly void for total lack of jurisdiction. *Wottrich v. Freeman* (1877) 71 N. Y. 601.

#### *e. By children of divorced parents.*

In the absence of any statute allowing the children of a divorced couple to attack the decree divorcing their parents on the ground that it was granted by collusion and fraud, a bill by them to set it aside will not lie. *Baugh v. Baugh* (1877) 37 Mich. 59, 26 Am. Rep. 495.

In a contest for the administration of a decedent's estate, between his son by his first wife and his second wife, a decree of divorce in reliance upon which the decedent married the second wife, obtained by the first wife in a suit brought in the county of the residence of the couple, while the defendant was incarcerated upon a conviction of felony, in the penitentiary in another county, cannot be annulled on the ground that the sheriff's return of service of process on the prisoner by leaving a copy of it at his residence with his wife—a legal service in ordinary cases—was null and void. *McLeod v. McLeod* (1915) 144 Ga. 359, 87 S. E. 286.

Two separate and independent divorces got upon constructive services by publication and default for want of appearances and defenses by two persons who afterwards intermarried, one from each of their respective former spouses, in proceedings filled with defects and irregularities sufficient to warrant annulment of both decrees upon direct attacks by the divorced spouses; cannot, after the man's death, be successfully attacked and overthrown in an action of ejectment brought by his daughter, born

of his first wife, against the second wife, to recover real estate of which he died seised, claimed by defendant as widow. *Pettiford v. Zoellner* (1881) 45 Mich. 358, 8 N. W. 57.

The infant children born after a decree of divorce had been fraudulently obtained by their father, and when he had, at his own request, resumed marital relations and cohabited as before with his wife, and condoned her alleged offenses, if they ever existed, are entitled, if *rectus in curia*, to maintain after their father's death a bill in equity to annul the decree and establish their property rights in their father's estate. *Rawlins v. Rawlins* (1881) 18 Fla. 345.

*f. By parent of divorced child.*

The mother of an infant against whom a decree of divorce was granted has no legal interest in the litigation to support her application to have the decree set aside as collusive, and to be appointed a guardian ad litem to defend the suit. *E. B. v. E. C. B.* (1858) 8 Abb. Pr. (N. Y.) 44.

*g. By heirs.*

After both husband and wife are dead, their status while living is not open to judicial inquiry except in so far as the property rights of their survivors or heirs are affected. *Wood v. Wood* (1907) 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492.

An attack by a divorced wife, continued after her death testate by her devisees, by means of a suit to partition property of which her former husband died seised, brought upon the theory that she was his lawful widow, upon the decree of divorce, upon the ground that it was granted in a collusive suit, is not maintainable. *Friebe v. Elder* (1914) 181 Ind. 597, 105 N. E. 151.

After the death intestate of the second husband of a divorced woman in the lifetime of her first husband, the heirs at law of the deceased, who, but for the widow's rights in the estate, would have inherited his property, have no legal interest or standing sufficient to maintain a suit to annul the decree of divorce on the ground that it was procured by fraud and perjury. *Tyler v. Aspinwall* (1901) 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755.

Assuming that the husband of a wife divorced from a former husband might, while he lived, have maintained a suit to annul his marriage on the ground that the divorce, although *prima facie* valid, had not, because of sundry errors, omissions, and irregularities in the pro-

ceedings, been legally granted, yet, after his death without having questioned the decree, his heirs at law cannot maintain a bill in equity for such purpose. *Richardson v. King* (1912) 157 Iowa, 287, 135 N. W. 640.

The heirs of a deceased party to a decree of divorce, whose rights in real estate would be affected if the decree should be set aside, should be brought in as parties to a bill in equity filed to annul the decree for fraud, after the death of the party who obtained it. *Barnes v. Willis* (1913) 65 Fla. 363, 61 So. 828.

To a suit in equity by the heirs at law of the second husband of a divorced woman, brought after he had died intestate, to set aside the decree of divorce obtained by her against her former husband, and to annul the second marriage, the divorced husband is an absolutely necessary party, without whose presence on the record the court will not proceed. *Richardson v. King* (Iowa) *supra*.

*XXXVIII. Estoppel of divorced spouses from attacking decrees.*

When an estoppel is relied upon to defeat an application or action to set aside, open, or modify a decree of divorce alleged to have been granted through fraud, duress, and undue influence, the facts out of which the supposed estoppel arises must be pleaded with particularity to be available as proof, and no inferences will be indulged to favor such plea. *Holt v. Holt* (1909) 23 Okla. 639, 102 Pac. 187.

*a. By conduct in divorce suit.*

A wife who co-operated and colluded with her husband for him to obtain a divorce from her by suppressing facts and by false testimony, and who remained quiescent for more than a year, knowing he had married another woman in the interim, is estopped to have the divorce set aside. *Karren v. Karren* (1902) 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465.

A bill by a wife to set aside a decree of divorce previously procured by her on the ground that she had obtained it by collusion, without any proof of fraud by her husband, is properly dismissed when her bill suing for divorce alleged that there was no collusion, and was verified by her oath to the truth of its averments. *Simons v. Simons* (1881) 47 Mich. 253, 10 N. W. 360.

A wife sued by her husband for divorce, and not served with process, is estopped to deny the jurisdiction of the

court over her person, on the ground that the attorney who entered an appearance for her and filed her answer had no authority to represent her, where she personally verified the answer and knew of the purpose of the suit. *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757.

A judgment of divorce rendered by a court of general jurisdiction in one state after a voluntary appearance by the defendant and knowledge and opportunity to defend, upon a collusive default, cannot be attacked and avoided, but is conclusive in an original suit in another state, brought by the beaten litigant against the successful one, for a divorce and alimony. *Nichols v. Nichols* (1874) 25 N. J. Eq. 60.

A general appearance by a wife in a divorce suit brought against her by her husband, in which she procured an amendment to be made to his bill that secured to her certain property subsequently obtained by her, when followed by inaction for many years, during which her husband married again, operates to estop her from maintaining a bill in equity to set aside the decree on the ground that the statute authorizing constructive service was not followed. *Hereu v. Hereu* (1899) 6 Ariz. 270, 56 Pac. 871.

A wife who knew in advance the purpose of her husband to sue for a divorce, and the charges he made against her as grounds for it, and who, because she preferred him to allege other and less obnoxious grounds than those he contemplated, authorized in writing an attorney to appear for her, and who then accepted money awarded her as alimony, is estopped, after her husband has married another woman, to maintain a bill in equity to set aside the decree on the ground that he was guilty of fraud in procuring it. *Maher v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365.

A man knowing that a woman he wishes to marry is the wife of another, and has brought suit to divorce her husband, in order to marry him, who marries her with full knowledge, after she has obtained a decree of divorce, is estopped in his subsequent suit to annul his marriage to her on the ground that she was, when it occurred, the lawful wife of another man, from impeaching the decree she obtained, for alleged fraud in procuring it. *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056.

A husband against whom his wife obtained a decree of divorce upon prima facie proof of his adultery, after his ap-

pearance and answer in her suit had been stricken out for failure to pay alimony allowed her pendente lite, cannot have the decree set aside and leave granted to come in and defend the action until he first purges himself of his contempt of court by complying with the order directing payment of the alimony. *Quigley v. Quigley* (1887) 45 Hun (N. Y.) 23.

A husband who, by collusion with his wife, employed an attorney to bring suit for her against him for divorce, is estopped afterwards to question the validity of the decree. *Moor v. Moor* (1901) — Tex. Civ. App. —, 63 S. W. 347.

A spouse who obtained in a foreign state a decree of divorce is estopped from afterwards questioning its validity in the home state. *Simmonds v. Simmonds* (1912) 78 Misc. 571, 138 N. Y. Supp. 639.

A spouse who obtained a divorce in another state, containing permission to both parties to marry again, cannot, while it remains unassailed, maintain an action for divorce in this state, predicated upon an alleged adultery of the other spouse in marrying another person by virtue of the permission. *Coddington v. Coddington* (1860) 10 Abb. Pr. (N. Y.) 450.

A husband who, in his home state, obtained a decree divorcing him from his wife, has no legal interest or standing which will enable him to assail and set aside, on the ground of a fraudulent procurement, a decree of divorce previously obtained in another state by his wife, after she has married again, and when there are no property rights involved nor any issue of the dissolved marriage. *Webster v. Webster* (1880) 54 Iowa, 154, 6 N. W. 170.

*b. By use of privileges or taking benefits of decree.*

One cannot be relieved from a judgment of divorce after using the privileges it confers. *Garner v. Garner* (1871) 38 Ind. 139.

He cannot accept the benefits of a decree of divorce and not be bound by it. *Van Sickle v. Harmeyer* (1912) 172 Ill. App. 218.

Whoever takes the benefits of a decree of divorce must bear its burdens. *Garner v. Garner* (Ind.) supra.

And one who obtains a decree of divorce and accepts the benefits it confers will not be heard afterwards to question its validity. *Van Slyke v. Van Slyke* (1915) 186 Mich. 324, 152 N. W. 921.

A decree of divorce, entered by consent, will not be set aside at the suit

of the spouse who accepted its benefits, brought after the death of the other spouse, for the purpose of obtaining a share in the latter's estate. *Mallory v. Mallory* (1911) 160 Ill. App. 471.

*c. By accepting alimony, money, or property.*

The acceptance by a wife having full knowledge of the facts, of alimony allowed her in a decree of divorce granted to her husband, has been held to be one element, in combination with others, helping to estop her from setting aside the decree despite the existence of good grounds for annulling it. *Maher v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365; *Mohler v. Shank* (1895) 93 Iowa, 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981; *Bourne v. Simpson* (1849) 9 B. Mon. (Ky.) 454.

A wife who, knowingly and voluntarily, accepts a sum of money and a conveyance of property awarded her as alimony in a decree of divorce granted to her husband, is afterwards and thereby estopped from contesting its validity. *Agnew's Appeal* (1883) 3 Walk. (Pa.) 320.

A woman sued for divorce, and charged with adultery and gross neglect of marital duty, who, in consideration of the withdrawal of the charge of adultery and the payment of a stated sum of money as alimony, agreed not to oppose the granting of a decree, after her husband has fulfilled the conditions and paid the money, is estopped to have the decree opened and the satisfaction of it annulled. *Neely v. Neely* (1884) 9 Ohio Dec. Reprint, 201.

A woman in whose name and by whose authority, when not residing within the state, an attorney instituted and prosecuted to judgment a suit for divorce against her husband, and to whom a decree was granted carrying alimony which she accepted, cannot, after the death of her divorced husband and the lapse of many years, be permitted to impeach the decree for want of jurisdiction in the court to entertain her suit and grant it, because she lacked the qualifying residence the statute prescribed. *Ellis v. White* (1883) 61 Iowa, 644, 17 N. W. 28.

The acceptance of alimony awarded a woman in a decree of divorce obtained by her husband in a suit of which she had due notice and in which she regularly appeared, coupled with her subsequent marriage to her paramour and the birth of a child by him, has been held to estop her from attacking the decree, despite the court's lack of jurisdiction. *L.R.A.1917B.*

*Mohler v. Shank* (1895) 93 Iowa, 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981.

A woman who was personally served, who voluntarily appeared and deliberately made default in a suit by her husband in another state for a divorce from her, under the laws thereof, and who afterwards, for a substantial pecuniary consideration, by him paid and by her freely accepted, executed and delivered a release which recited the divorce, and discharged him and his estate from all her claims upon either, cannot overturn the decree by a subsequent suit against him in the home state for a divorce, on the theory that she continued his lawful wife. *Loud v. Loud* (1880) 129 Mass. 14.

A judgment of divorce obtained upon legal grounds by a man after his wife had withdrawn her defense in consideration of the payment to her of a sum of money deemed at the time sufficient for her support and maintenance will not afterwards be set aside at her instance merely because she became dissatisfied, and hoped to obtain a larger allowance. *Wiemer v. Wiemer* (1911) 21 N. D. 371, 130 N. W. 1015.

A woman from whom her husband obtained a decree of divorce, and who, upon the strength of it, brought an action against him as an unmarried woman to recover certain personal property in his possession, belonging to her by gift from her father, which she successfully prosecuted to judgment, is estopped by her conduct from afterwards questioning the validity of the divorce, and is barred against relief from it by appeal. *Baily v. Baily* (1863) 44 Pa. 274, 84 Am. Dec. 439.

A wife who, having been personally served in a suit for divorce brought by her husband against her in another state, under the laws thereof, appeared and deliberately defaulted therein, and afterwards, for a substantial and acceptable money payment, released him and his estate from all her claims, cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marriage bond to her, not so much upon a theory of estoppel as because her own conduct amounted to conniving at or acquiescing in the later marriage. *Loud v. Loud* (Mass.) supra.

A wife who appeared and contested her husband's divorce suit in a foreign state, accepted payment of a large sum of money awarded her by the judgment granting a divorce to her husband, delayed over six years to bring a suit in

another state to obtain relief from the judgment, was defeated again, and again accepted a further payment awarded her by the second judgment, is estopped both by the record in the second case and her acceptance of benefits to maintain another suit in a third state to recover from her former husband support and maintenance for herself and her child, upon the theory that the original judgment of divorce was fraudulently obtained and her acceptance of the money payments was under the duress of extreme necessity. *Bidwell v. Bidwell* (1905) 139 N. C. 402, 2 L.R.A. (N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55.

A divorced wife who accepted money and property granted her in lieu of dower in a decree of divorce obtained by her husband which she had both time and opportunity to have reviewed on writ of error or appeal, and who afterwards married another man, is estopped from claiming dower in lands of which her former husband was seised during coverture, and which he had conveyed to third persons. *Bourne v. Simpson* (1849) 9 B. Mon. (Ky.) 454.

A judgment taken by a wife in a suit to divorce her husband upon the ground of his cruelty to her ought to be set aside and leave granted to the husband to defend, without costs, where, after the suit was begun, the pair became apparently reconciled and lived together as husband and wife upon the wife's agreement to do so, in return for a conveyance of the husband's property, which he made, since the husband had the right to suppose the suit was abandoned. *McDonald v. McDonald* (1916) — Mich., 157 N. W. 449.

It has, however, been elsewhere held that the acceptance of payments of alimony awarded her by a decree of divorce from her husband does not estop a wife from maintaining an action or proceeding to set aside or modify the decree on the ground that her husband by fraud, undue influence, and duress induced, swayed, and constrained her to sue him for the divorce. *Holt v. Holt* (1909) 23 Okla. 639, 102 Pac. 187.

In setting aside a judgment annulling a marriage upon a motion made by a wife in whose nominal favor it was rendered, Mr. Justice Borst, of the New York supreme court, anent the proposition that she was estopped to attack it by the acceptance of a large money payment, said in a recent case: It is asserted that plaintiff being the party plaintiff, and having received large monetary consideration in settlement of her rights against defendant, she is now estopped

to deny the validity of the judgment. If this is so, then parties may themselves dissolve the marriage contract; for in cases where a judgment, as here, has been obtained against good conscience and without right, the court would not be at liberty to correct it. A party obtaining an invalid decree of divorce or an invalid judgment annulling the marriage is not estopped from calling it in question. *Davidson v. Ream* (1916) 97 Misc. 89, 161 N. Y. Supp. 73.

*d. By acquiescence in reliance on unkept promises of money.*

A wife fraudulently divorced by her husband has been held in Kansas not to be estopped from attacking the decree by reason of having entered into an agreement with him not to disturb it, in consideration of his paying her a stated sum of money, the greater part of which he never paid. *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191.

The reasons for this decision were found in public policy.

But it was held in Colorado that a wife who had been personally served with process in her husband's divorce suit, and who fully comprehended the nature of the proceeding, and refrained from defending, pursuant to a collusive agreement with him, and under his promise to pay her money, could not have the decree he obtained set aside simply because she was cheated out of the promised consideration. *Hubbard v. Hubbard* (1893) 19 Colo. 13, 34 Pac. 170.

In other cases where similar decisions have been made there were additional grounds for denying the cheated spouse relief.

A spouse who voluntarily and knowingly agreed to make no defense to a divorce suit, and collusively consented that a decree be taken in it, in consideration of a promised payment of a sum of money which was never paid, has been held estopped to impeach the decree upon a bill in equity filed five years afterwards, and after the other spouse had married another. *Whitley v. Whitley* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078.

A wronged wife does not furnish a satisfactory and sufficient excuse for a delay of four years in bringing a suit in equity to set aside a decree of divorce fraudulently obtained against her by her husband, who remarried during the interval, by setting up that he assured her when she learned of the decree that she had no remedy, and that if she would forego her purpose to attack

it, he would amply and adequately provide pecuniarily for her, and that she believed his assertions and relied upon his promise until he broke his word. *Nicholson v. Nicholson* (1887) 113 Ind. 131, 15 N. E. 223.

*e. By new marriage.*

Every person against whom a decree of divorce has been granted, and who otherwise might have had it set aside for some good cause, becomes effectually estopped successfully to assail its validity as a dissolution of the marriage bond by marrying another spouse. *Hekking v. Pfaff* (1898) 43 L.R.A. 618, 33 C. C. A. 328, 50 U. S. App. 484, 91 Fed. 60; *Arthur v. Israel* (1890) 15 Colo. 147, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81; *Scase v. Johnson* (1906) 130 Ill. App. 35; *Garner v. Garner* (1871) 38 Ind. 139; *Stephens v. Stephens* (1875) 51 Ind. 542; *State ex rel. Hahn v. King* (1902) 109 La. 161, 33 So. 121.

An appeal from a decree of divorce by an appellant who has married another spouse must be dismissed. *Garner v. Garner* (1871) 38 Ind. 139; *Stephens v. Stephens* (1875) 51 Ind. 542.

A man who deserted and left his wife for many years without contributing ought to her support, and who had, though never served with process, actual knowledge that she had brought and was prosecuting a suit for divorce from him, during the pendency of which he wrote the court that he did not care to contest her action, and who, after she had obtained a decree, married another woman, by whom he had issue, and with whom he lived and cohabited as her husband,—is estopped to question the validity of the decree of divorce after the death of the first wife, when nothing but interests in the property of which she died possessed can be affected, notwithstanding the invalidity of the decree, even where it certainly would have been set aside if directly attacked in the lifetime of the wife, and previous to the husband's second marriage. *Marvin v. Foster* (1895) 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484.

A woman who, after accepting alimony awarded her in a decree of divorce granted her husband, procured a license, married her paramour, and bore him a child, is estopped from attacking the decree, notwithstanding it may have been void for lack of jurisdiction in the court. *Mohler v. Shank* (1875) 93 Iowa, 273, 34 L.R.A. 161, 57 Am. St. Rep. 274, 61 N. W. 981.

A wife who married another man after L.R.A.1917B.

her first husband had procured a divorce from her in a foreign jurisdiction, and who made no objection to his subsequent marriage to another woman, is estopped from claiming a share in his estate as his lawful widow, even if she might, upon a proper application, seasonably made, have had the divorce set aside. *Richardson's Estate* (1890) 132 Pa. 292, 19 Atl. 82.

A wife divorced for adultery, and having knowledge of the decree within four days after it was granted, who afterwards conveys property as a feme sole and marries another man, is thereby estopped to set aside, after a lapse of ten years, the decree, on the ground that it was obtained by collusion between her attorney and first husband. *Nagle v. Nagle* (1910) 43 Pa. Super. Ct. 442.

Conceding a decree of divorce by an act of the legislature to have been unconstitutional and void, nevertheless, where both husband and wife accepted it as valid, and lived separate and apart always afterwards, and each married again another spouse and had issue by the new marriage, a purchaser of real property from the wife twenty years later cannot be heard to object to the title tendered as bad, on the ground that the consent of her first husband had not been given to the conveyance, because the conduct of both estopped each from interfering in any wise in the affairs of the other. *Richeson v. Simmons* (1870) 47 Mo. 20.

In a case in New York, *Brown, J.*, of the supreme court, decided that a wife divorced by default in a foreign state in which she never had a domicile, without appearing, and upon a service only constructive, was not estopped from claiming dower as widow in her former husband's lands by her marriage to another man and motherhood of his children. *Rundle v. Van Inwegan* (1886) 9 N. Y. Civ. Proc. Rep. 328. The learned justice deemed the foreign divorce wholly void for want of jurisdiction, and hence incapable of vitalization and validation by any acquiescence of the wife, and he declared that she was an adulteress, that her second marriage was bigamous, and that her children by it were bastards.

**XXXIX. Laches in attacking divorces.**

The defense of laches is an equitable one, based upon a public policy of discouraging stale claims, for the peace of society. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

Undoubtedly many rights originally founded in fraud become by lapse of



time no longer open to inquiry in the usual and ordinary ways. *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

But, if a decree of divorce appears to be void on the face of the record, delay or inaction of the defeated party will not invest it with any power or vitality, for it is a nullity under all circumstances and for all time. *Martin v. Martin* (1911) 173 Ala. 106, 55 So. 632.

The general rule is that a bill to impeach a judgment or decree for fraud must be brought within the time allowed for suing out a writ of error. *French v. Thomas* (1911) 252 Ill. 65, 96 N. E. 564.

Laches in filing a bill in equity to set aside a decree of divorce granted to the complainant in a suit brought in her name is prima facie established by a delay beyond the period fixed by statute for suing out a writ of error. *Sloan v. Sloan* (1882) 102 Ill. 581.

In ordinary conditions a plea of laches against a bill in equity will be sustained where the limitation period for analogous actions at law has expired. *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134.

But, notwithstanding an application to open a decree of divorce is made before the time limited by statute for making it has expired, the applicant may, nevertheless, be charged with inexcusable laches in making it. *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017.

An application to set aside a decree of divorce which has been acquiesced in for several years, during which the person who obtained it married again, must be grounded upon something more than spitefulness or a desire to obtain money, or it will be denied. *Singer v. Singer* (1863) 41 Barb. (N. Y.) 139.

A defense of laches interposed to the suit of a former wife to set aside a decree of divorce obtained by her husband, although it need not be pleaded affirmatively, is not demurrable. *Tausick v. Tausick* (1909) 52 Wash. 301, 100 Pac. 757.

Unlike the defense of the statute of limitations, that of laches does not entirely rest upon the lapse of time. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

Lapse of time is a factor, and a factor of more and more importance as the time lengthens, in determining whether or not a litigant complaining of a judgment should be denied relief on the ground of laches; but it is never the sole

factor. Laches efficient to defeat a suit in equity or other appropriate proceeding to set aside a judgment may not be imputed as a matter of law from the mere lapse of time. *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548; *Brown v. Grove* (1888) 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; *Leathers v. Stewart* (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366; *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84; *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; *Fritz v. Fritz* (1899) 9 Ohio S. & C. P. Dec. 275; *Fidelity Ins. Co.'s Appeal* (1880) 93 Pa. 242, affirming *Peterson v. Peterson* (1878) 6 W. N. C. (Pa.) 449; *Kellow v. Kellow* (1886) 1 Lehigh Valley L. Rep. (Pa.) 202.

"Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right." *Chase v. Chase* (1897) 20 R. I. 202, 37 Atl. 804.

This paragraph was quoted and adopted in *Leathers v. Stewart* (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366.

Notwithstanding the time allowed by law for suing out a writ of error may have elapsed before the filing of a bill of review attacking, for fraud in procuring it, a decree of divorce, the bill will not be dismissed when the proof of the fraud is incontrovertible and the delay in bringing suit is fully and satisfactorily explained and excused. *Caswell v. Caswell* (1887) 120 Ill. 377, 11 N. E. 342, affirming (1886) 24 Ill. App. 548.

Delay beyond the time limited for suing out a writ of error in bringing a bill in equity to impeach a judgment or decree for fraud may be excused and explained when the complainant is either under a disability or ignorant of his rights. *French v. Thomas* (1911) 252 Ill. 65, 96 N. E. 564.

A delay of a year and seven months by a wife in bringing an action to set aside a decree of divorce obtained against her by fraud by her husband cannot be deemed laches as a matter of law, where her husband sent her to a

foreign country and left her without means, in order to prosecute, and prevent her from defending the action. *Colby v. Colby* (1894) 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460.

A wife wholly unaware of her rights as a defendant, and ignorant that she had been sued for divorce until long after a decree divorcing her had been obtained by her husband, and who was prevented by his deceit, fraud, and false statements from acquiring knowledge of the suit, is entitled to have the divorce set aside, and to an opportunity to defend on the merits. *State ex rel. Weidert v. Superior Ct.* (1904) 36 Wash. 81, 78 Pac. 198.

Laches is not imputable to a wife in moving to set aside a judgment fraudulently obtained by her husband upon a wilfully false affidavit to publish the summons, and its publication in a newspaper printed in a foreign language, on purpose to conceal it from her, where she remained wholly ignorant of the decree for two years, and was for a year and a half afterwards in such indigent circumstances that she had not the means to attack the judgment, and only acquired them through menial and domestic service. *Everett v. Everett* (1884) 60 Wis. 200, 18 N. W. 637.

Although a husband who obtained a decree of divorce from his wife by a gross fraud afterwards married another woman, and notwithstanding the wronged wife delayed several years after she discovered the fraud to take the necessary legal proceedings to have the decree set aside, nevertheless, where the second marriage was contracted before the fraud was discovered, where the second marriage was without issue, and where the second wife was probably a participant in and cognizant of the fraud, there was no laches to bar relief, because the delay did not operate to the disadvantage of the parties. *Leathers v. Stewart* (1911) 108 Me. 96, 79 Atl. 16, Ann. Cas. 1913B, 366.

That a wife was ill and nearly blind when, without her knowledge or consent, her husband fraudulently instituted a divorce suit and procured a decree of divorce to be entered therein in her name, against himself; that she soon afterwards became totally blind; and was so poor that for most of the subsequent time she was an inmate of the county almshouse, and during all of the time remained actually ignorant of the existence of any decree divorcing her from her husband,—satisfactorily explains and sufficiently excuses a delay L.R.A.1917B.

on her part, even so long as twenty years, in bringing a bill in equity to set aside the decree for fraud in its procurement, against the heirs of her husband, after his death. *Brown v. Grove* (1888) 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387.

A petition filed within a few months after the enrolment of a decree of divorce, praying that the decree be set aside, cannot be denied on the ground of laches, where, in the interval between the entry of the decree and the presentation of the petition, the status of the spouse who obtained the decree remained unchanged. *Galloway v. Galloway* (1915) 125 Md. 511, 94 Atl. 97.

A delay of seven months after a decree of divorce has been made absolute, in bringing suit to set it aside on the ground that it was obtained by fraud, cannot be pronounced fatal laches as a matter of law. *Sampson v. Sampson* (1916) 223 Mass. 451, 112 N. E. 84.

A bill in equity to annul a decree of divorce on the ground of fraud, brought within two years after the decree was granted, and within four months after it came to the complainant's knowledge, cannot be defeated on the ground of laches. *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795.

A delay of two years, even unexplained, in filing an original bill to set aside a divorce obtained by fraud, is not per se such laches as requires a dismissal of the bill, when a statute allows four years in ordinary cases after a fraud is discovered in which to bring an action to avoid what it accomplished. *Fritz v. Fritz* (1899) 9 Ohio S. & C. P. Dec. 275.

A decree of divorce founded upon perjury and a substituted service without any actual notice to the defendant may, even after the lapse of eleven years, the delay being satisfactorily explained, be impeached for fraud on motion, and set aside. *Adams v. Adams* (1872) 51 N. H. 388, 12 Am. Rep. 134.

A delay of twelve years constitutes no bar to setting aside in a proper case a judgment of divorce when no subsequent marriage has taken place and no adverse interests of third persons are affected. *Fidelity Ins. Co.'s Appeal* (1880) 93 Pa. 242, affirming *Peterson v. Peterson* (1878) 6 W. N. C. 449.

Although several years may have elapsed after a man obtained a divorce from his wife without notice to her and without her knowledge, upon utterly unfounded charges of desertion, predicated upon her occasional absences from home

by his consent and approval, the decree will, at her instance, be set aside if no subsequent marriage has taken place and no property rights of third persons are affected. *Ibid.*

In ordinary circumstances a suit in equity will be sustained against the plea of laches within the limitation period for analogous actions at law. *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134.

Diligence in seeking to set aside a judgment or decree nevertheless is required. A long delay by a person free to act, and not ignorant of the facts, calls for a satisfactory explanation and adequate excuse, and is *prima facie* laches if these are not forthcoming. *McNeil v. McNeil* (1909) 95 C. C. A. 485, 170 Fed. 289; *Horton v. Stegmyer* (Fed.) *supra*; *Hereu v. Hereu* (1899) 6 *Ariz.* 270, 56 *Pac.* 871; *Corney v. Corney* (1910) 97 *Ark.* 117, 133 S. W. 813; *Barnes v. Willis* (1913) 65 *Fla.* 363, 61 *So.* 828; *Sloan v. Sloan* (1882) 102 *Ill.* 581; *Whittaker v. Whittaker* (1894) 151 *Ill.* 266, 37 N. E. 1017; *French v. Thomas* (1911) 252 *Ill.* 65, 96 N. E. 564; *Maher v. Title Guarantee & T. Co.* (1900) 95 *Ill.* App. 365; *Treat v. Merchants' Life Assn.* (1912) 167 *Ill.* App. 371; *Smith v. Smith* (1914) 186 *Ill.* App. 540; *Earle v. Earle* (1883) 91 *Ind.* 27; *Nicholson v. Nicholson* (1887) 113 *Ind.* 131, 15 N. E. 223; *Holbrook v. Holbrook* (1874) 114 *Mass.* 568; *Re Brigham* (1900) 176 *Mass.* 223, 57 N. E. 328; *Zoellner v. Zoellner* (1881) 46 *Mich.* 511, 9 N. W. 831; *McElrath v. McElrath* (1913) 120 *Minn.* 380, 44 L.R.A.(N.S.) 505, 139 N. W. 708; *Brockman v. Brockman* (1916) — *Minn.* —, 157 N. W. 1086; *Yorston v. Yorston* (1880) 32 N. J. Eq. 495; *Watkinson v. Watkinson* (1904) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 *Atl.* 931, 6 *Ann. Cas.* 326; *Gans v. Gans* (1910) 77 N. J. Eq. 309, 76 *Atl.* 234; *Givernaud v. Givernaud* (1912) 81 N. J. Eq. 66, 85 *Atl.* 830; *Whitley v. Whitley* (1908) 60 *Misc.* 201, 111 N. Y. Supp. 1078; *Standard Fashion Co. v. Thompson* (1910) 137 *App. Div.* 588, 122 N. Y. Supp. 300; *Bidwell v. Bidwell* (1905) 139 N. C. 402, 2 L.R.A.(N.S.) 324, 111 *Am. St. Rep.* 797, 52 S. E. 55; *Nagle v. Nagle* (1910) 43 *Pa. Super. Ct.* 442; *Patrucio v. Selkirk* (1913) — *Tex. Civ. App.* —, 160 S. W. 635; *Karren v. Karren* (1902) 25 *Utah.* 87, 60 L.R.A. 294, 95 *Am. St. Rep.* 815, 69 *Pac.* 465; *Ferry v. Ferry* (1894) 9 *Wash.* 239, 37 *Pac.* 431; *Peyton v. Peyton* (1902) 28 *Wash.* 278, 68 *Pac.* 757; *Tausick v. Tausick* (1909) 52 *Wash.* 301, 100 *Pac.* 757; *Douglas v. Teller* (1909) L.R.A.1917B.

53 *Wash.* 695, 102 *Pac.* 761; *Uecker v. Thiedt* (1907) 133 *Wis.* 148, 113 N. W. 447.

A delay by the widow of a divorced husband who had remarried, until after his death, to bring a suit in equity against his former wife to set aside the decree of divorce, must be adequately excused and explained. *Smith v. Smith* (1914) 186 *Ill.* App. 540.

One seeking relief in equity from a judgment may be barred by laches when the delay has been so long and the circumstances have been such as to give rise to a presumption that the right to relief had been relinquished. *Brockman v. Brockman* (1916) — *Minn.* —, 157 N. W. 1086.

The burden is on a former wife seeking, through a bill in equity, to set aside a decree of divorce granted her former husband without her knowledge, of showing an adequate and satisfactory excuse for a delay of seven years to sue during which the husband married another woman. *Sloan v. Sloan* (1882) 102 *Ill.* 581.

Laches for several years, not explained and excused to the satisfaction of the court by clear, convincing, and preponderating testimony establishing the complainant's alleged ignorance of a divorce suit brought in her name and ending in a decree in her favor, requires a court of equity to dismiss a bill brought by her to set aside the divorce. *Ibid.*

A decree of divorce assailed on the ground of collusion and fraud between the plaintiff and sheriff to make an official false return of personal service of process on the defendant, after a lapse of eleven years, during which time both the plaintiff and the sheriff died, will not be annulled without the clearest and most convincing proof of the alleged collusion and fraud. *Barnes v. Willis* (1913) 65 *Fla.* 363, 61 *So.* 828.

Long delays without reasonable explanations or adequate excuses for them, where circumstances which render it inequitable to disturb the existing status have arisen in the meantime, have, in sundry cases, proved fatal to promising attempts to set aside decrees of divorce.

Such a result ensued in each of the following cases, after an unexcused delay of—forty years in *Douglas v. Teller* (1909) 53 *Wash.* 695, 102 *Pac.* 761, and *Givernaud v. Givernaud* (1912) 81 N. J. Eq. 66, 85 *Atl.* 830; —seventeen years in *Buffington v. Carty* (1905) 195 *Mo.* 490, 93 S. W. 779; —fifteen years in *Hereu v. Hereu* (1899) 6 *Ariz.* 270, 56 *Pac.* 871, and *Earle v. Earle* (1883) 91 *Ind.* 27; —thirteen years in *Peyton v. Peyton*

(1902) 28 Wash. 278, 68 Pac. 757; —twelve years in *Holbrook v. Holbrook* (1874) 114 Mass. 568; —eleven years in *Barnes v. Willis* (1913) 65 Fla. 363, 61 So. 828; —ten years in *Nagle v. Nagle* (1910) 43 Pa. Super. Ct. 442; —nine years in *Zoellner v. Zoellner* (1881) 46 Mich. 511, 9 N. W. 833; —eight years in *Yorston v. Yorston* (1880) 32 N. J. Eq. 495; —seven years in *Sloan v. Sloan* (1882) 102 Ill. 581; and *Gans v. Gans* (1910) 77 N. J. Eq. 309, 76 Atl. 234; —five years in *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134, and *Whittley v. Whittley* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078; —four years in *Nicholson v. Nicholson* (1889) 113 Ind. 131, 15 N. E. 223; and *Watkinson v. Watkinson* (1904) 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326.

And less lengthy delays of varying duration in *McNeil v. McNeil* (1909) 95 C. C. A. 485, 170 Fed. 289; *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017; *Corney v. Corney* (1910) 97 Ark. 117, 133 S. W. 813; *Catts v. Catts* (1908) 35 Pa. Super. Ct. 293.

An unexplained and unexcused delay for nearly three years to file a bill in equity to set aside a judgment dismissing an action constitutes laches requiring a denial of the prayed-for relief. *Treat v. Merchants' Life Assn.* (1912) 167 Ill. App. 371.

It cannot be said that the unexcused delays were the absolutely decisive reasons which brought about the defeats of the assailants of the judgments in the foregoing cases; perhaps they were such in few, if any, of them; but in every one of those cases delay without explanation and excuse of weight was a very powerful weapon in repelling the assault.

Laches in seeking it may bar relief from a judgment in equity where the long delay affords reasons in the nature of estoppel which make it unjust or inequitable for the relief to be granted. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086.

The marriage to another of the spouse who obtained a decree of divorce attacked by the divorced mate after a long lapse of time and an unexcused delay is a circumstance strongly tending to render it inequitable to disturb the judgment. *Corney v. Corney* (1910) 97 Ark. 117, 133 S. W. 813; *Whittaker v. Whittaker* (1894) 151 Ill. 266, 37 N. E. 1017; *Maher v. Title Guarantee & T. Co.* (1900) 95 Ill. App. 365; *Earle v. Earle* (1883) 91 Ind. 27; *Nicholson v. Nicholson* L.R.A.1917B.

(1889) 113 Ind. 131, 15 N. E. 223; *Zoellner v. Zoellner* (1881) 46 Mich. 511, 9 N. W. 833.

A decree of divorce in favor of a husband, obtained in a suit of which the wife had full notice and in which she appeared, by collusion between the two, will not, after the lapse of several years and the remarriage of the husband, be disturbed merely to provide the first wife with alimony. *Nichols v. Nichols* (1874) 25 N. J. Eq. 60.

A delay of fifteen years, during which the plaintiff remarried, after a decree of divorce originally granted on default after service of process by publication had, at the instance of the defendant, and upon her general appearance, been amended so as to secure to her certain property which thereby she obtained, in filing a bill in equity to set aside and annul the decree on the ground that the statute providing for substituted service of process in divorce cases had not been conformed to at the outset of the proceedings, constitutes such inexcusable laches as necessitates a dismissal of the bill. *Hereu v. Hereu* (1899) 6 Ariz. 270, 56 Pac. 871.

A charge by a wife whose husband obtained a divorce from her on the ground of adultery that he and his agents tampered with and kept away from the trial her witnesses to prove recriminatory charges against him does not warrant the setting aside of the decree after a lapse of a dozen years, where, by the wife's own showing, she knew two or three days before the trial ended of the absence of the witnesses, and took no measures whatever, either to procure their attendance or to obtain a postponement of the trial because of their absence. *Holbrook v. Holbrook* (1874) 114 Mass. 568.

The application of a wife to set aside a divorce obtained by her husband in a suit of which she had notice and in which she voluntarily and deliberately withdrew her appearance by an attorney, based on allegations that the charges against her were not true and that her husband, by pretending he had abandoned the suit, persuaded her to withdraw her defense, should be denied on the ground of laches where she knew the decree had been granted within a month after it was entered, and, without excuse, delayed for two years to apply for relief, and where the evidence of fraud was very weak and fairly negatived. *Catts v. Catts* (1908) 35 Pa. Super. Ct. 293.

A wife divorced for adultery who

knew about the decree within four days after it had been granted, and who, without adequate excuse or satisfactory explanation, waited ten years before moving to set it aside on the ground of alleged collusion between her attorney and her husband, when the latter had, in the interval, married another woman, who was still living, is barred by laches from relief. *Nagle v. Nagle* (1910) 43 Pa. Super. Ct. 442.

A delay of more than a year, and until after a new marriage has occurred, by a wife to apply to set aside a divorce obtained by her husband pursuant to her consent and by her collusion, deceitfully procured by his false representations and promises, afterwards broken, and by withholding facts from the court and giving false testimony, amounts to laches fatal to her claim to relief. *Karren v. Karren* (1902) 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465.

A divorce obtained by a man from his wife by collusion, and with her consent to make no opposition, will not be set aside upon her application, after the lapse of a year, and after the man had married another woman, notwithstanding the consent was obtained upon the man's representation that a divorce was necessary to enable him to get a deed of a homestead, and his promise to remarry his wife after the decree should have been granted. *Ibid.*

Assuming the judicial power, upon a motion made in the name of a man to set aside a decree of divorce granted to his wife after his answer had been stricken out for his disobedience of an order to pay alimony, to allow his alleged paramour to come in and contradict testimony respecting his adulterous intercourse with her, her laches for several months after she acquired full knowledge of the facts and proceedings would be a sufficient reason for denying relief. *Quigley v. Quigley* (1887) 45 Hun (N. Y.) 23.

A statute limiting to one year after the person who seeks to vacate a judgment learns of the judgment, the period within which to attack, stands as a bar to a suit to set aside a divorce, brought by the spouse who obtained it, five years after it was granted. *Uecker v. Thiedt* (1907) 133 Wis. 148, 113 N. W. 447.

Relief in an action to set aside a judgment of divorce brought in virtue of the Minnesota statute (Gen. Stat. 1913, § 7910), for fraud in obtaining it, is barred by laches. *Brockman v. Brockman* (1916) — Minn. —, 157 N. W. 1086. L.R.A.1917B.

The fact that a woman waited six and a half years before attacking in another suit a decree of divorce obtained by her husband in a suit in which she appeared, and was defeated in such attack, and delayed a considerable time longer to renew her assault upon the decree in another suit, though not deemed controlling, must have influenced the court to defeat her again, as the laches was not excused and hardly was explained. *Bidwell v. Bidwell* (1905) 139 N. O. 402, 2 L.R.A.(N.S.) 324, 111 Am. St. Rep. 797, 52 S. E. 55.

After the lapse of more than forty years and the remarriage and death of a man who had obtained an absolute decree of divorce from his wife, who was living in a foreign country, separate from him, under a limited divorce granted her according to the laws of her domicile, a court of equity will not interfere to set aside the decree upon her uncorroborated testimony that she never had notice of the proceedings and remained ignorant of the decree, for the avowed purpose of collecting a judgment against the deceased's estate, which at law stood barred by the statute of limitations. *Givernaud v. Givernaud* (1912) 81 N. J. Eq. 66, 85 Atl. 830.

A sufficient excuse for a former wife's delay about forty years to attack a judgment of divorce procured against her by her husband, since deceased, upon a substituted service, is not made by her allegation and oath that she was ignorant until within a few months that any divorce had been granted, when another witness testifies that she talked about the divorce many years before. *Douglas v. Teller* (1909) 53 Wash. 695, 102 Pac. 761.

A man who had been personally served with process in his wife's suit for divorce, who knew all about it from beginning to end, and refrained from contesting it, and who knowingly and wilfully acquiesced in the status established by the decree obtained by her against him for seventeen years, without seeking to avoid it, during which period the wife gave birth to a child after marrying again, is, after the death of his former wife, regardless of the merits or validity of the decree of divorce, in no position to invoke the aid of a court of equity to nullify the decree to enable him to recover real property held by the wife in her own right, and conveyed by her to an innocent purchaser at its full value, who entered and continued in possession on the faith

of her title. *Buffington v. Carty* (1905) 195 Mo. 490, 93 S. W. 779.

An attack on a decree of divorce obtained by a man upon a substituted service and by default, made by the divorced wife thirteen years afterward, on the ground that it was fraudulently obtained, where the wife had, in the meantime, commenced proceedings to annul the decree, and had abandoned them pursuant to a money settlement made by her with her former husband; and under advice of counsel, and where she knew for several years that her husband had married and was living with another woman as his wife,—cannot be maintained upon the theory that she did not discover the fraud until within the last six months, since she had the knowledge and means to discover it, and was guilty of laches and want of diligence if she did not do so. *Peyton v. Peyton* (1902) 28 Wash. 278, 68 Pac. 757.

Acquiescence and laches sufficient to estop in equity from attacking a divorce obtained by a husband against his wife on the ground that he and the sheriff fraudulently conspired falsely to make return of personal service of process in the divorce suit upon her are shown by the production of several letters by her to her former husband, and her acceptance from him of support after the decree was granted, for a period of eleven years, throughout which, according to her own testimony, she had knowledge of the rendition of the decree, and when she did not bring her bill until after the deaths of both her former husband and the sheriff. *Barnes v. Willis* (1913) 65 Fla. 363, 61 So. 828.

A unexcused delay of eight years by a woman to bring suit to set aside a decree of divorce which her husband had obtained against her, when she knew that, on the faith of it, he had been seven years married to and was living with another woman as his wife, and when, too, during the whole time, she was in constant communication with him and in receipt of regular contributions to her own and her children's support from him, constitutes such an acquiescence on her part as estops her from relief, and is such laches as bars her from relief in a court of equity. *Yorston v. Yorston* (1880) 32 N. J. Eq. 495.

A decree of divorce fairly and regularly obtained upon default, by a husband, from his wife, while she was living separate from him with her parents, out of the state, and after she had actual notice of the pendency of the suit, and

had employed counsel to defend her, who neglected, without any explanation, to file her answer in time, will not be set aside after a delay of seven years, on her application, upon the plea that she was ignorant during the first five of those years that the decree had been rendered, and had been led to believe that the suit had been abandoned, where she offers no excuse or explanation of a further delay of two years after learning the facts, and manifestly seeks only an allowance of alimony. *Gans v. Gans* (1910) 77 N. J. Eq. 309, 76 Atl. 234.

A delay of five years, explained only by a false plea of poverty, is laches which bars relief in equity from a divorce by voluntary default, after a second marriage of the spouse who obtained it. *Whitley v. Whitley* (1908) 60 Misc. 201, 111 N. Y. Supp. 1078.

That a husband who had obtained a decree of divorce from his wife by fraudulent means repeatedly told her afterwards that he regretted his past misconduct and separation from her, and reiterated a promise to provide for her to the extent of half of his estate, does not sufficiently excuse her for not bringing suit to set aside the decree for five years, having full knowledge of the facts. *Horton v. Stegmyer* (1910) 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134.

The record of a decree of divorce nominally in favor of a wife, against her husband, entered in a suit instituted by him in her name, without her knowledge or consent, and of which she was actually ignorant, is not implied notice to her, and cannot be used to impute laches to her in a subsequent suit in equity to annul the decree on the ground of its fraudulent procurement. *Brown v. Grove* (1888) 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387.

#### ***XL. Process, pleadings, procedure, and proof in actions attacking divorces.***

##### ***a. Constructive service of process in suits to set aside divorces.***

In two cases of suits to set aside divorces objections were made at the outset to the jurisdiction of the courts to grant the relief asked, and over the persons of absentee defendants, notwithstanding the decrees attacked had been granted by courts of the same state, or by the court in which the suit was brought. In both there had been no personal service of process on the defendants, and in both the objections were held fatal to the maintenance of the actions.

An action to set aside for fraud in procuring it a decree of divorce, not being one in which by statute service may be made by publication upon an absentee or nonresident defendant, a judgment in such an action, rendered after substituted service by publication and mailing, setting aside a prior divorce, cannot stand. *Pullman v. Pullman* (1916) — **Wash.** —, 158 **Pac.** 746.

A court which granted a man a divorce from his nonresident wife upon default, after a substituted service, authorized through his fraud, has no power, thirty years later, to entertain a suit to set it aside, or to grant any relief against it, in a proceeding by the divorced wife, even though she offers an adequate excuse and satisfactory explanation of the delay, where, in the meantime, the man married and had issue by another woman, and died, leaving no estate in the state where he obtained the divorce, but all his property was in another state, in which the second wife and her children resided, so that they could not be personally served with process, and where the only local statute empowering a court to annul its own judgment after the expiration of the term prescribed a time limit of two years. *Blair v. Blair* (1915) 96 **Kan.** 757, 153 **Pac.** 544.

**b. Need of specifically pleading ground of attack on divorces.**

As a judgment is presumed to be valid, one who would have it set aside on the ground that it was obtained by fraud must, to overbear the presumption, specifically allege and prove the particular acts and conduct that constitute the fraud relied upon to vitiate the judgment. *Moss v. Drost* (1912) 130 **La.** 285, 57 **So.** 929.

A pleading attacking a judgment upon broad, general, and indiscriminate charges of fraud, without any specification of particular facts constituting such fraud, is insufficient. *Patrucio v. Selkirk* (1913) — **Tex.** Civ. App. —, 160 **S. W.** 635.

These propositions have abundant support in the decisions. *Ramseur v. Bronnell* (1889) — **Ark.** —, 12 **S. W.** 200; *Corney v. Corney* (1913) 108 **Ark.** 415, 159 **S. W.** 20; *McCook v. Bernd Bros.* (1887) 79 **Ga.** 391, 5 **S. E.** 75; *Raburn v. Shortridge* (1830) 2 **Blackf.** (Ind.) 480; *Taylor v. Mallory* (1892) 76 **Md.** 1, 23 **Atl.** 1098; *Rooks v. Williams* (1858) 13 **La. Ann.** 374; *Devlin v. Boyd* (1891) 40 **N. Y. S. R.** 966, 16 **N. Y. Supp.** 37; *Burnley v. Rice* (1858) 21 **Tex.** 171; **L.R.A.** 1917B.

*Gulf, C. & S. F. R. Co. v. Henderson* (1892) 83 **Tex.** 70, 18 **S. W.** 432; *Patton v. Taylor* (1849) 7 **How. (U. S.)** 132, 12 **L. ed.** 637.

A general allegation that the complainant in a suit in equity to set aside a judgment and have a new trial did not have an opportunity to meet the case made by the adversary, without showing why, or any reasonable and proper effort to meet it, frustrated, if made, by fraud and circumvention, is insufficient as a foundation for relief. *Moore v. Gulley* (1907) 144 **N. C.** 81, 10 **L.R.A.(N.S.)** 242, 56 **S. E.** 681.

A petition to set aside a judgment is in the nature of a motion for a new trial, and must contain such a statement of facts as would support such a motion, made at the term at which the judgment was rendered. *Patrucio v. Selkirk* (1913) — **Tex.** Civ. App. —, 160 **S. W.** 635.

A complaint in an action brought in virtue of the Minnesota statute (Gen. Stat. 1878, chap. 66, § 285), to set aside a decree of divorce upon the ground that it was procured by perjured testimony and other fraudulent acts, but which does not specifically point out the alleged frauds and perjuries, nor show that the action was brought within the time limited by the statute for bringing it after discovery of the grounds, is bad on demurrer for failing to state a cause of action. *Bomsta v. Johnson* (1888) 38 **Minn.** 230, 36 **N. W.** 341.

A petition alleging that the defendant obtained by fraud a divorce from the petitioner, and praying for "a review of the same that said decree . . . may be annulled," is not open to the objection that it is bad for duplicity, for it seeks only to set aside the decree; and not a retrial of the merits of the divorce suit and annulment of the proceedings at the same time. *Lord v. Lord* (1877) 66 **Me.** 265.

**c. Defective or objectionable pleadings in suits attacking divorces.**

A bill in equity brought by a widow against the first wife of her deceased husband, to set aside a decree of divorce between the two, is properly dismissed for want of equity when it contains neither averments of fraud nor excuses for prima facie laches. *Smith v. Smith* (1914) 186 **Ill. App.** 540.

A decree divorcing a husband on the ground that his wife had deserted him will not be annulled as having been fraudulently procured, upon her allega-

tion that she desired and had sought to return to him and his home, supported only by proof that she was not cordially welcomed, without any evidence that she was really prevented or dissuaded from returning by him or with his approval. *Miller v. Bearb* (1914) 134 La. 893, 64 So. 822.

When, by proceedings regular upon their face, and upon proofs not shown to have been false, an interlocutory decree of divorce has been followed in due course by a final judgment, all upon default, after substituted service by publication, an application to set aside the final judgment under a statute providing for the granting of such relief in such cases, which fails to set out facts required to be stated by such statute, must be denied. *Burnes v. Burnes* (1895) 61 Mo. App. 612.

An application by a corespondent in a divorce suit to stay the entry of an interlocutory decree until the issues raised by a proposed answer can be tried and determined lacks sufficient support to be granted, in an affidavit of an attorney alone, without the applicant's sworn denial of the charges in the complaint. *Stafford v. Stafford* (1915) 170 App. Div. 172, 156 N. Y. Supp. 25.

A petition to set aside a decree of divorce, containing averments showing fraud and duress in obtaining it, which, if true, afford sufficient grounds for the relief sought, cannot be struck from the files because, in addition, it contains allegations deemed immaterial, impertinent, and scandalous. *Butler v. Butler* (1912) 34 Okla. 392, 125 Pac. 1127.

Allegations in proceedings to set aside a divorce that the action had been fraudulently conceived and prosecuted by the plaintiff in conspiracy with a third person named, to obtain a dissolution of the matrimonial bond and possession of some or all of defendant's property, for the mutual benefit of the conspirators, carried through by perjured testimony, are insufficient to make a case for setting aside the decree. *Cooper v. Cooper* (1916) — Wash. —, 158 Pac. 1007.

Allegations in a suit by a wife to set aside a decree of divorce granted her husband in proceedings of which she had due notice, instituted in her home county, that she was prevented from defending and appearing at the trial by his promises, upon which she relied, that if she would absent herself, he would withdraw the charges of adultery he had made and rely upon other grounds, would L.R.A.1917B.

not ask to have the custody of their minor child, but would leave it in care of her mother, and would deed her her interest in land they owned, and give her a part of his personal property,—do not, in legal contemplation, constitute a fraud in obtaining the decree, especially when not coupled with any charge that the promises were made of purpose to cheat and deceive the wife, and with an intent to break them. *Sperry v. Sperry* (1907) — Tex. Civ. App. —, 103 S. W. 419.

The petition of an injured spouse to set aside a decree of divorce upon the ground that it was procured by a fraud is not demurrable because it fails to allege that the other spouse has not married again. *Rush v. Rush* (1877) 46 Iowa, 648, 26 Am. Rep. 179, rehearing denied in (1878) 48 Iowa, 701.

A reviewing court is not warranted in upsetting a judgment vacating a decree for fraud in procuring it, upon the ground that the petition assailing such decree contained naught but very general and indefinite allegations of fraud, when such allegations were broad enough to justify the reception of evidence of fraud, and no objection to the admission of such evidence was made, based upon the generality and indefiniteness of the charges. *Frisbie v. Chase* (1913) 161 Iowa, 133, 140 N. W. 842.

Upon the overruling of a demurrer to a complaint in an action to annul a decree of divorce upon the ground that it was obtained by a fraud upon the jurisdiction of the court and the complainant, no judgment can be rendered pro confesso, but clear proof of the alleged fraud is still required. *Lord v. Lord* (1877) 66 Me. 265.

*d. Errors in reception of testimony to support attacks on divorces.*

A judgment vacating a decree of divorce which was granted by default upon a constructive service by publication, giving the complainant leave to appear and defend the divorce suit, on the ground that a fraud was perpetrated by a false affidavit to procure the substituted service, will not be disturbed on appeal for error in admitting testimony to support the attack on the divorce, where a meritorious defense to the divorce suit plainly exists, and the defendant had neither waived legal service of process nor appeared. *Parramore v. Parramore* (1911) 61 Fla. 701, 55 So. 795.

The principle of the common law, even when embodied in a statute which pro-



hibits private conversations of husband and wife to be testified to by either, does not prevent either from testifying that such a conversation took place at a stated time and place, and what was done as a result of it, for the purpose of proving inferentially a fraudulent misrepresentation vitiating a decree of divorce attacked for fraud. *Sampson v. Sampson* (1916) 223 *Mass.* 451, 112 *N. E.* 84.

***XXI. Effect of vacating decree of divorce.***

A decree of divorce granted after an *ex parte* hearing where service was made by publication only, set aside by order giving the defendant leave to answer and contest upon the merits, becomes a nullity when the plaintiff omits to appeal from the order and voluntarily dismisses the suit for the purpose of bringing a new action in another county. *Cheyney v. Cheyney* (1910) 163 *Mich.* 598, 128 *N. W.* 780.

Annulling a decree of divorce for fraud in procuring it restores the matrimonial status as it was before the decree was made. *Voorhees v. Voorhees* (1890) 46 *N. J. Eq.* 411, 19 *Am. St. Rep.* 404, 19 *Atl.* 172, affirmed in (1890) 47 *N. J. Eq.* 315, 14 *L.R.A.* 366, 20 *Atl.* 676; *State v. Watson* (1898) 20 *R. I.* 354, 78 *Am. St. Rep.* 871, 39 *Atl.* 193, 11 *Am. Crim. Rep.* 24, affirmed in (1900) 179 *U. S.* 679, 45 *L. ed.* 383, 21 *Sup. Ct. Rep.* 915.

The pendency undetermined of a suit in equity to annul a decree of divorce granted by default, on service by publication, cannot impair the force of the decree in the slightest. *Re McNeil* (1909) 155 *Cal.* 333, 100 *Pac.* 1086.

***XXII. Conclusion.***

Any attempt to formulate a conclusion which should be a safe foundation for forecasting the outcome of a given attack upon a divorce is foredoomed to failure. It is not alone because, as was said in one case, the methods of procedure to vacate and annul judgments after the expiration of the terms at which they were rendered vary greatly in the different jurisdictions (*Tyler v. Aspinwall* (1901) 73 *Conn.* 493, 54 *L.R.A.* 758, 47 *Atl.* 755), but it is literally the case, as was said in another, that every suit in equity to annul a decree of divorce must necessarily be determined by its own peculiar facts and circumstances (*Maher* *L.R.A.* 1917B).

*v. Title Guarantee & T. Co.* (1900) 95 *Ill. App.* 365).

In addition to the difficulties made apparent by these citations, there is to be considered the powerful element of judicial discretion to grant relief,—an element of influence varying in strength virtually with every judge, according to his predilection to make as far as possible a marriage indissoluble, or a dissolution of it irreversible. When account is further taken of the supposed public policy of the state where the divorce is attacked, and its legislation upon the subject, expressed in the statutes or construed by the courts, the search for a reliable guide even in a single jurisdiction becomes hopeless. The setting aside of a divorce always involves questions of fact determined, as the proceeding or suit is equitable, by the court itself, and none can say what evidence of the basic facts will be regarded as sufficiently clear and satisfactory to convince the trial judge of the justice and propriety of granting the relief sought; nor, if the facts shall be indubitably proved, can anyone say if the excuses for not making an earlier attack on the decree will be judicially deemed adequate, nor whether, the facts being established and the excuses considered valid, the court will not, after all, consider it inequitable or contrary to public policy to grant any relief. In the past many divorces granted without actual notice or real chance to defend have been held absolutely final on technical grounds, even when founded in fraud and perjury. In the past many successful raiders upon domestic peace have been judicially pronounced innocent third persons with equities superior to those of cruelly injured spouses, and by judicial adjudication have secured the fruits of the raids. It is too much to expect that such wrongs will not be repeated, yet there may be discerned a growing tendency in the courts not to repeat them, and it may be said with some confidence that efforts to get relief from iniquitous decrees of divorce which would certainly have failed in times gone by are in future likely to succeed. The cases in point have been collated with care and presented in such detail that it is believed that the future assailant of a wrongful divorce may be able to keep the difficult and devious path to the goal of nullification when it is attainable at all.

J. B. G.

## GEORGIA SUPREME COURT.

MRS. M. E. HOWLAND, Plff. in Err.,  
v.

R. L. MORRIS et al.

(141 Ga. 687, 92 S. E. 32.)

**Mortgage — foreclosure — sale of entire tract.**

1. An execution issued upon a judgment of foreclosure of a mortgage on land, which is described in the mortgage, judgment, and execution as one entire tract, may be levied on the entire tract, and the levy will not be excessive, although the value of the land may be much greater than the amount sufficient to satisfy the execution. Nor will a sheriff's sale of the entire tract, made in pursuance of such a levy, be void merely because the tract was capable of subdivision so that, by sale of a less quantity than the whole, a sum would be realized sufficient to discharge the *fi. fa.*

*For other cases see Mortgage, VI. g, §, in Dig. 1-52 N. S.*

**Same — consideration — sufficiency.**

2. Under the facts of this case, the sheriff's sale was not void, either because of inadequacy of consideration, or for the reason that a valid affidavit of illegality by the defendant in *fi. fa.* was delivered to the sheriff prior to the sale.

*For other cases, see Mortgage, VI. g, in Dig. 1-52 N. S.*

(May 19, 1914.)

**E**RROR to the Superior Court for Floyd County to review a judgment sustaining a demurrer to a petition filed for the cancellation and rescission of a sheriff's sale of property under a mortgage foreclosure. Affirmed.

**Statement by Fish, Ch. J.:**

Mrs. Medora E. Howland gave the Exchange Bank of Rome two mortgages on a parcel of land situated in the city of Rome and known as the "Toll house and lot," described by metes and bounds, to secure, respectively, two debts owing by her to the bank, one for \$1,000 principal and interest, and the other for \$500 principal and interest. Both mortgages were duly foreclosed and executions issued thereon in which the property ordered to be sold was described in the same way as set forth in the mortgages. The execution for \$1,000 principal and \$88.55 interest, together with cost, was levied on the mortgaged property, which was described in the entry of levy in the

**Headnotes by FISH, Ch. J.**

**Note.** — As to amount of property to be sold under mortgage foreclosure, see annotation following this case, post, 517.  
L.R.A.1917B.

same manner as in the mortgage and the execution; and it was advertised for sale as one parcel of land with the same description contained in the mortgage execution and levy. An attorney at law for the mortgagor prepared what purported to be an affidavit of illegality, in order to stop the sale of the property under the mortgage execution, on the grounds (a) that the mortgagor had never been served with a copy of the petition and rule nisi in the foreclosure proceeding, that she did not appear and plead therein nor waive service in any way, that she was not within the jurisdiction of the court at the time the entry of service was made, and had no knowledge of the proceeding until after the levy; and (b) that the return of service by the deputy sheriff, to the effect that he had served her personally with a copy of the foreclosure proceeding on a given date, was untrue, and that she traversed such return as entered. This affidavit began as follows: "Georgia, Floyd county: In person before me came the defendant in the above-stated case, who, being duly sworn, says under oath," etc. And it concluded with these words: "Sworn to and subscribed before me, October 1, 1912. Mrs. M. E. Howland. Witness. A. S. West. N. P. Floyd Co., Ga." This paper was handed, on the afternoon prior to the day of sale, by the attorney for the mortgagor to a lady who was alleged to have charge of the affairs in the office of the sheriff of Floyd county, with the statement by the attorney to her, "Here is an affidavit of illegality to stop the sale of the Howland property." The paper was delivered to the sheriff by the lady referred to some time prior to the sale of the property. On the day the sale was advertised to take place, the sheriff "called up the attorney of plaintiff in *fi. fa.*, and they together called over the telephone A. S. West, who had witnessed the said signature of Mrs. M. E. Howland as aforesaid, and . . . West said to them that he had merely witnessed the paper, and that it was not sworn to before him." Neither the sheriff nor the attorney for the plaintiff in *fi. fa.* notified the mortgagor or her attorney that they had received this information from West, or "that they would sell said property, or that they would not recognize the validity of said affidavit of illegality, or the legal sufficiency thereof." The property was sold as advertised by the sheriff, and brought the sum of \$1,910, R. L. Morris being the purchaser, and the sheriff conveyed the property to him in pursuance of the sale. Subsequently the mortgagor brought an equitable petition against Morris and the sheriff, in which she alleged in substance the foregoing facts, and further:

"That said property levied on was and is of the value of \$8,000, that the same is composed of a number of separate and distinct lots, and that the same can be easily divided into four lots worth approximately \$2,000 each." Also, "that said affidavit of illegality was properly witnessed and properly executed, and that when same was filed by your petitioner's attorney that both she and her attorney never questioned the fact but that it would stop the sale of said property, and for this reason failed to appear at the sale of said property or to be there, and as a result of their absence said property was sold at a grossly inadequate price, to wit, the sum of \$1,910, to R. L. Morris of Rome, Georgia." And that "petitioner says that said action of the attorney for plaintiff in *fi. fa.*, and said sheriff, in calling up said witness A. S. West and in keeping their information, and their further action in failing and refusing to notify either your petitioner or her counsel that said affidavit of illegality would not be accepted, and that said sale would be held on said first Tuesday in October, amounted to fraud. Petitioner further shows that said levy was grossly excessive, and that a levy on one of the lots constituting said property described in said mortgage and levied on as aforesaid would have been sufficient to have brought the amount of said mortgage *fi. fa.*; that said property was made up of four separate and distinct lots, either one of which was worth more than the sum of said mortgage *fi. fa.*, principal, interest, and cost; and that said levy on said property to satisfy said mortgage *fi. fa.* was grossly excessive and amounted to fraud. Petitioner shows that on account of said fraud, misrepresentation, irregularity, error, omission, and misapprehension of your petitioner and her attorney as to the time of sale, the said excessive levy as aforesaid, and the grossly inadequate price for which said property was bid in as aforesaid, constitutes such fraud and that said deed [from the sheriff to Morris] should be set aside."

The prayer in the petition as amended was as follows: "Wherefore petitioner prays that said deed be canceled of record, and said sale be set aside and declared null, void, and of no effect, and that petitioner be placed in full possession of said premises."

Process was prayed against Morris and the sheriff. Each of the defendants demurred to the petition. The demurrers were sustained, and the petitioner excepted.

Messrs. C. J. Carey, Denny & Wright, and Graham Wright, for plaintiff in error:

It was not necessary for a tender to be made by Mrs. Howland to R. L. Morris of L.R.A.1917B.

the purchase price before a cancellation and rescission of the sale could be had.

Benedict v. Gammon Theological Seminary, 122 Ga. 412, 50 S. E. 162; Milner v. Vandivere, 86 Ga. 546, 12 S. E. 879.

An excessive levy, coupled with any other circumstance, is a sufficient warrant to set aside a deed.

White-Diamond v. Hightower & Co. 125 Ga. 191, 53 S. E. 1024, 5 Ann. Cas. 260.

Plaintiff is entitled to have the deed set aside and her land returned to her.

17 Cyc. 1276; 24 Cyc. 39; Parker v. Glenn, 72 Ga. 647; Suttles v. Sewell, 109 Ga. 707, 35 S. E. 2; Stark v. Cummings, 127 Ga. 107, 56 S. E. 130; Cooney v. Atlanta, 136 Ga. 119, 70 S. E. 950; Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620; Stark v. Cummings, 119 Ga. 36, 45 S. E. 722; Roser v. Georgia Loan & T. Co. 118 Ga. 181, 44 S. E. 994; Haunson v. Nelms, 109 Ga. 802, 35 S. E. 227.

Messrs. Maddox & Doyal and Harris & Harris for defendants in error.

Fish, Ch. J., delivered the opinion of the court:

In their brief filed in this court counsel for plaintiff in error say: "The petition alleged, as ground for setting aside this deed and sale, (1) that the levy was excessive; (2) that the price was grossly inadequate; and (3) that the defendant in *fi. fa.*, before the sale of said property, filed with the sheriff's office an affidavit of illegality which was accepted by the sheriff's office, and thereupon the defendant in *fi. fa.* naturally supposing that the said sale would be postponed until a hearing could be had upon this affidavit, went away from the place of sale, and that later the attorney for the Exchange Bank, without the knowledge of Mrs. Howland or her attorney, conferred with the sheriff, and they thereupon made certain private investigations, and finally set aside the affidavit of illegality and sold the property without notifying or attempting to notify either Mrs. Howland or her attorney."

We will deal with the points insisted on in the brief in the order there stated.

1. Was the levy excessive? Counsel contend in their brief that the mortgaged property was susceptible of subdivision, so as to sell a less quantity than the whole, and thereby raise a sum sufficient to satisfy the mortgage *fi. fa.*; and therefore that the sale of the entire property was not lawful and should be set aside. We will consider these two points in this division of the opinion. In *Vickers v. Hawkins*, 111 Ga. 119, 120, 36 S. E. 464, it was said: "That an execution in rem against certain specific property may properly be levied upon that

property, and that the levy will not be void for excessiveness though the value of the property be far greater than the amount of the execution. We therefore think that, where a tax execution is issued against a particular lot of land, commanding the levying officer to levy upon and sell that lot, a levy of the execution upon the entire lot is not excessive."

This ruling was followed in *Wilkinson v. Holton*, 119 Ga. 557 (3), 558, 46 S. E. 620, where a security deed had been given by the debtor to his creditor and judgment obtained for the indebtedness, and an execution issued thereon had been levied on the entire land conveyed in the deed. In the case last cited it was said that, "Where the property is easily susceptible of division, it would be the duty of the sheriff to expose it for sale in parcels, in such a way as to discharge the amount due on the executions with as little loss to the plaintiff in the present action as possible."

It will, however, clearly appear from an examination of that case that what was said in respect of the sale, in parcels, of property levied on under the execution there involved, where it is susceptible of subdivision, was purely obiter. See also *Cooney v. Atlanta*, 136 Ga. 118 (3), 120, 70 S. E. 950, where the *fi. fa.* apparently directed the marshal to sell so much of the property described as might be necessary to make the amount of an assessment for a local improvement, and the marshal, in his answer to a petition for injunction, disclaimed any intention to sell in bulk rather than in parcels. Without discussing what may be the rule in cases of executions in rem for taxes or for assessments for local improvements, we know of no case, where the question was in issue, holding that where a mortgage execution has been levied on the entire property described in the mortgage judgment of foreclosure, and execution, it must be sold in parcels when susceptible of subdivision. In the other cases cited by counsel for plaintiff in error, the executions there involved were not against specific property, but were against the defendants generally. In *Reeves v. Bolles*, 95 Ga. 402, 22 S. E. 626, a borrower of money secured the same by a deed to a large tract of land to the lender, judgment was obtained for the money loaned, and execution was levied upon the entire tract of land. The defendant in *fi. fa.*, and certain persons as his judgment creditors, filed an equitable petition to enjoin the sale, and prayed that the land be surveyed, platted, and sold in separate parcels. The petitioners alleged that, if the land should be sold in one entire tract, it would bring a much less sum than if the same were sold in parcels, and would therefore be sacrificed

unless the defendants were enjoined from making the sale as advertised; that is, to be sold in gross. The trial judge refused to grant the injunction, and upon a writ of error to this court his judgment was affirmed. There was a conflict in the evidence submitted, as to whether or not the land would sell to better advantage if divided up into parcels than it would if sold as one entire tract. In the opinion, pronounced by Mr. Justice Samuel Lumpkin in behalf of the court, it was said: "This [conflict in the evidence] of itself would be a sufficient reason for declining to interfere with the discretion of the trial judge in refusing by injunction to arrest the progress of the defendant's execution."

The decision, however, was not left to stand on this ground alone, for it was said: "Granting, however, for the sake of the argument, that a larger amount would be realized by selling the plaintiff's land in separate tracts, we are still of the opinion that the judge was right in denying the injunction. It may be within the power of the court of equity, in some cases, to decree that the property of a debtor shall be sold in parcels, and not as a whole, where it manifestly appears that gross injustice would result if the latter course were pursued. We are entirely satisfied, however, that the case in hand is not one of this kind. The plaintiff, Reeves, borrowed money, gave his note for the same, and for the purpose of securing its repayment executed a deed conveying the entire body of land now in controversy. This gave to the lender an absolute legal right to enforce the collection of any judgment he might obtain upon the note by a sale of the land as one entire tract. . . . The land in its entirety being specifically pledged for the payment of the debt, it must inevitably have been within the contemplation of the parties that, if it should become necessary to enforce payment by resort to legal proceedings, the land would be subject to sale as a whole just as it was conveyed. It is not denied that the plaintiff in execution has a perfect legal right to have all the land sold to satisfy his judgment; and to have granted the injunction sought would necessarily have been to interfere, to some extent, with the exercise of this right."

A judgment of foreclosure of a mortgage on realty is in the nature of a judgment in rem: "It is a judgment to enforce a specific lien, created by agreement of the parties. It is not alone a judgment as to the amount due on the mortgage, but it is also a judgment that the property mortgaged shall be sold to pay the sum adjudged to be due. . . . In pursuance of the judgment, the process issues, commanding the

officer to levy upon and sell the property, naming it specifically. . . . What right of judgment or discretion has he? His duty is to levy the process, and the process commands him to levy upon and sell the property, designating it by full description. He is not directed to raise money, as in case of a general judgment, out of the property of the defendant, but to raise it out of the property named." *Wallace v. Holly*, 13 Ga. 389, 393, 394, 58 Am. Dec. 518.

That it is not the duty of an officer making a sale of land in pursuance of a mortgage foreclosure to divide the land into parcels in making the sale, where the land is described in the mortgage and judgment of foreclosure as a single tract, see *Patton v. Smith*, 113 Ill. 499; *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376; *Geuda Springs Town & Water Co. v. Lombard*, 57 Kan. 625, 47 Pac. 532; *Cochran v. Goodell*, 131 Mass. 464.

In the case at bar the property, as appears from the petition, was described in the mortgage, the judgment of foreclosure, the execution, the entry of levy, and the sheriff's advertisement of sale, as "all that tract or parcel of land situated, lying, and being in a part of the strip of land lying on the south bank of the Etowah river in the fifth ward of the city of Rome, Floyd county, Georgia, known as the 'Toll house and lot;'" the tract being further described by boundaries and distances. We are clear from what has been said that the levy was not excessive nor the sale void because the property was not subdivided and sold in parcels.

2. We are equally convinced that the sale was not void on account of inadequacy of price. Inadequacy of consideration, even if it be gross, is not per se sufficient cause to set aside a sheriff's sale, though it may be a strong circumstance to show fraud. *Parker v. Glenn*, 72 Ga. 637; *Civ. Code*, § 4129.

"While inadequacy of price at a sheriff's sale will not, of itself, be a sufficient ground to set aside the sale, yet when it is grossly inadequate and is connected with fraud, mistake, misapprehension, surprise, or other circumstances which tend to bring about such inadequacy, to the injury of parties interested, the sale will be set aside by a court of equity." *Smith v. Georgia Loan & T. Co.* 114 Ga. 189, 39 S. E. 846.

If the price were grossly inadequate in the present case, there were no circumstances connecting it with any fraud, mistake, misapprehension, or surprise, bringing about such inadequacy, as to authorize the setting aside of the sale. As already shown, the levy upon and the sale of the entire tract were lawful, and, as will later be made to appear, the other circumstances relied

upon to indicate fraud were not sufficient for that purpose.

"This court, in *Brooks v. Rooney*, 11 Ga. 427, 56 Am. Dec. 430, adopts the rule in *Wheaton v. Sexton*, 4 Wheat. 503, 4 L. ed. 626, and makes the purchaser bound to look to the judgment, the levy, and deed, and at sheriff's sales requiring him to notice only these. Caveat emptor is not to be applied to him in any other conduct of the officer or other authority to sell and convey." *Overby v. Hart*, 68 Ga. 493, 496; *Parker v. Glenn*, 72 Ga. 637 (2a).

In *Wilson v. Boyd*, 84 Ga. 34, 10 S. E. 499, it was said that, if the sheriff sold lawfully, it could not be a fraud for the purchaser to buy, although he paid a small price. "If he was the highest and best bidder at a fair and lawful sale, he was entitled to the benefit of his purchase, no matter how little it cost him."

In *Boyd v. Wilson*, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428, it was held: "A purchaser at a tax sale duly made under a legal levy, who is neither implicated in nor aware of any fraud contemplated by the selling officer, is not affected thereby."

In the instant case there was nothing tending to show that Morris, the purchaser of the property at the sheriff's sale, had any knowledge or notice of any irregularity or fault on the part of the sheriff or the plaintiff in execution (the bank) or its attorney, even if anything of that character existed.

3. Was the sale void for the reason that the sheriff made it after the paper purporting to be an affidavit of illegality had come into his hands? We have no difficulty in reaching the conclusion that it was not. An affidavit of illegality must, of course, be sworn to; otherwise it would not be an affidavit. *Civ. Code*, § 5305. The paper purporting to be an affidavit of illegality, which was lodged in the sheriff's office the afternoon prior to the sheriff's sale of the property, was unusual in form. In the beginning it stated: "In person before me came the defendant in the above-stated case, who, being duly sworn, says under oath," etc. But the jurat, while in the ordinary form, was followed by the word "witness," under which was the name of a notary public. Mrs. Howland's name was signed to the paper. The word "witness" following the jurat probably attracted the attention of the sheriff and caused him and the attorney for the plaintiff in *fi. fa.* to call up the notary, who apparently had merely witnessed the paper, and to inquire of him whether he had administered an oath to the defendant in *fi. fa.* The notary replied no, that he had merely witnessed the defendant's signature. This all appears from the

petition, in which it was nowhere alleged clearly and expressly that the defendant had sworn to the purported affidavit of illegality. It is true the petition alleged "that said affidavit of illegality was properly witnessed and property executed," but the allegation that it was properly executed partakes more of the nature of a conclusion of the pleader than an unequivocal statement of a fact. Such equivocal allegation was allowed to stand by the pleader in the face of a special demurrer that the petition did not allege that Mrs. Howland "ever made oath to said alleged affidavit of illegality." Certainly it was within the knowledge of Mrs. Howland and her attorney whether she had made oath as to the truth of the contents of the paper. It did not appear from the petition that the sheriff ever accepted the paper as an affidavit of illegality, nor did he do or say anything which tended to induce Mrs. Howland or her attorney to believe that he would accept it. Her attorney, on the afternoon before the day of sale, merely handed the paper to the lady who was alleged to have charge of the affairs of the sheriff in his office, with

the statement, "Here is an affidavit of illegality to stop the sale of the Howland property," and this was followed by the allegation that the lady turned the paper over to the sheriff some time prior to the sale. Ordinary diligence, we think, required Mrs. Howland or her attorney to ascertain from the sheriff whether he would accept the paper as an affidavit of illegality and stop the sale. So far as the petition shows, neither of them communicated with the sheriff in reference to the matter, nor was either of them present during sale hours to see whether or not the sale would be made. Moreover, there was no hint in the petition that Morris, the purchaser at the sale, had any knowledge or notice in reference to the paper purporting to be an affidavit of illegality.

In view of all these circumstances, we have no hesitancy in holding that the sale should not be declared void, and that there was no error in sustaining the demurrer to the petition.

Judgment affirmed.

All the Justices concur.

### **Annotation—Amount of property to be sold under mortgage foreclosure.**

It is the purpose of the present annotation to treat the general question of the amount of property to be sold under a mortgage foreclosed either by suit in equity or action under a statute as well as by the exercise of a power of sale, also to include the question of the mode or manner of sale, that is, as to whether the mortgaged property shall be sold in lots or parcels or in entirety, *solido*, block, bulk, or lump, as well as the question of the avoidability of a sale claimed to have been made in an irregular mode or in a wrong amount. The treatment, however, is confined to controversies between the mortgagor and the mortgagee or persons succeeding fully to their rights, in which the fact that rights of third persons may be involved does not influence the decisions. This limitation excludes cases turning upon the fact that there have been conveyances of parts of the premises subject to the mortgage as well as those in which there were succes-

sive mortgages or mortgages to different parties.<sup>1</sup> Cases which involve the amount and mode of sale as affected by the fact that dower rights are involved or that a homestead comprises a part of the mortgaged premises are likewise excluded.

Cases involving foreclosure of deeds of trust which are in the nature of a mortgage are included herein.

#### **Foreclosure by action or suit.**

Included under this heading are the cases involving foreclosure of a mortgage by an action or suit, the procedure in which was not controlled by statute. In other words, the present subdivision is reserved for treatment of those cases wherein neither the amount of the property to be sold nor the mode of sale was determined either by a power of sale<sup>2</sup> or by statutory provision<sup>3</sup> relating or applicable to foreclosure of a mortgage or deed of trust.

Taking up this phase of the general

<sup>1</sup> Some phases of these questions have been covered. Thus, for the rule as to inverse order of alienation as affected by assumption of mortgage debt, see the note to *Chancellor v. Towell*, 39 L.R.A.(N.S.) 350. And as to marshaling assets for the benefit of mortgagor, see note to *Newby v. Norton*, 47 L.R.A.(N.S.) 302. As to effect of sale en masse by sheriff directed to sell parcels of

land separately mortgaged, separately, see note to *Bechtel v. Weir*, 15 L.R.A.(N.S.) 549.

<sup>2</sup> For foreclosure under a power of sale contained in a mortgage or deed of trust, see *infra*, that title.

<sup>3</sup> For foreclosure under or pursuant to statutory enactment, see *infra*, that title.

question under annotation, it may be said that the general rule is that a court of equity in decreeing foreclosure of a mortgage may, in the exercise of the discretion vested in it in such cases, properly direct that the mortgaged property be sold in such order or mode as would be for the best interests of the parties to the action.<sup>4</sup> In fact, as has well been said, it is a settled and familiar principle with the courts that the mortgaged property shall be so disposed of as to bring the best price possible consistent with the preservation of the rights of the mortgagee,<sup>5</sup> and that courts of equity, in case of mortgage sales, will control and regulate the proceedings so that no injustice shall be done to either party.<sup>6</sup>

And generally speaking there are no arbitrary and inflexible rules requiring the adoption of a particular mode, as, for instance, that property be offered and sold in legal subdivisions or in any particular parcels or quantities, but rather each case must depend upon its own particular facts,<sup>7</sup> the usual and proper practice in the absence of special circumstances being to direct the sale of the mortgaged premises, or as much thereof as is necessary to satisfy the decree if a part can be sold with the least injury to the defendants.<sup>8</sup> Of course, while the courts must not cut off any absolute rights of an interested party,<sup>9</sup>

it may give, where it feels called upon to do so, specific direction as to the mode and amount of mortgaged property to be sold,<sup>10</sup> and it is the absolute duty of the officer making the sale to follow the decree and order of sale in such a case,<sup>11</sup> even though the judgment debtor demand that a different mode be adopted,<sup>12</sup> the officer having no discretion in the matter where an explicit direction is given by the court;<sup>13</sup> or it may decree that the property be sold in the manner prescribed for the sale of real estate under execution,<sup>14</sup> or it may decree a sale in such parcels as the officer may think will secure the best price.<sup>15</sup> And ordinarily a decree of foreclosure may be wholly silent as to the order in which the mortgage premises shall be offered for sale.<sup>16</sup> However, an application to the court by the debtor, that the decree of foreclosure direct in the alternative the sale of the mortgaged premises or so much as may be necessary, if a part may be sold separately without injury to the parties, should be respected where the court itself does not direct the specific mode or manner of sale to be pursued.<sup>17</sup> And even though the property mortgaged consists of separate parcels, or can readily be cut up into parcels, equity may and ought to order all the property to be sold together where to sever the same would decrease the value of each parcel.<sup>18</sup> And it has been

<sup>4</sup> *Bank of Ukiah v. Reed* (1901) 131 Cal. 597, 63 Pac. 921; *Macomb v. Prentiss* (1885) 57 Mich. 225, 23 N. W. 788; *Butters v. Butters* (1908) 153 Mich. 153, 117 N. W. 203; *Suffern v. Johnson* (1820) 1 Paige (N. Y.) 450, 19 Am. Dec. 440; *Mathers v. Kinney* (1882) 8 Ohio Dec. Reprint, 516; *Miller v. Trudgeon* (1905) 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 739.

<sup>5</sup> *Worley v. Naylor* (1861) 6 Minn. 192, Gil. 123.

<sup>6</sup> *Suffern v. Johnson* (1820) 1 Paige (N. Y.) 450, 19 Am. Dec. 440.

<sup>7</sup> *Worley v. Naylor* (Minn.) and *Miller v. Trudgeon* (Okla.) *supra*.

<sup>8</sup> *Gladden v. American Mortg. Co.* (1885) 80 Ala. 270; *Harris v. Makepeace* (1859) 13 Ind. 560; *Johnson v. Williams* (1860) 4 Minn. 260, Gil. 183; *Wiley v. Angel* (1840) 1 Clarke, Ch. (N. Y.) 217; *Lane v. Conger* (1877) 10 Hun (N. Y.) 1.

<sup>9</sup> *Griswold v. Fowler* (1857) 4 Abb. Pr. (N. Y.) 238, 24 Barb. 135. And see *Skaggs v. Kincaid* (1893) 48 Ill. App. 608, holding that, when mortgaged land consists of separate government subdivisions belonging to different persons, the decree should so direct the order of sale of the parcels as to preserve the rights and equities of the separate owners.

<sup>10</sup> *Bank of Ukiah v. Reed* (1901) 131 Cal. L.R.A.1917B.

<sup>11</sup> *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848; *Meriwether v. Craig* (1880) 118 Ind. 301, 20 N. E. 769; *Hill v. Pettit* (1902) 23 Ky. L. Rep. 2004, 66 S. W. 190; *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233; *Woodhull v. Osborne* (1836) 2 Edw. Ch. (N. Y.) 614; *Oppenheimer v. Reed* (1895) 11 Tex. Civ. App. 367, 32 S. W. 325; *Babcock v. Perry* (1858) 8 Wis. 277.

<sup>12</sup> *Meux v. Trezevant* (Cal.) *supra*.

<sup>13</sup> *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233.

<sup>14</sup> *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616.

<sup>15</sup> *Barnwell v. Marion* (1901) 60 S. C. 314, 38 S. E. 593.

<sup>16</sup> *Skaggs v. Kincaid* (1893) 48 Ill. App. 608; *Kane v. Jonasen* (1898) 55 Neb. 757, 76 N. W. 441.

<sup>17</sup> *Wiley v. Angel* (1840) 1 Clarke, Ch. (N. Y.) 217.

<sup>18</sup> *Shepherd v. Pepper* (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438; *Central Trust Co. v. United States Rolling-Stock Co.* (1893) 56 Fed. 5 (realty on which

held that it is error for the court, in decreeing foreclosure of a mortgage, to leave it optional with the master to sell a part or the whole of the property at his discretion, where any of the defendants are infants,<sup>19</sup> or are non compos mentis, or under any other legal disability which would prevent them from appearing and protecting their rights.<sup>20</sup> However, the courts which so hold also admit that there are cases in which a discretion may be confided in the master in regard to the sale.<sup>21</sup> And in such jurisdiction it has also been held that it is not error to decree a sale without first ascertaining whether the amount due might be raised by a sale of a part of the mortgaged premises, where the defendants are all adults,<sup>22</sup> unless it be suggested that such a reference is proper, as where the mortgaged premises exceed in value the amount of the mortgage debt and are capable of subdivision and a motion is made for a reference.<sup>23</sup>

Where no direction in relation to the order or mode of sale is contained in the decree, the officer charged with its execution is vested with discretionary power.<sup>24</sup> And the same conclusion has been reached where the mortgaged premises consisted of one undivided tract, it being held that the officer making the

sale still had discretionary power to sell the whole or part of the premises even though the writ commanded him to sell "so much" of the premises as might be necessary to satisfy the mortgage debt.<sup>25</sup> But the discretionary power vested in an officer whose duty it is to make a sale is subject to the control of the court,<sup>26</sup> and the court may, upon directing a sale of mortgaged property or so much thereof as is necessary, also direct that, in case the officer employed to make the sale is in doubt as to whether justice requires a sale of the whole or a part only of the premises, he shall report the facts, etc., for direction.<sup>27</sup>

Where a discretion is vested in the trustee or other officer empowered to sell as a whole or in parcels, it must be exercised in good faith for the best interests of both the creditor and debtor;<sup>28</sup> in other words, it is his duty to sell in the mode which, in the exercise of a sound judgment and discretion, probably will be the most advantageous.<sup>29</sup> Or, as it has been stated, it is the duty of an officer when making the sale, if not controlled by express direction or other rule of law, to sell the property in the manner he thinks best calculated to produce competition, so that it will bring the most money and that no more property

a manufacturing plant was located would produce a less price if cut up than if sold as an entirety).

<sup>19</sup> Walker v. Hallett (1840) 1 Ala. 379; Walker v. Bank of Mobile (1844) 6 Ala. 452; Fry v. Merchant's Ins. Co. (1849) 15 Ala. 810; Eslava v. Lepretre (1852) 21 Ala. 504, 56 Am. Dec. 266; Homer v. Schonfeld (1887) 84 Ala. 313, 4 So. 105.

<sup>20</sup> Eslava v. Lepretre (1852) 21 Ala. 504, 56 Am. Dec. 266.

<sup>21</sup> See Walker v. Hallett (Ala.) supra.

<sup>22</sup> Ticknor v. Leavens (1841) 2 Ala. 149; Eslava v. Lepretre (Ala.) supra; Homer v. Schonfeld (1887) 84 Ala. 313, 4 So. 105.

<sup>23</sup> Ticknor v. Leavens; Eslava v. Lepretre; and Homer v. Schonfeld (Ala.) supra, holding that it is not the duty of the court to move in this matter ex mero motu.

<sup>24</sup> Kane v. Jonasen (1898) 55 Neb. 757, 76 N. W. 441; Mallory v. Patterson (1902) 63 Neb. 429, 88 N. W. 686; Iowa Loan & T. Co. v. Devall (1902) 63 Neb. 826, 89 N. W. 381; Pierce v. Reed (1903) 3 Neb. (Unof.) 874, 93 N. W. 154; Worth v. Newlin (1896) — N. J. Eq. —, 36 Atl. 30; Suffern v. Johnson (1829) 1 Paige (N. Y.) 450, 19 Am. Dec. 440; Woodhull v. Osborne (1836) 2 Edw. Ch. (N. Y.) 614; Wiley v. Angel (1840) 1 Clarke, Ch. (N. Y.) 217; American Ins. Co. v. Oakley (1841) 9 Paige (N. Y.) 259; Merchants' Ins. Co. v. Hinman (1856) 3 Abb. Pr. (N. Y.) 455; Wolcott v. Schenck (1862) 23 How. Pr. (N. Y.) 385; L.R.A.1917B.

Whitbeck v. Rowe (1862) 25 How. Pr. (N. Y.) 403.

And see infra text and note 93.

<sup>25</sup> Parkhurst v. Cory (1856) 11 N. J. Eq. 233.

<sup>26</sup> Parkhurst v. Cory (N. J.) supra; Suffern v. Johnson (1829) 1 Paige (N. Y.) 450, 19 Am. Dec. 440; American Ins. Co. v. Oakley (1841) 9 Paige (N. Y.) 259; Merchants' Ins. Co. v. Hinman (1856) 3 Abb. Pr. (N. Y.) 455; Wolcott v. Schenck (1862) 23 How. Pr. (N. Y.) 385.

<sup>27</sup> Brinckerhoff v. Thalhimer (1817) 2 Johns. Ch. (N. Y.) 486; Lyman v. Sale (1817) 2 Johns. Ch. (N. Y.) 487.

<sup>28</sup> Humboldt Sav. Bank v. McCleverty (1911) 161 Cal. 285, 119 Pac. 82; Carroll v. Hutton (1898) 88 Md. 676, 41 Atl. 1081, holding that the officer making the sale should exercise the same degree of judgment and prudence that a careful owner would exercise in the sale of his own property, not only as to whether it was advisable to offer it in lots or parcels, but also as to the proper location and outlines of each parcel; Thomas v. Fewster (1902) 95 Md. 446, 52 Atl. 750; Mays v. Lee (1905) 100 Md. 227, 59 Atl. 848; Stirling v. McLane (1906) 103 Md. 47, 63 Atl. 205.

And see infra, text and note, 95.

<sup>29</sup> Chicago & G. W. R. & Land Co. v. Peck (1885) 112 Ill. 408; Hughes v. Riggs (1807) 84 Md. 502, 36 Atl. 269; Edgecombe Park Co. v. Finney (1913) 121 Md. 320, 88 Atl. 143.



may be sold than is necessary to satisfy the debt and costs.<sup>30</sup>

And some general rules for the guidance of an officer having discretionary power as to the amount of property to be sold under mortgage foreclosure and the mode of selling the same are deducible from the cases. Thus the general rule is that mortgaged property which consists of several distinct known lots, parcels, or tracts shall be first offered for sale in parcels,<sup>31</sup> especially where the debtor requests that such a mode of sale be adopted,<sup>32</sup> or the decree directs the sale of land or so much thereof as is

necessary to pay the debt,<sup>33</sup> the theory being that many persons might be disposed to bid for separate parcels of the mortgaged property who have neither the wish nor the means to acquire the whole property, and that sales en masse therefore tend to the sacrifice of the property of the debtor and his consequent prejudice.<sup>34</sup> But this rule, while a wholesome one, is not an arbitrary one, and should not be enforced where there is a valid reason for a sale of property en masse; as, for example, where the latter mode will insure the best prices and be most advantageous to all parties concerned,<sup>35</sup>

<sup>30</sup> *Dates v. Winstanley* (1894) 53 Ill. App. 623; *Stone v. Missouri Guarantee Sav. & Bldg. Assn.* (1895) 58 Ill. App. 78, holding that a sale of separate parcels may properly be made en masse when that mode results in obtaining a greater sum; *Suffern v. Johnson* (1829) 1 Paige (N. Y.) 450, 19 Am. Dec. 440; *American Ins. Co. v. Oakley* (1841) 9 Paige (N. Y.) 259; *Merchants' Ins. Co. v. Hinman* (1856) 3 Abb. Pr. (N. Y.) 455; *Quaw v. Lameraux* (1875) 36 Wis. 626.

And see *infra* text and note 97.

<sup>31</sup> *San Francisco v. Pixley* (1862) 21 Cal. 56; *Waldo v. Williams* (1840) 3 Ill. 470; *Dates v. Winstanley* (1894) 53 Ill. App. 623; *Gueda Springs Town & Water Co. v. Lombard* (1897) 57 Kan. 625, 47 Pac. 532; *Berhard v. Hovey* (1899) 9 Kan. App. 25, 57 Pac. 245; *Hutchison v. Yahn* (1900) 9 Kan. App. 837, 61 Pac. 458 (dictum); *Gleason v. Kentucky Title Co.* (1904) 25 Ky. L. Rep. 1546, 78 S. W. 170; *Mays v. Lee* (1905) 100 Md. 227, 59 Atl. 848; *Laughlin v. Schuyler* (1871) 1 Neb. 409; *Kane v. Jonassen* (1898) 55 Neb. 757, 76 N. W. 441; *Mallory v. Patterson* (1902) 63 Neb. 429, 88 N. W. 686; *Penn v. Craig* (1841) 2 N. J. Eq. 495; *Ryerson v. Boorman* (1848) 7 N. J. Eq. 167, 640; *Woods v. Monell* (1815) 1 Johns. Ch. (N. Y.) 502; *American Ins. Co. v. Oakley* (1841) 9 Paige (N. Y.) 259; *Merchants' Ins. Co. v. Hinman* (1856) 3 Abb. Pr. (N. Y.) 455; *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385; *Miller v. Trudgeon* (1905) 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 739; *Tankersley v. Anderson* (1809) 4 Desaus. Eq. (S. C.) 44. And see *Citizens Bank v. Downs* (1877) Man. Unrep. Cas. (La.) 247.

And see *infra*, text and note, 101.

<sup>32</sup> *Ryerson v. Boorman* (1848) 7 N. J. Eq. 167, 640; *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385. And see *infra*, text and notes, 51 et seq.

<sup>33</sup> *Davis v. Dreesback* (1876) 81 Ill. 393.

<sup>34</sup> *San Francisco v. Pixley* (1862) 21 Cal. 56; *Bernhart v. Hovey* (1899) 9 Kan. App. 25, 57 Pac. 245, holding that the object to be accomplished is to invite the fullest and freest competition; *Hutchison v. Yahn* (1900) 9 Kan. App. 837, 61 Pac. 458 (dictum); *Gleason v. Kentucky Title Co.* (1904) 25 Ky. L. Rep. 1546, 78 S. W. 170; *Penn v. Craig* (1841) 2 N. J. Eq. 495; *Woods L.R.A.* 1917B.

*v. Monell* (1815) 1 Johns. Ch. (N. Y.) 502; *American Ins. Co. v. Oakley* (1841) 9 Paige (N. Y.) 259; *Merchant's Ins. Co. v. Hinman* (1856) 3 Abb. Pr. (N. Y.) 455; *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385.

And see *infra* text and note 100.

<sup>35</sup> *Geuda Springs Town & Water Co. v. Lombard* (1897) 57 Kan. 625, 47 Pac. 532, holding that, where a blanket encumbrance exceeded the amount of any parcel and some parcels were practically unsalable at any price and a sale of the whole en masse was most advantageous to all parties concerned, a sale en masse was proper, the debtor not having requested that the mortgaged property be sold in separate tracts; *Cronkwhite v. Buchanan* (1898) 59 Kan. 541, 68 Am. St. Rep. 379, 53 Pac. 863, holding that a sale en masse of two quarter sections which were divided by a road would not be set aside where it appeared that such a mode of sale was most advantageous and that no request for a sale by parcels had been made; *Craig v. Stevenson* (1884) 15 Neb. 362, 18 N. W. 510, holding that, where the mortgaged premises consisted of three city lots upon which were situated a dwelling house and appurtenances, and the house covered a portion of each lot, the sale should be in gross; *Kane v. Jonassen* (1898) 55 Neb. 757, 76 N. W. 441, holding that a sale of two lots en masse would not be set aside in the absence of a showing of prejudice; *Mallory v. Patterson* (1902) 63 Neb. 429, 88 N. W. 686, holding that a sale of numerous city lots en masse would not be disturbed where not prejudicial; *Iowa Loan & T. Co. v. Devall* (1902) 63 Neb. 826, 89 N. W. 381, holding that a sale of two distinct but contiguous lots en masse would not be disturbed when not prejudicial; *Penn v. Craig* (1841) 2 N. J. Eq. 495 (dictum); *Guarantee Trust & S. D. Co. v. Jenkins* (1885) 40 N. J. Eq. 451, 2 Atl. 13, holding that four contiguous lots improved and occupied as one may properly be sold in the lump as one parcel; *American Ins. Co. v. Oakley* (1841) 9 Paige (N. Y.) 259 (dictum); *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385; *Whitbeck v. Rowe* (1862) 25 How. Pr. (N. Y.) 403, holding that the sale en masse, in the discretion of the officer, of contiguous and adjacent mortgaged premises which had always been controlled by one person,

or where the separate parcels are used as one property and all are essential to such use.<sup>36</sup> And no objection can be raised to the sale of mortgaged lands en masse where they consist of contiguous subdivisions or distinct tracts, if they are first offered in separate parcels and no bids are received.<sup>37</sup> In fact, where the mortgaged property consists of distinct tracts or parcels, and upon the offering of the same for sale parcel by parcel either no bids are received, or the bids received are insufficient to cover the mortgage debt, the officer is in duty bound to offer the property for sale en masse.<sup>38</sup>

And where the mortgaged property is readily divisible, the officer making the sale may divide the property and offer the same by parcels, if that mode of sale seems more advisable to him and he has discretionary power to determine the mode of sale.<sup>39</sup> In fact, where the property is divisible and an offer sufficient to satisfy all claims is made for a designated part of the property, it would seem

to be the duty of the officer to so divide and sell such part only.<sup>40</sup> But where the land is mortgaged as an entirety and the decree for sale follows the description used in the mortgage, it has been held that the officer making the sale is not bound to take upon himself the duty of dividing the mortgaged premises, there being no directions in the decree or requests by the parties.<sup>41</sup>

And in England and Canada it has been held that, even though land may be divided vertically and parcels of it sold, it cannot be divided horizontally; that is, mines, timber, fixtures, etc., cannot be separated from the land itself.<sup>42</sup> But in England legislation finally provided for the severance of timber and mines from the land with the sanction of the court.<sup>43</sup>

And, generally, where the mortgaged property is divided or is divisible, only so much of it should be sold as will satisfy the mortgage debt.<sup>44</sup> Nor, from the fact that the decree authorizes all the mortgaged premises to be sold, does it

would not be disturbed; *Miller v. Trudgeon* (1905) 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 730, holding that a sale en masse of land which had been platted into lots was proper.

<sup>36</sup> *Elgutter v. Northwestern Mut. L. Ins. Co.* (1898) 30 C. C. A. 218, 53 U. S. App. 643, 86 Fed. 500, holding that where the decree directs that the mortgaged premises, which had consisted of two lots, but which had been used as one tract, or as much thereof as shall be necessary to raise the amount due, if a sufficient part may be sold separately without material injury to the parties, be sold, it is the duty of the master to ascertain and determine whether or not the lots can be sold separately without material injury to the parties; *Stinson v. Lelievre* (1870) 22 La. Ann. 191, holding that a hotel premises consisting of several lots should not be divided for purposes of sale; *McLaughlin v. Teasdale* (1880) 9 Daly (N. Y.) 23, holding the same with respect to several lots so built upon as to constitute one establishment; *Coudert v. De Logerot* (1894) 77 Hun, 660, 30 N. Y. Supp. 114, holding that premises occupied by a hotel can properly be sold en masse, although they formerly had consisted of separate parcels. And see *Hughes v. Riggs* (1897) 84 Md. 502, 36 Atl. 269; *Craig v. Stevenson* (1884) 15 Neb. 362, 18 N. W. 510, and *Guarantee Trust & S. D. Co. v. Jenkins* (1885) 40 N. J. Eq. 451, 2 Atl. 13, wherein it was held that in the absence of statutory requirements, decretal directions or request to the contrary, separate lots which have been used as one tract may properly be sold in solidio.

And see *infra* text and note 106.

<sup>37</sup> *Martin v. Hargardine* (1868) 46 Ill. 322 (contiguous parts of different sections); *L.R.A.* 1917B.

*Fairman v. Peck* (1877) 87 Ill. 156 (adjoining town lots); *Bozarth v. Largent* (1889) 128 Ill. 95, 21 N. E. 218 (separate parcels); *Malaer v. Damron* (1889) 31 Ill. App. 572 (separate tracts).

And see *infra* text and note 105.

<sup>38</sup> *Tichy v. Simecek* (1903) 5 Neb. (Unof.) 81, 97 N. W. 323.

<sup>39</sup> *Nebraska Loan & T. Co. v. Hamer* (1894) 40 Neb. 281, 53 N. W. 695; *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233. And see *infra* text and notes 110, 111.

<sup>40</sup> *Quaw v. Lameraux* (1875) 36 Wis. 626. And see *infra* text and note 115.

<sup>41</sup> *Woodhull v. Osborne* (1836) 2 Edw. Ch. (N. Y.) 614. And, generally, as to sale in entirety where property is mortgaged in entirety, see *infra* text and notes 68-82.

<sup>42</sup> *Re Yates* (1888) L. R. 38 Ch. Div. (Eng.) 112, 57 L. J. Ch. N. S. 697, 59 L. T. N. S. 47, 36 Week. Rep. 563 (trade fixtures); *Stewart v. Rowsom* (1891) 22 Ont. Rep. 533 (timber).

<sup>43</sup> See *Stewart v. Rowsom* (Ont.) supra, and *Re Hirst* (1890) L. R. 45 Ch. Div. (Eng.) 263, 60 L. J. Ch. N. S. 48, 63 L. T. N. S. 444, 38 Week. Rep. 685 (mines).

<sup>44</sup> *Buckley v. Stevenson* (1907) 30 Ky. L. Rep. 952, 99 S. W. 961; *Highland Land & Bldg. Co. v. Audas* (1908) 33 Ky. L. Rep. 214, 110 S. W. 325; *Thomas v. Fewster* (1902) 95 Md. 446, 52 Atl. 750; *Mays v. Lee* (1905) 100 Md. 227, 59 Atl. 848; *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233; *Hewson v. Deygert* (1811) 8 Johns. (N. Y.) 333; *Woods v. Monell* (1815) 1 Johns. Ch. (N. Y.) 502; *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385; *Tankersley v. Anderson* (1809) 4 De Sauss. Eq. (S. C.) 44; *Quaw v. Lameraux* (1875) 36 Wis. 626.

And see *infra* text and note 103.

follow that all should be sold where the mortgage covers separate and distinct tracts of land, in such a case it being the duty of the officer making the sale to offer each tract separately, and when the sales amount to sufficient to pay the debt and costs to desist from any further sale.<sup>45</sup>

Of course, the parties to a mortgage may in terms prescribe whether the property is to be sold en masse or in separate parcels,<sup>46</sup> and if in parcels may state the order in which the same are to be disposed of;<sup>47</sup> and an agreement to this end is enforceable.<sup>48</sup> But it has been held that where such a mortgage is foreclosed in equity the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage, but may exercise a sound discretion, having due regard to the interests of all the parties.<sup>49</sup> And where the mortgage expressly provides the mode in which the premises shall be sold, such provisions may be waived by the parties so as to preclude insistence that the same be complied with.<sup>50</sup>

And some question has also been made as to whether or not either the debtor or the creditor may control the discretion of the officer having a foreclosure sale in charge, by a request or direction

that a particular mode of sale be adopted or that certain parcels only of the mortgaged property be sold. In this respect it seems that generally the debtor may govern the mode of sale by requesting or directing that the mortgaged property be sold in a certain mode or order,<sup>51</sup> unless a sale in the mode requested would not be so advantageous as another,<sup>52</sup> or would violate an absolute right of the mortgagee,<sup>53</sup> or unless the premises were mortgaged as one tract and subsequently divided, and the subdivision was not accepted by the mortgagee,<sup>54</sup> or unless there is a difference of opinion between the debtor and creditor as to how the mortgaged premises should be sold,<sup>55</sup> in which case it has been held that the matter is discretionary with the officer making the sale. In fact, it has been held that under a decree for a sale of land, or a competent part thereof, where it will not be necessary to sell the whole property, it is the duty of the mortgagor to protect himself against the sale of an excess quantity by parceling out the amount to be sold.<sup>56</sup> And obviously, where the mortgaged premises are worth far more than the debt and costs, and are laid out in lots, the court may decree that the debtor be allowed to direct what portion of the premises shall be first sold.<sup>57</sup>

<sup>45</sup> *Waldo v. Williams* (1840) 3 Ill. 470.

<sup>46</sup> *Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* (1897) 82 Fed. 344, affirmed sub nom. *Low v. Blackford* (1898) 31 C. C. A. 15, 58 U. S. App. 737, 87 Fed. 392; *Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 119 Pac. 82.

And see *infra* text and note 90.

<sup>47</sup> *Mickle v. Maxfield* (1879) 42 Mich. 304, 3 N. W. 961.

<sup>48</sup> *Humboldt Sav. Bank v. McCleverty* (Cal.) *supra*. And see *infra* text and notes 91, 92.

<sup>49</sup> *Low v. Blackford* (1898) 31 C. C. A. 15, 58 U. S. App. 737, 87 Fed. 392, affirming *Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co.* (1897) 82 Fed. 344.

<sup>50</sup> *Blood v. Munn* (1909) 155 Cal. 228, 100 Pac. 694.

<sup>51</sup> See *Jones v. Gardner* (1881) 57 Cal. 641; *Geuda Springs Town & Water Co. v. Lombard* (1897) 57 Kan. 625, 47 Pac. 532; *Cronkhite v. Buchanan* (1898) 59 Kan. 541, 68 Am. St. Rep. 379, 53 Pac. 863; *Woodhull v. Osborne* (1836) 2 Edw. Ch. (N. Y.) 614; and *Brown v. Frost* (1839) Hoffm. Ch. (N. Y.) 41, reversed on other grounds in (1843) 10 Paige, 243.

And see *infra* text and notes 110 et seq.

<sup>52</sup> *Greenwell v. Moffett* (1908) 77 Kan. 41, 93 Pac. 609, holding that a sale en masse of mortgaged property consisting of a farm which was used as such, although a part thereof had been platted into town lots, would not be set aside because a demand to sell in parcels had been refused, where L.R.A.1917B.

the land could be sold to better advantage as a single tract; *Wiley v. Angel* (1840) 1 Clarke, Ch. (N. Y.) 217, holding that the officer may in some cases disregard a request to sell in parcels.

<sup>53</sup> *Griswold v. Fowler* (1857) 4 Abb. Pr. (N. Y.) 238, 24 Barb. 135, holding that in such a case even the court has no power to direct a sale in the mode requested. And see *Frost v. Frost* (1846) 3 Sandf. Ch. (N. Y.) 188, holding that, where tenants in common execute a joint mortgage for a joint and several debt, one of the cotenants cannot require the mortgagee to proceed against the undivided moiety of the other, even upon payment of one half of the debt, the mortgagee being entitled, as a matter of right in such case, to proceed against the whole of the mortgaged premises.

<sup>54</sup> *Hanscom v. Meyer* (1899) 57 Neb. 786, 73 Am. St. Rep. 544, 78 N. W. 367; *Griswold v. Fowler* (N. Y.) *supra*; *Lane v. Conger* (1877) 10 Hun (N. Y.) 1.

<sup>55</sup> *Guaranty Trust & S. D. Co. v. Klein* (1899) 9 Kulp (Pa.) 499.

<sup>56</sup> *Beatty v. Radenhurst* (1871) 3 Ch. Chamb. Rep. (U. C.) 344, holding that it is for the mortgagor to make out that the whole need not be sold, that portions thereof can be sold separately without injury to the plaintiff and others interested, and that the land can be properly divided.

<sup>57</sup> *Walworth v. Farmers' Loan & T. Co.* (1846) 4 Sandf. Ch. (N. Y.) 51, reversed on other grounds in (1848) 1 N. Y. 433.

And the instructions or wishes of the owner should control over those of the creditor where a sale in the mode desired by the former will satisfy the creditor's claim in full.<sup>58</sup> The parties may, however, by stipulation, agree as to who shall determine the mode and order of sale;<sup>59</sup> but this statement does not apply where all the debtors are not parties to the agreement, it having been held that the complainant and one of several defendants interested in the subject matter cannot stipulate a mode or order of sale different from that prescribed by the court.<sup>60</sup>

Where only a part of the mortgage debt is due, the general rule is that the court should decree a sale of so much of the mortgaged property as is sufficient to satisfy the debt due, with interest and costs,<sup>61</sup> at least where no representations are made or it does not appear that the interest of the parties would be better served by a sale of the whole;<sup>62</sup> provided, of course, that the mortgaged property is divisible to advantage.<sup>63</sup> But the parties may stipulate in the mortgage

that, in case of foreclosure because of default in payment of interest or a part of the principal, the property shall be sold en masse.<sup>64</sup> And the whole estate may be sold either where the mortgagor assents or where the interests of the mortgagee require it.<sup>65</sup> But it has been held that the court, where a part only of the debt is due, before decreeing a sale of the mortgaged premises as against an infant defendant, must direct an inquiry as to what part of the premises, if any part short of the whole, shall be sold, taking into consideration the best interests of the infant.<sup>66</sup> In some jurisdictions the sale of the mortgaged property where only a part of the debt is due is expressly regulated by statute.<sup>67</sup>

In a few instances stress has been laid upon the fact that the premises were mortgaged as an entirety rather than in parcels, some courts laying down the broad rule that where property is mortgaged as one entire tract and the decree is that the property described in the mortgage be sold, it may be sold in the same way, although it is readily divisible

<sup>58</sup> *Brown v. Frost* (1839) Hoffm. Ch. (N. Y.) 41, reversed on other grounds in (1843) 10 Paige, 243. And see *Snyder v. Stafford* (1844) 11 Paige (N. Y.) 71, holding that the owner of a decree for the sale of mortgaged premises has no right to control the order of sale of separate parcels where the sale of all is necessary.

<sup>59</sup> *Woodruff v. Bush* (1853) 8 How. Pr. (N. Y.) 117, holding that, where the stipulation was that the premises should be sold in parcels as designated by the mortgagor, or by the mortgagee in case the mortgagor did not make the designation, and the mortgagor made an invalid designation, the mortgagee had a right to determine the mode of sale. And see *infra* text and note 125.

<sup>60</sup> *Babcock v. Perry* (1858) 8 Wis. 277.

<sup>61</sup> *Levert v. Redwood* (1839) 9 Port. (Ala.) 79; *Walker v. Hallett* (1840) 1 Ala. 379; *Hunt v. Dohrs* (1870) 39 Cal. 304, holding that an order for the sale of all the premises was erroneous; *Bank of Napa v. Godfrey* (1888) 77 Cal. 612, 20 Pac. 142; *Blazey v. Delius* (1874) 74 Ill. 299; *Bardstown & L. R. Co. v. Metcalfe* (1862) 4 Met. (Ky.) 199, 81 Am. Dec. 541; *Salmon v. Clagett* (1830) 3 Bland. Ch. (Md.) 125, affirmed in (1832) 5 Gill & J. 314; *James v. Fisk* (1847) 9 Smedes & M. (Miss.) 144, 47 Am. Dec. 111; *Barton v. King* (1866) 41 Miss. 284; *American Life & F. Ins. & T. Co. v. Ryerson* (1846) 6 N. J. Eq. 9; *Suffern v. Johnson* (1820) 1 Paige (N. Y.) 451.

<sup>62</sup> *Levert v. Redwood* (Ala.) *supra*; *Blazey v. Delius* (1874) 74 Ill. 299, holding that a sale of the whole may be ordered where it appears that such mode would be most conducive to the ends of justice, but that L.R.A.1917B.

such condition is not established by a showing that the premises formed a meager security or are becoming run down; *Suffern v. Johnson* (N. Y.) *supra*, holding that a sale of the whole property may frequently be necessary to prevent injustice; *Ogdensburg Bank v. Arnold* (1835) 5 Paige (N. Y.) 38.

<sup>63</sup> *Walker v. Hallett* (1840) 1 Ala. 379; *Bardstown & L. R. Co. v. Metcalfe* (1862) 4 Met. (Ky.) 199, 81 Am. Dec. 541; *Salmon v. Clagett* (1830) 3 Bland. Ch. (Md.) 125, affirmed in (1832) 5 Gill & J. 314; *James v. Fisk* (1847) 9 Smedes & M. (Miss.) 144, 47 Am. Dec. 111; *Campbell v. Macomb* (1820) 4 Johns. Ch. (N. Y.) 534 (property not divisible or capable of being sold in parcels); *Schreiber v. Carey* (1879) 48 Wis. 208, 4 N. W. 124 (court decided that it was to the benefit of all the parties to sell the whole property).

<sup>64</sup> See *San Gabriel Valley Bank v. Lake View Town Co.* (1906) 4 Cal. App. 630, 89 Pac. 360, holding that a stipulation in a mortgage that in the event of a foreclosure sale "the mortgaged premises . . . shall be treated as one parcel, and not . . . as several parcels, and they shall be entitled to be sold as one parcel," showed an intent that, in case of foreclosure for default in payment, the property should be sold en masse.

<sup>65</sup> *Caufman v. Sayre* (1841) 2 B. Mon. (Ky.) 202.

<sup>66</sup> *Mills v. Dennis* (1818) 3 Johns. Ch. (N. Y.) 367.

<sup>67</sup> See *infra*, subdivision entitled, "Foreclosure under statute," text and notes 171 et seq.

into or even consists of separate identifiable tracts;<sup>68</sup> such courts maintaining that, where the mortgage and the decree describe the land as a single tract, the officer making the same is under no obligation to divide the tract and sell it in parcels, unless the court so decrees. And this notwithstanding a statutory provision that where property is taken on execution the same shall be sold in separate tracts if it is susceptible of division,<sup>69</sup> although this conclusion may perhaps be attributed to a view that such statutes do not apply to sales under decrees of foreclosure;<sup>70</sup> or notwithstanding an applicable statute provides that where the property consists of "several known lots or parcels they must be sold separately," if the property, although consisting of separate and "known buildings," does not consist of "known lots or parcels."<sup>71</sup> These rules have been held to apply to a mortgage of a plantation and the personal property belonging thereto,<sup>72</sup> to separate parcels of suburban and city property,<sup>73</sup> to one entire tract capable of subdivision so that, by sale of a less quantity than the whole, a sufficient sum would be realized to discharge the mortgage *fi. fa.*; <sup>74</sup> to a single tract of land which the court, for the sake of argument, assumed would bring a larger total price if divided and sold in separate tracts, the action being one to enjoin

the sale on foreclosure of the tract *en masse*; <sup>75</sup> to two tracts upon which were separate buildings, which property was divisible according to buildings and the lands thereunder, but not divisible according to the original tracts; <sup>76</sup> and to a single tract of land which had never been subdivided, in the mortgage of which there was nothing to indicate that it should be subdivided for the purpose of a sale on foreclosure.<sup>77</sup> And some courts have held that the premises covered by a mortgage must all be sold on foreclosure;<sup>78</sup> but several distinct parcels included in a mortgage may be sold to separate purchasers if all the sales are made at one general sale.<sup>79</sup> So, it has been held that, where a debt is secured by a mortgage on several parcels of land, the court has no authority to except any part of the property from sale on foreclosure, even though the value of the property decreed to be sold exceeds the amount of the debt.<sup>80</sup> But in Louisiana the supreme court has expressly repudiated the contention that a mortgage is indivisible and bears on each and every part of the premises so that property mortgaged *en masse* must be sold in the same manner, holding that mortgaged property which has been divided into lots need not be sold *en masse*.<sup>81</sup> Other courts do not seem to have expressly repudiated the rule that property mort-

<sup>68</sup> *Stockmeyer v. Tobin* (1890) 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504; *Goerz v. Barstow* (1906) 78 C. C. A. 248, 148 Fed. 502; *Reeves v. Bolles* (1894) 95 Ga. 402, 22 S. E. 626 (See case as set out and quoted in *HOWLAND v. MORRIS*, ante, 513); *HOWLAND v. MORRIS*, disapproving as dictum a statement seemingly to the contrary made in *Wilkinson v. Holton* (1904) 119 Ga. 557, 46 S. E. 620; *Maile v. Carter* (1905) 17 Haw. 49; *Davis v. Dresback* (1876) 81 Ill. 393; *Patton v. Smith* (1885) 113 Ill. 499; *Field v. Brokaw* (1896) 159 Ill. 560, 42 N. E. 877; *Dates v. Winstanley* (1894) 53 Ill. App. 623; *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616. And see *Citizens' Bank v. Downs* (1877) Man. Unrep. Cas. (La.) 247, and *Duckworth v. Payne* (1874) 26 La. Ann. 683.

<sup>69</sup> *Field v. Brokaw* (1896) 159 Ill. 560, 42 N. E. 877.

<sup>70</sup> See *Dates v. Winstanley* (1894) 53 Ill. App. 623, wherein it was held that such a statute does not apply to a sale under foreclosure. And the court in *Field v. Brokaw* (Ill.) supra, must have been of the same opinion, although it does not appear in the report that such was the fact.

<sup>71</sup> *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616.

<sup>72</sup> *Stockmeyer v. Tobin* (1890) 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504. L.R.A.1917B.

<sup>73</sup> *Goerz v. Barstow* (1906) 78 C. C. A. 248, 148 Fed. 502.

<sup>74</sup> *HOWLAND v. MORRIS*, ante, 513, holding that in such a case the officer making the sale has no right of judgment or discretion; *Davis v. Dresback* (1876) 81 Ill. 393.

<sup>75</sup> *Reeves v. Bolles* (1894) 95 Ga. 402, 22 S. E. 626.

<sup>76</sup> *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616.

<sup>77</sup> *Maile v. Carter* (1905) 17 Haw. 49; *Patton v. Smith* (1885) 113 Ill. 499 (mortgage and decree described land as a certain quarter section in M. county); *Field v. Brokaw* (1896) 159 Ill. 560, 42 N. E. 877; *Dates v. Winstanley* (1894) 53 Ill. App. 623, holding that an officer in making the sale is not required to subdivide a quarter section and first offer smaller tracts for sale, where the mortgage foreclosed is on the larger tract.

<sup>78</sup> *Cochran v. Goodell* (1881) 131 Mass. 464, holding that a sale on execution of part only of the lands included in one mortgage, passes no title. And see *Citizens' Bank v. Downs* (1877) Man. Unrep. Cas. (La.) 247, and *Webster v. Foster* (1860) 15 Gray (Mass.) 31.

<sup>79</sup> *Holmes v. Turner's Falls Co.* (1890) 150 Mass. 535, 6 L.R.A. 283, 23 N. E. 305.

<sup>80</sup> *Baker v. Marsh* (1890) 1 N. D. 20, 44 N. W. 662.

<sup>81</sup> *Plauche v. Gravier* (1828) 6 Mart N.

gaged as an entirety and ordered sold by a decree describing the property in the terms of the mortgage should or must be sold in the same way, but the decisions in a great many of the cases which are treated herein would seem to warrant a more liberal rule, the application of which would in many cases be more beneficial to the parties. In fact, it is more than probable that a rule allowing mortgaged premises to be divided and sold by parcels in some instances would often be more beneficial to the debtor than a sale in solido, and at the same time the creditor would have no ground for objection to the former mode of sale, this being true at least in those cases where the mortgaged premises, or a part or parcel thereof, would sell for enough to satisfy his claims, and under the more liberal rules he would be protected in any event, for if the property were insufficient to raise the required amount, he would be entitled to have it sold in the mode that would bring the greatest return. Of course, even in a majority of those jurisdictions which lay down the narrow rule that sales by the entirety only are permissible under the general decree so describing the property, it would seem that the court could and probably would, upon application of the debtor, decree a sale by parcels, provided such a mode of sale appeared to be more beneficial to the debtor and

would not result in injury to the creditor.

A rule similar to the entirety rule just discussed is generally applied to sales of property of a public service corporation mortgaged as an entirety, but the rule in these cases is founded upon the theory that the property is generally held more valuable as a whole, each part being necessary to the proper performance of the public service rendered by the corporation, rather than, as in the immediately preceding cases, the right of the mortgagee to look to the whole of the mortgaged property. Thus, where the real estate, franchises, and other property of a public service corporation are mortgaged as an entirety, it is generally held that it is the duty of the court in foreclosure proceedings to decree the sale, as an entirety, of the whole property so mortgaged,<sup>53</sup> especially where it cannot otherwise be sold to advantage,<sup>54</sup> even though a part only of the debt is due,<sup>55</sup> unless, perhaps, the property can be leased as an entirety for a term of years and for a sum sufficient to satisfy the amount due.<sup>56</sup> And this notwithstanding statutes give a right of redemption from foreclosure sales of real estate.<sup>56</sup> These conclusions are, of course, furthered by the fact that the public interests are to be taken into account and the corporation preserved as a going concern so far as it can be done consistently with the rights of the par-

S. (La.) 597, holding that a mortgaged square could be sold in separate lots.

<sup>52</sup> *Hammock v. Farmers' Loan & T. Co.* (1881) 105 U. S. 77, 26 L. ed. 1111 (railroad); *Guaranty T. Co. v. Metropolitan Street R. Co.* (1909) 168 Fed. 937 (street railway); *Wilmer v. Atlantic & R. Air Line R. Co.* (1875) 2 Woods, 447, Fed. Cas. No. 17,776 (railroads); *Chicago, D. & V. R. Co. v. Loewenthal* (1879) 93 Ill. 433, holding that it was error for the court to decree the sale of a middle section of a railroad; *Bardstown & L. R. Co. v. Metcalfe* (1862) 4 Met. (Ky.) 199, 81 Am. Dec. 541 (railroad); *Clearwater County State Bank v. Bagley-Ogema Teleph. Co.* (1911) 116 Minn. 4, 36 L.R.A.(N.S.) 1132, 133 N. W. 91, Ann. Cas. 1913A, 622 (telegraph company); *McFadden v. Mays Landing & E. H. City R. Co.* (1891) 49 N. J. Eq. 176, 22 Atl. 932 (railroad); *McNeal Pipe & F. Co. v. Woltman* (1894) 114 N. C. 178, 19 S. E. 109 (waterworks and franchise); *McKenzie v. Bismarck Water Co.* (1897) 6 N. D. 361, 71 N. W. 608 (waterworks, etc.); *Hand v. Savannah & C. R. Co.* (1870) 12 S. C. 314 (railroad); *Gibert v. Washington City, V. M. & G. S. R. Co.* (1880) 33 Gratt. (Va.) 586 (railroad system which originally consisted of three railroads). And see *Farmers Loan & T. Co. L.R.A.1917B*.

*v. Bankers & M. Teleg. Co.* (1887) 44 Hun (N. Y.) 406, which involved a mortgage of telegraph lines, etc., and *Coe v. Columbus P. & I. R. Co.* (1859) 10 Ohio St. 372, 75 Am. Dec. 518, which involved a mortgage on a railroad and the real estate and franchises of a railroad.

<sup>53</sup> *First Nat. Bank v. Shedd* (1886) 121 U. S. 74, 30 L. ed. 877, 7 Sup. Ct. Rep. 807; *Guaranty T. Co. v. Metropolitan Street R. Co.* (1909) 168 Fed. 937; *Clearwater County State Bank v. Bagley-Ogema Teleph. Co.* (1911) 116 Minn. 4, 36 L.R.A.(N.S.) 1132, 133 N. W. 91, Ann. Cas. 1913A, 622; *Gibert v. Washington City, V. M. & G. S. R. Co.* (1880) 33 Gratt. (Va.) 586.

<sup>54</sup> *Wilmer v. Atlanta & R. Air Line R. Co.* (1875) 2 Woods, 447, Fed. Cas. No. 17,776; *Bardstown & L. R. Co. v. Metcalfe* (1862) 4 Met. (Ky.) 199, 81 Am. Dec. 541; *McFadden v. Mays Landing & E. H. City R. Co.* (1891) 49 N. J. Eq. 176, 22 Atl. 932.

<sup>55</sup> See *Bardstown & L. R. Co. v. Metcalfe* (Ky.) supra.

<sup>56</sup> *Clearwater County State Bank v. Bagley-Ogema Teleph. Co.* (1911) 116 Minn. 4, 36 L.R.A.(N.S.) 1132, 133 N. W. 91, Ann. Cas. 1913A, 622; *McKenzie v. Bismarck Water Co.* (1897) 6 N. D. 361, 71 N. W. 608.

ties.<sup>87</sup> On the other hand, however, under statutes making the movable property of a public service corporation personality and liable to execution and sale, it has been held that it is not the duty of the court to order a sale of the whole property in bulk as an entirety,<sup>88</sup> although in its discretion it has a power to so order where the debtor requests it and it can be done without prejudice to the creditor.<sup>89</sup> And in such a case a refusal to order a sale in bulk is not error where it does not appear that all the movables are necessary for the operation of the company, but will be regarded as vesting a discretion in the commissioner to sell en masse or in parcels, although the direction was to sell all the property.<sup>90</sup>

#### Foreclosure under power of sale.

This subdivision includes those cases wherein a mortgage or deed of trust was foreclosed by the exercise of a power of sale contained in the instrument itself.

The parties to a mortgage or deed of trust may contract therein as to the mode in which the property shall be sold upon default,<sup>90</sup> and where they do so provide in express and explicit terms neither the trustee nor the court should disregard the terms of the power,<sup>91</sup> even though unfortunate circumstances caused the debtor to agree to the same.<sup>92</sup>

But in the absence of statutory provision or other controlling direction, a person intrusted with the sale of property upon foreclosure under a power is vested with a discretion as to the mode to be adopted.<sup>93</sup> But even an authorization "to sell said premises entire without division or in parcels," as the trustee might "think best," does not empower the trustee to do absolutely as he pleases, or to do that which would be most convenient for him, such a clause not giving the right of arbitrary discretion.<sup>94</sup> And in fact neither a trustee in a deed of trust nor a mortgagee represents the interest of the cestui que trust or himself alone, but he is also a trustee for the debtor.<sup>95</sup> However, in Ontario it has been held that a mortgagee does not act as a trustee for the mortgagor, but only in pursuance of the powers conferred by the mortgage, and that he may consult his own interest before that of the mortgagor, being liable only for wilful default or neglect.<sup>96</sup>

Where a trustee or mortgagee is vested with a discretion as to the amount of property to be sold or the mode of selling property under a power, he must exercise the same in keeping with the general rule that it is the primary duty of one making a sale to adopt the mode which will probably command the best

<sup>87</sup> *Guaranty T. Co. v. Metropolitan Street R. Co.* (1909) 168 Fed. 937; *Clearwater County State Bank v. Bagley-Ogema Teleph. Co.* (1911) 116 Minn. 4, 36 L.R.A.(N.S.) 1132, 133 N. W. 91, Ann. Cas. 1913A, 622; *McNeal Pipe & Foundry Co. v. Woltman* (1894) 114 N. C. 178, 19 S. E. 100.

<sup>88</sup> *Southwestern A. & I. T. R. Co. v. Hays* (1897) 63 Ark. 355, 38 S. W. 665. And see *Metropolitan Trust Co. v. Dolgeville Electric Light & P. Co.* (1901) 35 Misc. 467, 71 N. Y. Supp. 1055.

<sup>89</sup> *Southwestern A. & I. T. R. Co. v. Hays* (Ark.) supra.

<sup>90</sup> *Dunn v. McCoy* (1899) 150 Mo. 548, 52 S. W. 21; *Benton Land Co. v. Zeitler* (1904) 182 Mo. 251, 70 L.R.A. 94, 81 S. W. 193; *Hyman v. Devereux* (1869) 63 N. C. 624. And see *Pryor v. Baker* (1882) 133 Mass. 459, holding that a single mortgage covering separate and distinct parcels of land may validly authorize a sale by parcels, although in the absence of such a power such a mode of sale would have been illegal.

And see supra text and notes 46 and 64.

<sup>91</sup> *Dunn v. McCoy* (1899) 150 Mo. 548, 52 S. W. 21; *Benton Land Co. v. Zeitler* (1904) 182 Mo. 251, 70 L.R.A. 94, 81 S. W. 193.

<sup>92</sup> *Ibid.*; *Hyman v. Devereux* (1869) 63 N. C. 624; *McCollum v. Jones* (1911) — Tex. Civ. App. —, 141 S. W. 1030.

And see supra text and note 48.

<sup>93</sup> *Givens v. McCray* (1906) 196 Mo. 306, L.R.A.1917B.

113 Am. St. Rep. 736, 93 S. W. 374; *Kline v. Vogel* (1881) 11 Mo. App. 211; *Hinton v. Pritchard* (1897) 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121; *Curry v. Hill* (1881) 18 W. Va. 370; *Wilson v. Taylor* (1912) 7 D. L. R. 317, 48 Can. L. J. 707, 23 Ont. Week. Rep. 359, affirmed in (1913) 11 D. L. R. 455, 24 Ont. Week. Rep. 669; *Aldrich v. Canadian Permanent Loan & Sav. Co.* (1896) 27 Ont. Rep. 548, affirmed in (1897) 24 Ont. App. Rep. 193.

And see supra text and note 24.

<sup>94</sup> *Cassidy v. Cook* (1881) 99 Ill. 385; *Goode v. Comfort* (1866) 39 Mo. 313.

<sup>95</sup> *Chesley v. Chesley* (1872) 49 Mo. 540; *Benkendorf v. Vincenz* (1873) 52 Mo. 441; *Tatum v. Holliday* (1875) 59 Mo. 422, expressly holding that a trustee is a trustee for both parties; *Hinton v. Pritchard* (1897) 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121; *Aldrich v. Canadian Permanent Loan & Sav. Co.* (1896) 27 Ont. Rep. 548, affirmed in (1897) 24 Ont. App. Rep. 193. And see *Ord v. Noel* (1820) 5 Madd. Ch. 438, 56 Eng. Reprint, 962, 21 Revised Rep. 328.

And see supra text and note 28.

<sup>96</sup> *Wilson v. Taylor* (1912) 7 D. L. R. 317, 48 Can. L. J. 707, 23 Ont. Week. Rep. 359, affirmed in (1913) 11 D. L. R. 455, 24 Ont. Week. Rep. 669.

price, and to exercise his best judgment in determining what is the mode most likely to accomplish that end; as well as to protect the interests of all parties who may be interested in the property.<sup>97</sup> And in determining the proper mode the trustee's duties are not merely formal, but he should inform himself as to the condition of the property so that he may adopt that course which in his judgment will bring the highest price,<sup>98</sup> although in some cases no such duty devolves upon the trustee; as, for example, where the property to be sold consists of one lot only, and cannot be sold otherwise than as one parcel.<sup>99</sup>

And some rules for the guidance of trustees and mortgagees vested with a power of sale can be drawn from the decisions.

Thus, resting upon the reasonable presumption sanctioned by observation and experience, that mortgaged property will produce more when sold in parcels, because the sale is thus accommodated to the probable wants of more possible purchasers,<sup>100</sup> the general rule, when there is a general power of sale, is that, where

a tract of land is in parcels distinctly marked for separate and distinct enjoyment, it should be sold, or at least first offered for sale, in parcels,<sup>101</sup> unless it cannot be so sold without injury to the part or parts unsold, in which case the property is properly sold en masse even though a sale of a part thereof would satisfy the debt due.<sup>102</sup> And where property mortgaged consists of parcels or is divisible, and the trustee rightfully sells the same by parcels, he should not sell more of the land than is sufficient to satisfy the mortgage debt,<sup>103</sup> unless, perhaps, the debtor requests that the property all be sold.<sup>104</sup> But it is proper to sell mortgaged property en masse if it first has been offered in parcels and no bids have been received.<sup>105</sup> And notwithstanding the property when mortgaged consisted of several and distinct parcels, if it has been made into a unit which cannot be disintegrated and the parts sold separately without large depreciation and a diminished amount in the aggregate of the yield, it should be sold en masse.<sup>106</sup> And it has been held that, where the mortgage gives a general

<sup>97</sup> *Mahone v. Williams* (1863) 39 Ala. 202; *Cassidy v. Cook* (1881) 99 Ill. 385; *Taylor v. Elliott* (1862) 32 Mo. 172; *Goode v. Comfort* (1866) 39 Mo. 313; *Carter v. Abshire* (1871) 48 Mo. 300; *Sumrall v. Chaffin* (1871) 48 Mo. 402; *Chesley v. Chesley* (1872) 49 Mo. 540, on subsequent appeal in (1873) 54 Mo. 347; *Benkendorf v. Vincenz* (1873) 52 Mo. 441; *Tatum v. Holliday* (1875) 59 Mo. 422; *Harlin v. Nation* (1894) 126 Mo. 97, 27 S. W. 330, quoting *Chesley v. Chesley* (Mo.) supra, with approval; *Lazarus v. Caesar* (1900) 157 Mo. 199, 57 S. W. 751; *Markwell v. Markwell* (1900) 157 Mo. 326, 57 S. W. 1078; *Givens v. McCray* (1906) 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374; *Hinton v. Pritchard* (1897) 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121; *Aldrich v. Canada Permanent Loan & Sav. Co.* (1896) 27 Ont. Rep. 548, affirmed in (1897) 24 Ont. App. Rep. 193. And see *Ord v. Noel* (1820) 5 Madd. Ch. 438, 56 Eng. Reprint, 962, 21 Revised Rep. 328. And see supra text and notes 28, 29, and 30.

<sup>98</sup> *Cassidy v. Cook* (1881) 99 Ill. 385; *Hubbard v. Jarrell* (1865) 23 Md. 66, holding that the trustee should use all reasonable diligence to obtain the best price; *Carter v. Abshire* (1871) 48 Mo. 300; *Harlin v. Nation* (1894) 126 Mo. 97, 27 S. W. 330.

<sup>99</sup> *Harlin v. Nation* (Mo.) supra.

<sup>100</sup> *Mahone v. Williams* (1863) 39 Ala. 202; *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364; *Lazarus v. Caesar* (1900) 157 Mo. 199, 57 S. W. 751; *Aldrich v. Canada Permanent Loan & Sav. Co.* (1897) 24 Ont. L.R.A. 1917B.

App. Rep. 193, affirming (1896) 27 Ont. Rep. 548. And see supra text and note 34.

<sup>101</sup> *Mahone v. Williams* (Ala.) supra; *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364; *Hubbard v. Jarrell* (Md.) supra; *Patterson v. Miller* (1879) 52 Md. 388; *Taylor v. Elliott* (1862) 32 Mo. 172; *Goode v. Comfort* (1866) 39 Mo. 313; *Chesley v. Chesley* (1872) 49 Mo. 540, on subsequent appeal in (1873) 54 Mo. 347; *Lazarus v. Caesar* (1900) 157 Mo. 199, 57 S. W. 751; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121. And see *Smith v. Deeson* (1893) — Miss. —, 14 So. 40; and *Aldrich v. Canada Permanent Loan & Sav. Co.* (1896) 27 Ont. Rep. 548, affirming in (1897) 24 Ont. App. Rep. 193.

And see supra text and notes 31, 32, and 33.

<sup>102</sup> *Olcott v. Bynum* (1872) 17 Wall. (U. S.) 44, 21 L. ed. 570.

<sup>103</sup> *Patterson v. Miller* (1879) 52 Md. 388; *Pryor v. Baker* (1882) 133 Mass. 450 (dictum); *Tatum v. Holliday* (1875) 59 Mo. 422; *Baker v. Halligan* (1882) 75 Mo. 435; *Curry v. Hill* (1881) 18 W. Va. 370.

And see supra text and note 44.

<sup>104</sup> *Curry v. Hill* (W. Va.) supra.

<sup>105</sup> *Sumrall v. Chaffin* (1871) 48 Mo. 402. And see supra text and notes 37 and 38.

<sup>106</sup> *Hill v. Farmers & M. Nat. Bank* (1878) 97 U. S. 450, 24 L. ed. 1051, holding that where four lots and the buildings thereon were mortgaged, and the purchaser remodeled the buildings and acquired machinery, and water power, the whole plant constituting a paper mill, the realty and water power and the machinery should be sold as an entirety.

And see supra text and note 36.



power "to sell and dispose of such premises," it is for the trustee in good faith to exercise a sound discretion, and to sell the land either as a whole or in parcels as he sees fit, even though it consists of parcels or is easily divisible.<sup>107</sup>

The other phase of the general rule is that, where there is no division of the tract into parcels adapted for separate and distinct enjoyment, the tract should be sold as a whole,<sup>108</sup> unless the party interested should show in some intelligible manner the distinct manner in which the land might be profitably divided for sale,<sup>109</sup> or the reasonable exercise of a discretion clearly indicates that a sale in a mode other than one which an application of the general rule would indicate would be more advantageous to the parties and produce a larger sum.<sup>110</sup> However, it has been held that, where there is a general discretion vested in the trustee, or the power is to sell the whole or so much of the mortgaged premises as may be necessary to satisfy the debt secured, and the property, although entire, is susceptible of advantageous subdivision, the trustee may so divide and sell by parcels.<sup>111</sup> And if it will bring more by being so divided and sold in separate parcels or lots,<sup>112</sup> or if enough of it to satisfy the amount due can be segregated and sold without injury to the residue,<sup>113</sup> it is his duty to so divide and sell, even though express authority was given in the mortgage to sell "all"

the property.<sup>114</sup> And it has been held that a trustee should offer for sale in subdivisions if anyone wishes to so bid, even though the property is not readily susceptible of subdivision.<sup>115</sup> However, it has also been said that a trustee having a general power of sale is under no obligation to divide and sell in parcels land consisting of a single tract,<sup>116</sup> especially where the deed of trust authorizes the trustee "to sell the premises," the trustee being bound to pursue his powers strictly and there being no obligation upon him to depart from the terms of his trust,<sup>117</sup> even though a sale of a part of the mortgaged property would have produced enough to satisfy the claim;<sup>117</sup> and this notwithstanding the debtor requested that a part only of the premises be sold.<sup>117</sup> But in Minnesota it has been held that, although a strict observance of a power of sale which authorizes a sale of the whole premises on default is regular, even though a lesser portion of the property would suffice to pay the debt, chancery may interfere upon the application of the mortgagor and restrain the full exercise of the power by the mortgagee where the land greatly exceeds in value the amount of the debt, and confine the sale to such part of the land as may be sufficient to discharge the amount due on the mortgage and costs.<sup>118</sup> But the proper time to make such an application is before the sale takes place, since, where the

<sup>107</sup> *Loveland v. Clark* (1888) 11 Colo. 265, 18 Pac. 544; *Singleton v. Scott* (1859) 11 Iowa, 589.

<sup>108</sup> *Mahone v. Williams* (1863) 39 Ala. 202, holding that a single lot containing 10 acres, which was used as an entirety for a family residence, and which could not be divided without impairing the value, was not within the rule requiring a sale in parcels; *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364; *Cleaver v. Green* (1883) 107 Ill. 67; *Kellogg v. Carrico* (1870) 47 Mo. 157, holding that two separate parcels constituting one farm could properly be sold as a whole.

<sup>109</sup> *Mahone v. Williams* (Ala.) *supra*.

<sup>110</sup> *Lazarus v. Caesar* (1900) 157 Mo. 199, 57 S. W. 751; *Kline v. Vogel* (1881) 11 Mo. App. 211; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121.

And see *supra*, text and note, 39.

<sup>111</sup> *Gray v. Shaw* (1851) 14 Mo. 341, holding that when so subdivided all the parcels may be sold if necessary, and that, where the proceeds of the sale equal the aggregate value of the property, no exception can be taken to the mode of sale; *Tatum v. Holliday* (1875) 59 Mo. 422.

And see *supra*, text and notes, 39, 40, and 110.

<sup>112</sup> *Tatum v. Holliday* (Mo.) *supra*; *Ald-L.R.A.* 1917B.

*rich v. Canada Permanent Loan & Sav. Co.* (1896) 27 Ont. Rep. 548, affirmed in (1897) 24 Ont. App. Rep. 193.

<sup>113</sup> *Olcott v. Bynum* (1872) 17 Wall. (U. S.) 44, 21 L. ed. 570.

<sup>114</sup> *Ibid*.

And see *Todd v. Bémis* (1913) — *Tex. Civ. App.* —, 158 S. W. 182, holding that a power to sell "all" the mortgaged premises empowers a sale of a portion, and that such a sale cannot be avoided on the ground that the power required a sale of the whole property, the debtor not being specially injured by the sale of the parcel.

<sup>115</sup> *Sumrall v. Chaffin* (1871) 48 Mo. 402, holding that in selling a number of tenement houses standing together, the trustees should offer them in separate units if anyone desires to purchase in that way, even though the houses were built with their walls together so that the property is not readily susceptible of subdivision.

And see *supra*, text and note, 40.

<sup>116</sup> *Connolly v. Belt* (1838) 5 Cranch, C. C. 405, *Fed. Cas. No.* 3,117; *Markwell v. Markwell* (1900) 157 Mo. 326, 57 S. W. 1078.

<sup>117</sup> *Connolly v. Belt* (*Fed.*) *supra*.

<sup>118</sup> *Johnson v. Williams* (1860) 4 Minn. 260, *Gil.* 183.

mortgage confers the power to sell the whole premises, it is presumed that the mortgagee will take advantage of it, and when the mortgagor allows the sale to take place without interference or objection on his part, he must excuse such neglect fully, or a court of chancery will not relieve him.<sup>118</sup>

Even where a mortgage or deed of trust vests a discretion in the trustee to sell the encumbered premises either entire without division or in parcels as he thinks best, such discretion is not an arbitrary one, but generally is subject to the control and direction of the debtor, who may choose the mode of offering the property for sale.<sup>119</sup> But it has been said that, where a mortgage conveys different parcels of the same kind, or different classes of property, the mortgagee may, in the absence of a stipulation to the contrary, elect for his own benefit the particular property to which he will resort in the first instance,<sup>120</sup> especially if the application is made to the court for an order to that effect and the request seems equitable,<sup>121</sup> and that, in the absence of some peculiar equity growing out of other circumstances, the mortgagor or any person claiming under him cannot compel the mortgagee to exhaust any one of the different parcels or classes of property conveyed by the mortgage to the exclusion of other property conveyed.<sup>122</sup> It is also held, however, that upon a sale under a power in a deed of trust the cestui que trust has no right to give direction as to how the property should be sold, when such di-

rection, if carried out, would result in injury to the debtor.<sup>123</sup> And in Missouri it has been declared that no particular one of the parties interested has the right to control the manner and method of sale, but that the question is one for the exercise of sound discretion by the trustee.<sup>124</sup> But the parties may by joint agreement determine the mode of sale to be adopted.<sup>125</sup>

#### Foreclosure under statute.

Many jurisdictions now have statutes which control, or at least influence, the mode of procedure upon foreclosure of a mortgage, and many of such statutes have provisions dealing with the questions under consideration in this annotation. These statutes in some instances control foreclosure under power of sale as well as by action or suit, but generally do not affect equitable proceedings.<sup>126</sup> In fact, it has been said that in a statutory foreclosure the aid of a court of equity is not invoked, and that the object of the statute regulating these sales is to have them fairly made, and as nearly in accordance with the principles established by courts of equity in like cases as possible.<sup>127</sup>

Thus, in Michigan, Minnesota, New York, North Dakota, and South Dakota, the adjudications show that the statutes provide that, if mortgaged premises consist of distinct farms, tracts, or lots, they shall be sold separately, and that no more parcels shall be sold than shall be necessary to satisfy the amount due;<sup>128</sup> and by an amendment to the Michigan

<sup>118</sup> Cassidy v. Cook (1881) 99 Ill. 385; Curry v. Hill (1881) 18 W. Va. 370.

And see *supra* text and notes 51 et seq.

<sup>120</sup> Witherington & Co. v. Mason (1888) 86 Ala. 345, 11 Am. St. Rep. 41, 5 So. 679.

<sup>121</sup> Re Wilkinson (1872) L. R. 13 Eq. (Eng.) 634, 41 L. J. Ch. N. S. 392.

<sup>122</sup> Witherington & Co. v. Mason (Ala.) *supra*.

<sup>123</sup> Chesley v. Chesley (1872) 49 Mo. 540.

<sup>124</sup> See Givens v. McCray (1906) 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374.

<sup>125</sup> See Montague v. Raleigh Sav. Bank (1896) 118 N. C. 223, 24 S. E. 6.

And see *supra* text and note 59.

<sup>126</sup> See Macomb v. Prentiss (1885) 57 Mich. 225, 23 N. W. 788, and Johnson v. Williams (1860) 4 Minn. 260, Gil. 183.

<sup>127</sup> Worley v. Naylor (1861) 6 Minn. 192, Gil. 123.

<sup>128</sup> See Swenson v. Halberg (1880) 1 McCray, C. C. 96, 1 Fed. 444, applying a Minnesota statute; Lee v. Mason (1862) 10 Mich. 403, applying Mich. Comp. Laws, § 5183; Grover v. Fox (1877) 36 Mich. 461, applying Mich. Comp. Laws, § 6918; Larzelere v. Starkweather (1878) 38 Mich. 96, L.R.A.1917B.

holding that the term "distinct" as used in the statute means "separate" or different, and therefore does not apply to a tract divided by a highway or by section lines, which is used as one farm and was mortgaged as one parcel; Durm v. Fish (1881) 46 Mich. 312, 9 N. W. 429, construing Mich. Comp. Laws, §§ 6915, 6918, and holding that when property is mortgaged as a single parcel it may be sold without regard to subsequent subdivision by the mortgagor, with which the mortgagee had no connection, but that where the land is subdivided with the concurrence of the mortgagee the sale should be made in parcels according to the statute; Yale v. Stevenson (1885) 58 Mich. 537, 25 N. W. 488, holding that two lots fenced and continually used as one lot were not separate and distinct lots within the meaning of the statute, and that the same could be validly sold as one parcel; Keyes v. Sherwood (1888) 71 Mich. 516, 39 N. W. 740, construing How. Stat. § 8503; Harris v. Creveling (1890) 80 Mich. 249, 45 N. W. 85, construing How. Stat. § 8503; McIntyre v. Wyckoff (1899) 119 Mich. 557, 78 N. W. 654; O'Connor v. Keenan (1903)

statute it was in addition provided that "if distinct lots be occupied as one par-

cel they may in such case be sold together,"<sup>129</sup> and similarly in New York

132 Mich. 646, 94 N. W. 186, construing 3 Mich. Comp. Laws, § 11,139; Walker v. Schultz (1913) 175 Mich. 280, 141 N. W. 543, applying 3 Mich. Comp. Laws, § 11,119 (5 How. Stat. 2d. ed. § 13,934); Worley v. Naylor (1861) 6 Minn. 192, Gil. 123, construing Minn. Comp. Stat. p. 644, § 8, and holding that the term "distinct" as applied to farm lands means parcels separated by some natural means or boundary, or by intervening space, and not simply a portion which may be described by arbitrary imaginary lines, such as governmental subdivisions; Paquin v. Braley (1865) 10 Minn. 379, Gil. 304, holding that where lands mortgaged as one tract or lot are subsequently cut up into lots, the mortgagee, upon foreclosure, is not bound to sell in parcels unless so ordered by a court of equity; Merrill v. Nelson (1872) 18 Minn. 366, Gil. 335, construing Minn. Pub. Stat. chap. 75, § 8, and holding that two tracts of land used as one farm could properly be sold in gross thereunder; Lalor v. McCarthy (1878) 24 Minn. 417, applying Minn. Gen. Stat. chap. 81, § 9, and holding that two lots used and occupied as one constituted one tract under the statute; Abbott v. Peck, 35 Minn. 499, 20 N. W. 194, holding that, where the mortgagee joined in a division of the mortgaged premises into blocks and lots, he was bound by the division and must sell accordingly, but that a sale by blocks rather than lots did not render the sale absolutely void; Hull v. King (1888) 38 Minn. 349, 37 N. W. 792, holding that under a mortgage of separate lots for separate amounts the sale should not be in gross; Willard v. Finnegan (1890) 42 Minn. 476, 8 L.R.A. 50, 44 N. W. 985, construing Minn. Gen. Stat. 1878, chap. 81, § 9, and holding that where a mortgagee adopts a division made by the mortgagor after the mortgaging of the land as an entirety, and advertises the land by such subdivisions, the sale should be by parcels rather than en masse; Ryder v. Hulett (1890) 44 Minn. 353, 46 N. W. 559, applying Minn. Gen. Stat. 1866, chap. 81, § 9; Bay View Land Co. v. Myers (1895) 62 Minn. 265, 64 N. W. 816, holding that where the mortgagor subdivided the mortgaged premises into blocks and lots, and the mortgagee accepted such subdivision, the premises should be sold by parcels; Phelps v. Western Realty Co. (1903) 89 Minn. 319, 94 N. W. 1085, 1135; Lamerson v. Marvin (1850) 8 Barb. (N. Y.) 9, applying 2 Rev. Stat. 546, § 6, which applies to foreclosure of mortgages by advertisement, and holding that the statute was "designed to provide for a sale of mortgaged premises consisting, at the time of the mortgage, of 'distinct tracts, farms, or lots,' and mortgaged and described as such, and not for the sale of premises mortgaged as one farm, tract, or lot, and being in fact but one farm, tract, or lot at the time of the mortgage, but subsequently subdivided for the convenient occupation of the mortgagor, or for the

purposes of sale;" that "the mortgagee cannot be required, upon any fair construction of the statute, to sell the mortgaged premises by any other or different description, or in any other or different parcels, than are given by the mortgage itself;" and that "he is not called upon to survey or redescribe at his peril the premises, or the several parcels into which it has been or may be conveniently subdivided;" Anderson v. Austin (1861) 34 Barb. (N. Y.) 319, holding that, where the premises consisted of two or more parcels which had previously been used and conveyed together as one farm, a sale of the whole in one parcel was good; Wells v. Wells (1867) 47 Barb. (N. Y.) 416, applying 3 Rev. Stat. 5th ed. 860, § 6, and holding that a sale of separate and distinct tracts or lots en masse violated the statute; Ellsworth v. Lockwood (1870) 42 N. Y. 89, applying 2 Rev. Stat. 546, § 8, and holding that a sale en masse was not justified where the premises were divisible and the mortgagor requested that the sale be by parcels and that no more should be sold than would satisfy the mortgage debt and costs, and offered to bid a sufficient amount for a certain then designated parcel, even though the premises were mortgaged as one parcel; Ellsworth v. Lockwood (1877) 9 Hun (N. Y.) 548, applying 2 Rev. Stat. 546, § 6, distinguishing the next preceding case, and holding that premises which were mortgaged as a whole and later subdivided by the mortgagor could properly be sold as an entirety, although the mortgagor requested that a certain parcel be first sold, such parcel differing from any into which the property had previously been subdivided, and therefore not being "a distinct tract or parcel that could have been conveniently sold, described, and conveyed;" Hemmer v. Hustace (1888) 14 N. Y. Civ. Proc. Rep. 254, affirmed in (1889) 51 Hun, 457, 3 N. Y. Supp. 850, holding that a sale en masse of property mortgaged as three distinct lots violated § 2393 of the Code of Civil Procedure; Bailey v. Hendrickson (1913) 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739, applying N. D. Rev. Codes 1905, § 7462, and holding that a farm or tract in one parcel was properly sold as a whole, especially as it was offered in parcels and no bids were received; Kirby v. Howie (1897) 9 S. D. 471, 70 N. W. 640, referring to S. D. Comp. Laws, § 5418, which relates to foreclosure by advertisement under a power, and holding that the mortgagee can acquire no title to a separate and distinct parcel sold after enough other parcels have been sold to satisfy the amount due with interest and costs; Thompson v. Browne (1897) 10 S. D. 344, 73 N. W. 194, construing S. D. Comp. Laws, § 5418, and holding that two lots upon which are a hotel and appurtenances, used as one premises, do not constitute separate tracts or lots under the statute.

<sup>129</sup> See Keyes v. Sherwood (1888) 71 Mich. 516, 39 N. W. 740, construing and

a statute reads that, if two or more buildings are situated on the same city lot and access to one is obtained through the other, they may be sold together.<sup>130</sup>

And in California statutes having similar provisions with respect to sales of separate pieces of real property upon execution have been held applicable to sales upon strict foreclosure of mortgages<sup>131</sup> when the decree is silent as to the manner or order in which the separate parcels shall be sold.<sup>132</sup> And the mortgagor may direct the order of sale.<sup>133</sup> And in fact where the decree of foreclosure merely follows the general provisions of the statute by ordering a sale of the premises or so much thereof as is necessary, when a part may be sold without material injury to the parties interested, it has been said that, if the defendants desire the property to be sold in separate parcels, they should give direction to that effect at the sale.<sup>134</sup> And where the mortgage contains an express stipulation as to the manner in which the premises shall be sold upon foreclosure, the decree may direct a sale to be made accordingly, it being proper for the court to enforce such a contract.<sup>135</sup>

applying How. Stat. § 8503, and holding that where a mortgagee releases a portion of the premises and severs the unreleased portion into two parcels which are occupied as such, they must be sold as such on foreclosure under the statute; *Harris v. Creveling* (1890) 80 Mich. 249, 45 N. W. 85, holding that "occupancy," within the meaning of the statute, does not require that all the land be fenced or improved," and that "the actual inclosure of part carries with it the occupancy of the balance, which is used or intended to be used as a part of one form," and therefore that two lots, one an inclosed tract and the other an uninclosed piece of woods, used in connection with each other, could be sold as one lot; *Gage v. Sanborn* (1895) 106 Mich. 269, 64 N. W. 32, holding that adjacent parcels used as one tract may be sold en masse; *Hawes v. Detroit F. & M. Ins. Co.* (1896) 109 Mich. 324, 63 Am. St. Rep. 581, 67 N. W. 329, holding that mortgage premises which consisted partly of unplatted land and partly of land platted by the mortgagor, and so recognized by the mortgagee, do not constitute a single tract under the statute, which must be sold in parcels; *O'Connor v. Keenan* (1903) 132 Mich. 646, 94 N. W. 186, applying 3 Mich. Comp. Laws, § 11,139, and holding that three distinct and separate tenancies could not be sold as one parcel, although there was a fence around the entire tract.

<sup>130</sup> *Wallace v. Feely* (1881) 61 How. Pr. (N. Y.) 225, affirmed in (1882) 10 Daly, 331, which is affirmed in (1882) 88 N. Y. 646.

<sup>131</sup> *San Francisco v. Pixley* (1861) 21 Cal. 56; *Ontario Land & Improv. Co. v. Bedford* L.R.A.1917B.

So, in Oregon a statute providing that, when a sale upon execution is of real property consisting of several known lots or parcels, they should be sold separately or otherwise as is likely to bring the highest price, has been held applicable to sales upon execution upon a decree of foreclosure of a mortgage;<sup>136</sup> but this statute leaves the sale of real property consisting of several known lots entirely to the discretion of the sheriff as to whether he will sell it in parcels or not.<sup>136</sup>

And the Utah statute providing that, when real estate is to be sold on execution and is composed of several known lots, they shall be sold separately has been regarded as applicable to sales on foreclosure of mortgages.<sup>137</sup>

And in Mississippi, by statutory provision (Code 1892, § 2443), lands comprising a single tract which are to be sold under a mortgage or deed of trust shall be sold as lands are required to be sold under execution; viz., they must be offered in subdivisions not exceeding 160 acres and then as an entirety and the mode which will obtain the greater sum shall govern.<sup>138</sup>

(1891) 90 Cal. 181, 27 Pac. 39; *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588; *Hibernia Sav. & L. Soc. v. Behnke* (1898) 121 Cal. 339, 53 Pac. 812; *County Bank v. Goldtree* (1900) 129 Cal. 160, 61 Pac. 785; *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848, holding that the statute does not apply and cannot be invoked unless it clearly appears that the land consists of separate and distinct parcels; *Anglo-Californian Bank v. Cerf* (1904) 142 Cal. 303, 75 Pac. 902, holding the same as the next preceding case.

<sup>132</sup> *Ontario Land & Improv. Co. v. Bedford* (1891) 90 Cal. 187, 27 Pac. 39; *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588.

<sup>133</sup> *Jones v. Gardner* (1881) 57 Cal. 641 (recognizes the right, but does not refer to the existing California statute).

<sup>134</sup> *County Bank v. Goldtree* (1900) 129 Cal. 160, 61 Pac. 785.

<sup>135</sup> *Bank of Sonoma County v. Charles* (1890) 86 Cal. 322, 24 Pac. 1019.

<sup>136</sup> *Bank of British Columbia v. Page* (1879) 7 Or. 454; *Balfour v. Burnett* (1895) 28 Or. 72, 41 Pac. 1, applying Hill's Code, § 292.

<sup>137</sup> See *Dickert v. Weise* (1877) 2 Utah, 350, construing Utah Comp. Laws, § 1448.

<sup>138</sup> See *Brown v. British & A. Mortg. Co.* (1905) 86 Miss. 388, 38 So. 312; *McClusky v. Trussell* (1907) 90 Miss. 544, 44 So. 69; and *Provine v. Thornton* (1908) 92 Miss. 395, 46 So. 950, holding that the fact that a part of the mortgaged tract was separated from the greater part thereof did not make it a separate tract within the meaning of the statute.

So, in Washington the statutes at one time expressly provided that decrees of foreclosure must be enforced by execution as an ordinary decree for payment of money, and that the sheriff should "sell the mortgaged premises or so much thereof as may be necessary to satisfy the judgment," etc., and the execution provisions stated that, when the sale was of real property and consisted of several known lots or parcels, they should be "sold separately or otherwise as is likely to bring the highest price," etc., and that, where the property to be sold did not consist of known lots or parcels, "the sheriff shall offer the land for sale, the lots or parcels separately or together as he shall deem most advantageous. All lands except town lots to be sold by the acre;"<sup>139</sup> but although these provisions were in part at least repealed by the act of March 10, 1897 (Laws of 1897, p. 70),<sup>140</sup> the provisions relating to sales on execution have largely been retained, and have been applied to sales on foreclosure of mortgages.<sup>141</sup>

So, in Indiana the statutory requirements that, when land is sold by the sheriff upon execution, "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately, and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same shall not be susceptible of division," applies to sales on foreclosure of a mortgage with like force as to sales on execution.<sup>142</sup> Under this statute it is the duty of the sheriff in the exercise of a sound discretion to determine the question of divisibility where the property

consists of one tract,<sup>143</sup> unless the mortgage debtor subdivides the same and requests that the parcels be sold as such and in a certain order,<sup>144</sup> he having the privilege of directing the order of sale of parcels provided a sale in the manner directed does not prejudice the execution plaintiff in the collection of his debt.<sup>145</sup> If the property is divisible and the debtor makes no request, it is the duty of the sheriff to sell no more than enough to make the debt and costs;<sup>146</sup> but if not divisible he may offer the entire premises.<sup>147</sup> However, if the mortgaged estate does consist of several lots, tracts, or parcels, he must offer each separately, and must sell the same if a bid equaling two thirds of the appraised value of a parcel is received, and even the fact that the sale of all the parcels is necessary to satisfy the execution does not justify the sheriff in selling in *solido*.<sup>147</sup>

But general execution statutes have not universally been held to apply to sales upon foreclosure. This was the attitude taken in an Illinois case,<sup>148</sup> the court declaring that such statutes apply solely to sales under and by execution, and not to sales under a decree of foreclosure.

In Iowa the statutes provide that, when a mortgage or a deed of trust, which latter can be foreclosed only by statute (Act March 30, 1860), is foreclosed, the courts "must direct the mortgaged property or so much thereof as is necessary, to be sold,"<sup>149</sup> and that "so far as practicable the property sold must be only sufficient to satisfy the mortgage foreclosed."<sup>150</sup> And by the statutes the execution debtor has a right to de-

<sup>139</sup> See *Solicitors' Loan & T. Co. v. Washington & I. R. Co.* (1895) 11 Wash. 684, 40 pac. 344, quoting Wash. Code of Proc. §§ 501, 504, 630.

<sup>140</sup> See *Dennis v. Moses* (1898) 18 Wash. 537, 40 L.R.A. 302, 52 Pac. 333.

<sup>141</sup> See *Bartlett Estate Co. v. Fairhaven Land Co.* (1909) 56 Wash. 437, 105 Pac. 848, quoting Bal. Code, §§ 5276 and 5288, and holding that the provision that all lands except town lots shall be sold by the acre does not mean that the land must be sold an acre at a time, but that the bids shall be at so much per acre, and that the bids for a tract containing a certain number of acres will be construed as a bid at or by the acre; and that a direction by the court to sell the various mortgaged tracts and parcels as described in the mortgage must be regarded as a determination by the court that such mode of sale would bring the highest price within the meaning of the statutory provision directing that the sale be "separately or otherwise as is likely to bring the highest price." L.R.A.1917B.

<sup>142</sup> See *Piel v. Brayer* (1868) 30 Ind. 332, 95 Am. Dec. 699; *Gregory v. Purdue* (1870) 32 Ind. 453; and *Bardeus v. Huber* (1873) 45 Ind. 235.

<sup>143</sup> *Benton v. Wood* (1861) 17 Ind. 260; *Gregory v. Purdue* (Ind.) supra (states rules for determining divisibility); *Bardeus v. Huber* (Ind.) supra; *Stotsenburg v. Stotsenburg* (1881) 75 Ind. 538.

<sup>144</sup> *Gregory v. Purdue* (Ind.) supra.

<sup>145</sup> *Benton v. Wood*; *Gregory v. Purdue*; and *Stotsenburg v. Stotsenburg* (Ind.) supra.

<sup>146</sup> *Benton v. Wood* (Ind.) supra.

<sup>147</sup> *Gregory v. Purdue* (Ind.) supra.

<sup>148</sup> *Dates v. Winstanley* (1894) 53 Ill. App. 623.

<sup>149</sup> Iowa Code 1851, § 2084; Rev. 1860, § 3661; Code 1873, § 3321; Rev. 1888, § 4557; Code 1897, § 4289. And see *Malony v. Fortune* (1862) 14 Iowa, 417, holding that the statute evidently contemplates a conditional order of sale, and not an absolute one.

<sup>150</sup> Code 1851, § 2091; Rev. 1860, § 3668; Code 1873, § 3326; Rev. 1888, § 4562; Code

mand of the officer making the sale that it be made according to a plan of division offered by him.<sup>151</sup>

And in Maryland, upon foreclosure of a mortgage, the court, by express statutory provision, may decree that the mortgaged property or so much thereof as may be necessary for the satisfaction of the debt and costs shall be sold.<sup>152</sup>

So, in Virginia the statutes require a trustee in selling property under a deed of trust to "sell the property conveyed by deed or so much thereof as may be necessary."<sup>153</sup> Under this statute it is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him in case of default to sell the trust subject without saying, "so much thereof as may be necessary to satisfy the purposes of the trust," that being always implied unless a contrary intention plainly appears.<sup>154</sup> But if it is difficult or impossible to do this, as when the property cannot be divided without doing unnecessary injury to the owner, it is duty of the trustee to sell the whole tract, or more of it than is required for the purposes of the trust, especially if so desired by the owner of the land.<sup>154</sup> In fact, it is the duty of the trustee to sell the property as a whole or in separate parcels, according to which mode will be to the best interests of the parties, the only limitation being that he shall not sell more than enough to pay the debt unless necessary;<sup>155</sup> but any requests of the owner that a particular and designated portion of the property be sold ought to be carried into effect if such portion is fully adequate to raise the required amount.<sup>156</sup> And there is no necessity for any pre-

liminary reference to a commission to ascertain and report how much and what part of the property shall be sold, it being the duty of the trustee to determine that question, although, should he meet with any difficulty in so doing, he may ask for a reference.<sup>157</sup> And, of course, where the trustee, acting under a power in the deed of trust, violates or threatens to violate the debtor's rights, the debtor may invoke the intervention and assistance of a court of equity to control the trustee,<sup>158</sup> or to avoid his acts where they have been irregular and prejudicial, provided his own conduct is such that it is not inequitable for him to do so.<sup>159</sup>

And in England by the Conveyancing Act of 1881, § 16, subdiv. 1, a mortgagee has power to sell "the mortgaged property or any part thereof" when the mortgage money has become due.<sup>160</sup>

In Kentucky it has been provided by statute that, before ordering a sale of real property for payment of a debt, the court must be satisfied whether or not the property can be divided without materially impairing its value, and that if all liens on real property be held by the same person it may order a sale of enough of the property to pay the debts then due, unless it appears that it is not susceptible of advantageous subdivision or that for some other reason the sale would cause a sacrifice thereof or seriously prejudice the interests of defendants.<sup>161</sup> Under this statute it is erroneous for the court to decree a sale of the premises en masse if they are divisible, as the debtor is entitled to have the property so offered for sale that a part of it may, if possible, be saved to him, the court being required by statute to

1807, § 4294. And see *Grapengether v. Fejervary* (1859) 9 Iowa, 163, 74 Am. Dec. 336.

<sup>151</sup> See *Taylor v. Trulock* (1882) 59 Iowa, 558, 13 N. W. 661.

<sup>152</sup> See *Thomas v. Fewster* (1902) 95 Md. 446, 52 Atl. 750, holding that under such statute no more of the property should be sold than is necessary.

<sup>153</sup> *Michie v. Jeffries* (1871) 21 Gratt. Va. 334, construing and applying Va. Code 1860, chap. 117, § 6; *Miller v. Mann* (1891) 88 Va. 212, 13 S. E. 337, construing and applying Va. Code, § 2442; *Morris v. Virginia State Ins. Co.* (1893) 90 Va. 370, 18 S. E. 843, construing and applying Va. Code 1873, chap. 117, § 6.

<sup>154</sup> *Michie v. Jeffries and Morris v. Virginia State Ins. Co.* (Va.) supra.

<sup>155</sup> *Terry v. Fitzgerald* (1879) 32 Gratt. (Va.) 843; *Morris v. Virginia State Ins. Co.* (Va.) supra, L.R.A.1917B.

<sup>156</sup> *Crenshaw v. Seigfried* (1874) 24 Gratt. (Va.) 272; *Terry v. Fitzgerald and Morris v. Virginia State Ins. Co.* (Va.) supra.

<sup>157</sup> *Michie v. Jeffries* (Va.) supra.

<sup>158</sup> *Terry v. Fitzgerald and Morris v. Virginia State Ins. Co.* (Va.) supra.

<sup>159</sup> *Miller v. Mann* (Va.) supra.

<sup>160</sup> See *Born v. Turner* [1906] 2 Ch. (Eng.) 211, 60 L. J. Ch. N. S. 503, 83 L. T. N. S. 148, 48 Week. Rep. 697, holding that under the statute a mortgagee had power to sell a part of the mortgaged premises, the right being reasonably exercised.

<sup>161</sup> See *Sears v. Henry* (1877) 13 Bush (Ky.) 413, construing and applying Ky. Civ. Code, 694; *McFarland v. Garnett* (1888) 10 Ky. L. Rep. 91, 8 S. W. 17; *Ficener v. Bott* (1895) 16 Ky. L. Rep. 519, 29 S. W. 639; *Burge v. Chestnut* (1909) — Ky. —, 121 S. W. 989.

determine the divisibility of the mortgaged premises.<sup>162</sup>

Texas has a statutory provision requiring that land in towns and cities be sold by lots,<sup>163</sup> but this statute is not a limitation on the power of the court to order a sale in a mode deemed proper and most conducive to the interests of the parties concerned.<sup>163</sup>

In Indiana it is provided by statute that at a sale under foreclosure of a mortgage on real estate the rents and profits for a specified term of years must first be offered for sale.<sup>164</sup>

And Indiana has a statute providing that upon the sale of land mortgaged to secure trust funds the state auditor "shall make sale of so much of the mortgaged premises, to the highest bidder for cash, as will pay the amount due for principal, interest, damages, and costs, and such sales may be in parcels, so that the whole amount may be realized."<sup>165</sup> Under this particular statute the auditor is not required to offer the mortgaged property for sale in parcels, but "may" do so only where necessary to enable him to realize the necessary amount, an offer of the entire tract not having produced such amount.<sup>166</sup>

And Indiana also has a statute relating to the selling of land mortgaged to the state for the use of the school fund, it being provided that at the sale on a foreclosure of such a mortgage the auditor shall sell so much of the mortgaged premises as will pay the amount due, and that when less than the whole amount is sold the part sold shall be taken in a certain form or shape and in a particular manner as regards location.<sup>166</sup> This contemplates a sale of a less quantity than the whole tract if anyone will pay the amount due for such less quantity.<sup>167</sup> And the provisions are mandatory, and a departure from the prescribed procedure renders the proceeding of no binding force.<sup>168</sup> But the

county auditor in making a sale is not required to offer any certain or specific quantity or parcel less than the whole, it being sufficient to merely demand who will take a less quantity than the whole tract and pay the amount due, the land in controversy having been described in the mortgage as an entirety.<sup>169</sup>

In Wisconsin it has been held that Rev. Stat. § 3530 (provisions not set out) sanctions the sale as a whole rather than in separate government subdivisions, of a tract of land constituting a distinct farm which has been used and cultivated as such.<sup>170</sup>

In a few instances statutes have been enacted which define the mode of sale of mortgaged property to be employed where a part only of the debt is due at the time.

Thus, in Indiana, by Rev. Stat. 1843, chap. 29, §§ 461, 462, it was provided that, upon foreclosure of a mortgage securing a debt only partially due at the time, the court should designate by reference the situation of the mortgaged premises, and ascertain whether the same can be sold in parcels without injury to the interests of the parties, and, if such a sale can be had, direct that so much of the premises be sold as will be sufficient to pay the amount then due, but that if the mortgaged premises are so situated that the sale of the whole will be more advantageous to the parties, the decree shall in the first instance be entered for the sale of the whole premises.<sup>171</sup> Under this statute the court is bound to make the inquiry provided for, and where a division is practicable to decree a sale of a portion only, unless it is established that a sale of the whole would be more advantageous to both parties,<sup>172</sup> although it has been held that an omission to make the inquiry and order is not such an error as will authorize a reversal where the defendants appeared and made no motion nor took any exception to the

<sup>162</sup> Quigley v. Beam (1910) 137 Ky. 325, 125 S. W. 727.

<sup>163</sup> Oppenheimer v. Reed (1895) 11 Tex. Civ. App. 367, 32 S. W. 325.

<sup>164</sup> See Nix v. Williams (1886) 110 Ind. 234, 11 N. E. 36, holding that where no bid was received upon such an offer the sheriff could proceed to a sale of the land itself. Carpenter v. Russell (1891) 129 Ind. 571, 29 N. E. 36, holding the same as the preceding case, and ruling in addition that where the land consisted of separate tracts it was not necessary to offer the rents and profits of all the tracts together before selling a parcel.

<sup>165</sup> See Bansemer v. Mace (1862) 18 Ind. 27, 81 Am. Dec. 344. L.R.A.1917B.

<sup>166</sup> See Haynes v. Cox (1888) 118 Ind. 184, 20 N. E. 758.

<sup>167</sup> See Shannon v. Hay (1886) 106 Ind. 589, 7 N. E. 376.

<sup>168</sup> Haynes v. Cox (Ind.) supra.

<sup>169</sup> Shannon v. Hay (Ind.) supra.

<sup>170</sup> Maxwell v. Newton (1886) 65 Wis. 261, 27 N. W. 31.

<sup>171</sup> See Greenman v. Pattison (1847) 8 Blackf. (Ind.) 465; Harris v. Makepeace (1859) 13 Ind. 560; Smith v. Pierce (1860) 15 Ind. 210; Brugh v. Darst (1861) 16 Ind. 70; Denny v. Graeter (1863) 20 Ind. 20; Thompson v. Davis (1868) 29 Ind. 264; and Hannah v. Dorrell (1881) 73 Ind. 465.

<sup>172</sup> Greenman v. Pattison (Ind.) supra; Frame v. Bell (1861) 16 Ind. 229; Dale v.

decree;<sup>173</sup> and that the court may inquire into and determine the question of divisibility, etc., at a subsequent term.<sup>174</sup> And in decreeing a sale by parcels of land found to be susceptible of division, the court must specify the division and the particular portion to be sold,<sup>175</sup> it being error even for the court to give the plaintiff power to direct the order in which the several parcels shall be sold.<sup>176</sup> And mortgaged property may be decreed to be sold as a whole where it is established that a sale in parcels would be injurious, even though such property consists of distinct tracts or parcels.<sup>177</sup> But the provisions of this statute cannot be invoked unless there are instalments of the debt yet to become due when the foreclosure is sought.<sup>178</sup>

So, in New York at an early date it was provided that where the mortgage debt was not all due a reference should be had to ascertain and report the situation of the mortgaged premises, and that, if it appeared from the report that the premises could be sold in parcels without injury to the interests of the parties, then so much only was to be sold as would be sufficient to pay the amount then due with costs, etc.<sup>179</sup> The provisions of this statute should be strictly observed<sup>180</sup> and are imperative upon the court.<sup>181</sup> And under this statute the duty of the referee has been defined as follows: "This provision of the statute relates entirely to the material condition of the mortgaged property. If the referee finds that the property cannot be sold in parcels, as he would be bound to do in cases where it is indivisible for use or enjoyment, as in the case of a mill, a store, a dwelling house, or a farm, or single piece of property, whose value consisted in keeping it together in its unity or entirety, such finding will practically end his duties under

the order. And so it will be if he finds that the mortgaged premises consist of distinct parcels of land whose relative value is entirely independent of each other. In such cases he will so report, and the land must be sold accordingly. But if he finds that the mortgaged premises consist of a large tract of land, he will then inquire whether such tract can be subdivided and sold in distinct parcels without impairing its aggregate value, and if so in what parcels, or whether the premises are so situated that the sale of the whole in one parcel will be most beneficial to the parties. So far as the duty of the referee is concerned under this branch of the order of reference, the inquiry is simply how can the mortgaged premises be sold so as to realize therefrom the greatest amount of money?"<sup>182</sup> And applying the foregoing rules it is held that the courts should direct a sale *en masse* where the report shows that such mode would be more beneficial to the parties, even though the property had been cut up into a large quantity of lots and blocks and so planted.<sup>183</sup>

And in Minnesota when a mortgage is given to secure the payment of money payable in instalments, if the mortgaged premises consist of separate and distinct farms or tracts, only such tract or tracts should be sold as are sufficient to satisfy the instalment or instalments then due; but if the premises do not consist of separate and distinct farms and tracts, the whole shall be sold, etc.<sup>184</sup>

And in California and Utah the statutes provide that, if the debt for which a mortgage is held is not all due, as soon as sufficient of the property has been sold to pay the amount due with costs, the sale must cease, etc.; but that, if the property cannot be sold in portions without injury to the parties, the

Bugh (1861) 16 Ind. 233; Patton v. Stewart (1862) 19 Ind. 233; Denny v. Graeter (1863) 20 Ind. 20; Knarr v. Conaway (1873) 42 Ind. 260; Griffin v. Reis (1879) 68 Ind. 9; Hannah v. Dorrell (Ind.) supra.  
<sup>173</sup> Thompson v. Davis (1868) 29 Ind. 264.

<sup>174</sup> Hannah v. Dorrell (Ind.) supra.

<sup>175</sup> Brugh v. Darst (1861) 16 Ind. 79; Denny v. Graeter (1863) 20 Ind. 20; Knarr v. Conaway (1873) 42 Ind. 260.

<sup>176</sup> Knarr v. Conaway (Ind.) supra.

<sup>177</sup> Firestone v. Klick (1879) 67 Ind. 309.

<sup>178</sup> Harris v. Makepeace (1859) 13 Ind. 560; Smith v. Pierce (1860) 15 Ind. 210; Denny v. Graeter (1863) 20 Ind. 20.

<sup>179</sup> See Ogdensburgh Bank v. Arnold (1835) 5 Paige (N. Y.) 38, construing 2 Rev. L.R.A.1917B.

Stat. 103; Gregory v. Campbell (1858) 16 How. Pr. (N. Y.) 417, construing § 164 of art. 6, chap. 1, pt. 3, of the Rev. Stat.; and Long v. Lyons (1875) 54 How. Pr. (N. Y.) 129, applying 2 Rev. Stat. §§ 163, 164. For the present New York statutory provision upon this question, see Code of Civ. Proc. §§ 1636, 1637.

<sup>180</sup> Long v. Lyons (N. Y.) supra.

<sup>181</sup> Ogdensburgh Bank v. Arnold (N. Y.) supra, holding that, where the master reports that the premises can be sold in parcels without injury to the interest of the parties, only so much can be sold as will satisfy the amount then due.

<sup>182</sup> Gregory v. Campbell (N. Y.) supra.

<sup>183</sup> See Fowler v. Johnson (1880) 26 Minn. 338, 3 N. W. 986, 6 N. W. 486.



whole may be ordered to be sold in the first instance, etc.<sup>184</sup>

In New Jersey it is provided that when all the mortgage money is not due, and it shall appear that a part of the mortgaged premises cannot be sold to satisfy the amount due without material injury to the remainder, and it is just and reasonable that the whole should be sold together, a decree that a sale of the whole be made is lawful.<sup>185</sup>

In some jurisdictions statutes of the character hereinbefore treated are held to be directory merely, and a sale en masse will not be disturbed unless the parcels were sold fraudulently, or it is shown that the mortgagor or owner of the equity of redemption was damaged thereby.<sup>186</sup> But in other cases the statutes have been held mandatory and the duties imposed imperative.<sup>187</sup>

And generally compliance with the statutory method of sale in parcels may be waived by the parties.<sup>188</sup>

Under statutes relating to execution and sheriff's sales by parcels, it is the duty of the sheriff to make the sale of the separate and distinct lots separately;<sup>189</sup> or where the property is divided or is divisible and the statute provides that where practicable no more shall be sold than is necessary, to sell enough only to satisfy the mortgage,<sup>190</sup> unless a decree of the court directs another mode of sale, in which case the statute has been held not to be applicable;<sup>191</sup> or unless the property is first offered in parcels and no bid is received, in which cases the statutes are regarded either as not applicable<sup>192</sup> or as sufficiently com-

<sup>184</sup> See *Bank of Napa v. Godfrey* (1888) 77 Cal. 612, 20 Pac. 142, quoting and applying Cal. Code Civ. Proc. § 728; and *Dupee v. Salt Lake Valley Loan & T. Co.* (1899) 20 Utah, 103, 77 Am. St. Rep. 902, 57 Pac. 845, which quotes Utah Rev. Stat. 1898, § 3502.

<sup>185</sup> See *McFadden v. Mays Landing & E. H. City R. Co.* (1891) 49 N. J. Eq. 176, 22 Atl. 932.

<sup>186</sup> *Swenson v. Halberg* (1880) 1 McCrary, 96, 1 Fed. 444; *San Francisco v. Pixley* (1862) 21 Cal. 56; *Willard v. Finnegan* (1890) 42 Minn. 476, 8 L.R.A. 50, 44 N. W. 985, holding that the Minnesota statutory provision that, if mortgaged property consists of separate parcels, they should be sold separately, was directory merely; *Ryder v. Hulett* (1890) 44 Minn. 353, 46 N. W. 559, holding the same as next preceding case; *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616, holding that a Montana statute declaring that upon the sale of real estate under execution, which consists of several known lots or parcels, they may be sold separately, which statute was applicable to a sale on foreclosure because of the fact that the court decreed that the sale be made in the manner prescribed for the sale of property under execution, was merely directory; *Wallace v. Feely* (1881) 61 How. Pr. (N. Y.) 225, affirmed in (1882) 10 Daly, 331, which is affirmed in (1882) 88 N. Y. 646; *Oppenheimer v. Reed* (1895) 11 Tex. Civ. App. 367, 32 S. W. 325, holding that the requirement of the Texas statute that city property be sold in lots is directory merely, and that the court may direct a sale in another mode more beneficial to the parties interested.

Generally, as to the effect of a sale in violation of such a statute and the remedies available, see the next following subdivision.

<sup>187</sup> See *Gregory v. Purdue* (1870) 32 Ind. 453; *Malony v. Fortune* (1862) 14 Iowa, L.R.A.1917B.

417; *Ficener v. Bott* (1895) 16 Ky. L. Rep. 519, 29 S. W. 639; *Lee v. Mason* (1862) 10 Mich. 403, expressly holding that the Michigan statutory provision that, if the mortgaged premises consist of farms, tracts, or lots, they should be sold separately, was not directory merely; *Keyes v. Sherwood* (1888) 71 Mich. 516, 39 N. W. 740, holding the same as next preceding case; *Walker v. Schultz* (1913) 175 Mich. 280, 141 N. W. 543, holding the same as next preceding case.

<sup>188</sup> *Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 119 Pac. 82; *Patton v. Stewart* (1862) 19 Ind. 233; *Clark v. Stillson* (1877) 36 Mich. 482, holding that the provisions of such statutes are for the benefit of the parties and consequently that they may waive the same; *Brown v. British & A. Mortg. Co.* (1905) 86 Miss. 388, 38 So. 312, holding in effect as next preceding case.

<sup>189</sup> *Jones v. Gardner* (1881) 57 Cal. 641; *Sowle v. Champion* (1861) 16 Ind. 165; *Benton v. Wood* (1861) 17 Ind. 260; *Gregory v. Purdue* (1870) 32 Ind. 453; *Bardeus v. Huber* (1873) 45 Ind. 235; *Stotsenburg v. Stotsenburg* (1881) 75 Ind. 538; *Nix v. Williams* (1886) 110 Ind. 235, 11 N. E. 36; *Meriwether v. Craig* (1888) 118 Ind. 301, 20 N. E. 769.

<sup>190</sup> *Grapengether v. Fejervary* (1859) 9 Iowa, 163, 74 Am. Dec. 336; *Boyd v. Ellis* (1860) 11 Iowa, 97; *White v. Watts* (1864) 18 Iowa, 74; *State Bank v. Brown* (1905) 128 Iowa, 665, 105 N. W. 49.

<sup>191</sup> *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588. And see *Hopkins v. Wiard* (1887) 72 Cal. 259, 13 Pac. 687, wherein it was held that a sale of several distinct tracts en masse, pursuant to court decree, was valid if in other respects fair, and that it would not be set aside although the mortgagor requested that the sale be made by parcel.

<sup>192</sup> *Marston v. White* (Cal.) supra; *Hibernia Sav. & L. Soc. v. Behnke* (1898) 121

plied with,<sup>193</sup> so that the property may be sold en masse; or unless upon offering the mortgaged property as a whole it brings more money than was bid upon an offer of sale by parcels;<sup>194</sup> or unless, as in California, in case of a failure of the court to decree the mode of sale, the mortgagor, pursuant to the statute, points out the mode of sale desired by him.<sup>195</sup>

Where statutes provide that the court must determine the advisability of division of mortgaged property upon a sale thereof, and the court after determination decrees a certain mode of sale, the officer making the sale must follow the order prescribed in the decree.<sup>196</sup> But, generally speaking, it is not incumbent upon the court to find whether or not it will be to the advantage of the defendant to have separate parcels sold separately, or to subdivide the premises for that purpose,<sup>197</sup> unless the statute provides that it must inquire or be satisfied before making a decree.<sup>198</sup> But even though it is not incumbent upon the court to find regarding the advisability of subdivision or separate sales, it may divide the property or decree the order of sale, and in such a case the officer making the sale has no right to exercise

a discretion, but must follow the decree.<sup>199</sup>

#### Avoidance of sales.

It is the purpose of the annotator to treat under this title those cases in which an attempt has been made to avoid a foreclosure sale upon the ground that it was either of a wrong amount of mortgaged property or was made in a wrong mode, regard being given principally to the question what error or irregularities afford sufficient ground for the setting aside of a foreclosure sale.

In the first place it may be stated that generally it is presumed that the method adopted by a mortgagee or trustee was the one best calculated to realize the greatest amount for the property sold,<sup>200</sup> as is required by the rules stated in the preceding subdivisions.

And likewise the general rule is that, where a wrong mode is pursued in selling property under a mortgage foreclosure, the sale is not absolutely void, but rather is voidable only.<sup>201</sup> And this is true even though applicable statutory provisions are to the effect that where the mortgaged property consists of separate and distinct parcels it shall be sold in parcels.<sup>202</sup> But in

Cal. 339, 53 Pac. 812; *Connick v. Hill* (1899) 127 Cal. 162, 59 Pac. 832, holding that the parts of the property upon which no bids were received could be sold en masse without again offering the same in parcels, even though the judgment debtor demanded that the latter be done; *Anglo-Californian Bank v. Cerf* (1904) 142 Cal. 303, 75 Pac. 902; *Nesbit v. Hanway* (1882) 87 Ind. 400; *Carpenter v. Russell* (1891) 129 Ind. 571, 29 N. E. 36.

<sup>193</sup> *Sowle v. Champion* (1861) 16 Ind. 165; *Nix v. Williams* (1880) 110 Ind. 234, 11 N. E. 36; *Burmeister v. Dewey* (1869) 27 Iowa, 468; *Hill v. Baker* (1871) 32 Iowa, 302, 7 Am. Rep. 193; *Brumbaugh v. Shoemaker* (1879) 51 Iowa, 148, 50 N. W. 493; *Walsh v. Colby* (1908) 153 Mich. 602, 126 Am. St. Rep. 546, 117 N. W. 207; *Dickert v. Weise* (1877) 2 Utah, 350.

<sup>194</sup> *Barlow v. McClintock* (1889) 10 Ky. L. Rep. 804, 11 S. W. 20.

<sup>195</sup> *Ontario Land & Improv. Co. v. Bedford* (1891) 90 Cal. 181, 27 Pac. 39; *Anglo-Californian Bank v. Cerf* (1904) 142 Cal. 303, 75 Pac. 902.

<sup>196</sup> *Hill v. Pettit* (1902) 23 Ky. L. Rep. 2004, 66 S. W. 190. And see *infra* text and note 199.

<sup>197</sup> *Jones v. Gardner* (1881) 57 Cal. 641.

<sup>198</sup> *Sears v. Henry* (1877) 13 Bush (Ky.) 413; *McFarland v. Garnett* (1881) 10 Ky. L. Rep. 91, 8 S. W. 17; *Quigley v. Beam* (1910) 137 Ky. 325, 125 S. W. 727.

<sup>199</sup> *Meriwether v. Craig* (1888) 118 Ind. 301, 20 N. E. 769. L.R.A.1917B.

<sup>200</sup> See *Balfour v. Burnett* (1895) 28 Or. 72, 41 Pac. 1.

<sup>201</sup> *San Francisco v. Pixley* (1862) 21 Cal. 56; *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588; *Bozarth v. Largent* (1889) 128 Ill. 95, 21 N. E. 218; *Kerfoot v. Billings* (1896) 160 Ill. 563, 43 N. E. 804; *Flynn v. Wilkinson* (1894) 56 Ill. App. 239; *Meriwether v. Craig* (1888) 118 Ind. 301, 20 N. E. 769; *Highland Land & Bldg. Co. v. Audas* (1908) 33 Ky. L. Rep. 214, 110 S. W. 325; *Willard v. Finnegan* (1890) 42 Minn. 476, 8 L.R.A. 50, 44 N. W. 985; *Ryder v. Hulett* (1890) 44 Minn. 353, 46 N. W. 559; *Clark v. Kraker* (1892) 51 Minn. 444, 53 N. W. 706; *Phelps v. Western Realty Co.* (1903) 89 Minn. 319, 94 N. W. 1085, 1135; *Miller v. Evans* (1864) 35 Mo. 45; *German Bank v. Stumpf* (1880) 73 Mo. 311; *Penn v. Craig* (1841) 2 N. J. Eq. 495; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121; *Middlesex Bkg. Co. v. Lester* (1895) 7 S. D. 333, 64 N. W. 168.

<sup>202</sup> *San Francisco v. Pixley* (Cal.) *supra*; *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588; *Anglo-Californian Bank v. Cerf* (1904) 142 Cal. 303, 75 Pac. 902; *Meriwether v. Craig* (1888) 118 Ind. 301, 20 N. E. 769; *Willard v. Finnegan* (1890) 42 Minn. 476, 8 L.R.A. 50, 44 N. W. 985; *Ryder v. Hulett* (1890) 44 Minn. 353, 46 N. W. 559; *Clark v. Kraker* (1892) 51 Minn. 444, 53 N. W. 706; *Phelps v. Western Realty Co.* (1903) 89 Minn. 319, 94 N. W. 1085, 1135; *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616 (statute

Indiana,<sup>303</sup> Michigan,<sup>304</sup> and Mississippi,<sup>305</sup> the courts, proceeding upon the assumption that the provisions of the statutes are mandatory rather than merely directory, have declared that a sale made in violation of such provisions was "void;" and in some of them, perhaps, it was necessary to go to that extent, but others involve only a direct attack upon the sale, and therefore do not necessarily require a characterization of the sale as void. However, in Indiana<sup>306</sup> and Michigan,<sup>307</sup> the declarations in some of the earlier cases so characterizing the sale have been repudiated, or, at least, qualified and explained in later cases, thereby again

demonstrating that the legal implications of the term "void" as employed by the courts are at best uncertain, and that it is necessary in this connection to observe the actual question involved in the case in which the term is employed. And even in the jurisdictions which apply the rule that the adoption of a wrong mode renders a sale void, it seems that, where mortgaged premises which are divisible have never been subdivided, a sale thereof as a whole is not absolutely void, unless the propriety of a division was so palpable and clear that a sale without division would operate as a fraud upon the execution defendant and amount to an abuse of official discretion.<sup>308</sup>

applicable in this case because of the fact that court decree directed that it be followed); *Vingut v. Ketcham* (1905) 102 App. Div. 403, 92 N. Y. Supp. 605; *Northwestern Mortg. Trust Co. v. Bradley* (1897) 9 S. D. 495, 70 N. W. 648; *Thompson v. Browne* (1897) 10 S. D. 344, 73 N. W. 194; *Oppenheimer v. Reed* (1895) 11 Tex. Civ. App. 367, 32 S. W. 325.

<sup>303</sup> *Piel v. Brayer* (1868) 30 Ind. 332, 95 Am. Dec. 699, holding that a sale en masse by a sheriff in violation of statute, of several distinct tracts or parcels of land, was void, the suit being one by the purchaser to quiet title; *Haynes v. Cox* (1888) 118 Ind. 184, 20 N. E. 758, holding, in a suit to quiet title to land sold in violation of the statute relating to mortgages given to protect school funds, that the sale was void and conveyed no title.

<sup>304</sup> *Lee v. Mason* (1862) 10 Mich. 403 (a proceeding to recover possession of premises from a mortgagor who was alleged to be holding over after foreclosure, in which it was held that, as the property consisted of separate parcels and was not sold as such, the sale was invalid and the mortgagor was not guilty of unlawfully holding over); *Durm v. Fish* (1881) 46 Mich. 312, 9 N. W. 429 (a suit in ejectment to recover premises claimed under a mortgage foreclosure, in which it was held that where the mortgagor and the mortgagee had subdivided the land a sale in entirety rather than by parcels was "void"); *Keyes v. Sherwood* (1888) 71 Mich. 516, 39 N. W. 740 (same as next preceding case); *Hawes v. Detroit F. & M. Ins. Co.* (1896) 109 Mich. 324, 63 Am. St. Rep. 581, 67 N. W. 329 (bill to set aside a deed made on a statutory foreclosure, on the ground that the premises were not sold in parcels); *O'Connor v. Keenan* (1903) 132 Mich. 646, 94 N. W. 186 (a suit for the partition of certain lands in which H. intervened, claiming as purchaser on mortgage foreclosure, and in which it was held that, as the property consisted of three distinct tracts which were occupied as separate and distinct tenancies, the sale of the whole en masse was "void").

<sup>305</sup> *McClusky v. Trussel* (1907) 90 Miss. L.R.A.1917B.

544, 44 So. 69 (bill to set aside a sale en masse of the land in controversy, in violation of the Mississippi statutes requiring the mortgaged land to be sold in parcels of not exceeding 160 acres).

<sup>306</sup> *Meriwether v. Craig* (1888) 118 Ind. 301, 20 N. E. 769, expressly stating that where the question of divisibility of the property is an open one, as where the property is merely susceptible of division and sale in parcels sufficient to satisfy the debt, and the sheriff sells as an entirety, the sale is not void, but is voidable only, but holding in a suit to set aside a sale in entirety of property ordered to be sold in separate parcels, that where the question of divisibility was not an open one, as in the then present case, it was the imperative duty of the sheriff to offer the mortgaged lands for sale in parcels, and that a failure to do so avoided the sale. And see dictum in *Jones v. Kokomo Bldg. Asso.* (1881) 77 Ind. 340.

<sup>307</sup> See *Walker v. Schultz* (1913) 175 Mich. 280, 141 N. W. 543, a suit to quiet title based on a statutory foreclosure of a mortgage, in which the court, in answering the contention that the foreclosure was not only irregular and invalid, but absolutely void and a nullity because the property was sold not in parcels, but as an entirety, said that it was true that the court in some of the earlier Michigan cases had used very positive language when declaring sales defective, characterizing them as "void," "absolutely void," etc., and yet, while so declaring them, had given such sales certain recognition when the mortgagor had been the party moving to set them aside, and then proceeded to examine the case on the merits, deciding that the sale, being violative of the statute, was voidable.

<sup>308</sup> *Bardeus v. Huber* (1873) 45 Ind. 235, wherein, in so holding, it was also held that under the facts in the suit the sale was void; *Stotsenburg v. Stotsenburg* (1881) 75 Ind. 538, holding that a sale of mortgaged premises as a whole was voidable where the same was susceptible of subdivision and of sale in parcels sufficient to satisfy the execution; *Jones v. Kokomo Bldg. Asso.* (Ind.)

Assuming, then, that the fact that an unnecessary amount of property is sold, or that an irregular mode is pursued, renders a sale voidable only, the question arises as to what circumstances constitute grounds upon which a sale will be set aside. And numerous courts have laid down rules upon this phase of the question. Thus it has often been said that courts will not set aside a sale under foreclosure for light or trivial reasons, but that, generally speaking, it must appear that there has been a material departure from the mandates of the decree or the law governing such sales, to the substantial injury or prejudice of the party seeking to set the sale aside.<sup>209</sup> So, it has been declared that it required good and substantial grounds to justify the court in setting aside a sale on foreclosure of a mortgage when regularly made, for otherwise all confidence would be destroyed and the public would be loath ever to bid for property thus offered.<sup>210</sup> And in fact several courts have maintained that, in order to obtain the aid of a court of equity to avoid a sale under a mortgage or a deed of trust, there must be some fraud, unfair dealing, or abuse, by the officer making the sale, of the confidence reposed in him, or some injury resulting from a

sale made in one mode rather than in another, in which it is contended that it should have been made.<sup>211</sup> And it has often been broadly ruled that it is only upon the ground of fraud or the ground that someone must have been substantially prejudiced, as by the working of an actual injustice or wrong, by a sale of mortgaged property en masse, that equity will set the sale aside because the property was not sold in parcels.<sup>212</sup>

And applying these general rules, it is generally held that the sale of mortgaged property en bloc rather than in parcels, as it should have been, or vice versa, or in different sized parcels, is a mere irregularity which alone does not constitute a sufficient ground for setting it aside, where it is not shown that the contesting party was materially injured thereby.<sup>213</sup> In other words, it has been said that the mortgagor will not be heard to complain of an irregularity such as selling the property in a wrong manner, if it brought a fair price,<sup>214</sup> even though it is possible that if it had been sold in a different manner it might by some fortuitous circumstances have brought more than its actual value.<sup>215</sup> And a mere irregularity which does not render a sale void is not available in an outside or collateral attack on the title

supra, holding that the sale in question, though in solido, whereas it should have been in parcel, was voidable only.

<sup>209</sup> *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848; *Goode v. Comfort* (1866) 39 Mo. 313; *German Bank v. Stumpf* (1880) 73 Mo. 311; *Kane v. Jonasen* (1898) 55 Neb. 757, 76 N. W. 441; *Miller v. Trudgeon* (1905) 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 739; *Bank of British Columbia v. Page* (1879) 7 Or. 454.

<sup>210</sup> *Stirling v. McLane* (1906) 103 Md. 47, 63 Atl. 205, quoting *Bank of Commerce v. Lanahan* (1876) 45 Md. 410, with approval. See also *State Realty & Mortg. Co. v. Villaume* (1907) 121 App. Div. 793, 106 N. Y. Supp. 698.

<sup>211</sup> *Benkendorf v. Vincenz* (1873) 52 Mo. 441; *Chase v. Williams* (1881) 74 Mo. 429; *Lazarus v. Caesar* (1900) 157 Mo. 199, 57 S. W. 751; *Givens v. McCray* (1906) 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374; *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233.

<sup>212</sup> *Gillespie v. Smith* (1863) 29 Ill. 473, 81 Am. Dec. 328; *Fergus v. Woodworth* (1867) 44 Ill. 374; *Fairman v. Peck* (1877) 87 Ill. 156; *Cleaver v. Green* (1883) 107 Ill. 67; *Kerfoot v. Billings* (1896) 160 Ill. 563, 43 N. E. 804; *Dates v. Winstanley* (1894) 53 Ill. App. 623; *Stone v. Missouri Guarantee Sav. & Bldg. Assn.* (1894) 58 Ill. App. 78; *Willard v. Finnegan* (1890) 42 Minn. 476, 8 L.R.A. 50, 44 N. W. 985; *Ryder L.R.A.* 1917B.

*v. Hulett* (1890) 44 Minn. 353, 46 N. W. 559; *Clark v. Kraker* (1892) 51 Minn. 444, 53 N. W. 706; *Phelps v. Western Realty Co.* (1903) 89 Minn. 319, 94 N. W. 1085, 1135; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121. And see *Adams v. Scott* (1859) 7 Week. Rep. (Eng.) 213.

<sup>213</sup> *Stockmeyer v. Tobin* (1890) 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504 (case arose in Louisiana); *Goerz v. Barstow* (1906) 78 C. C. A. 248, 148 Fed. 562 (case arose in Georgia); *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848; *Summerville v. March* (1904) 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388; *Chesley v. Chesley* (1872) 49 Mo. 540, on subsequent appeal in (1873) 54 Mo. 347; *State Realty & Mortg. Co. v. Villaume* (1907) 121 App. Div. 793, 106 N. Y. Supp. 698; *Tankersley v. Anderson* (1809) 4 Desauss. Eq. (S. C.) 44; *Middlesex Bkg. Co. v. Lester* (1895) 7 S. D. 333, 64 N. W. 168; *Peterman v. Turner* (1875) 37 Wis. 244 (dictum).

<sup>214</sup> *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364; *Fergus v. Woodworth* (1867) 44 Ill. 374, holding that equity would not interfere where the price paid was not so small as to amount to an unusual wrong or oppression; *Fairman v. Peck* (1877) 87 Ill. 156 (land sold for full value); *Kerfoot v. Billings* (1896) 160 Ill. 563, 43 N. E. 804.

<sup>215</sup> *Summerville v. March* (1904) 142 Cal. 554, 100 Am. St. Rep. 144, 76 Pac. 388.

transferred by the sale.<sup>216</sup> And it has been held that, although the mortgaged premises consisted of separate parcels and the sale of the first was for enough to satisfy the mortgage debt, the fact that the sheriff proceeded to sell the other parcels does not render him a wrongdoer, but that the sale was at most an irregularity which cannot be questioned after acknowledgment of the deed, the sheriff having acted within the command of his writ, which was to seize and sell the mortgaged premises.<sup>217</sup> So a mere error of judgment in the selection of the mode of sale, whereby some injury may have resulted, has been held not to constitute a ground for avoidance of a sale,<sup>218</sup> since all certainty and stability would be stripped from such sales and their validity would depend upon mere vague speculation.<sup>219</sup> And where the mode of sale is discretionary with the officer, a sale will not be set aside because one mode rather than another was adopted, unless the manner of sale was so palpably injurious as to amount to an abuse of discretion, in which case it would be a fraud upon the parties.<sup>219</sup> And the fact that the official making the sale was in duty bound to follow the terms of the decree of sale, and that he departed therefrom, does not warrant

the setting aside of the sale at the suit of parties who were not in fact damaged by such departure from the decree.<sup>220</sup> And a judgment decreeing the sale of mortgaged premises, or so much thereof as may be necessary, "in one tract or parcel," will not be reversed on appeal, where it does not affirmatively appear that the mortgaged premises consisted of separate and distinct tracts or parcels.<sup>221</sup> So it has been ruled that a decree allowing a sale of mortgaged premises as an entirety, they having been originally described as one lot, will not be disturbed where there is nothing to show that the land should have been sold in parcels, and a sale pursuant to such a decree will not be disturbed.<sup>222</sup> And injury cannot be presumed from mere irregularity.<sup>223</sup> Nor will a sale be set aside as a mere experiment,<sup>224</sup> except, perhaps, where it appears that the debtor may possibly be injured by a refusal and he gives security that the creditor shall be none the worse off for such experiment.<sup>225</sup>

Of course, where the sale was under a power and the court can find nothing unreasonable or prejudicial with respect to the mode adopted, it is not justified in setting the sale aside,<sup>226</sup> especially where the debtor was present at the sale

<sup>216</sup> *Goertz v. Barstow* (1906) 78 C. C. A. 248, 148 Fed. 502; *Thomas v. Thomas* (1911) 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616.

<sup>217</sup> *Gibson v. Lyon* (1885) 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129. But see *infra* text and notes 240, 242.

<sup>218</sup> *Mahone v. Williams* (1863) 39 Ala. 202.

<sup>219</sup> *Parkhurst v. Cory* (1856) 11 N. J. Eq. 233; *Bank of British Columbia v. Page* (1879) 7 Or. 454, holding that there must be an apparent abuse of discretionary power to avoid a sale; *Balfour v. Burnett* (1895) 28 Or. 72, 41 Pac. 1, holding the same as next preceding case.

But see *infra* text and note 236.

<sup>220</sup> *Summerville v. March* (1904) 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

<sup>221</sup> *Von Hemert v. Taylor* (1899) 76 Minn. 386, 79 N. W. 319.

<sup>222</sup> *Vaughn v. Nims* (1877) 36 Mich. 297.

<sup>223</sup> *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848.

<sup>224</sup> *Carroll v. Hutton* (1900) 91 Md. 379, 46 Atl. 967; *Stirling v. McLane* (1906) 103 Md. 47; 63 Atl. 205; *Old Dominion Invest. Co. v. Moomaw* (1896) 2 Va. Dec. 419, 25 S. E. 540.

<sup>225</sup> *Miller v. Kendrick* (1888) — N. J. Eq. —, 15 Atl. 259.

<sup>226</sup> *Mutual F. Ins. Co. v. Barker* (1900) 17 App. D. C. 205, holding that the court would not set aside a sale of mortgaged premises, which consisted of one lot upon L.R.A.1917B.

which were two houses, where the lot, which had never been subdivided, was conveyed as a whole, and it required little proof to establish the belief that a sale by parcels would have produced no good results, the regularity of the sale having been attacked on the ground that the property was sold as a whole without first having been offered in parcels; *Cleaver v. Green* (1803) 107 Ill. 67, holding that a sale as one parcel, of a suburban lot no larger than many others in the same neighborhood which were used for single residences, could not be avoided for failure to divide the same, there being nothing in the deed of trust imposing such a duty. *Singleton v. Scott* (1859) 11 Iowa, 589, holding that a sale en masse would not be set aside although the property sold consisted of several subdivisions, the mode adopted seeming to be beneficial rather than injurious; *Pryor v. Baker* (1882) 133 Mass. 459, holding that a sale of one only of three parcels covered by a single mortgage was valid when such a sale was authorized by the mortgage; *Gray v. Shaw* (1851) 14 Mo. 341, holding that a sale by parcels, the trustee having subdivided the property, would not be disturbed where the proceeds of the sale equaled the aggregate value of the property; *Carter v. Abshire* (1871) 48 Mo. 300, holding that a sale in gross for as much as or more than the property would have brought had the sale been by parcels could not be set aside because not made in the latter mode; *Benkendorf v.*

and neither suggested nor requested a different mode of sale,<sup>227</sup> or where the defendant does not even offer to redeem and does not ask any equitable relief, he simply introducing a sale in bulk as a defense in an action of ejectment.<sup>228</sup> Likewise a sale upon strict foreclosure, where the officer making the sale deter-

mined the mode to be pursued, cannot be avoided upon the ground that the mortgaged property consisted of separate and distinct parcels, or was divisible, but was sold en masse, it appearing that the sale in the manner or mode adopted was the most advantageous to all parties or, at least, was not prejudicial to any.<sup>229</sup>

Vincenz (1873) 52 Mo. 441, holding that the mere fact that the property conveyed by a deed of trust was sold in gross was not per se sufficient to avoid the sale, but that there must be some attendant fraud, unfair dealing, or abuse of discretion resulting in injury; German Bank v. Stumpf (1880) 73 Mo. 311, holding that the mere fact that property which is susceptible of division has been sold en masse will not render a trustee's sale void, but that substantial injury is necessary; Chase v. Williams (1881) 74 Mo. 429, holding that a sale en masse would not be set aside where it brought approximately the full value, and the evidence was not clear that a greater sum would have been obtained by a sale in parcels; Snyder v. Chicago, S. F. & C. R. Co. (1895) 131 Mo. 568, 33 S. W. 67, holding that a sale of property in gross is not per se sufficient to avoid the same; Dunn v. McCoy (1899) 150 Mo. 548, 52 S. W. 21 (dictum); Lazarus v. Caesar (1900) 157 Mo. 199, 57 S. W. 751, holding the same as Benkenдорф v. Vincenz (Mo.) supra; Pullis v. Pullis Bros. Iron Co. (1900) 157 Mo. 565, 57 S. W. 1095, holding that a sale of a single manufacturing plant as a whole would not be avoided although it occupied adjoining lots; Benton Land Co. v. Zeitler (1904) 182 Mo. 251, 70 L.R.A. 94, 81 S. W. 193, holding that the mere fact that land was sold in bulk will not vitiate the sale; Givens v. McCray (1906) 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374, holding that the mere statement that the trustee had sold land in bulk and had refused the request of the plaintiff to sell a less quantity and his offer to bid the amount due for any certain number of acres in the tract, to the injury of the plaintiff, did not warrant the setting aside of the sale, there being nothing to show the true nature and character of the property, its susceptibility of division, or any abuse of discretion or confidence on the part of the trustee in making the sale, or to show that in conducting such sale he in any manner acted otherwise than impartially with all the parties in interest, or did not exercise a proper and sound discretion in adopting the method and manner of sale employed; Kline v. Vogel (1881) 11 Mo. App. 211, holding that a sale en masse of property consisting of seven houses in a row on one tract having a front of 100 feet would not be set aside where no request for a different mode of sale was made and the impropriety of the mode adopted was not established; Lane v. Conger (1877) 10 Hun (N. Y.) 1, holding that a sale en masse of premises which had been mortgaged and used as an entirety L.R.A.1917B.

would not be disturbed, although the mortgagor has subsequently to the giving of the mortgage divided the same, the division not having been approved by the mortgagee, and in fact being detrimental to his interests in that the division made a part of the premises into a roadway; Shaw v. Holloway (1896) 13 Tex. Civ. App. 254, 35 S. W. 800, holding that a sale of property in bulk would not be set aside where it was unlikely that more would be received on a forced sale by parcels; National Loan & Invest. Co. v. Dorenblaser (1902) 30 Tex. Civ. App. 148, 69 S. W. 1019, holding that a sale en bloc would not be set aside where not prejudicial; McCollum v. Jones (1911) — Tex. Civ. App. —, 141 S. W. 1030, holding that a sale en masse would not be set aside where not prejudicial; Old Dominion Invest. Co. v. Moomaw (1896) 2 Va. Dec. 419, 25 S. E. 540, holding that a sale en masse would not be set aside where there was no showing that such mode of sale was prejudicial; Wilson v. Taylor (1912) 7 D. L. R. 707, 23 Ont. Week. Rep. 359, affirmed in (1913) 11 D. L. R. 455, 24 Ont. Week. Rep. 669, holding that a sale would not be set aside where there was a bona fide exercise of discretion as to the mode adopted.

<sup>227</sup> Mutual F. Ins. Co. v. Barker (1900) 17 App. D. C. 205 (sale contested on ground that it was made en masse rather than in parcels); Kellogg v. Carrieco (1870) 47 Mo. 157 (two distinct parcels which constituted one farm were sold en masse).

<sup>228</sup> Benton Land Co. v. Zeitler (Mo.) supra.

<sup>229</sup> Geuda Springs Town & Water Co. v. Lombard (1897) 57 Kan. 625, 47 Pac. 532 (sale en masse obtained greater sum); Cronkhite v. Buchanan (1898) 50 Kan. 541, 68 Am. St. Rep. 379, 53 Pac. 863 (sale en masse secured better price); Aukam v. Zantzinger (1904) 98 Md. 380, 56 Atl. 820 (no showing that division and sale by parcels would have been more advantageous); Stirling v. McLane (1906) 103 Md. 47, 63 Atl. 205 (no clear showing that sale by parcels would have been more advantageous); Edgecombe Park Co. v. Finney (1913) 121 Md. 320, 88 Atl. 143 (no satisfactory showing that different mode would have been more advantageous); Craig v. Stevenson (1884) 15 Neb. 362, 18 N. W. 510 (property consisted of three lots upon portions of all of which a dwelling house was erected); Kane v. Jonasen (1898) 55 Neb. 757, 76 N. W. 441 (no showing of prejudice); Mallory v. Patterson (1902) 63 Neb. 429, 88 N. W. 686 (no showing of prejudice in the sale of city lots en masse); Iowa

And a sale made in accordance with the determination of the court reached pursuant to the terms of a statute requiring it to determine the divisibility, etc., of the mortgaged land, will not be interfered with where the judgment of the court appears to have been justified.<sup>230</sup> And where the mortgagor objects to a sale en masse and requests that a certain division be made and the parcels sold separately, which request is acceded to, it seems that the mortgagor cannot afterwards object to the sale in that mode.<sup>231</sup>

But courts of equity will set aside a sale under a mortgage or deed of trust where the officer making the same has been guilty of fraud, partiality, or prejudicial misconduct.<sup>232</sup> And failure to sell in the manner which was known to be most likely to produce the largest price

has been held to be sufficient reason for avoiding the sale.<sup>233</sup> And for a better reason where the sale is en masse and should have been in parcels, or vice versa, and actually brings a price greatly below the actual value of the property, it cannot be sustained against the objection of the debtor showing that there is reasonable ground for believing that it was less beneficial to him than it would have been had a reasonable mode been pursued.<sup>234</sup> And a failure to sell in a mode which a reasonable exercise of the seller's judgment would have shown to be the most probable means of bringing the largest price is a good ground of objection to the sale, where the price obtained was altogether inadequate.<sup>235</sup> So a sale may be set aside where the officer making the same

*Loan & T. Co. v. Devall* (1902) 63 Neb. 826, 89 N. W. 381 (same as next preceding case); *Potter v. Lynch* (1902) 2 Neb. (Unof.) 798, 90 N. W. 217 (farm occupied by one set of buildings and used as a whole, and no showing of prejudice); *Franklin County Bank v. Everett* (1902) 3 Neb. (Unof.) 379, 91 N. W. 495 (land not sold in smallest governmental subdivisions, but no showing that more would have been obtained had it been so sold); *Pierce v. Reed* (1903) 3 Neb. (Unof.) 874, 93 N. W. 154 (farm of 200 acres lying in one section, and occupied and farmed and mortgaged as a whole, may be sold en masse rather than in smaller government subdivisions, although parts of the tract are in different quarter sections and are separately assessed for taxation, if sale is not prejudicial); *Guarantee Trust & S. D. Co. v. Jenkins* (1885) 40 N. J. Eq. 451, 2 Atl. 13 (four contiguous lots improved and occupied as one); *Worth v. Newlin* (1896) — N. J. Eq. —, 36 Atl. 30 (mortgage of a hotel and its furniture and equipment was executed as a mortgage of real property only, and the property was sold as an entirety); *Miller v. Trudgeon* (1905) 16 Okla. 337, 86 Pac. 523, 8 Ann. Cas. 739 (the mere fact that land which has been divided is sold en masse does not alone justify the setting aside of the sale).

<sup>230</sup> *Jones v. Louisville Sav. Loan & Bldg. Co.* (1900) 22 Ky. L. Rep. 570, 58 S. W. 534.

<sup>231</sup> See *Knapp v. Conger* (1874) 59 N. Y. 635.

<sup>232</sup> *Dunn v. McCoy* (1899) 150 Mo. 548, 52 S. W. 21; *Schilling v. Lintner* (1887) 43 N. J. Eq. 444, 11 Atl. 153; *Meadors v. Johnson* (1910) 27 Okla. 544, 112 Pac. 1121.

<sup>233</sup> *Mahone v. Williams* (1863) 39 Ala. 202; *Dozier v. Farrior* (1914) 187 Ala. 181, 65 So. 364.

<sup>234</sup> *San Francisco v. Pixley* (1862) 21 Cal. 56, holding that a sale en masse of a tract laid out in blocks and streets and officially mapped, for a grossly inadequate price, would be set aside; *Bernhard v. Hovey* L.R.A.1917B.

(1899) 9 Kan. App. 25, 57 Pac. 245, holding that a sale en masse of a business block and a separate vacant unimproved lot, for a very inadequate sum, would be set aside where the property would have sold for more if sold in separate lots; *Gleason v. Kentucky Title Co.* (1904) 25 Ky. L. Rep. 1546, 78 S. W. 170, holding that a sale en masse of a lot containing five cottage houses, for a grossly inadequate price, would be set aside; *Hubbard v. Jarrell* (1865) 23 Md. 66, holding that a sale of three separate and distinct farms en masse, for a grossly inadequate price, should be set aside; *Mays v. Lee* (1905) 100 Md. 227, 59 Atl. 848, holding that a sale of two separate farms en masse, for an inadequate price, should be set aside; *Larkin v. Brouty* (1891) 31 N. Y. S. R. 879, 15 N. Y. Supp. 509, holding that a sale en masse of property which had been divided, for about one half what it would have brought if it had been sold in parcels, would be set aside.

<sup>235</sup> *Mahone v. Williams* and *Dozier v. Farrior* (Ala.) supra, holding that where personalty and land were sold en masse under a power of sale, for an inadequate price, and the property had been dedicated to separate and distinct uses, equity would avoid the sale; *Lalor v. McCarthy* (1878) 24 Minn. 417, holding that a sale of two lots which were occupied by one building, each essential to the use of the other, separately, for an inadequate price, should be set aside upon suit brought therefor; *Goode v. Comfort* (1866) 39 Mo. 313, holding that a sale en masse of parcels of city lots, for a grossly inadequate price, should be set aside; *Chesley v. Chesley* (1873) 54 Mo. 347, on former appeal in (1872) 49 Mo. 540, holding that a sale of separate and distinct parcels as a whole, for an inadequate price, should be set aside where more would have been obtained by a sale in parcels; *Tatum v. Holliday* (1875) 59 Mo. 422, holding that a sale en masse at a great sacrifice, of property which could have been easily

violates his duty to exercise a discretion vested in him to act in good faith for the best interests of the parties.<sup>236</sup> And it has been held that an arbitrary sale of separate and distinct parcels as a whole may be set aside by the court upon the coming in of the report, where the sale should have been by parcels.<sup>237</sup> And relief will be granted where it clearly appears that a trustee in a deed of trust has not kept within the authority conferred upon him, and has not sold the property to the best advantage.<sup>238</sup> And a sale may be set aside in equity where it appears that the trustee sold the premises en masse rather than in parcels as insisted upon by the debtor, which latter mode would have been more advantageous.<sup>239</sup> So, where, upon a sale of land by parcels or of land which is divisible, more land is arbitrarily sold than is necessary to pay the mortgage debt and costs, the court may set the sale aside,<sup>240</sup> except, perhaps, as against an innocent purchaser for value.<sup>241</sup> And a sale en masse of property which is divisible may be set aside if a part only of the property would have been sufficient to satisfy the claim.<sup>242</sup> And a decree directing the sale of the whole of mortgaged premises which are divisible is erroneous where only a part of the mortgage debt is due and a sale of a part of the property would satisfy the portion

of the mortgage debt due at the time.<sup>243</sup> And it has been held that a sale en masse in violation of a statute is an irregularity, to correct which the defendant has a remedy by motion to set aside the sale on notice to the creditor, the officer making the sale, and the purchaser at the sale, even though it is established that the property brought more than it would on a resale,<sup>244</sup> it being said that to uphold such a sale would be to deprive the judgment debtor of his right to redeem any one of the separate parcels;<sup>245</sup> but, of course, where a sale is legally made en masse, it will not be set aside simply because, in order to redeem any of the property, a judgment debtor must redeem it all.<sup>246</sup> So a decree under a statute providing that the court "must direct the mortgaged property, or so much thereof as is necessary, to be sold," which orders a sale of the entire premises, has been held error upon the ground that the order of sale should be conditional, and not absolute.<sup>247</sup> And a sale in violation of a statutory requirement that so far as practicable the property sold must be only sufficient to satisfy the mortgage foreclosed and costs will be set aside upon motion or proceeding in equity by the proper party for that purpose,<sup>248</sup> although it has been said that the fact that separate parcels were not sold separately is a mere irregularity which in

and advantageously divided, should be set aside; *American Ins. Co. v. Oakley* (1841) 9 Paige (N. Y.) 259, holding the same as *Chesley v. Chesley* (Mo.) supra; *Merchants' Ins. Co. v. Hinman* (1856) 3 Abb. Pr. (N. Y.) 455, holding the same as next preceding case.

<sup>236</sup> *Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 119 Pac. 82; *Givens v. McCray* (1906) 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374; *Laughlin v. Schuyler* (1871) 1 Neb. 409 (case is meagerly reported and is classified here because of the construction placed upon it by subsequent Nebraska cases which are elsewhere set out in this annotation). And see *Schilling v. Lintner* (1887) 43 N. J. Eq. 444, 11 Atl. 153.

But see supra text and note 219.

<sup>237</sup> *Waldo v. Williams* (1840) 3 Ill. 470 (dictum).

<sup>238</sup> *Dunn v. McCoy* (1899) 150 Mo. 548, 52 S. W. 21.

<sup>239</sup> *Cassidy v. Cook* (1881) 99 Ill. 385; *Wolcott v. Schenck* (1862) 23 How. Pr. (N. Y.) 385; *Vandercook v. Cohoes Sav. Inst.* (1875) 5 Hun (N. Y.) 641.

<sup>240</sup> *Waldo v. Williams* (Ill.) supra; *Thomas v. Fewster* (1902) 95 Md. 446, 52 Atl. 750; *Mays v. Lee* (1905) 100 Md. 227, 50 Atl. 848; *Tatum v. Holliday* (1875) 59 Mo. 422; *Baker v. Halligan* (1882) 75 Mo. L.R.A.1917B.

435. And see *Gaienne v. Questi* (1832) 3 La. 433.

But see supra text and note 217.

<sup>241</sup> See *Beaty v. Radenhurst* (1871) 3 Ch. Chamb. Rep. (U. C.) 344.

<sup>242</sup> *Highland Land & Bldg. Co. v. Audas* (1908) 33 Ky. L. Rep. 214, 110 S. W. 325; *Quigley v. Beam* (1910) 137 Ky. 325, 125 S. W. 727; *Quaw v. Lameroux* (1875) 36 Wis. 626. And see *Woods v. Monell* (1815) 1 Johns. Ch. (N. Y.) 502.

<sup>243</sup> *James v. Fisk* (1847) 9 Smedes & M. (Miss.) 144, 47 Am. Dec. 111; *American Life & F. Ins. & T. Co. v. Ryerson* (1846) 6 N. J. Eq. 9.

<sup>244</sup> *Browne v. Ferrea* (1876) 51 Cal. 552 (a strong dissent was entered in this case by Wallace, Ch. J., upon the ground that the sale en masse was productive of no appreciable damage); *Marston v. White* (1891) 91 Cal. 37, 27 Pac. 588.

<sup>245</sup> *Browne v. Ferrea* (Cal.) supra.

<sup>246</sup> *Anglo-Californian Bank v. Cerr* (1904) 142 Cal. 303, 75 Pac. 902.

<sup>247</sup> *Malony v. Fortune* (1862) 14 Iowa, 417.

<sup>248</sup> *Grapengether v. Fejervary* (1859) 9 Iowa, 163, 74 Am. Dec. 336; *Boyd v. Ellis* (1860) 11 Iowa, 97; *Lay v. Gibbons* (1862) 14 Iowa, 377, 81 Am. Dec. 487; *White v. Watts* (1864) 18 Iowa, 74; *State Bank v. Brown*, (1905) 128 Iowa, 665, 105 N. W. 49.



the absence of fraud does not affect the title of the purchaser.<sup>249</sup> And where more property is sold than is necessary to satisfy the mortgage debt and costs, and the statute provides that the court may decree a sale of the mortgaged property or so much thereof as may be necessary for the satisfaction of the debt and costs, the sale may be set aside.<sup>250</sup> And, of course, where the statute unqualifiedly provides that upon the sale of mortgaged property consisting of separate and distinct farms, tracts, or lots, the parcels shall be sold separately, and forbids the sale of more parcels than necessary to satisfy the claims, a sale of more parcels than necessary constitutes grave error.<sup>251</sup> So a sale en masse without inquiry as to the divisibility of the premises and the propriety of a sale of a part only, as required by statute, is irregular and may be set aside on motion.<sup>252</sup> And a sale made under a decree of foreclosure which absolutely requires separate government subdivisions owned by different persons to be sold en masse will

be set aside where no imperative reasons for such a decree are present,<sup>253</sup> and a clause in the trust deed authorizing the trustee in his discretion to sell the property en masse cannot avail to support the decree.<sup>253</sup> And a sale made in violation of the terms of a decree made under a statute requiring the court to determine the advisability of dividing mortgaged property for the purposes of sale will be set aside as prejudicial.<sup>254</sup> And where the statutes permit the execution debtor to demand that a sale be made according to a plan furnished by him, and the officer disregards the same, the sale should be set aside, it appearing that the plan furnished was intelligible and easily made certain.<sup>255</sup>

But a sale en masse cannot be avoided upon the ground that a statutory requirement that separate and distinct parcels be sold in parcels was not complied with, where it does not clearly appear that the land in question consisted of separate and distinct parcels.<sup>256</sup>

<sup>249</sup> *Olmstead v. Kellogg* (1877) 47 Iowa, 460.

<sup>250</sup> *Thomas v. Fewster* (1902) 95 Md. 446, 52 Atl. 750.

<sup>251</sup> *Grover v. Fox* (1877) 36 Mich. 461.

<sup>252</sup> *Frame v. Bell* (1861) 16 Ind. 229.

<sup>253</sup> *Skaggs v. Kincaid* (1892) 48 Ill. App. 608.

<sup>254</sup> *Hill v. Pettit* (1902) 23 Ky. L. Rep. 2004, 66 S. W. 190.

<sup>255</sup> *Taylor v. Trulock* (1882) 59 Iowa, 558, 13 N. W. 661.

<sup>256</sup> *Meux v. Trezevant* (1901) 132 Cal. 487, 64 Pac. 848, G. J. C.

# KENTUCKY COURT OF APPEALS LOUISVILLE & NASHVILLE RAIL- ROAD COMPANY, Appt., v. COMMONWEALTH OF KENTUCKY.

(Two cases.)

(171 Ky. 355, 188 S. W. 394.)

## Commerce — duty to equip interstate train with coaches for colored passengers.

1. A transfer train operated by a railroad to take its passengers to and from a city located near its line, but in another state, which travels between two stations in the state where the road is located, is, as far as traffic between such stations is concerned, within its statute requiring equipment for both white and colored passengers.

For other cases, see *Commerce*, II. c, in *Dig.* 1-52 N. S.

Note. — As to cumulative penalties for failure of carrier to provide separate accommodations for white and colored persons, see annotation following this case, post, 548.  
L.R.A.1917B.

## Carrier — accommodations for white and colored races — demand for.

2. To subject a carrier to a penalty for failure to equip its trains with separate accommodations for white and colored passengers, an actual demand for accommodations by members of both races need not be shown.

For other cases, see *Carriers*, IV. a, in *Dig.* 1-52 N. S.

## Criminal law — continuing offense — single conviction.

3. But one conviction can be had for failure to equip a particular train with accommodations for both white and colored passengers prior to the finding of the indictment first tried, where the train remains the same as to schedule time and equipment from day to day, although it is broken up each night and reassembled in the morning, where the penalty provided is for each offense, and not for each day's violation of the statute.

For other cases, see *Criminal Law*, II. g, 2, in *Dig.* 1-52 N. S.

(October 5, 1916.)

APPEALS by defendant from judgments of the Circuit Court for Kenton County

convicting it, under two indictments, of operating trains without providing separate coaches for white and colored passengers. Affirmed in first case. Reversed in second case.

The facts are stated in the opinion.

Messrs. B. D. Warfield and S. D. Rouse for appellant.

Messrs. M. M. Logan, Attorney General, and Overton S. Hogan, Assistant Attorney General, for the Commonwealth:

The trial of the first indictment was not a bar to the trial of the second indictment.

Chesapeake & O. R. Co. v. Com. 88 Ky. 368, 11 S. W. 87; Louisville & N. R. Co. v. Com. 154 Ky. 293, 157 S. W. 369.

There was a violation by defendant of the separate-coach law.

Chesapeake & O. R. Co. v. Com. 119 Ky. 519, 84 S. W. 566; Louisville & N. R. Co. v. Com. 99 Ky. 666, 37 S. W. 79.

The two indictments against the defendant charge separate offenses.

Shirley v. Com. 143 Ky. 183, 136 S. W. 227.

Mr. Stephens L. Blakely, also for the Commonwealth:

The statute is not to be enforced only when passengers of different race are on the train.

Chesapeake & O. R. Co. v. Com. 119 Ky. 519, 84 S. W. 566.

The two indictments do not charge the same offense.

Com. v. Brownling, 146 Ky. 770, 143 S. W. 407; State v. Norman, 16 Utah, 457, 52 Pac. 986; Hopkins v. United States, 4 App. D. C. 430; Com. v. Hawkins, 11 Bush, 604, 1 Am. Crim. Rep. 65; McIntyre v. Com. 154 Ky. 149, 156 S. W. 1058; Miller v. State, 33 Ind. App. 509, 71 N. E. 248; State v. Virgo, 14 N. D. 293, 103 N. W. 610; Clement v. State, — Tex. Crim. Rep. —, 86 S. W. 1016; Com. v. Standard Oil Co. 120 Ky. 724, 87 S. W. 1090; Wilson v. Com. 110 Ky. 769, 82 S. W. 427; Cawein v. Com. 110 Ky. 273, 61 S. W. 275; Tucker v. Moultrie, 122 Ga. 160, 50 S. E. 61; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Com. v. Crowell, 22 Ky. L. Rep. 1182, 60 S. W. 179; Louisville & N. R. Co. v. Com. 154 Ky. 293, 157 S. W. 369; Roberson, Crim. Law, § 52; State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817; Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272; People v. Spencer, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818, note; Suydam v. Smith, 52 N. Y. 383; Morgan v. State, 119 Ga. 964, 47 S. E. 567; United States v. Boston & M. R. Co. 168 Fed. 148.

L.R.A.1917B.

Clarke, J., delivered the opinion of the court:

The grand jury of Kenton county, at its February, 1916, term, returned two indictments against the appellant, charging it with operating a passenger train in Kenton county between its Covington and Latonia stations without providing separate coaches for white and colored passengers, as provided by § 795 of the Kentucky Statutes. One of these indictments, No. 3134, charged the commission of the offense on the ——— day of April, 1915, and the other indictment, No. 3142, charged the commission of the offense therein on the ——— day of May, 1915.

Upon the trial of the first case the commonwealth introduced the testimony of C. W. Schultz, conductor on the train, who testified that in April, 1915, the appellant operated a passenger train, known as the "Transfer," between Union Central Depot in Cincinnati and Covington and Latonia stations in Kentucky; that the train consisted of an engine and one coach, and that the coach was not divided into compartments; that both interstate and intrastate passengers were carried on this train; that the train made several trips each way daily; that after its last regular run the engine was sent to the roundhouse and the coach placed on a sidetrack for the night. Appellant introduced no witnesses, and the court instructed the jury to find it guilty, and to impose a fine of not less than \$500 nor more than \$1,500. The jury fixed the fine at \$500.

Upon the trial of the second indictment the case was submitted upon an agreed statement of facts, in effect the same as the testimony given by the conductor on the former trial, except that the time of the commission of the acts was fixed upon May 1, 1915. The court again instructed the jury to find appellant guilty, and this jury fixed the penalty at \$625.

Separate appeals from these two judgments were prosecuted, but by agreement are heard together. Three reasons for reversal are urged by appellant: (1) That the separate coach law does not apply to the train in question; (2) that the evidence does not show that any negroes applied for passage upon the occasions named in the indictments, and that there is no violation of the law unless the company fails to provide separate coaches as needed; (3) that the offense is a continuing one, and that one conviction is a bar to another conviction for all violations occurring before the date of the indictment upon which the first conviction was had.

1. It is argued that because the train in question is simply a transfer train, operated

by appellant to accommodate its passengers going to and from Cincinnati, with a choice of two passenger stations in said city, that the business it does is largely interstate, and that the business performed within the state is trivial and incidental as compared with the principal business, that this train, therefore, is not subject to the provisions of § 795 of the Statutes. The indictments charged and the proof shows that the train in question is operated by appellant within the state between the Covington and Latonia stations upon appellant's line of railroad in the state. Appellant's argument is based upon the assumption that this train is not operated within the state, and is therefore not subject to the provisions of § 795 of the Kentucky Statutes, under which this charge is prosecuted. This assumption is erroneous, because the proven operation between the two Kentucky stations brings this train within the provisions of that statute. Appellant's whole argument upon this question is therefore based upon a false premise and is of no force. Even if it is conceded as stated by appellant, that the principal business of this particular train is interstate, and it is not operated in intrastate commerce "except incidentally, casually, and obliquely," the fact nevertheless remains that the train is operated within the state. It also results that, as this record presents no questions of interstate commerce, the constitutionality of the act under which the charge is drawn cannot be questioned here. *Ohio Valley R. Co. v. Lander*, 104 Ky. 431, 47 S. W. 344, 882; *Chesapeake & O. R. Co. v. Com.* 21 Ky. L. Rep. 228, 51 S. W. 160; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.

2. Appellant contends that, in order to sustain an indictment for failure to provide separate coaches for the travel of white and colored passengers, it is necessary for the commonwealth to prove upon the occasions in question that passengers of both races desired transportation; that there can be no violation of the statute unless there was in fact a passenger of the particular race for whom a separate compartment was not provided; that, while the proof here shows there was but one coach or compartment, appellant's motion for a peremptory instruction should have been sustained, because there was a failure in the proof to show that passengers of the other race desired transportation upon that occasion. This raises a question not heretofore passed L.R.A.1917B.

upon in this state. Counsel for appellant do not cite any authority in support of their contention, and in the only case cited by appellee (*Chesapeake & O. R. Co. v. Com.* 119 Ky. 519, 84 S. W. 566), while the opinion states there were no colored passengers on the train at the time the defendant failed to furnish a separate compartment for that race, that fact was not presented as a defense and is not considered in the opinion.

The only case that we have been able to find which treats of this particular question is *Southern Kansas R. Co. v. State*, 44 Tex. Civ. App. 218, 99 S. W. 166. In that case the court, under a Texas statute which, in substantially the same terms as our statute, required common carriers to provide separate coaches for the white and colored races, disallowed the defense that appellant is urging here. The applicable part of our statute requires common carriers "to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines or railroad." The Texas statute provides that common carriers "shall provide separate coaches for the accommodation of white and negro passengers." While the language of the two statutes is not identical, the evident purpose of both is the same. Unquestionably the legislatures of the two states, in the enactment of these statutes, intended to accomplish the same things in the same way, and no difference in construction could be sustained upon any difference in the language employed in one from the other. Therefore, unless the reasons advanced in support of the construction of the Texas statute are unsound or inadequate, the same conclusions ought to be reached in the construction of our statute. We quote the following from the opinion in the Texas case: "We think the plain requirement of the statute is that railroad companies doing business in this state as common carriers of passengers for hire must provide separate coaches, whether the particular train is actually carrying at the time both white and negro passengers or not. If the train is one 'carrying passengers,' the company should be deemed to know that negro passengers may at any time demand carriage thereon, and is required to anticipate such a contingency by making preparations therefor. While the object of the legislature was undoubtedly to provide for the segregation of the races upon passenger trains in this state, yet it clearly sought to reach this end by requiring railroad companies to equip their trains carrying passengers with separate coaches, and it is for a failure in this respect that the penalty is imposed. Furthermore, each . . . vehicle or compartment of a coach,

as provided in § 3, must bear in some conspicuous place appropriate words in plain letters, indicating the race for which it is set apart."

From which it will be seen that the legislative intent in the enactment of the law is interpreted to be (1) the segregation of the races upon passenger trains, and (2) to accomplish this end by requiring railroad companies to equip their passenger trains with separate coaches. If it was the legislative will, as it undoubtedly was, that the desired purpose should be attained by requiring the railroad companies to equip their trains in the manner prescribed, it will not do to say, as is argued by counsel for appellant, that the companies may take the chance of their being upon a particular train or a particular trip no passengers of one of the races. We do not think that the legislature intended that railroad companies might speculate, subject only to a fine in the event that they guessed wrongly upon this matter, but are of the opinion that it was clearly the intention that all railroad trains should be equipped with separate accommodations for the two races, and that there is a violation of the provisions of the statute whenever a railroad company fails to so equip any of its passenger trains, without regard to whether or not passengers of both races desire passage upon a particular trip or train.

3. Our conclusion upon the second proposition above in a large measure determines our decision of the third proposition. As stated above, the statute is violated when a railroad company fails to equip any of its trains with separate coaches for the two races. We now come to consider whether or not a conviction for failure to provide the required equipment upon a particular train in the month of April is a bar for a failure to provide such equipment for the same train in May. Appellee attempts to show that this was a different train each day by proof of the fact that the train was broken up each night and reassembled the next morning. This, however, does not result, as it was the same train every day, operated in exactly the same service and upon the same schedule, with the same equipment and the same crew of operators. As we have above construed the law, appellant's offense consisted in the failure to equip this transfer train with separate coaches, and the offense was continuous, provable by a single act, and the failure upon separate days to comply with the law supplies but cumulative evidence of the one violation. The statute does not provide a penalty for each day's violation; the penalty being for each offense.

Counsel for appellee rely upon the case L.R.A.1917B.

of Louisville & N. R. Co. v. Com. 154 Ky. 293, 157 S. W. 369, as sustaining their contention that each day the train was operated without separate compartments was a separate violation of the law. We do not so regard the opinion in that case, but, upon the other hand, consider it strong support for our conclusion here. In that case the railroad company was indicted for its failure to block the frogs on its tracks, as provided by § 780 of the Statutes, and the court held that the failure to block each frog constituted a separate offense, just as here we hold the failure to equip each train as required is a separate offense. The court there was not asked to, and did not, decide that a separate offense was committed each day for each frog not blocked, and we find nothing in that opinion to authorize here a finding that a separate offense was committed each day a certain train was not equipped with separate coaches.

Counsel for appellee have cited many other authorities, too numerous for us to refer to them all, none of which, in our judgment, is contrary to our conclusion here. In the case of State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817, cumulative penalties were permitted for each violation of the provisions of an act which required railroad companies to provide a blackboard at each telegraph station, and to post a report thereon of whether or not each train would arrive on schedule time, and, if late, how much. Cumulative penalties were allowed for each failure to post notice when each train would arrive, upon the ground that the statute clearly made each failure to post such notice a separate offense. That statute provides a penalty "for each violation of the act in failing to report or in making a false report," and in clearly defining what constitutes a separate offense is different from our statute.

In the case of People v. Spencer, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818, one conviction was held not to be a bar to a subsequent conviction under a statute prohibiting the manufacture and sale of adulterated vinegar and the misbranding of any package containing such vinegar, and providing further a penalty for each violation. Cumulative penalties were there allowed because clearly authorized by the statute. In the course of the opinion the court said: "We must look to the language of the statute to see whether, and when, cumulative penalties are permitted in actions of this character. In repeated decisions this court has refused to recognize a right to recover them, unless clearly authorized. The theory of such prosecutions has been considered to be to administer a warning not to continue the acts complained of. Generally the pur-

pose of the legislature will be sufficiently subserved when one violation, or one default, is recovered for, which shall act as a deterrent upon continuing to disregard the statute."

This is a clear statement of the principle generally recognized under which cumulative penalties are permitted. The statute before us not only does not clearly provide a penalty for each day the statute is violated, but, upon the other hand, provides only a penalty for each offense. As we have before stated, the offense under the statute before us is committed by failure to equip with separate coaches each train, and not for each time a particular train is operated. The following cases, we believe, support our conclusion: *Com. v. Standard Oil Co.* 120 Ky. 724, 87 S. W. 1090; *Wilson v. Com.* 119 Ky. 769, 82 S. W. 427; *Com. v. Crowell,*

22 Ky. L. Rep. 1182, 60 S. W. 179; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *United States v. Boston & M. R. Co.* (D. C.) 168 Fed. 148; *United States v. St. Louis & S. F. R. Co.* (C. C.) 107 Fed. 870; *United States v. Boston & A. R. Co.* (D. C.) 15 Fed. 209; *United States v. Patty* (D. C.) 9 Miss. 429, 2 Fed. 664.

It therefore results that the conviction under indictment No. 3134 was a bar to the prosecution under indictment No. 3142, and any other prosecution for the failure to equip this transfer train as required by the separate coach law prior to the finding of the indictment first tried.

Wherefore the judgment in the first case is affirmed, and the judgment in the second case is reversed, with directions to dismiss the indictment.

### **Annotation—Cumulative penalties for failure of carrier to provide separate accommodations for white and colored persons.**

An extended search and examination of cases involving "separate coach laws" discloses no case other than *LOUISVILLE & N. R. Co. v. Com.* ante, 544, which has passed upon the question whether or not cumulative penalties may be recovered for failure of a carrier to provide separate accommodations, etc., for white and colored persons, or whether a conviction or acquittal upon one indictment for such a failure bars a subsequent prosecution for other violations of the statute prior to the first indictment. However, similar questions have arisen in connec-

tion with a great variety of statutes relating to other subjects, some of which are illustrated by the cases cited in *LOUISVILLE & N. R. Co. v. Com.* And see *State v. Freeman*, 45 L.R.A.(N.S.) 977, and the annotation thereto, which treats the question of conviction or acquittal of sale of liquor as a bar to a prosecution for sales made prior to the first indictment. And see also annotation to *Muckenfuss v. State*, 20 L.R.A.(N.S.) 783, for a treatment of the question of violations of Sunday laws as a continuing offense.

G. J. C.

#### **MINNESOTA SUPREME COURT.**

*FRIDA HILLSTROM, Admr., etc., of*  
*Fridolph Hillstrom, Deceased, Resp.,*  
*v.*

*CITY OF ST. PAUL, Appt.*

(— Minn. —, 159 N. W. 1076.)

**Municipal corporation — fire protection — governmental duty.**

1. In providing fire protection, a city is

Headnotes by TAYLOR, C.

**Note.**—Municipal liability for acts or negligence of members of fire department is treated in notes to *Dodge v. Granger*, 15 L.R.A. 781; *Cunningham v. Seattle*, 4 L.R.A. (N.S.) 629; and *Martin v. Comrs.* 44 L.R.A. (N.S.) 68; and see later case, *O'Daly v. Louisville*, 49 L.R.A.(N.S.) 1119.

The liability of a municipal corporation for tort in connection with buildings used

exercising a governmental function, and is not liable for the negligent performance of duties devolving upon its fire department.

For other cases, see *Municipal Corporations*, II, g, 2, in *Dig. 1-52 N. S.*

**Same — unsafe street — liability.**

2. It is liable for negligently failing to keep its street safe for public use, and the fact that the dangerous condition of the street resulted from negligence in caring for an instrumentality used by its fire department does not relieve it from such liability.

For other cases, see *Highways*, IV, a, 2, in *Dig. 1-52 N. S.*

by it, including buildings used in connection with the fire department, is discussed in the note to *Columbia Finance & T. Co. v. Louisville*, 25 L.R.A.(N.S.) 88; and see later case, *Butler v. Kansas City*, L.R.A. 1916D, 626.

Other phases of the question of municipal liability for negligence as affected by the distinction between its corporate and gov-

**Appeal — excessive verdict.**

3. The verdict as reduced is not so excessive as to require this court to interfere therewith.

For other cases, see *Appeal and Error*, VII. l. 2, b, in *Dig. 1-52 N. S.*

(November 24, 1916.)

**A**PPEAL by defendant from an order of the District Court for Ramsey County denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for the death of plaintiff's son, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. O. H. O'Neill and John A. Burns, for appellant:

Defendant is not liable as a matter of law, for the reason that, if any negligence was proved, it was only the negligence of the city in the performance of a purely governmental function.

Dosdall v. Olmsted County, 30 Minn. 96, 44 Am. Rep. 185, 14 N. W. 458; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; Lerch v. Duluth, 88 Minn. 295, 92 N. W. 1116; East Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 Ann. Cas. 1015; Claussen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; Ihk v. Duluth, 58 Minn. 182, 59 N. W. 960; Wilcox v. Rochester, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 Ann. Cas. 759; Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Schwalk v. Louisville (Columbia Finance & T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A.(N.S.) 91, 122 S. W. 860, 3 N. C. C. A. 37; 4 Dill. Mun. Corp. 5th ed. §§ 1660 et seq.; Gaetjens v. New York, 132 App. Div. 394, 116 N. Y. Supp. 759; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Kelley v. Cook, 21 R. I. 29, 41 Atl.

571, 5 Am. Neg. Rep. 94; Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419; 6 McQuillin, Mun. Corp. § 2643; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177; Smith v. Rochester, 76 N. Y. 506; Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. W. 405; Abbott, Mun. Corp. §§ 2237-2254; 5 Thomp. Neg. 257; Cooley, Const. Lim. 7th ed. 305; Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100.

The damages awarded are excessive.

Hutchins v. St. Paul, M. & M. R. Co. 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294; Gunderson v. Northwestern Elevator Co. 47 Minn. 161, 49 N. W. 694; Milton v. Biesanz Stone Co. 99 Minn. 439, 109 N. W. 990; Kerling v. G. W. Van Dusen & Co. 109 Minn. 481, 124 N. W. 235, 372; McVeigh v. Minneapolis & R. River R. Co. 110 Minn. 184, 124 N. W. 971; Thomas v. Chicago G. W. R. Co. 112 Minn. 360, 128 N. W. 297.

Messrs. Douglas, Kennedy, & Kennedy, for respondent:

The court did not error in denying defendant's motion for judgment notwithstanding the verdict.

Aokeret v. Minneapolis, 129 Minn. 190, L.R.A.1915D, 1111, 151 N. W. 976; Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381; Hoppe v. Winona, 113 Minn. 252, 33 L.R.A.(N.S.) 449, 129 N. W. 577, Ann. Cas. 1912A, 247, 3 N. C. C. A. 128; Dill. Mun. Corp. § 1670; Walters v. Carthage, 36 S. D. 11, 153 N. W. 881, 10 N. C. C. A. 884; Twist v. Rochester, 37 App. Div. 307, 55 N. Y. Supp. 860, affirmed in 163 N. Y. 619, 59 N. E. 1131; Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563; Herron v. Pittsburg, 204 Pa. 509, 93 Am. St. Rep. 708, 54 Atl. 311; Cassidy v. Poughkeepsie, 71 Hun, 144, 24 N. Y. Supp. 144; Deyoe v. Saratoga Springs, 1 Hun, 341; Palestine v. Siler, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345; Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279.

The damages are not excessive.

ernmental functions are discussed in the notes cited in the Index to L.R.A. Notes under the title "Municipal Corporations," subtitle, "Liability for damages."

Many phases of the liability of a municipal corporation for personal injuries on account of the condition of the streets and highways are treated in notes that may be found by consulting the Index to L.R.A. Notes, under the title "Highways,"

The subject of excessive or inadequate damages for personal injuries resulting in L.R.A.1917B.

death is discussed at length in the annotation following St. Louis, I. M. & S. R. Co. v. Craft, L.R.A.1916C, 820. Excessiveness of verdicts in actions for personal injuries not resulting in death is discussed in the annotation to Padrick v. Great Northern R. Co. L.R.A.1915F, 30; and the question as to inadequacy of verdicts in actions for personal injuries not resulting in death in the annotation to Montgomery Light & Traction Co. v. King, L.R.A.1915F, 491.

*Carver v. Luverne Brick & Tile Co.* 121 Minn. 388, 141 N. W. 488; *Murphy v. Gross*, 118 Minn. 311, 136 N. W. 868; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440; *McVeigh v. Minneapolis & R. River R. Co.* 113 Minn. 450, 129 N. W. 852; *Gray v. St. Paul City R. Co.* 87 Minn. 280, 91 N. W. 1106, 12 Am. Neg. Rep. 604; *Chicago G. W. R. Co. v. Root*, 106 Ill. App. 164; *Clarke v. Tulare Lake Dredging Co.* 14 Cal. App. 414, 112 Pac. 561; *Morris v. Metropolitan Street R. Co.* 63 App. Div. 78, 71 N. Y. Supp. 321, affirmed in 170 N. Y. 592, 63 N. E. 1119; *Houghkirk v. Delaware & H. Canal Co.* 28 Hun, 407; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424, 49 Pac. 599, 3 Am. Neg. Rep. 26.

Mr. Frank E. McGray also for respondent.

**Taylor, C.**, filed the following opinion:

A pole erected in one of the streets of defendant city and used solely for the purpose of supporting a telegraph wire and an alarm box of the fire alarm system belonging to the city fire department fell because it had rotted through where it entered the ground. Plaintiff's son, a boy fourteen years of age, and several other boys, were playing in the street. In falling, the cross-arm upon the pole struck and killed plaintiff's son. Plaintiff brought suit for damages and recovered a verdict. Defendant appealed from an order denying the usual alternative motion for judgment or a new trial.

In providing fire protection, the city is exercising a public or governmental function and is not liable for damages resulting from negligence in the performance of the duties which devolve upon its fire department. *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183. But it is well settled that the city is liable for damages resulting from negligently permitting a dangerous condition to exist in its streets. This is a firmly established exception to the rule that a city is not liable in damages for negligence in the performance of its governmental functions. *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; *Snider v. St. Paul*, 51 Minn. 406, 18 L.R.A. 151, 53 N. W. 763; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382; *Schigley v. Waseca*, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 259, 16 Ann. Cas. 169; *Sundell v. Tintah*, 117 Minn. 170, 38 L.R.A.(N.S.) 1127, 134 N. W. 639, Ann. Cas. 1913C, 1311; *Ackeret v. Minneapolis*, 129 Minn. 190, L.R.A.1915D, 1111, 151 N. W. 976. L.R.A.1917B.

Defendant insists that the fact that the pole was used exclusively for the purposes of the fire department brings the case within the rule which absolves the city from liability for injuries resulting from negligence on the part of its fire department, notwithstanding the fact that the pole was located in the street and rendered the street unsafe. The charter of the city provides that the commissioner of public works "shall be charged with the construction, control and supervision of all sidewalks, streets, lanes, pathways, bridges, alleys, public levees and sewers, and it is hereby made the duty of said commissioner at all times to have and to keep all the sidewalks, streets, lanes, pathways, bridges, alleys, and public levees in a cleanly condition, passable and safe for public use and travel."

Whether this provision requires the city to exercise greater care than the previously existing law exacted, or is merely declaratory of the previously existing law, it makes clear the fact that the duty is imposed upon the city to keep its streets safe for public use at all times. The precise question now presented does not appear to have been directly passed upon by this court; but it is well settled that the city is liable for a dangerous condition of its streets caused by the acts of third parties, committed either with or without the consent of the city. *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; *Estelle v. Lake Crystal*, 27 Minn. 243, 6 N. W. 775; *Hoppe v. Winona*, 113 Minn. 252, 33 L.R.A.(N.S.) 449, 129 N. W. 577, Ann. Cas. 1912A, 247, 3 N. C. C. A. 128. While the city is not liable for negligence of the officers of its fire department in performing their official duties, it is liable for negligence in failing to keep its streets safe. And we see little room for making a distinction between a dangerous condition of the street caused by a third party for whose acts the city is not responsible, and a dangerous condition caused by a department of the city for whose negligence the city is not liable. It is the duty of the city to exercise reasonable care to keep its streets free from danger, and it possesses the power to do whatever is necessary to accomplish this purpose. If, through negligence, it fails to perform this duty and injury results from a dangerous condition in one of its streets, the city cannot avoid liability by showing that negligence in caring for an instrumentality used in the performance of a governmental duty is what brought about the dangerous condition. *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345; *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563; *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131;

Walters v. Carthage, 36 S. D. 11, 153 N. W. 881, 10 N. C. C. A. 884; Circleville v. Sohn, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788, 5 Am. Neg. Rep. 704. See also Blyhl v. Waterville, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381. If the city permits the dangerous condition to continue after it knew, or ought to have known, of its existence, and after it has had a reasonable opportunity to protect the public from the danger, the city cannot excuse its failure to perform its duty of keeping its streets safe, and relieve itself from liability for such omission, by showing that the dangerous condition of the street resulted from acts done in the performance of another governmental duty, notwithstanding the fact that

it is not liable for negligence in the performance of such other governmental duty.

Defendant also contends that the verdict is excessive. The case has been tried twice. At the first trial, the jury returned a verdict for \$7,500, and the trial court granted a new trial on the ground that it was excessive. At the second trial, the jury returned a verdict for \$5,000. The trial court granted a new trial unless plaintiff stipulated to reduce the verdict to the sum of \$3,500, but denied a new trial in case such stipulation were filed. Plaintiff filed the stipulation and reduced the verdict to the sum of \$3,500. Under the circumstances we think this court would not be justified in interfering with the verdict as reduced.

Order affirmed.

# MISSOURI SUPREME COURT. (In Banc.)

KANSAS CITY, Respt.,  
v.

R. M. PENGILLEY, Appt.

(— Mo. —, 199 S. W. 380.)

## Imprisonment for debt — violation of ordinance.

A municipal corporation cannot, under a constitutional provision forbidding imprisonment for debt, provide for imprisonment of one who refuses to pay for use of a vehicle which he has hired to transport himself or his property.

*For other cases, see Imprisonment for Debt, in Dig. 1-52 N. S.*

(Bond, J., dissents.)

(November 11, 1916.)

**A**PPEAL by defendant from a judgment of the Criminal Court for Jackson County convicting him of violating an ordinance making it a misdemeanor for any person to hire a vehicle and refuse to pay for its use. Reversed.

The facts are stated in the opinion.

Messrs. William C. Forsee, J. E. Trogdon, and S. P. Forsee, Jr., for appellant: The ordinance in question is invalid.

St. Louis v. Gloner, 210 Mo. 502, 15 L.R.A.(N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30; Carthage v. Block, 139 Mo. App. 386, 123 S. W. 483; St. Louis v. Fitz,

**Note.** — The general subject of imprisonment for debt, including the question, what are debts within the constitutional provision, is treated in notes to Carr v. State, 34 L.R.A. 634, and State v. Prudential Coal Co. L.R.A.1915B, 645; and see later cases, Bronson v. Syverson, L.R.A.1916B, 993. L.R.A.1917B.

53 Mo. 582; St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; Ex parte Smith, 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628; Cape Girardeau v. Riley, 72 Mo. 220; Springfield v. Starke, 93 Mo. App. 70; St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; Lamar v. Weidman, 57 Mo. App. 507; State v. Paint Rock Coal & Coke Co. 92 Tenn. 81, 36 Am. St. Rep. 68, 20 S. W. 499; Ex parte Hollman, 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 Ann. Cas. 1105; Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977; Knutte v. Superior Ct. 134 Cal. 660, 66 Pac. 875; Lamar v. State, 120 Ga. 312, 47 S. E. 958; Youmans v. State, 7 Ga. App. 101, 66 S. E. 383; State v. Benson, 28 Minn. 424, 10 N. W. 471; Carr v. State, 106 Ala. 35, 34 L.R.A. 634, 54 Am. St. Rep. 17, 17 So. 350; Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; State v. Yardley, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481; Parker v. Follensbee, 45 Ill. 473; Lower v. Wallick, 25 Ind. 68; Ex parte Crenshaw, 80 Mo. 447; Coughlin v. Ehlert, 39 Mo. 286; McMakin v. McMakin, 68 Mo. App. 57; Roberts v. Stoner, 18 Mo. 481; Ex parte Millett, 37 Mo. App. 76; Ex parte Drayton, 153 Fed. 986; Gulf. C. & S. F. R. Co. v. Ellis, 165 U. S. 157, 41 L. ed. 669, 17 Sup. Ct. Rep. 255, Re Milecke, 52 Wash. 312, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968, 100 Pac. 743.

There is no evidence to sustain the judgment.

State v. Whidbee, 124 N. C. 796, 32 S. E. 318, 11 Am. Crim. Rep. 416; Kitson v. Farwell, 132 Ill. 327, 23 N. E. 1024; Chauncey v. State, 130 Ala. 71, 89 Am. St. Rep. 17, 30 So. 403.

The taxicab bill was uncollectable.



**Bernard v. Lopping**, 32 Mo. 341; **Barney v. Spangler**, 131 Mo. App. 58, 109 S. W. 855.

Messrs. **Andrew F. Evans**, **Hunt C. Moore**, **H. A. Ault**, and **A. F. Smith**, for respondent:

The ordinance is valid and not uncertain, unreasonable, or oppressive.

**Chicago v. Openheim**, 229 Ill. 313, 82 N. E. 294, 11 Ann. Cas. 554; **Wyman**, Pub. Serv. Corp. § 186; **Bray v. State**, 140 Ala. 172, 37 So. 250; *Ex parte Lorenzen*, 128 Cal. 431, 50 L.R.A. 55, 70 Am. St. Rep. 47, 61 Pac. 68; **State v. Missouri P. R. Co.** 242 Mo. 339, 147 S. W. 118.

There was sufficient evidence to support the verdict.

**State v. Scott**, 214 Mo. 257, 113 S. W. 1069; **Raifeisen v. Young**, 183 Mo. App. 508, 167 S. W. 648.

Messrs. **J. A. Harzfeld** and **Charles M. Blackmar** also for respondent.

**Blair, J.**, delivered the opinion of the court:

This appeal comes from the criminal court of Jackson county, wherein, on appeal from the municipal court of Kansas City, appellant was fined \$5 for an alleged violation of a section of an ordinance of Kansas City, reading thus: "Section 1. That any person who shall hire a horse-drawn or power-propelled vehicle, whether carriage, buggy, wagon, automobile or taxicab, for the purpose of riding therein or transporting any goods, wares, or merchandise, and shall refuse to pay the agreed price, or the reasonable price therefor, or the rate therefor as fixed by any ordinance of Kansas City, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than \$1 nor more than \$500."

The remainder of the ordinance prescribed rates and regulations for automobiles used for carrying passengers for hire. Commitment for failure to pay the fine is part of the judgment in this case.

This proceeding grew out of appellant's failure to pay \$15.40 claimed for the use of an automobile in which he rode. Let it be assumed the amount was correct, and that appellant refused to pay. The principal question counsel discuss is whether the ordinance is valid when tested by the provision of § 16, art. 2, of the state Constitution, which forbids imprisonment for debt.

A fine assessed for the infraction of a valid city ordinance is not within the prohibition mentioned. **St. Louis v. Sternberg**, 69 Mo. 302, 303. Is this ordinance valid? It is true it gives the unpaid owner of the vehicle no recovery under it; yet it does make the mere failure to pay an offense punishable by imprisonment. The obligation L.R.A.1917B.

to pay arose out of a contract (**Lemon v. Chanslor**, 68 Mo. loc. cit. 353, 30 Am. Rep. 799), and is strictly within the meaning of the word "debt" as used in the constitutional provision forbidding imprisonment therefor. It cannot be admitted that the constitutional prohibition may be evaded by the device of declaring a simple breach of contract a crime unless it is to be conceded that city councils and the legislature are not restricted at all. **Bailey v. Alabama**, 210 U. S. loc. cit. 242, 55 L. ed. 201, 31 Sup. Ct. Rep. 145. Upon this question the supreme court of Washington said: "Imprisonment for debt is abhorrent to the spirit of free government, and is not to be tolerated under the form of penal statutes." **Re Milecke**, 52 Wash. loc. cit. 315, 21 L.R.A. (N.S.) 259, 132 Am. St. Rep. 968, 100 Pac. 743.

The same principle was approved in **State v. Paint Rock Coal & Coke Co.** 92 Tenn. loc. cit. 83, 84, 36 Am. St. Rep. 68, 20 S. W. 490. In **Lamar v. Prosser**, 121 Ga. loc. cit. 153, 48 S. E. 977, the supreme court of Georgia, discussing the same proposition, said: "The general assembly of this state cannot, under the guise of a statute creating a criminal offense, imprison one who has failed to pay a debt."

In this case the ordinance did not require, nor did the evidence tend toward, proof of fraud in the procurement and use of the vehicle. It is hardly disputable that the chauffeur knew appellant had no money with him when accepted as a passenger. The ordinance constitutes an effort to do indirectly what the Constitution declares shall not be directly done, and is therefore invalid. **State ex rel. Smith v. Neosho**, 203 Mo. loc. cit. 72, 73, 101 S. W. 99.

It is contended the ordinance falls within the police power. "The police power cannot be made a cloak under which to overthrow or disregard constitutional rights." **State v. Missouri P. R. Co.** 242 Mo. loc. cit. 356, 147 S. W. 121. This is settled doctrine.

The case of **Bray v. State**, 140 Ala. 172, 37 So. 250, involved an ordinance punishing the failure to pay hack hire. While the court held the ordinance valid, it did not discuss the provision of the Alabama Constitution prohibiting imprisonment for debt, except to hold that "fines, forfeitures, mulcts," etc., were not debts within its meaning. It did declare the passage of the ordinance within the council's legislative power as a police regulation, but did not argue the matter, and cited as authority a case holding city councils had power to regulate markets and require certain businesses to be transacted therein. The views of that court upon the particular justification, in

the police power, of the ordinance it was considering, are not given in detail in the opinion. The ordinance is not set out in full, and what it may have required, if anything, in respect of proof of fraud, does not appear. In these circumstances we are not inclined to consider it as an authority supporting the city's contention in this case.

It is urged the fact the taxicab company was a common carrier ought to induce a different conclusion. There is no direct proof supporting the fact assumed. The taxicab company is in no wise at the mercy of its patrons. It may require payment in advance if it so desires, and thus protect itself. Regulations may be imposed upon patrons of carriers and fines may be as-

sessed for their violation, but such regulations must accord with applicable constitutional provisions. Further, the ordinance is not limited to common carriers, but applies, by its terms, to every horse-drawn or power-propelled vehicle hired for the conveyance of goods or passengers. Again, it is not confined to licensed vehicles, as was the ordinance in *Bray v. State*, supra.

The judgment is reversed.

Graves, Walker, Faris, and Revelle, JJ., concur. Woodson, Ch. J., concurs in the result.

Bond, J., dissents.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK J. KANE, Plff. in Err.,

v.

STATE OF NEW JERSEY, HENRY TITUS, PROSECUTOR.

(81 N. J. L. 594, 80 Atl. 453.)

### Tax — automobiles — license — revenue.

1. The legislature may impose a license tax upon automobiles for revenue purposes. For other cases, see *Licensee*, II. c, in Dig. 1-52 N. S.

### Same — interstate commerce — validity.

2. No unconstitutional interference with interstate commerce is effected by a statute imposing upon automobiles passing through the state, together with those owned and used in the state, a license tax for revenue purposes, the proceeds of which are to be applied to the upkeep of the highway. For other cases, see *Commerce*, IV. a, in Dig. 1-52 N. S.

### Same — property — value.

3. That a license tax on automobiles is graduated according to the horse power of the machine does not constitute it a property tax so as to render it invalid because not imposed according to value.

For other cases, see *License*, II. e, in Dig. 1-52 N. S.

(June 22, 1911.)

**E**RROR to the Supreme Court to review a judgment affirming a judgment of the Recorder's Court of the City of Paterson,

**Note.** — Generally as to the validity of excise or license tax upon motor vehicles, see notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215; *Mark v. District of Columbia*, 37 L.R.A.(N.S.) 440; *Re Hoffert*, 52 L.R.A.(N.S.) 949, and *Re Kessler*, L.R.A.1915D, 322.

As to regulation of jitney buses, see notes L.R.A.1917B.

convicting defendant of violating the automobile law. Affirmed.

The facts are stated in the opinion.

Messrs. John W. Griggs, John W. Harding, and Charles Thaddeus Terry, for plaintiff in error:

The license fees exacted from owners of automobiles by the Act of 1908 are not limited to the cost of registration and inspection, but exceed that cost to an extent so large as to require the court to judicially determine that they are intended as revenue measures.

*State, North Hudson County R. Co. Prosecutors, v. Hoboken*, 41 N.J. L. 71; *Laundry License Case*, 22 Fed. 701; *Philadelphia v. Western U. Teleg. Co.* 82 Fed. 797; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Mulcahy v. Newark*, 57 N. J. L. 513, 31 Atl. 226; *Johnson v. Asbury Park*, 60 N. J. L. 427, 39 Atl. 693; *State, Muhlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518; *Boston v. Schaffer*, 9 Pick. 415; *Chilvers v. People*, 11 Mich. 43; *Adams Exp. Co. v. Owensboro*, 85 Ky. 265, 3 S. W. 370.

These fees are a tax upon property, and as such are not laid, in accordance with the requirements of the Constitution of New Jersey, upon the true value of the vehicles, but are arbitrarily fixed upon the basis of their horse-power capacity; hence they are

to *Dickey v. Davis*, L.R.A.1915F, 840, and *Memphis v. State*, L.R.A.1916B, 1156; and see later case, *Desser v. Wichita*, L.R.A. 1916D, 246.

Other analogous questions in relation to license taxes are discussed in annotations that may be found by consulting the Indexes to L.R.A. Notes under the title "License."

illegal against all persons, whether residents or nonresidents.

State, *Muhlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518.

This tax cannot be supported as a tax upon a business or occupation, or as a privilege tax.

*Vincent v. Crandall & G. Co.* 181 App. Div. 200, 115 N. Y. Supp. 600; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A. (N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478; *Chicago v. Banker*, 112 Ill. App. 94; *Chicago v. Collins*, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; *Densmore v. Erie*, 20 Pa. Co. Ct. 513; *Swift v. Topeka*, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Moses v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516.

The imposition of license fees for revenue purposes upon nonresidents of the state of New Jersey passing through the state in a motor vehicle is violative of the Constitution of the United States, in that such nonresidents passing through the state are engaged in interstate commerce, and the imposition of license fees for revenue upon them is a burden on interstate commerce, and not within the power of the state to impose.

*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Lord v. Goodall, M. & P. S. S. Co.* 102 U. S. 544, 26 L. ed. 226; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204-218, 38 L. ed. 962-969, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Belden v. Chase*, 150 U. S. 674, 37 L. ed. 1218, 14 Sup. Ct. Rep. 264; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Robbins v. Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289-302, 38 L. ed. 719-723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. L.R.A.1917B.

*Messrs. Nelson B. Gaskill, Assistant Attorney General, and Edmund Wilson, Attorney General, for defendant in error:*

The fee required by the act and its amendment is not a tax upon property.

*Unwen v. State*, 73 N. J. L. 530, 64 Atl. 163, 75 N. J. L. 500, 68 Atl. 110.

Revenue is not inconsistent with an exercise of the police power.

1 *Tiedeman, State & Federal Control of Persons & Property*, p. 482; *Gartside v. East St. Louis*, 43 Ill. 47; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Bogart v. State*, 10 Ohio Dec. Reprint, 365, 20 Ohio L. J. 458.

The state is not limited in the exercise of its police power by the fact that a possible subject of the police power may be engaged in interstate commerce.

*Freund, Pol. Power*, p. 82; *Walling v. Michigan*, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 683, 27 L. ed. 445, 2 Sup. Ct. Rep. 185; *Mobile County v. Kimball*, 102 U. S. 698, 26 L. ed. 240; *Gilman v. Philadelphia*, 3 Wall. 726, 18 L. ed. 99; *Pacific Coast S. S. Co. v. Railroad Comrs.* 9 Sawy. 253, 18 Fed. 11; *Peirce v. New Hampshire*, 5 How. 578, 12 L. ed. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 628, 42 L. ed. 883, 18 Sup. Ct. Rep. 488; *Michigan Teleph. Co. v. Charlotte*, 93 Fed. 12; *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787; *Robbins v. Taxing Dist.* 120 U. S. 493, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 215, 29 L. ed. 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. ed. 529; *Re Minor*, 5 Inters. Com. Rep. 329, 69 Fed. 236; *New York v. Miln*, 11 Pet. 138, 9 L. ed. 662; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 518, 46 L. ed. 306, 22 Sup. Ct. Rep. 95; *Austin v. Tennessee*, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, Fed. Cas. No. 15,867; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 209, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Crutcher v. Kentucky*, 141 U. S. 61, 35 L. ed. 653, 11 Sup. Ct. Rep. 851; *Erb v. Morasch*, 177 U. S. 585, 44 L. ed. 898, 20 Sup. Ct. Rep. 819; *Smith v. Alabama*, 124 U. S. 480, 31 L. ed. 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 137, 42 L. ed. 692, 18 Sup. Ct. Rep. 289.

Gummere, Ch. J., delivered the opinion of the court:

The plaintiff in error, a resident of the state of New York, while driving his automobile along the highways of this state, on his way from his place of residence to a town in the state of Pennsylvania, was arrested for violating the 15th and 16th sections of the automobile law of 1908 (Pamph. Laws 1908, p. 615), by not having registered his machine, or paid the fee required for doing so; and by not having filed with the secretary of state a duly executed instrument constituting that official his attorney, upon whom all original process in any action or legal proceeding brought against him, and arising out of the operation of his automobile within the state, might be served. His prosecution for this offense followed his arrest, and resulted in a conviction. Upon a review of that conviction by the supreme court, there was an affirmance; the court considering that the case was governed by its deliverance in *State, Cleary, Prosecutor, v. Johnston*, 79 N. J. L. 49, 74 Atl. 538. The plaintiff in error, by the present writ, attacks the legality of the original conviction, and of its affirmance.

The first contention made in his behalf is that the automobile law of 1908 is invalid, because the license fees exacted by it are not limited to the cost of registration and inspection, and the act is therefore intended as a revenue measure. In *State, Cleary, Prosecutor, v. Johnston*, supra, the proofs submitted were not considered by the court to be demonstrative that the statute was a revenue measure; the court, however, pointed out that if such was conceded to be its object, the law was nevertheless not invalid on that account, for the reason that the imposition of license fees for revenue purposes was clearly within the sovereign power of the state. We agree with counsel of the plaintiff in error that the proofs taken in the present case satisfactorily show that the present automobile law is a revenue measure, but hold, in accordance with the view expressed by the supreme court, and above adverted to, that in passing it the legislature was fully within the powers conferred upon it by the Constitution. The former decisions of our courts, upon this subject are fully cited in the opinion in the *Cleary Case*, and a re-citation of them by us is unnecessary.

It is further contended by the plaintiff in error that, conceding the power of the legislature to impose license fees upon its own citizens for the purpose of raising revenue, the statute under consideration, because it imposes such fees upon nonresidents passing through the state, and engaged in interstate commerce, violates the commerce provision L.R.A.1917B.

of the Federal Constitution, and is therefore, to that extent, void; that plaintiff in error was so engaged at the time of his arrest; and that for this reason his conviction should be set aside.

We are willing to assume, in the discussion of this point, that the claim of the plaintiff in error that, at the time of his arrest, he was engaged in interstate commerce, is justified by the fact. This being so, the important question remains whether the act of 1908 is to any extent a regulation of commerce between the states, within the meaning of the commerce clause of the Federal Constitution. That it affects interstate commerce is true. But state laws may do this without being obnoxious to the constitutional provision appealed to. For example, a state may erect, or authorize the erection, of wharves along the banks of its navigable rivers which are used for commerce between the states, and charge, or authorize to be charged, wharfage fees for the privilege of receiving and landing thereon passengers and freight which come from other states, without infringing upon that provision. The imposition of such charges, although affecting interstate commerce, is nevertheless a legitimate exercise of state power. *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732. So, too, a state may construct locks in such rivers, in order to improve the navigation thereof, and legally charge reasonable tolls to persons using such locks while engaged in interstate commerce. *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313. It may construct, or authorize to be constructed, in such waters, booms for the purpose of increasing the facility with which the business of floating and gathering logs may be conducted thereon, and lawfully charge, or authorize to be charged, reasonable sums for the use of such booms in the floating of logs from a point within the state to a point outside thereon, or vice versa. *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325. A state may do these things because, having expended moneys, either itself or by the agencies created by it, in increasing the facility with which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay made by it, and for the maintenance of the public work which it has constructed.

A very ordinary example of the exercise of this power is the construction of public roads known as "turnpikes" by agencies created by the state, for the use of which tolls are permitted to be charged to persons using the same. Such public roads are open to the use of every person desiring to travel

upon them upon payment of the tolls authorized to be charged, but it has never been suggested, so far as we are aware (and certainly any such suggestion would be without merit), that a team and wagon bringing merchandise from another state is entitled to the use of these improved highways, without the payment of the required toll, because engaged in interstate commerce.

Although, ordinarily, turnpikes are built and owned by corporations created by the state, for the purpose of constructing and maintaining them, what the state may do indirectly through such agencies it may do directly; that is, it may itself lay out and construct such improved public roads, and charge reasonable tolls to all persons using the same, without regard to the character of the business for which they are being used. And this is practically what New Jersey is now doing. It has spent millions of dollars in improving the roads of the state, and is yearly expending hundreds of thousands more in their extension and maintenance. It has found that the use of these roads by heavy and swiftly moving automobiles results in their rapid deterioration, and increases largely the annual expense of maintaining them in proper condition. It considers, and rightly, we think, that a user of its roads, which is so abnormally destructive, should no longer be free, and by the law of 1908 it imposes upon all of these vehicles which are driven over its roads a charge for such user, for the purpose of raising revenue to be applied to their upkeep. Instead of charging mileage fee, or toll, to be regulated by the distance traveled, it has seen fit to require the payment of a lump sum by the owners of such machines, for the privilege of using its roads: the charge being regulated by the horse power shown, viz., automobiles of 10 horse power or less are charged \$3, those between 10 and 30 horse power \$5, and those of more than 30 horse power \$10. The payment of these fees is required, alike by residents and nonresidents, for machines used for pleasure or for commerce. No discrimination whatever is made by the statute in favor of any person or any automobile. It is absolutely impartial in its operation. By paying the fee re-

quired, the owner of an automobile, whether a resident or nonresident, is entitled to use the same upon the roads of the state to the fullest extent he may desire.

The charging of an annual sum for the use of its highways by automobiles, instead of a mileage fee, is clearly a matter within the discretion of the state. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593. The only limit upon its power is that the amount charged shall not be unreasonable; and there is no suggestion that such a condition is created by the present law. We conclude, therefore, that the contention of the plaintiff in error, that the Act of 1908 contravenes the Federal Constitution, is without substance.

It is further contended on behalf of the plaintiff in error that the imposition provided by the Act of 1908 is a property tax, and invalid because it is imposed without regard to the value of the property upon which it is laid. What we have already said disposes of this contention. The character of the imposition is not determined by the mode adopted in fixing its amount. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. The imposition is a license or privilege tax charged in the nature of compensation for the damage done to the roads of the state by the driving of these machines over them, and is properly based, not upon the value of the machine, but upon the amount of destruction caused by it.

The other errors assigned and argued are fully discussed by the Supreme Court in its opinion in *State, Cleary, Prosecutor, v. Johnston*, and we are entirely content with the disposition there made of them.

The judgment under review will be affirmed.

Affirmed by the Supreme Court of the United States, December 4, 1916, in 242 U. S. 160, 61 L. ed. —, 37 Sup. Ct. Rep. 30.

#### NORTH CAROLINA SUPREME COURT.

S. J. DULIN, Appt.,  
v.

C. G. BAILEY et al.

(— N. C. —, 90 S. E. 689.)

Case — mutilation of will — liability.

1. One mutilating another's will is liable. R.A.1917B.

ble in tort to a legatee who is thereby deprived of the provision which the will made for him.

For other cases, see *Case, I. in Dig. 1-52 N. S.*

Venue — action for spoliation of will.  
2. An action to recover damages from one

Note. — As to liability for mutilation or spoliation of will, see annotation following this case, post, 558.

who deprived another of a legacy by spoliation of the will of a third person may be brought in the county where the plaintiff resides.

For other cases, see *Venue, I. in Dig. 1-52 N. S.*

(November 29, 1916.)

**A**PPEAL by plaintiff from a nonsuit granted by the Superior Court for Rowan County in an action brought to recover damages for depriving plaintiff of a legacy by spoliation of a will. Reversed.

The facts are stated in the opinion.

Mr. George W. Garland for appellant.

Mr. E. L. Gaither for appellees.

Clark, Ch. J., delivered the opinion of the court:

The complaint alleges that after the death of W. A. Bailey the defendants conspired to deprive the plaintiff and others of the benefits of his last will by removing from the paper writing to which the sheet of paper containing the alleged signature of the deceased was attached that part providing for the legacy to the plaintiff and others, and substituting other provisions therefor. The plaintiff contends that thereby a previous will has been admitted to probate. In the course of the proceeding the plaintiff asked for the appointment of a commissioner to take the examination of the defendants in the nature of a bill of discovery. The defendants demurred that the complaint did not state a cause of action. The court sustained the demurrer, and held that unless the will that had been proven in common form was attacked and set aside by caveat, the plaintiff could not maintain the cause of action set out in the complaint. This put an end to the plaintiff's further progress in the cause, and he took a nonsuit and appealed.

The plaintiff is not seeking to attack the will on record, nor to probate what he alleges was a subsequent will. He is not seeking to recover anything out of the estate, but is bringing an action of tort against the parties who, as she alleges, conspired and injured her by removing the clause of, and the signature to, what was a subsequent will by which she would have received a legacy. It is an action of spoliation by which she alleges the defendants have prevented her receiving the sum of money which was due her if they had not fraudulently altered and defaced the subsequent will. She alleges that she does not attempt to set up the second will, because the evidence accessible to her would not prove its entire contents. She prefers, therefore, to bring this action against the defendants for their wrongdoing in fraudulent-

ly destroying the part of the will which was beneficial to herself.

Though this action seems to be of the first impression in this state, and is doubtless a very unusual one, there is foundation and reason for the action upon well-settled principles of law, and we are not entirely without precedent. In *Tucker v. Phipps*, 3 Atk. 359, 26 Eng. Reprint, 1008, cited in *Barnesly v. Powel*, 1 Ves. Sr. 284, 27 Eng. Reprint, 1034, it was held that, the spoliation being clearly proven, the plaintiff could maintain his action without setting up the will by a probate. It was held that where a will is destroyed or concealed, while the general rule is to probate the alleged will by proof in the ecclesiastical court [which was there the court for probate wills], yet the legatee might bring his action for the damage sustained by spoliation and suppression.

In that case the spoliation was alleged to have been a destruction or concealment of the will by the executor. Such action against a stranger is even more appropriate than an independent action against the executor. *Tucker v. Phipps* is to be found in 26 Eng. Reprint, 1008. Another case very much in point is *Barnesly v. Powel*, 1 Ves. Sr. 284, 27 Eng. Reprint, 1034, in which *Tucker v. Phipps* is cited as authority, and the court also refers with approval to "a late case where the defendant burned a will, in which was a legacy to the plaintiff, so that it could not be proved in the ecclesiastical court (which cannot prove a will on loose parts of the contents of it), yet on evidence of there being such a will, and the defendant's destroying it, the court decreed the legacy to the plaintiff, as the defendant by his own iniquity had prevented the plaintiff from coming at it."

There may be other precedents, but the instances must have been rare. Even if there had been no precedent, it would seem that, upon the principle of justice that there is "no wrong without a remedy," the plaintiff is entitled to maintain this action, if, as she alleges, the defendants conspired and destroyed the subsequent will in which the legacy was left her. If she cannot prove the destroyed will because unable to prove the entire contents thereof (*Re Hedgepeth*, 150 N. C. 245, 63 S. E. 1025), surely she is entitled to recover of the defendants for the wrong they have done her by the conspiracy and destruction of the will, and the measure of her damages will be the legacy of which she has been deprived. It may be very difficult for her to prove her allegations by legal evidence and satisfactory to a jury, but with that we have nothing to do. The only question presented to us is the ruling of the court below that the complaint does

not state a cause of action; and in this we think the court below was mistaken.

As the action is not to set up the will, nor against the estate, but against the de-

fendants individually for their tort, the action could be brought in the county where the plaintiff resides.

Reversed.

### Annotation—Liability for mutilation or spoliation of will.

The decision in *DULIN v. BAILEY*, ante, 556, seems sound and reasonable. That an action of tort for damages will lie by one injured by the spoliation of a will has already been held in at least one instance prior to the reported case, the action, however, not having been brought until after the will had been correctly probated.

In *Taylor v. Bennett* (1885) 1 Ohio C. D. 57, 1 Ohio C. C. 95, the plaintiffs, after proving the will of their father, brought an action against one who had spoliated it by cutting out the names of the witnesses and other material parts, alleging that, by reason of such wrongful acts, the plaintiffs were compelled to employ counsel and institute legal proceedings in the probate court of the county, for the purpose of having the said will proved and admitted to record by said court, and that they were compelled to expend their time and money in and about the probate of the said will; and they recovered judgment.

*Tucker v. Phipps* (1746) 3 Atk. 360, 26 Eng. Reprint, 1008, cited in *DULIN v. BAILEY*, was a bill in equity, reciting that the defendant had destroyed or concealed a will of the plaintiff's father-in-law which gave the plaintiff's wife a legacy, and it was held that the plaintiff was entitled to an immediate decree for payment of the legacy, although the will had not been probated.

In this connection it is interesting to refer to two or three of the cases where relief was granted in equity.

Thus, in *Woodruff v. Burton* (1719; Eng.) referred to in the decision of the Master of the Rolls in *Dalston v. Coatsworth* (1721) 1 P. Wms. 734, 24 Eng. Reprint, 591,—“A devisee brought his bill against the heir, and it being made

to appear that there was such a will as the plaintiff had suggested, and that the defendant had destroyed it, the Lord Chancellor Parker decreed the defendant to convey the premises to the plaintiff in fee, and to deliver up the possession, which (his Honour said) seemed to him to be the most effectual and reasonable decree.”

A similar decision was made in *Williams v. Williams* (1863) 33 Beav. 306, 55 Eng. Reprint, 385, 3 New Reports, 100, 9 Jur. N. S. 1267, 9 L. T. N. S. 566, 12 Week. Rep. 140. So, where the heir suppressed the will against the sole devisee and legatee, equity decreed that the estate would be held against him till he produced the will. *Hampden v. Hampden* (1709) 3 Bro. P. C. 550, 1 Eng. Reprint, 1492.

It may be noted that the quotation in *DULIN v. BAILEY*, from *Barnesly v. Powell* (1749) 1 Ves. Sr. 284, 27 Eng. Reprint, 1034, is from the plaintiff's argument, and not from the court's opinion.

Of interest by way of analogy is the case of *Mitchell v. Langley*, L.R.A. 1916C, 1134, holding that one named as a beneficiary in a certificate issued by a benefit society, though not having such a vested interest as to prevent the member from changing beneficiaries, had such an interest as would sustain an action against a third person who, by false and malicious defamation of the beneficiary, fraudulently induced the member to change beneficiaries; and see comment in footnote to that case.

In connection with the general subject reference may be made to the notes on impressing constructive trusts on the shares of heirs, etc., in 8 L.R.A. (N.S.) 698; 31 L.R.A. (N.S.) 176; and 33 L.R.A. (N.S.) 996. B. B. B.

### OKLAHOMA SUPREME COURT.

SOUTHERN SURETY COMPANY, Plff. in

Err.,

v.

MUNICIPAL EXCAVATOR COMPANY.

(— Okla. —, 160 Pac. 617.)

Pleading — construction — exhibits.

1. The allegations of a petition challenged

Headnotes by GAILBRAITH, C.  
L.R.A. 1917B.

by a general demurrer must be construed in connection with the exhibits attached to the petition.

For other cases, see *Pleading*, 1, h, in *Dig.* 1-52 N. S.

Bond — contractors — rented machines.

2. A claim for rentals due for the use of certain trenching machines let to a con-

Note. — The nature of labor or materials which will support an action upon a contractor's bond is considered in the notes to

tractor in charge of the construction of a waterworks system for a municipal government is not "labor and material furnished in the construction of such public improvement," and is not protected by the bond required by § 3881, Rev. Laws 1910, and the surety on such bond is not liable for such indebtedness.

*For other cases, see Bonds, II. a, in Dig. 1-52 N. S.*

(July 25, 1916.)

**E**RROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover a balance alleged to be due for labor and material furnished in the construction of a public improvement. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. E. C. Stanard, J. H. Wahl, and C. H. Ennis, for plaintiff in error:

One who simply rents a contractor a machine with which to do excavating on public works does not come within the purview of the phrase of the bond, "labor and material furnished in the construction of said extension."

Hutchinson v. Krueger, 34 Okla. 23, 41 L.R.A.(N.S.) 315, 124 Pac. 591, Ann. Cas. 1914C, 98; Alpena ex rel. Besser v. Title Guaranty & S. Co. 150 Mich. 329, 123 N. W. 1126; Standard Boiler Works v. National Surety Co. 71 Wash. 28, 43 L.R.A.(N.S.) 162, 127 Pac. 473; Kansas City use of Kansas City Hydraulic Press Brick Co. v. Youmans, 213 Mo. 151, 112 S. W. 225; Empire State Surety Co. v. Des Moines, 152 Iowa, 549, 131 N. W. 870, 132 N. W. 837; United States use of Rockland Lake Trap Rock Co. v. Conkling, 68 C. C. A. 220, 135 Fed. 508; Woods, C. & Co. v. El Dorado Lumber Co. 153 Cal. 230, 16 L.R.A.(N.S.) 585, 126 Am. St. Rep. 80, 94 Pac. 877, 15 Ann. Cas. 382; McMullin v. McMullin, 92 Me. 336, 69 Am. St. Rep. 510, 42 Atl. 500; Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; Edwards v. H. B. Waite Lumber Co. 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; Mabie v. Sines, 92 Mich. 545, 52 N. W. 1007; Eastern Texas R. Co. v. Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030; St. Louis, I. M. & S. R. Co. v. Love, 74 Ark. 528, 86 S. W. 395; McKinnon v. Red River Lumber Co. 119 Minn. 479, 42 L.R.A.(N.S.) 872, 138 N. W. 781; McAuliffe v. Jorgenson, 107 Wis. 132, 82 N. W. 706; Allen v. Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; Troy Public Works Co. v. Yonkers, 207 N. Y. 81, 44

L.R.A.(N.S.) 311, 100 N. E. 700; Potter Mfg. Co. v. A. B. Meyer & Co. 171 Ind. 513, 131 Am. St. Rep. 267, 86 N. E. 837; Hall v. Cowen, 51 Wash. 295, 98 Pac. 670.

Messrs. Twyford & Smith, for defendant in error:

The surety having had the legal right to make the bond, and having done so, it is now bound to perform, as intended at the time the contract was made.

Coody v. Coody, 39 Okla. 719, L.R.A. 1915E, 465, 136 Pac. 754; Calman v. Kreipke, 40 Okla. 516, 139 Pac. 698.

The facts alleged and admitted on demurrer show a cause of action in favor of the plaintiff as a subcontractor, under the original contractor, with the city, for work done under his subcontract in the performance of the terms of the original contract with the city.

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Griffith v. Stucker, 91 Kan. 47, 136 Pac. 937.

The surety company is liable to the plaintiff under the terms of the statutory bond, on any construction which might be given to the petition.

American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; Chicago Lumber Co. v. Douglas, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563; Hurley-Mason Co. v. American Bonding Co. 79 Wash. 564, 140 Pac. 575; National Surety Co. v. Bratnaber Lumber Co. 67 Wash. 601, 122 Pac. 337; People ex rel. Smith v. Collins, 112 Mich. 605, 71 N. W. 153; Rosman v. Bankers Surety Co. 126 Minn. 435, 148 N. W. 454; Hogan v. Cushing, 49 Wis. 169, 5 N. W. 494; Breault v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; George H. Sampson Co. v. Com. 202 Mass. 326, 88 N. E. 911; Potter Mfg. Co. v. A. B. Meyer & Co. — Ind. App. —, 85 N. E. 725; United States Fidelity & G. Co. v. United States, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. Rep. 88.

Galbraith, C., filed the following opinion:

This cause was decided on demurrer in the court below. It was held that a cause of action was stated by the plaintiff, and judgment was rendered accordingly. The plaintiff brought action against the Southern Surety Company and Nick Peay, upon a bond given in pursuance to §§ 3881 and

Standard Boiler Works v. National Surety Co. 43 L.R.A.(N.S.) 162, and United States Rubber Co. v. Washington Engineering Co. L.R.A.1915F, 951; and see later case, National Surety Co. v. United States, L.R.A.1917B.

tional Surety Co. v. United States, L.R.A. 1917A, 336. Various annotations on allied questions are cited in the note last referred to.



3882, Rev. Laws 1910. The allegations of the petition, so far as important to be noticed here, are: That the Southern Surety Company does a general bonding business throughout the state of Oklahoma. That Nick Peay, doing business under the name of Nick Peay Construction Company, as principal, and the Southern Surety Company, as surety, executed and filed with the clerk of the district court of McIntosh county a certain bond in writing, a copy of which is attached as "Exhibit A." That said bond was for the sum of \$63,000 and recited that whereas the Nick Peay Construction Company had entered into a written contract with the city of Eufaula, Oklahoma, for the construction of a sanitary sewer system and the further extension of the waterworks system, now, therefore, "if the said principal shall well and truly pay all indebtedness incurred for any and all labor and material furnished in the construction of said extension in the performance of said contract, then this obligation to be null and void, otherwise to remain in full force and effect." That prior to making and filing the bond the plaintiff entered into a certain contract in writing with the defendant Nick Peay, conditioned for supplying and furnishing certain labor and material to be used in the execution of the terms of said contract of the said Nick Peay with the city of Eufaula. A copy of said contract was attached to the petition, and further alleged: "That the said Nick Peay, doing business as the Nick Peay Construction Company, became indebted to and incurred certain indebtedness with the plaintiff for work and material furnished by plaintiff to said Nick Peay in the construction of said sewer system and extension provided for and under the terms of the contract marked 'Exhibit C,' and to cover which indebtedness the said bond marked 'Exhibit —' was made and filed by the defendants, and each of them. That the labor and material furnished by plaintiff to said defendant aforesaid was under and by virtue of the said subcontract hereto attached, marked 'Exhibit B.' That said labor and material was furnished and the indebtedness incurred therefor between the 25th day of January, 1913, and June 12, 1913, and was of the contract price and value of \$3,394.51, and on which amount the plaintiff received payment of \$850, leaving a balance due and unpaid of \$2,544.51 for such labor and material so furnished and indebtedness incurred as aforesaid, and for which said surety bond was given by said defendants." And that demand for the payment of the balance due on said account for labor and material had been made and payment refused, and that said action was L.R.A.1917B.

brought within six months, as provided by statute, and attached a statement of the account for labor and material, as claimed, as "Exhibit B," and prayed for judgment in the amount of the account.

The statement of the account attached to the petition was as follows:

Oklahoma City, Okl., August, 1913.	
Nick Peay, doing business as the Nick Peay Construction Company to Municipal Excavator Company, Dr.	
February 28, 1913, statement rendered .....	\$ 894 23
February 28, 1913, statement rendered .....	483 36
April 6, 1913, statement rendered .....	409 21
April 6, 1913, statement rendered .....	19 74
June 12, 1913, statement rendered .....	1,443 53
June 12, 1913, statement rendered .....	144 44
	<hr/>
	\$3,394 51
Credits.	
March 1, 1913, by cash .....	850 00
Balance due .....	<hr/>
	\$2,544 51

The pertinent parts of the contract between plaintiff and Nick Peay, under which plaintiff's claim arose, are as follows:

"Clause 1. That said first party (plaintiff) hereby agrees to furnish said second party (the construction company) with two of its trenching machines for a minimum term of sixty working days, without respect to delays, Sundays and legal holidays excepted. . . .

"Clause 3. Said first party hereby agrees to furnish one operator who shall be in full charge of said machine during such time as second party desires to operate said machine, and shall also have the right to employ an engineer and fireman to operate the engine and do firing. Said operator, engineer, and fireman to be the employees of and to be paid by the second party.

"Clause 5. Said second party shall pay to said first party a minimum rental of \$30 for No. 43 and \$20 for No. 58 per day . . . and in addition to pay five (5) cents per cubic yard for all excavation in trenches less than eight (8) feet in depth, and ten (10) cents per cubic yard for all excavation in trenches (8) feet or more in depth."

The surety company filed a general demurrer to the petition which was by the court overruled, and the surety company, refusing to amend, but electing to stand upon its demurrer, refused to plead further, and the court rendered judgment against it for the amount claimed in plaintiff's petition. To review that judgment an appeal has been duly perfected to this court.

The error assigned is the order of the court overruling the demurrer to the peti-

tion. It is insisted by the plaintiff in error that, inasmuch as it appeared from the face of the petition that the account sued upon was not for "labor and material" furnished in connection with the execution of the contract for a public improvement, but arose out of a claim for rentals for trenching machines furnished by the plaintiff to the contractor, this indebtedness is not within the condition of the bond, and therefore the petition failed to state a liability against the surety company. It is contended on behalf of the defendant in error that inasmuch as the petition alleged that the account was for "labor and material furnished the contractor in the execution of the public improvement," and that the demurrer admitted the truth of these allegations, therefore the petition stated an indebtedness within the conditions of the bond, and the court was therefore right in overruling the demurrer.

It may be conceded that, so far as the allegations of the petition are concerned, considered alone, an indebtedness within the terms of the bond is declared upon, since the claim is alleged to be due for labor and material furnished the contractor in the execution of his contract; but, when taken in connection with the exhibits attached to the petition, it clearly appears that the indebtedness sued upon was for the rentals for the trenching machines that the plaintiff furnished the contractor. However, the rule is that, in construing the petition upon a demurrer, the exhibits attached thereto must be considered in connection with the allegations thereof. In the case of *Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865, it is said: "On demurrer to a petition, as defective, in that it does not state facts sufficient to constitute a cause of action, the petition should be liberally construed with a view to substantial justice between the parties; and a demurrer will only be sustained where the petition presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever."

In *Calman v. Kreipke*, 40 Okla. 516, 139 Pac. 698, the *Nichols* Case, *supra*, is approved, and the first paragraph of the syllabus of that case reads: "In an action on account, where the petition upon its face states facts sufficient to constitute a cause of action against the defendant, but certain exhibits attached thereto suggest a doubt as to whether the defendant, in making the purchase, acted in a representative capacity, or as an individual, a general demurrer thereto should be overruled."

See also *Davis v. Choctaw County*, — Okla. —, L.R.A.1916F, 873, 158 Pac. 294.

Under the rule announced in these decisions,

the allegations of the petition in the instant case must be construed in connection with the exhibits attached thereto. So construed, it clearly appears that the claim in suit is due entirely for rentals on machines furnished by the Excavator Company to the contractor. This presents the question squarely whether or not a claim for rentals due for a machine, independent of any claim for labor for operating it, can properly be said to be "labor and material furnished" within the condition of the bond in suit. Upon the answer returned to this question depends the correctness of the ruling of the trial court. If the claim for rentals were either labor or material, then the ruling of the trial court was right; but, if such claim cannot be held to be either labor or material, then the ruling was wrong.

We are reminded at the outset of this investigation that the industry of counsel has not discovered a single decision holding that rentals for machines furnished a contractor engaged in construction work were either labor or material within the terms of a statute permitting liens against improvements for labor and material furnished therefor, or that such a claim is within the protection of a bond required of a public contractor, conditioned that all labor and material furnished shall be paid for by him. It seems that this question is one of first impression in this jurisdiction, although analogous questions have been adjudicated by the courts of other states having a similar statute to our own.

Section 3881, Rev. Laws 1910, requires any public officer, before entering into a contract for any public works costing to exceed \$100, to take from the contractor a sufficient bond, payable to the state of Oklahoma, conditioned that the contractor "shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

In the state of Washington the statute requiring a public contractor to give bond was broader than the statute in this state, inasmuch as it required the condition of the bond to be that the contractor "shall pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply said principal or subcontractors with provisions and supplies for the carrying on of said work, all just debts, dues and demands incurred in the performance of said work."

*Hurley-Mason Co. v. American Bonding Co.* 79 Wash. 564, 140 Pac. 575, was an action for the rental value of a pump and hoist derrick furnished to the contractor constructing a waterworks system for a city

in the state of Washington. The action was against the contractor and the surety company on a bond conditioned as provided in the statute above quoted. The court held that this claim for rentals was "supplies" and within the condition of the bond, and that the surety company was liable therefor. The court said in the course of its opinion: "It must be conceded that this approaches very close to the line between secured and unsecured items under this statute and bonds given in pursuance thereof."

It will be observed that the conditions of the bond given under the statute of the state of Washington were broader than the conditions of the bond in suit in the instant case. It cannot be claimed that this decision is an authority justifying the holding that the claim for rentals involved in the instant case was either labor or material within the conditions of the bond in suit.

In the state of Michigan there was a statute similar to § 3881 of our Rev. Laws 1910. The case of *Alpena ex rel. Besser v. Title Guaranty & S. Co.* 159 Mich. 329, 123 N. W. 1126, was an action for labor and material furnished in repair work performed on the pumps and machines used in connection with a waterworks contract. The question presented was whether or not this claim was within the conditions of the bond requiring the payment of labor and material furnished. The court held that it was not, and in part said: "The provision of the bond upon which the claim of the use plaintiff is based is the promise of the defendant to save harmless the city of Alpena, etc., from unpaid claims for 'labor and materials furnished under the contract.' To give to this provision the construction claimed for it by the plaintiff would render the surety liable, not only for the cost of small and incidental repairs to the machinery and plant used in construction (which is the extent of the use plaintiff's claim in the case at bar), but also for all large changes and improvements in equipment, more or less permanent in character, and perhaps long surviving in usefulness the completion of the contract upon which the equipment was being used at the time the repairs were made. And by a parity of reasoning it might even be said that the surety became responsible for the original cost of the plant, because it was purchased by the contractor, to be used upon the contract. We are of opinion that this contention is not tenable, but, on the contrary, think that the term 'labor and materials, furnished under the contract,' means such labor and materials as are necessary to construct the work in ac-

cordance with the contract. This view is supported by reason and authority."

*Kansas City use of Kansas City Hydraulic Press Brick Co. v. Youmans*, 213 Mo. 151, 112 S. W. 225, was an action against the surety on a bond having a similar condition as that in the instant case, and the court, in holding that a claim for explosives sold to a contractor and used in the construction of the waterworks system was within the protection of the bond, and that steam shovels, engines, boilers, shovels, crowbars, and other like tools were not within its provisions, in part said: "A steam shovel, an engine, and boiler, picks, shovels, crowbars, and the like, are tools and appliances, which, while used in the doing of the work, survive its performance and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work, and are therefore invisible except as they survive in tangible results. We think that explosives, when used as substitutes for other recognized 'materials,' are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts, and bridges that we can see and feel."

*McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706, was an action seeking to establish a lien for rentals due for the use of a well-boring machine used by the contractor in drilling a well. The court, in denying the claim, in part said: The "plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to . . . who had the contract to bore the well. . . . Under no permissible theory can it be said the plaintiff has furnished any 'material' that entered into or became a component part of the well. Whatever right he has, if any, arises from the use of his machine. When he hired it to . . . (the contractor) to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by . . . (the contractor) as though it was his own. For its use in connection with his own labors he would have been entitled to a lien; not for the use of the machine alone, but because, with his labors in the use and operation of the machine, the well was drilled."

In *Wood C. & Co. v. El Dorado Lumber Co.* 153 Cal. 230, 16 L.R.A. (N.S.) 585, 126 Am. St. Rep. 80, 94 Pac. 877, 15 Ann. Cas. 382, it was held by the supreme court of California: "One who merely rents horses and harness to the contractor, to be used in

the prosecution of railroad construction, does not bestow labor on the road within the meaning of a statute giving a lien to one so doing.

In *Potter Mfg. Co. v. A. B. Meyer & Co.* 171 Ind. 513, 131 Am. St. Rep. 267, 86 N. E. 837, the supreme court of Indiana, in denying a lien claimed for the rental value of a trenching machine, under a statute giving lien for machinery furnished for the construction of public improvements, in part said: "A lien is authorized in favor of a laborer to the extent of the value of the work done by him. This trench machine owned by appellant did not work automatically, but was operated by men in the employ and under direction of the lessee of the machine, J. J. Smith & Company. There could be no question that the contractor, J. J. Smith & Company, might have acquired a lien to the extent of the value of the work done . . . by this labor-saving machine. Appellant, however, did not perform . . . any labor upon the structure to be erected. Its claim is not for the value of work actually done, but compensation at an agreed price for a specified time, as the rental value of the machine, without regard to whether it was idle or in use upon this work. But, waiving any technical questions as to the theory of the cross complaint, and assuming that, if the evidence so warranted, appellant might recover thereon to the extent of the value of work done by it, we are clearly of opinion that appellant is not shown to have performed any work, and, as the mere lessor of this machine, cannot be regarded as one performing labor within the meaning of the statute under consideration."

*United States use of Rockland Lake Trap Rock Co. v. Conkling*, 68 C. C. A. 220, 135 Fed. 508, was an action to recover a claim for per diem charged for a certain scow let to the contractor engaged in public works, against the surety and his bondsmen on a bond given under the Federal statute, conditioned for the payment of all labor and material furnished, on the ground that the rental for this scow was labor and material supplied in the prosecution of said work. The court, denying the claim, held that it was not within the conditions of the bond.

In *United States use of Hill v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 166, it was admitted that the claimant had furnished labor on a public improvement for which he had not been paid, but it was contended that he had furnished this labor to the subcontractor, and that the liability on the bond required

by the Federal statutes from a contractor on public works extended only to claims for labor and material furnished to the contractor. The court said, in effect, that the object of requiring the bond under the law was to make sure that labor and material entering into public improvements for the Federal government should be paid for, and that, while the literal terms of the obligation of the bond only covered labor and material furnished to the contractor, still the labor and material sued for in that case entered into the public structure and were within the spirit and therefore within the protection of the bond. This case, however, does not hold, and is not an authority for the contention, that a claim for rentals on a machine furnished to the contractor, used upon public works, was either labor or material within the protection of the obligation of such a bond as that in suit.

Under the foregoing authorities, and many others cited and discussed in those decisions, we are constrained to the view that only "a strong arm" construction of the statutes would bring the claim involved in this suit within the protection of the bond. It cannot be said that the excavator company furnished either labor or material for the public works, or that it sustained any contract relation to such public works. It merely furnished two machines to the contractor that he employed in the construction of this public work. It is true that the excavator company furnished the skilled operator and retained the right in its contract to furnish an engineer and fireman, but it expressly stipulated that such employees should be the employees of the contractor, and should be paid for by him. It therefore performed no labor in connection with the operation of the machine. Its claim is only for a stipulated rental for the use of the machine. Such a claim was not within the letter or spirit of the bond and was not protected thereby. The court was therefore in error in overruling the demurrer to the petition, on account of which the judgment appealed from should be reversed, and the cause remanded, with directions to the trial court to vacate the order overruling the demurrer, and to enter an order sustaining the same, and for such further proceedings as may be necessary, not inconsistent with this opinion.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied October 31, 1916.

OREGON SUPREME COURT.  
(Department No. 1.)

HENRY LEVY, Respt.,  
v.  
NEVADA-CALIFORNIA-OREGON RAIL-  
WAY, Appt.

(81 Or. 673, 160 Pac. 808.)

**Pleading — enforcement of contract —  
undisclosed principal.**

1. A complaint to enforce a contract on behalf of an undisclosed principal need not state that the contract was made through the agent.

*For other cases, see Pleading, II. h, in Dig. 1-52 N. S.*

**Damages — failure to transport live stock.**

2. The damages for delay of a carrier in furnishing cars to transport live stock to a particular market are the loss in that market because of diminution of weight of the animals when they arrive below what it would have been had the contract been complied with, and not merely the depreciation at point of shipment.

*For other cases, see Damages, III. d, in Dig. 1-52 N. S.*

(November 14, 1916.)

**APPEAL** by defendant from a judgment of the Circuit Court for Lake County in plaintiff's favor in an action brought to recover damages for failure of defendant to furnish cars for the transportation of plaintiff's live stock. Affirmed.

**Statement by Burnett, J.:**

The amended complaint contains four separate causes of action, the gravamen of each of which is that the plaintiff in one instance and his assignors in the others contracted with the defendant for the latter to furnish cars at a station on its railroad in which to ship live stock for the San Francisco market; but that, in violation of the agreement, the defendant failed to supply the cars until a later date, in consequence of which delay the stock to be transported depreciated in weight and quality, to the damage of the shipper. The defense against each count of the amended complaint consists in general denials, and the affirmative charge, in substance, that if the animals declined in con-

dition, it was on account of the negligence of the person in charge failing to give them sufficient food and proper care while in the stockyards of the defendant awaiting shipment. The new matter of the answer is denied by the reply. The jury rendered a verdict favorable to the plaintiff, and from the consequent judgment the defendant appeals.

Messrs. James Glynn and L. F. Conn, for appellant:

The complaint was entirely insufficient to warrant the admission of any testimony in behalf of the plaintiff, in regard to the contract to furnish cars, there being no allegation which would authorize him or J. G. Johnson to sue on the contract made by plaintiff's agent.

*Chrisman v. State Ins. Co.* 16 Or. 289, 18 Pac. 466; 15 Enc. Pl. & Pr. 715; *Litchfield v. Garratt*, 10 Mich. 426.

It is the province of the jury to assess the damages according to the rule of law which it is the province of the court to lay down for their guidance, and witnesses are allowed only to furnish the data from which the amount is arrived at.

*Burton v. Severance*, 22 Or. 95, 29 Pac. 200; *Montgomery v. Somers*, 50 Or. 262, 90 Pac. 674.

The court improperly instructed the jury as to the measure of damages.

*Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 65 S. E. 285; 3 Sedgw. Damages, 9th ed. § 843A; *St. Louis Southwestern R. Co. v. Musick*, 35 Tex. Civ. App. 591, 90 S. W. 673; *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80; *Galveston, H. & S. A. R. Co. v. Thompson*, — Tex. Civ. App. —, 44 S. W. 8; *Richey & G. Co. v. Northern P. R. Co.* 110 Minn. 347, 125 N. W. 897.

Messrs. W. Lair Thompson and Arthur D. Hay, for respondent:

Where one has made a contract through an agent, even though the name of the principal is not disclosed, the principal may sue in his own name for breach of contract, and introduce evidence to prove his interest.

*Smith Meat Co. v. Oregon R. & Nav. Co.* 50 Or. 206, 117 Pac. 303; *Kitchen v. Holmes*, 42 Or. 252, 70 Pac. 830; 3 Hutchinson, Carr. 3d ed. § 1306; *Trimble v. New York C. & H.*

**Note.** — The question as to damages for failure to furnish cars is considered in the notes to *Di Giorgio Importing & S. S. Co. v. Pennsylvania R. Co.* 8 L.R.A. (N.S.) 108, and *Illinois C. R. Co. v. River & R. Coal & Coke Co.* 44 L.R.A. (N.S.) 643, in connection with the general subject of the duty of carriers to furnish cars independently of contract.

The question of loss of profits because of inability of shipper to fulfil contract for sale L.R.A. 1917B.

of goods as an element of damages for carrier's breach of contract to furnish cars is treated in note to *Clyde Coal Co. v. Pittsburgh & L. E. R. Co.* 26 L.R.A. (N.S.) 1191.

The liability of a carrier for loss of profits incident to delay in the delivery of articles intended for use, and not for sale, is considered in the notes to *Wells v. National Life Asso.* 53 L.R.A. 33, and *Harper Furniture Co. v. Southern Exp. Co.* 30 L.R.A. (N.S.) 483.

R. R. Co. 39 App. Div. 403, 57 N. Y. Supp. 437, 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; 16 Enc. Pl. & Pr. 899.

While, in an action for damages, a witness may not state what, in his judgment, the amount of damage is that plaintiff has sustained, yet he may, if properly qualified, give his opinion as to the deterioration in the quantity, quality, and market value of the particular object alleged to have been damaged.

*Pacific Livestock Co. v. Murray*, 45 Or. 103, 76 Pac. 1079; *Wade v. Amalgamated Sugar Co.* 65 Or. 488, 132 Pac. 710, 71 Or. 75, 142 Pac. 350; *Pacos & N. T. R. Co. v. Meyer*, — Tex. Civ. App. —, 155 N. W. 309; *St. Louis, I. M. & S. R. Co. v. Edwards*, 24 C. C. A. 300, 49 U. S. App. 52, 78 Fed. 745.

The measure of damages for breach of contract by delay in furnishing cars for shipment of live stock to a particular market of which the railroad company had notice is the difference in the market value of said live stock in the condition and at the time it should have arrived at its destination, and when it did actually arrive.

*McManus v. Chicago G. W. R. Co.* 156 Iowa, 359, 136 N. W. 769; *Texas & P. R. Co. v. Nicholson*, 61 Tex. 491; *Newport News & M. Valley R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301; *Missouri, K. & T. R. Co. v. Mulkey*, — Tex. Civ. App. —, 159 S. W. 111; *San Antonio & A. P. R. Co. v. Timon*, 45 Tex. Civ. App. 47, 99 S. W. 419; *Hunt v. Chicago, B. & Q. R. Co.* 95 Neb. 746, 146 N. W. 986; *De Lisle v. St. Louis & S. F. R. Co.* 149 Mo. App. 8, 129 S. W. 252; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 592, 616, 617, 37 L. ed. 292, 304, 305, 13 Sup. Ct. Rep. 444; 13 Enc. Ev. 570.

**Burnett, J.**, delivered the opinion of the court:

Several assignments of error are predicated upon the fact that the court allowed testimony to the effect that the agreement with the defendant was made in each instance by an agent of the plaintiff who did not disclose his principal, the contention being that under the averment that the plaintiff entered into the contract, it is not admissible to show that the compact was really made between the defendant and an agent of the plaintiff. The defendant's argument is that, in order for the undisclosed principal to recover on such a stipulation, it would be necessary to aver that the contract was made through an agent. This court has held to the contrary in *Kitchen v. Holmes*, 42 Or. 252, 70 Pac. 830, and *Smith Meat Co. v. Oregon R. & Nav. Co.* 59 Or. 206, 117 Pac. 303. In other words, if the plaintiff alleges that he himself made

the contract, it is permissible to prove that he did this by an agent. Cases like *Baker v. Eglin*, 11 Or. 333, 8 Pac. 280, to the effect that where A makes a contract with B for the benefit of C, the latter may bring an action upon it, are not applicable in this instance. There the real party in interest was avowedly C, and he was entitled to litigate in his own name. In the present juncture if in fact the agreement was made by the agent, acting for his principal, the latter is the real party in interest, and the proper one to conduct the litigation.

Another class of errors assigned relates to the measure of damages. The defendant contends that it is the difference between the value of the stock at the point of shipment when offered for transportation and the reasonable worth of the same when the cars were actually furnished at the same place; while the plaintiff urges that it is the difference between what would have been the market value at the place of destination and the real worth of the stock at the time they arrived there. In brief, the defendant contends that the damages should be measured by conditions at the point of shipment, while the plaintiff maintains that they should be governed by the circumstances at the place of destination.

We note that the only cause of complaint is the delay in furnishing the cars where the stock was to be loaded, as the parties had previously agreed upon. No charge is made that the animals were neglected or ill treated enroute to San Francisco. We observe, also, that it is alleged, and the evidence tended to show, that the cars were ordered for the transportation of the stock to the San Francisco market. The general rule is that damages may be predicated with reference to all that was in the reasonable contemplation of the parties in the performance of the agreement. It may be conceded that if the defendant had no knowledge or notice of the purpose for which the cars were to be used, or of the place to which the animals were to be forwarded, or of the purpose for which they were to be sent there, the damages ought to be computed by the rule which the defendant suggests.

But here it is alleged and the evidence shows that it was within the contemplation of both parties that the cars were to be used to transport the stock to the San Francisco market: that is to say, they were to be taken there for sale. What injury, then, naturally flows from the neglect of the defendant to carry out its agreement? The delay where the shipment originated caused a depreciation in the marketable condition of the animals, had its effect on their condition at their destination, and rendered them less valuable there. As stated in *Chat-*

*tanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 131, 65 S. E. 285, 287, cited by the defendant: "Ordinarily, in a suit by a shipper against a carrier, in case of injury to or loss of the property by the carrier's fault, the carrier is required to make compensation on the basis of the value at the place of destination."

In that case the court refused to apply that rule because in the agreement to furnish the cars there was no stipulation about any destination for the goods to be shipped in them. The court there properly decided that the damages should be computed as at the place of shipment, because there was no destination or particular market within the contemplation of the parties. In *St. Louis Southwestern R. Co. v. Musick*, 35 Tex. Civ. App. 591, 80 S. W. 673, noted in the defendant's brief, the trial court charged the jury thus: "If you find for plaintiff, the measure of damages will be the difference, if any, between the market value of the cattle when they should have arrived at their destination and when they did arrive, and also such damages, if any, as said cattle may have sustained by the unreasonable and negligent delay on the part of the defendant in furnishing cars and shipping said cattle after said cattle had been received by defendant for shipment."

The court of civil appeals of Texas held this erroneous because it authorized double damages. In other words, the two clauses of the charge were in legal effect duplicates, as the precedent is applied to the instant contention. Where there is a market value of property intended for sale, that is the standard by which depreciation of it must be measured, and that was the ultimate question to be determined in that case, no matter what was the cause of the decline. So here, the parties had in view the accomplishment of a certain plan by the plaintiff; namely, the delivery of sheep and lambs in San Francisco for market purposes. That which rendered them less valuable for that purpose is what would cause damage, and hence it was proper to instruct the jury to consider how much less they were worth than the market value by reason of the damage caused by the defendant's delay. The instruction of the court on that subject here follows: "The damage in each cause of action in this case will be determined without any regard to rise or fall in the sheep or lamb market in San Francisco during the delay in furnishing cars alleged in each cause of action in the complaint, if you find there was any such delay, and without regard to any delay en route between the place where each shipment originated and its destination. The measure of damages, if any you find, will therefore be the differ-

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ence between the reasonable market value of the live stock described in each cause of action set forth in the complaint at the time and in the condition such stock would have arrived in San Francisco if the Nevada-California-Oregon Railway had furnished cars according to the contract alleged in each cause of action, if you find such contract to have been made, and the decreased reasonable market value, if you find there was any decrease, at the time and in the condition said live stock did arrive in San Francisco, taking into consideration only loss in weight and quality, if any, of the lambs or sheep, directly due to the delay, if any, of the defendant railroad in furnishing cars in which to move said stock, and without regard to any fluctuation in the price of lambs or sheep in the San Francisco market, or delay, if there was any, after the live stock was loaded on the cars. In other words, the damage, if any, is the loss in reasonable market value due solely to loss in weight or deterioration in quality of the lambs and sheep because of delay, if any, on the part of the defendant in furnishing cars, if you find defendant agreed to furnish cars as alleged. If you find plaintiff is entitled to recover damages from defendant, you will include in your verdict the reasonable value of any hay or feed necessarily fed to said live stock, and the reasonable value, if any, of necessary care and attention bestowed upon said live stock during the delay, if any you find, in providing cars for shipment, but in no event can you find for plaintiff damages in excess of the sum prayed for."

The trial judge very carefully excluded from the consideration of the jury anything about fluctuations in the price of the stock, and limited the jurors solely to the consideration of loss in weight or deterioration in quality of the stock, caused by the delay of the defendant in furnishing the cars as agreed. Other cases applicable are *McManus v. Chicago G. W. R. Co.* 156 Iowa, 359, 136 N. W. 769; *Texas & P. R. Co. v. Nicholson*, 61 Tex. 491; *Newport News & M. Valley R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444.

The following precedents cited by the defendant are distinguishable: *Richey & G. Co. v. Northern P. R. Co.* 110 Minn. 347, 125 N. W. 897, was where no place of destination was mentioned, and it was held that the damages must be governed by conditions at the place of shipment. In *Gulf, C. & S. F. R. Co. v. Hume Bros.* 87 Tex. 211, 27 S. W. 110, it was held that if the shipment of stock is not made for a certain market, but for pasturage only at the point of desti-

nation, the damage is referable to the decline in intrinsic rather than market value of the chattels, caused by the delay. In other words, the element of market conditions was not within the contemplation of the parties. *Galveston, H. & S. A. R. Co. v. Thompson*, — Tex. Civ. App. —, 44 S. W. 8, was also a case where stock was shipped to pasture, and not to market. *Dawson v. Quincy, O. & K. C. R. Co.* 188 Mo. App. 365, 122 S. W. 335, was an instance where the plaintiff shipped two carloads of cattle from Trindle, Missouri, to Chicago. The train was delayed in arrival. The trial court instructed the jury that the defendant was liable: (1) For any loss to plaintiff occasioned by decline in the market at Chicago between the time plaintiff's cattle should have arrived and the time they did arrive; (2) for any shrinkage in the weight of the cattle over and above what was ordinary and usual in such cases; (3) for any loss to plaintiff occasioned by the stale appearance of the cattle, caused by the delay. The Kansas City court of appeals held that this was a correct statement of the law, but that as to the first and third elements there was no proof, and consequently reversed the case; but it will be observed that it expressly recognized as an element of damages the shrinkage in the weight of the cattle caused by the delay of the carrier. *Southern Kansas R. Co. v. O'Loughlin Land & Cattle Co.* 60 Tex. Civ. App. 91, 127 S. W. 568, was a case where the transportation company refused to deliver the cars for so long a time that the owner was compelled to sell the goods at the place of shipment. Under those circumstances, there being no transportation whatever, the court held that the measure of damages was the difference between the market value at the destination and the same value at the shipping point, less freight. There the feature of the stock arriving at the market was not open for consideration, because it was utterly absent.

In the present juncture, if nothing else were shown, we might well say that the

failure to furnish cars at the appointed time worked out its full hurt at the point of shipment; that it accomplished there all it could in depreciation of the intrinsic worth of the animals; that it could have no subsequent effect upon them; and that, hence, the damage must be assessed according to their lessened value where they were delivered to the carrier. This, however, leaves out of view the feature that cars were to be furnished to carry the sheep to a specified market; not, indeed, to meet a certain price prevalent there on a particular day, but still to be sold there. That was the end to be attained, and it was known to the defendant. It contracted accordingly. Any shortcoming of the carrier, therefore, alleged and established, which operated to impair the plaintiff's fruition of the purpose taken into account by both parties to the agreement, constitutes ground for damage. The remedy ought to correspond in scope with the previously known plan which the defendant disarranged by its failure to co-operate as it promised.

Here we have within the contemplation of the parties the purpose of making the shipment to the San Francisco market. We have not only the delay of the defendant to supply the cars for that purpose, but we also have present the fact that, later on, the stock was actually transported to the destination. The measure of damage naturally flowing from these circumstances is the difference between the value of such stock in the condition in which they would have arrived at San Francisco if the cars had been furnished promptly, as agreed, and their actual value in the condition in which they did arrive. The other errors complained of either were not assigned, or were not presented in the brief; hence they must be considered as waived.

The judgment is affirmed.

Moore, Ch. J., and Bean and Harris, JJ., concur.

#### TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL. J. W.  
BARNES, Appt.,  
v.

E. A. GARRETT, Sheriff.

(135 Tenn. 617, 188 S. W. 58.)

**Pardon — pending appeal — validity.**

1. A pardon granted pending appeal, after

**Note.**—As to effect of pardon granted after verdict and before sentence or pending appeal, see annotation following this case post, 570.

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a verdict of guilty, is valid under constitutional authority to grant a pardon after conviction.

*For other cases, see Criminal Law, IV. A, 1, in Dig. 1-52 N. S.*

**Same — waiver — failure to plead.**

2. Failure to plead a pardon upon appeal from a conviction does not waive it if the conviction is affirmed for want of a bill of exceptions, after denial of appellant's motion to dismiss.

*For other cases, see Criminal Law, IV. A, 1, in Dig. 1-52 N. S.*



**Same — effect on costs.**

3. A pardon does not release the convict from liability for the costs of prosecution. For other cases, see *Criminal Law*, IV. h, 1, in *Dig. 1-52 N. S.*

(August 9, 1916.)

**A**PPEAL by relator from an order of the Criminal Court for Pickett County, dismissing his petition for a writ of habeas corpus to secure his discharge from custody to which he had been committed upon conviction of carrying a pistol. Remanded for relator's discharge upon payment of costs.

The facts are stated in the opinion.

Messrs. E. D. White and J. L. McDonald for appellants.

Mr. W. H. Swiggart, Jr., Assistant Attorney General, for appellee.

Green, J., delivered the opinion of the court:

J. W. Barnes was indicted on a charge of carrying a pistol at the February, 1914, term of the criminal court of Pickett county. He was tried at the October, 1914, term of that court, fined \$50, and a jail sentence also imposed upon him. He appealed in error to the December, 1914, term of this court.

Pending the hearing of his case in this court, he was pardoned by the governor, December 22, 1914. His case was heard here January 11, 1915, and the judgment below, with a slight correction, was affirmed, and the case remanded for execution of said judgment.

Prior to the hearing in this court, Barnes undertook to dismiss his appeal in error, which he was not allowed to do, no explanation of this motion being made to the court, and the attorney general opposing the motion in order to have the judgment corrected as before noted.

The pardon that had been granted to Barnes was not called to the attention of this court in any manner on his former appeal. Upon the remand, Barnes pleaded his pardon in the trial court, but that court was of opinion the pardon was ineffective, and ordered Barnes into custody to serve his sentence and to secure the payment of the fine and costs previously adjudged against him. From the last order, the court refused an appeal, and this petition for habeas corpus was then filed. The petition was dismissed, and the petitioner gave bond and appealed.

The principal question is upon the validity of the pardon issued under such circumstances.

The Constitution of Tennessee provides that the governor "shall have power to grant reprieves, and pardons, after conviction, ex-  
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cept in cases of impeachment." Article 3, § 6.

The state insists that the pardon, issued pending appeal in error to this court, was not issued after conviction. The argument is that the appeal in error suspended the judgment against Barnes, that he did not stand convicted, and there was no conviction upon which a pardon might operate, pending the appeal.

The contrary contention is that the verdict of the jury against Barnes was a conviction; that he was convicted after verdict, and a lawful object of executive clemency, regardless of judgment,—whether or not judgment had been entered, or, having been entered, had been suspended by appeal in error.

What meaning is to be attached to the word "conviction" in the section of the Constitution quoted?

In a dictum in *Smith v. State*, 6 Lea, 637, the court said: "A conviction implies not simply a verdict, but also a judgment (see *Bouvier's Law Diet.* title, 'Conviction'): though we believe it has not generally been held that a judgment should be actually entered before a pardon can be interposed."

In *Parker v. State*, 103 Tenn. 547, 53 S. W. 1092, there was a verdict of guilty and judgment entered thereupon, but defendant was released on bond pending motion for new trial. Prior to the filing of this motion, a pardon was granted, and the legality of the pardon was questioned on the ground that there had been no final judgment. We quote from the opinion:

"For the defendant, it is insisted that the term 'conviction,' as here used, signifies the adjudication or determination by the jury of the guilt or innocence of the defendant, and that after verdict and before judgment pronounced upon it a pardon may issue, but that in any event final judgment in this case passed upon the defendant after the verdict was returned by the jury, and hence the pardon could legally issue.

"The court is of opinion this contention is well made. The judgment of the court upon the verdict is in form a final one, without the necessity of any formal sentence. The conviction was one which did not require that a sentence of infamy be pronounced."

The learned justice delivering the opinion in the court in *Parker v. State* did not agree to the invalidity of the pardon. It does not distinctly appear what opinion the majority entertained as to the contention that conviction signified the determination of a defendant's guilt by the jury. The decision was apparently rested on the idea that final judgment had been entered on the verdict, which judgment had not been suspended.

In *Smith v. State*, *supra*, the court cor-

rectly declared the general rule to be that a judgment need not actually be entered before a pardon can be interposed. A conviction is held to accrue upon a verdict of guilty in all the cases of which we know, *save* *Campion v. Gillan*, 79 Neb. 364, 11 L.R.A. (N.S.) 865, 126 Am. St. Rep. 667, 112 N. W. 585, 16 Ann. Cas. 319.

The *Campion Case* was really decided on other points, before the question here involved was reached, and the latter expressions of the court do not appear to have been at all necessary.

A very learned and elaborate discussion of the meaning of the word "conviction," as used in the Massachusetts Constitution (chap. 2, § 1, art. 9), providing that "no charter of pardon granted by the governor, with advice of the council, before conviction, shall avail the party pleading the same," etc., was undertaken by Mr. Justice Gray in *Com. v. Lockwood*, 109 Mass. 333, 12 Am. St. Rep. 699. He reviewed authorities in England, Massachusetts, and elsewhere, and showed very plainly that "the ordinary legal meaning of 'conviction' when used to designate a particular stage of a criminal prosecution triable by jury is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court, before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." *Com. v. Lockwood*, supra.

It was accordingly held that a pardon granted after verdict of guilty and before sentence was valid.

The supreme court of North Carolina reached a like conclusion, where the Constitution authorized the governor to grant pardons "after conviction." That court referred to the fact that in England the King might issue a pardon at any time, and, pointing out the reason for the constitutional provision, said: "At common law the Crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light. The person charged was not brought before the public and required to answer the charge, and, of course, the public were dissatisfied. But under our Constitution and statute, the person charged must be brought before the public in a public trial, and face his accusers, and all the facts must appear, and the jury must find him guilty, and the court must sentence him. If then he will ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public, be-  
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cause he has to report the facts and his reasons for exercising the power." *State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675.

In the North Carolina case the defendant appealed before pardon, and it was argued that the appeal vacated the sentence or judgment, and no conviction remained. The court, however, thought the sentence or judgment was not part of the conviction, and the vacation of the judgment by appeal did not vacate the conviction, the verdict of the jury. The conviction would not be annulled unless the supreme court found error on the record, and awarded a new trial and a venire de novo. It was said that "nothing can be a conviction but the verdict of a jury." *State v. Alexander*, supra.

In full accord with the Massachusetts and North Carolina cases are *People v. Marsh*, 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472; *Gilmore v. State*, 3 Okla. Crim. Rep. 639, 139 Am. St. Rep. 981, 108 Pac. 416.

Looking to our statutes and to our Constitution, we find the word "conviction," as there used, does not ordinarily include nor imply judgment or sentence, but has a meaning entirely separate and apart from judgment or sentence. In many of our statutes the term "conviction" is used to signify the jury's verdict of guilty, and as something precedent to, and distinct from, judgment or sentence.

Thus, Shannon's Code, § 5595, provides that persons shall be rendered incompetent as witnesses by "conviction and sentence" for various crimes enumerated.

The following statutes further illustrate the point:

"Upon conviction of the crimes of abusing a female child, arson and felonious burning.

... burglary, etc., . . . it shall be part of the judgment of the court that the defendant be infamous, and be disqualified to give evidence, or to exercise the elective franchise." Shannon's Code, § 7199.

"If the defendant has been convicted of two or more offenses before judgment on either, the judgment is that the imprisonment on one commence at the expiration of the imprisonment upon any other of the offenses." Shannon's Code, § 7201.

"Whenever a felon is convicted of stealing or feloniously taking or receiving [stolen] property, or defrauding another thereof, the jury shall ascertain the value of such property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases." Shannon's Code, § 7208.

"The court may also, where any person is convicted of a capital offense, and the jury who convicted him state in their verdict that they are of opinion that there are mitigating circumstances in the case, commute the punishment from death to imprisonment for life in the penitentiary." Shannon's Code, § 7232.

"A conviction, judgment, and execution for any one offense, is no bar to a prosecution for any other public offense committed previously, not necessarily included in the offense for which the defendant was convicted." Shannon's Code, § 7250.

Illustrations might be multiplied, but the Constitution of 1870 itself shows what its framers understood the word "conviction" to mean. It is provided in the Constitution: "That elections shall be free and equal, and the right of suffrage, as herein-after declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction." Article 1, § 5.

Without further elaboration we are satisfied that, as used in article 3, § 6, of the Constitution, the word "conviction" does not imply judgment or sentence. A pardon granted after a verdict of guilty is "after conviction," is valid, and entitles a defendant to his discharge, irrespective of judgment. An appeal in error suspends the judgment, but does not affect the verdict, and the defendant stands convicted, unless this court finds error and awards a new trial and venire de novo.

It is said, however, by the attorney general, that Barnes failed to plead his pardon on his former appeal to this court, and in no way called the attention of the court thereto, and that he has accordingly waived the benefit thereof.

It is undoubtedly true that the court does not judicially notice a pardon. A pardon is an act of grace, the benefit of which may be accepted or rejected by the convict. It is said to be like a deed, in that delivery is essential, and delivery is not complete without acceptance. If rejected, the court is without power to force the acceptance of executive clemency, and the court can neither know of the grant of a pardon nor presume its acceptance unless the facts are

brought before it by motion, plea, or otherwise. So, usually, if one in possession of a pardon fails to plead it, and puts himself upon his trial, he has waived the advantage of such pardon. *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640; *People v. Marsh*, 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472; 4 Bl. Com. 402.

Barnes, however, did not willingly go to trial in this court on the appeal in error from judgment against him. He undertook to dismiss his appeal, but permission to do this was denied him, as heretofore stated. There was no investigation and no trial of his case here on its merits, and could not have been, for there was no bill of exceptions. A slight modification was made in the judgment below, technical in character, upon motion of the attorney general, and the said judgment affirmed for want of bill of exceptions.

While it would have been proper practice for the pardon to have been pleaded here, still the circumstances were unusual and without precedent in our books, and we are not inclined to hold that Barnes lost the benefit of his pardon by his failure to call it to the attention of this court. He manifested no disposition to experiment with the court or trifle with its jurisdiction, but endeavored to dismiss his appeal. He did not put himself on trial here. There was only a formal affirmance of the judgment against him. He did promptly exhibit and interpose his pardon, in the court below, when the case was remanded for execution of sentence. Such delay, under such circumstances, should be attributed rather to the novelty of the situation and lack of announced rules of practice in this jurisdiction than to motives that would hazard the efficacy of the pardon.

The pardon did not release Barnes from any of the costs in the criminal case. *Spellings v. State*, 99 Tenn. 201, 41 S. W. 444; *Smith v. State*, 6 Lea, 637.

This case will be remanded to the court below, where petitioner will be held to secure all the costs in the criminal case. Upon payment of such costs he will be discharged. The costs of the habeas corpus proceedings are taxed to Pickett county. *Henderson v. Walker*, 101 Tenn. 229, 47 S. W. 430.

### **Annotation—Effect of pardon granted after verdict and before sentence, or pending appeal.**

Generally as to parole and pardon, see Indexes to L.R.A. Notes under the title "Criminal Law," subtitle, "Parole; pardon." L.R.A.1917B.

This note does not include the question of the necessity of bringing the pardon judicially before the court by plea, motion, or otherwise (see *United*

*States v. Wilson* (1833) 7 Pet. (U. S.) 150, 8 L. ed. 640), nor does it include the question of the effect of pardon upon costs. Upon that question, see the notes to *Fischel v. Mills*, 15 L.R.A. 396, and *Villines v. State*, 43 L.R.A. (N.S.) 207.

**"Conviction" as verdict, etc.**

Where the constitutional power of pardon excludes pardon "before conviction," a pardon after verdict, but before judgment or sentence, is good (*Com. v. Lockwood* (1872) 109 Mass. 323, 12 Am. Rep. 699); and no question seems to have been raised to such course in *Com. v. Mash* (1844) 7 Met. (Mass.) 472.

On the same principle, where the constitutional power to the governor is to grant pardons "after conviction," he may pardon after verdict, though before sentence or judgment. *State ex rel. Butler v. Moise* (1896) 48 La. Ann. 109, 35 L.R.A. 701, 18 So. 943; *People v. Marsh* (1900) 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472; *Spafford v. Benzie* Circuit Judge (1904) 136 Mich. 25, 98 N. W. 741; *Ex parte Collins* (1887) 94 Mo. 22, 6 S. W. 345 (obiter); *Blair v. Com.* (1874) 25 Gratt. (Va.) 850. The same was apparently taken for granted in *State v. Fuller* (1821) 1 McCord L. (S. C.) 178.

So, the fact that the Constitution places in the governor power to grant reprieves and pardons "after conviction" does not limit his authority to cases in which the court has pronounced judgment, so as to authorize conferring upon the court, prior to that time, jurisdiction to remit punishment by a suspension of sentence. *Snodgrass v. State* (1912) 67 Tex. Crim. Rep. 615, 41 L.R.A. (N.S.) 1144, 150 S. W. 162.

In *Com. v. Lockwood* (Mass.) supra, and *People v. Marsh* (1900) 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472, the pardon was granted before sentence, pending the hearing of the exceptions in the appellate court, and in *Com. v. Mash* (Mass.) supra, it was granted before sentence, but after the appellate court had overruled the exceptions.

**— Contra.**

The contrary was held in *Campion v. Gillan* (1907) 79 Neb. 364, 11 L.R.A. (N.S.) 865, 126 Am. St. Rep. 667, 112 N. W. 585, 16 Ann. Cas. 319, where, in holding that the governor could not pardon in a bastardy proceeding, it was also held that a verdict was not a conviction within the Nebraska constitutional provision, the court pointing out that "the L.R.A. 1917B.

governor is required to communicate to the legislature each case of pardon granted, 'stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation, or pardon.' This he could not do if there had been no judgment and sentence."

It may be observed that the fact that the governor is required to report the sentence is also true in North Carolina, where it is considered, as appears later in this note, that the governor may pardon pending an appeal, on the theory that the appeal annuls or vacates the judgment, but that, as the verdict remains, the pardon is "after conviction." And in view of the obiter holding in *Ex parte Collins* (1887) 94 Mo. 22, 6 S. W. 345, supra, it may be further noted that in Missouri the governor is also required to report the sentence.

**Pardons pending appeal.**

A pardon after sentence, pending appeal, is one after conviction. *Cole v. State* (1907) 84 Ark. 473, 106 S. W. 673; *Gilmore v. State* (1910) 3 Okla. Crim. Rep. 639, 139 Am. St. Rep. 981, 108 Pac. 416; *Chapman v. State* (1910) 3 Okla. Crim. Rep. 643, 108 Pac. 418; *White v. State* (1910) 3 Okla. Crim. Rep. 644, 108 Pac. 1135; *State v. Alexander* (1877) 76 N. C. 231, 22 Am. Rep. 675; *State v. Teeter* (1877) 76 N. C. 239; *State v. Heaton* (1877) 76 N. C. 240; *State v. Heaton* (1877) 76 N. C. 241; *STATE EX REL BARNES v. GARRETT*, ante, 567.

In *Cole v. State* (Ark.) supra, the court said: "It has been questioned whether, when a case is pending in an appellate court on appeal, the governor has a right, in advance of the final decision, to issue a pardon. An appeal to this court only suspends, and does not vacate, a judgment of conviction, and it cannot be said that the governor has not the power, if he sees fit to exercise it, to pardon a criminal while the case is pending a final determination in the supreme court. Authority for it may be found in *State v. Alexander* (1877) 76 N. C. 231, 22 Am. Rep. 675; *State v. Carson* (1872) 27 Ark. 469."

The North Carolina cases, supra, proceed on the theory that the appeal annuls or vacates the judgment.

As heretofore stated in the first part of this note, in *Com. v. Lockwood* (Mass.) and *People v. Marsh* (Mich.) supra, the pardon was granted before sentence, pending the hearing of the exceptions in the appellate court, and in

*Com. v. Mash* (Mass.) supra, it was granted before sentence, but after the appellate court had overruled the exceptions.

#### Effect.

Most of the cases on the effect of pardons with reference to the time when they were granted concern their effect upon costs, as to which see the aforesaid notes in 15 L.R.A. 396 and 43 L.R.A. (N.S.) 207.

Where a defendant convicted of fornication and bastardy was pardoned before sentence, it was held that he could not be held for maintenance of the child. *Com. v. Ahl* (1862) 43 Pa. 53.

It was held in North Carolina that an appeal to the supreme court in a criminal case annuls the judgment below, and that therefore, pending the appeal, a pardon remitting part of a judgment is inoperative; but this was not necessary to the decision. *State v. McIntire* (1853) 46 N. C. (1 Jones, L.) 1, 59 Am. Dec. 566.

While beyond the scope of this note, reference may be made in this connection to *State v. Underwood* (1870) 64 N. C. 599, where, on an appeal to the supreme court from a judgment against the accused, it was held there was no error, but before judgment was entered below on the transcript from the supreme court, the defendant produced a pardon, and it was held that the appeal had vacated the judgment, and that the pardon thus being before judgment, there were no costs to be paid by the accused.

Where a pardon is granted pending an appeal, the usual practice is to dismiss the appeal. *Cole v. State* (1907) 84 Ark. 473, 106 S. W. 673; *Manlove v. State* (1899) 153 Ind. 80, 53 N. E. 385; *Phillips v. State* (1880) 58 Miss. 578; *Gilmore v. State* (1910) 3 Okla. Crim. Rep. 639, 139 Am. St. Rep. 981, 108 Pac. 416; *Chapman v. State* (1910) 3 Okla. Crim. Rep. 643, 108 Pac. 418; *White v. State* (1910) 3 Okla. Crim. Rep. 644, 108 Pac. 1135; *Lack v. State* (1915) 11 Okla. Crim. Rep. 420, 149 Pac. 924; *Stewart v. State* (1915) 11 Okla. Crim. Rep. 400, 146 Pac. 921; *Sibenaler v. State* (1915) 11 Okla. Crim. Rep. 504, 148 Pac. 678; *Terrell v. State* (1915) 11 Okla. Crim. Rep. 529, 148 Pac. 822; *Keith v. State* (1911) 6 Okla. Crim. Rep. 618, 117 Pac. 652; *Woodland v. State* (1915) — Okla. Crim. Rep. —, 152 Pac. 810; *State v. White* (1895) 26 Or. 605, 40 Pac. 229.

The same practice applies on the granting of a parole. *Cadenhead v. State* (1911) 6 Okla. Crim. Rep. 514, 117 Pac. 462; *Parks v. State* (1911) 6 Okla. Crim. Rep. 617, 117 Pac. 651; *James v. State* (1911) 6 Okla. Crim. Rep. 630, 117 Pac. 651; *Arnold v. State* (1911) 6 Okla. Crim. Rep. 615, 117 Pac. 652; *Rhoads v. State* (1911) 6 Okla. Crim. Rep. 619, 117 Pac. 652; *Smallwood v. State* (1911) 6 Okla. Crim. Rep. 615, 117 Pac. 652; *Fossett v. State* (1911) 6 Okla. Crim. Rep. 629, 117 Pac. 653; *Cowley v. State* (1915) 11 Okla. Crim. Rep. 561, 149 Pac. 924.

B. B. B.

#### TENNESSEE SUPREME COURT.

W. H. CUNNINGHAM et al.

v.

ERNEST SHELBY et al., Plffs. in Err.

(— Tenn. —, 188 S. W. 1147.)

#### Corporation — foreign — failure to comply with laws — partnership liability.

1. Holders of stock in a foreign corporation which has not complied with the laws entitling it to do business in the state, but which maintains an office and undertakes to carry on its business in the state, are liable as partners for services rendered under contract with those in charge of the office.

For other cases, see *Corporations*, VII. a, in *Dig. 1-52 N. S.*

Note. — As to partnership liability of stockholders of a foreign corporation in a state in which it is doing business, see annotation following this case, post, 574. L.R.A.1917B.

#### Writ and process — sufficiency of summons — action against partners.

2. A warrant is sufficient to hold stockholders in a foreign corporation not authorized to do business in the state liable as partners which describes them as stockholders in a foreign corporation not authorized to do business in the state, and summons them to answer an action on account for labor rendered.

For other cases, see *Writ and Process*, I. in *Dig. 1-52 N. S.*

(October 28, 1916.)

**E**RROR to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Rhea County in plaintiffs' favor in consolidated actions brought to recover compensation for services rendered to a foreign corporation in which defendants were stockholders. Reversed.

The facts are stated in the opinion.

Messrs. Wright & Haggard and C. G. Myers, for plaintiffs in error:

Failure of a foreign corporation to comply with positive requirements of the law as a prerequisite to its having corporate existence, and its transacting business in the state, renders its stockholders personally liable for the companies' debts.

Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Morton v. Hart Bros. 88 Tenn. 427, 12 S. W. 1026; Taylor v. Branham, 35 Fla. 297, 39 L.R.A. 362, 48 Am. St. Rep. 249, 17 So. 552; 19 Cyc. 1218; Empire Mills v. Alston Grocery Co. 4 Tex. App. Civ. Cas. (Willson) 346, 12 L.R.A. 366, 15 S. W. 505; Cleaton v. Emery, 49 Mo. App. 345; Jones v. Aspen Hardware Co. 21 Colo. 263, 29 L.R.A. 143, 52 Am. St. Rep. 220, 40 Pac. 457; Booth v. Wonderly, 36 N. J. L. 250; Hill v. Beach, 12 N. J. Eq. 31; Glenn v. Bergmann, 20 Mo. App. 343; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799.

Messrs. D. M. Rhea and J. B. Swafford for defendants in error.

Neill, Ch. J., delivered the opinion of the court:

Defendants in error were stockholders in a corporation chartered under the laws of the state of Delaware, but which had its office and transacted its business in Rhea county, Tennessee, without having complied with the statutes of the state permitting foreign corporations to do business here. The corporation was chartered as a development company for the purpose of developing the mineral and timber resources of the territory adjacent to Spring City, in Rhea county, including the promotion of several industries. Carrying out this purpose it came to Spring City, rented buildings, hired transportation, had options taken on certain lands, and had in its employ there a chief engineer and an assistant engineer, who had charge of a body of servants, employees of the company, engaged in making surveys and maps of lands on which the alleged company held options, and which surveys were being made for the benefit of the company. In one of the offices which was maintained at Spring City it had in its employ a stenographer who wrote the correspondence with reference to the business of the company, and these letters were always signed, "Central Tennessee Development Co., per ——— Secy." Its board of directors and stockholders were permitted to meet at this office and confer concerning the business of the concern, and it kept and used at this office a corporate seal. The plaintiffs in error did work for them in carrying out these purposes, and compensation was sought for this work by the suit L.R.A.1917B.

mentioned in the margin, and other suits consolidated therewith.

It was contended in the trial court that the defendants in error were liable as partners, and the trial judge, in effect, so charged the jury.

Was this the correct view? We think it was.

Foreign corporations have no right to do business in this state unless they first comply with the provisions of our statutes, with reference to the filing of their charters, etc. If they fail to do so, they have no standing before the courts for the enforcement of any rights, with two exceptions, which we shall presently note. Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; New Hampshire Ins. Co. v. Kennedy, 96 Tenn. 711, 36 S. W. 709; New York Nat. Bldg. & L. Asso. v. Cannon, 99 Tenn. 344, 41 S. W. 1054; Advance Lumber Co. v. Moore, 126 Tenn. 313, 148 S. W. 212; Interstate Amusement Co. v. Albert, 128 Tenn. 417, 427, 161 S. W. 488; and compare Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879.

The exceptions above referred to are State v. O'Brien, 94 Tenn. 79, 26 L.R.A. 252, 28 S. W. 311, holding that a servant of a company, who has feloniously appropriated its money, is estopped to defend on the ground of the company's failure to comply; the case of Memphis & A. River Packet Co. v. Agnew, 132 Tenn. 265, L.R.A.1916A, 640, 177 S. W. 949, holding that an unfaithful servant of such company, who has made profits by the use of the company's business for his own purposes, cannot defend, when called to account, by showing that the company had failed to comply; and finally the case of State v. Cumberland Teleph. & Teleg. Co. 114 Tenn. 194, 86 S. W. 390, in which it was held that where such company had attempted to comply, but had inadvertently omitted one requirement, it would not be ousted from the state except upon a direct suit for that purpose by the state. We have no direct decision upon the question whether stockholders of such a corporation carrying on business would be liable as partners; but we have two cases which are based substantially on the same principle. In Morton v. Hart Bros. 88 Tenn. 427, 12 S. W. 1026, it was held that where a foreign insurance company had failed to comply, an agent who took a policy in its name was personally liable thereon, since, inasmuch as he could not bind his principal, he bound himself. In Carter v. McClure, 96 Tenn. 109, 36 L.R.A. 282, 60 Am. St. Rep. 842, 38 S. W. 585, it appeared that certain persons associated themselves together for the purpose of carrying on a co-operative store, entered into a writ-

ten agreement providing for directors and for stockholders, and called themselves stockholders, and set forth the amount which was to be employed in the business, and carried on the business for a profit, but were, in fact, not incorporated. The concern finally failed, and the so-called stockholders were sued as partners, and the court held they were liable as such, on the ground that the persons concerned composed an association carrying on a business for profit, and, it not being a corporation, the law had no other name for it than that of a partnership. To the same effect is the case of *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153, 94 C. C. A. 47, 168 Fed. 187, in which will be found an elaborate discussion of the point.

A direct authority is found in *Taylor v. Branham*, 35 Fla. 297, 39 L.R.A. 362, 48 Am. St. Rep. 249, 17 So. 552, in which it was held that a corporation chartered in Tennessee had no right to transact business in Florida without complying with the laws of that state, prescribing certain conditions for the entering of that state by foreign corporations, and that the stockholders who undertook to carry on the business of such foreign corporations were liable as partners. The same principle is found laid down in *Mandeville v. Courtright*, 6 L.R.A.(N.S.) 1003, 73 C. C. A. 321, 142 Fed. 97. In that case it was held that a dental company chartered in New Jersey had no right to carry on its business in Pennsylvania, by virtue of its New Jersey charter, and that its stockholders carrying on such business in Pennsylvania became personally liable as partners. In the case it appeared that an employee of the company fractured a woman's jaw while trying to operate upon her teeth. The stockholders were held liable for damages, as partners.

The general principle is that stated in *Carter v. McClure* and *Harrill v. Davis*, supra, that where persons are associated together, carrying on a business for profit, they are prima facie partners, no matter what name they use, and they cannot escape except by showing that they were a corporation.

The fact that plaintiffs in error dealt with them in their corporate name can avail them nothing. *Harrill v. Davis*, supra; *Empire Mills v. Alston Grocery Co.* 4 Tex. App. Civ. Cas. (Willson) 346, 12 L.R.A. 366, 369, 15 S. W. 505, and see note. It does not appear that plaintiffs in error knew that

the corporation had not complied with the Tennessee laws. However, we do not think this would have made any difference, since the corporation was without the power of contracting, and, as the defendants in error could not bind it, they necessarily bound themselves. *Morton v. Hart Bros.* supra.

It should be noted that the principles above announced do not apply to corporation de facto; that is, those which have made a bona fide effort to comply with the provisions of law and have inadvertently failed in some particular, and in good faith have exercised the franchises of such corporation. *Merriman v. Magiveny*, 12 Heisk. 494; *Swofford Bros. Dry Goods Co. v. Owen*, L.R.A.1916C, 189, and note, 37 Okla. 616, 133 Pac. 193. And see note to *Rutherford v. Hill*, 17 L.R.A. 549.

The learned court of civil appeals was of the opinion that the defendants in error were liable as partners, but held that the warrant was not adequately framed against them as such, and on that ground reversed the judgment of the trial court. We think the court of civil appeals was somewhat too strict in its construction of the warrant. The suit was originally brought before a justice of the peace, and subsequently appealed to the circuit court of Rhea county, and there tried. The warrant, instead of describing the defendants in error in terms as partners, described them as stockholders in a foreign corporation not authorized to do business in the state of Tennessee, and summoned the defendants in error to answer in an action by account for labor rendered. This is very meager, it is true, but it sufficiently notified the defendants in error of the grounds on which they were to be held liable; that is, for transacting business in Tennessee under the name of a foreign corporation without having complied with the laws authorizing such transaction of business, such business, of course, implying an effort to obtain profit. This was using the definition for the name. The defendants in error, when so summoned, could not misunderstand what they were called upon to defend, so the purpose of requiring some general statement of the cause of action in the warrant of the justice of the peace was sufficiently complied with. Therefore, we are of the opinion that the judgment of the Court of Civil Appeals must be reversed, and that of the trial court affirmed.

### **Annotation—Partnership liability of stockholders of a foreign corporation in a state in which it is doing business.**

The general question of the partnership liability of stockholders in case of

defective or illegal incorporation is discussed in the notes to *Rutherford v. Hill*, L.R.A.1917B.

17 L.R.A. 549, and *Swofford Bros. Dry Goods Co. v. Owen*, L.R.A.1916C, 196. This note is confined to a discussion of whether or not such a partnership liability arises in the case of a corporation organized in one state—regularly, it may be—which is doing business in another. The determination of this question is rendered difficult from the obscurity of some of the reports as to whether those stockholders who are sought to be held liable were themselves actively participating in such business. A liability based upon such participation is a different thing than a liability based upon the mere relation of stockholder. It is going considerably farther to hold that a liability arises from the relation of stockholder without any active participation in the management of the business, than to hold that a liability arises on the part of those who actively participate in such management.

An attempt is sometimes made to question the compliance of a foreign corporation with the laws of the state of its

organization in a suit against some members in another state. Such cases in which the corporation does not appear to have been doing business in the state of the forum are excluded.<sup>1</sup>

It is the theory of some early cases that an act of incorporation can have no extraterritorial effect.<sup>2</sup> Accordingly, incorporation in a foreign state is no protection against liability arising from the manner in which a group of persons are doing business; if they are doing business as a partnership, a partnership liability arises. But this doctrine has not been generally accepted. The relation existing between the states is such as to make it impracticable. By the rules of comity one state will recognize a corporation formed in another.<sup>3</sup> Accordingly, where a corporation is regularly formed in one state, its stockholders cannot be held liable as partners, where it has been carrying on business in another.<sup>4</sup> This is especially true where the policy of the state is to give foreign corporations the right to do business

<sup>1</sup> This class of cases is illustrated by *Laffin & R. Powder Co. v. Sinsheimer* (1877) 46 Me. 315, 24 Am. Rep. 522, where, in an action against certain members of a foreign corporation to hold them liable on an obligation of the corporation, on the theory that the corporation had not, in good faith, complied with the laws of the state of its incorporation, it was held that a third person cannot thus impeach the corporate existence.

<sup>2</sup> The Florida court in *Taylor v. Branham* (1895) 35 Fla. 297, 39 L.R.A. 362, 48 Am. St. Rep. 249, 17 So. 552, expressed an opinion in accord with this theory, but that decision is finally based upon the fact that the corporation, although chartered in Tennessee, was organized in Florida.

It is stated in *March v. Eastern R. Co.* (1860) 40 N. H. 548, 77 Am. Dec. 732, that the only effect of the refusal to recognize a foreign corporation as such would be to compel the members to hold their property and maintain their rights as partners.

Upon the general question of whether or not a foreign corporation can be regarded as a de facto corporation, see note to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 280, subdivision on page 203.

<sup>3</sup> See *Merrick v. Van Santvoord* (N. Y.) *infra*.

<sup>4</sup> In *Boyington v. Van Etten* (1896) 62 Ark. 63, 35 S. W. 622, a verdict directed in favor of the plaintiff in an action against certain stockholders of a foreign corporation on the theory, as shown in the complaint, that they had rendered themselves liable as partners by reason of emigrating from the state of incorporation to the state of the forum without complying with the statutory provisions of the latter state, was L.R.A.1917B.

reversed upon appeal. That the corporation had failed to comply with the laws of the state of the forum is denied by the answer of the defendant and this question is not determined. The appellate court states generally that "when once regularly formed in a foreign state, until dissolved according to the laws of that state, the existence of a corporation cannot be destroyed, or even called in question, except to ascertain the fact of its existence at home, by the courts of this state. . . . Such a corporation may be forbidden to enter this state at all, and is forbidden by legislative enactment to do business here except on condition; but that is all. There is no law making such null and void when attempting to do business here without complying with conditions."

It was contended in *Second Nat. Bank v. Hall* (1878) 35 Ohio St. 158, that the incorporation in the foreign state to conduct a business within the state of the forum was a fraud upon the laws of the state of the forum, because the stockholders were not, by the laws of the state of incorporation, individually liable to any extent for the debt of the corporation. This is apparently based upon the fact that, according to the laws of the state of the forum, the stockholders in a corporation are individually liable to a certain extent for the debt of the corporation. That this did not render the incorporators liable as partners is held in the case, the court stating that how the fact that they are not individually liable for corporate debts can, in the absence of the statutory regulation, operate to make them liable on a promise they never made, either expressly or impliedly, is difficult to understand.



upon complying with certain conditions.<sup>5</sup> It was urged in one case<sup>6</sup> that a corporation which did nothing in the state in which it was organized except to hold its annual elections must be deemed to have migrated to the state in which its business was conducted, and it thereby forfeited its charter in the state of its organization. This contention was denied, and a stockholder of the corporation held not liable as a partner for liabilities incurred by the corporation. The only contract ever made by the stockholder which had any bearing on the question at issue in the case was that which he made on becoming a party to the corporation. The court states that that "certainly did not make him a partner, either of the defendants Brainard, or of Mr. Redfield, the secretary of the company. He gave no power to either to contract for him and no consent to be responsible for their tortious act. His contract with the state of Connecticut

was for immunity from personal liability. The plaintiffs insist that the burden is upon him to show how he was ever relieved from the liability of a partner. This is a precise inversion of the rule. The onus is upon the plaintiffs to show that he ever assumed any such liability; or that he became chargeable with it in law, through his own acts or through those of the company. No statute of that state, or of this, has been violated, either by him or by the corporation."

According to the weight of authority the failure of a foreign corporation to comply with the laws of the state in which it is doing business relative to foreign corporations does not render the stockholders liable as partners.<sup>7</sup> At any rate, the partnership relation will not be extended to liabilities not arising by reason of the conduct of a business prohibited from being transacted without a permit.<sup>8</sup> In one case<sup>9</sup> it was sought to hold as partners two members of a

<sup>5</sup> *Merrick v. Van Santvoord* (1866) 34 N. Y. 208. Foreign corporations doing business in the state were required to comply with certain conditions. Whether these conditions were complied with in the case at bar is not stated except by inference, in the statement that no statute of the state had been violated by the corporation.

See *Boyington v. Van Etten* (Ark.) supra.

<sup>6</sup> *Merrick v. Van Santvoord* (N. Y.) supra. supra.

<sup>7</sup> *Bond v. Stoughton* (1904) 26 Pa. Super. Ct. 483; *Stephenson v. Dodson* (1908) 36 Pa. Super. Ct. 343. See *Boyington v. Van Etten* (Ark.) supra.

But see *CUNNINGHAM v. SHELBY*, ante, 572.

It is stated in *National Bank v. Spot Cash Coal Co.* (1911) 98 Ark. 597, 136 S. W. 953, that the doing of business in a state by a foreign corporation that has not complied with the laws of the state prescribing conditions upon which such corporations may do business does not have the effect of dissolving such corporation and rendering it in effect a partnership and its officers partners as to such business done within the state.

It is stated in *Tribble v. Halbert* (1910) 143 Mo. App. 524, 127 S. W. 618, that the bare fact, if proven, that a foreign corporation has not complied with the laws of the state of the forum, is not sufficient to authorize a judgment against stockholders of that corporation as partners upon contracts executed in the name of the corporation. In order to establish such a liability it must be shown that there was fraud of some kind connected with the organization of the corporation.

The fact that a contract is made by a foreign corporation before the date of registration of a certificate does not render those contracting liable individually, where it was not doing business prior to the registration. *L.R.A.1917B.*

*Stoner v. Phillipi* (1909) 41 Pa. Super. Ct. 118.

In *Smith v. Warden* (1885) 86 Mo. 382, the members of a limited partnership association who had failed to comply with the laws of the state where organized, in that they had not recorded the articles of association, as required by the statutes of that state, were held to become general partners even in that state, and, as a necessary result, must be held bound and liable as such in another state in which they were transacting business. The court does not decide the further question as to whether, if there had been a compliance with the laws of the state where organized, the members would have been liable as partners in the other state, but says on this point that "the statutes of Pennsylvania as such can have no extraterritorial force or operation in this state, but rights which had accrued in that state under such statutes might be enforced here."

<sup>8</sup> It was urged in *A. Leschen & Sons Rope Co. v. Moser* (1913) — Tex. Civ. App. —, 159 S. W. 1018, that the stockholders in a foreign corporation were liable as partners on a debt assumed by it. In denying such liability the court states that the debt could be assumed without taking out a permit to do business in the state, "and we do not think that because the corporation may have engaged in other transactions for which it should have procured a permit, or have maintained an office in Texas without obtaining a permit, we are justified in holding its stockholders liable as partners for the debt assumed. If the stockholders of a corporation which could legally do business in Texas under a permit are to be punished for not obtaining a permit by being held to be partners, such punishment should be limited to liabilities arising from transactions for which the permit is re-

foreign corporation whose names were combined into the corporate name on an indorsement by one of the defendants. No copy of the charter and by-laws of the corporation had been filed with the commissioner of corporations, and no copy of the vote appointing him attorney for the service of process had been filed with him. The court, after referring to this fact, states that the defendants are not thereby constituted partners, or made personally liable on the indorsement on the note.

There is some authority, however, for the view that until a foreign corporation has complied with the laws of the state in which it is transacting business, the corporate organization does not relieve its members from personal liability.<sup>10</sup>

When the territorial scope of operations of a corporation is limited by its charter, it has been stated that it cannot exceed such limits without creating the partnership relation between those stockholders and officers who participated.<sup>11</sup>

In the cases discussed in the foregoing

part of this note it does not appear but that the corporations involved were regularly incorporated for the purpose of doing business in the state of incorporation; at least, it does not appear that they were organized for the sole purpose of doing business in another state.<sup>12</sup> Where the fact that the corporation was organized for the sole purpose of doing business in another state does appear, the stockholders have, in a number of cases, been held liable as partners,<sup>13</sup> especially if it was organized by citizens of the state in which the business is being conducted, for the purpose of escaping some provision of the law of that state. Thus, an individual who, with others, organized a corporation in a foreign state where the taxing laws were more favorable, has been held personally liable for obligations incurred by the corporation.<sup>14</sup> It has been regarded as fraud rendering the incorporators liable as partners for citizens of one state, who are unable to incorporate in that state because of insufficient subscription to the capital stock, to go into another

quired, and not extended to liabilities not arising by reason of the conduct of a business prohibited from being transacted without a permit."

See *Stoner v. Phillipi* (Pa.) supra.

<sup>9</sup> *Shawmut-Commercial Paper Co. v. Auerbach* (1913) 214 Mass. 363, 101 N. E. 1000.

<sup>10</sup> *Rowden v. Daniell* (1910) 151 Mo. App. 15, 132 S. W. 23. In this case an officer and stockholder in a foreign corporation who was engaged in business in the state prior to the attempt to organize the corporation, and continued in charge of the business after the organization thereof, was held personally liable upon a tort of the company. No attempt was made in this case to hold any other stockholder in the corporation than the one thus participating in the management.

See *CUNNINGHAM v. SHELBY*, ante, 572.

<sup>11</sup> It is stated obiter in *Campbell v. J. I. Campbell Co.* (1906) 117 La. 402, 41 So 696, with reference to a lumber company incorporated in Texas and authorized to do business in certain counties in Texas, that when it established a business in Louisiana under another name, and so conducted the business, the stockholders and officers of the corporation who participated in or ratified such action became partners in the business in Louisiana. It was held in this case that the assets of the branch business established in Louisiana would be distributed as assets of the partnership, and the creditors of the corporation would not be allowed to participate therein.

<sup>12</sup> In *Merrick v. Van Santvoord* (1866) 34 N. Y. 208, it appeared that the entire corporate business was being done in the state of the forum at the time the *H.L.R.A.* 1917B.

bility on which suit was brought, was incurred.

<sup>13</sup> The right of a corporation to incorporate in one state for the transaction of business in another is denied in *Lynch v. Perryman* (1911) 29 Okla. 615, 119 Pac. 229, Ann. Cas. 1913A, 1065, and the stockholders are stated to be liable as partners.

See *CUNNINGHAM v. SHELBY*, ante, 572.

<sup>14</sup> In *Montgomery v. Forbes* (1889) 148 Mass. 249, 19 N. E. 342, an individual, finding the tax laws of New Hampshire more favorable to corporations than the laws of Massachusetts, went to New Hampshire, and, with others, attempted to form a corporation for the manufacture of woolen goods in which he was engaged. The articles of incorporation stated that the business was to be carried on at a place in New Hampshire and another in Massachusetts. The individual first above referred to was the only person interested in the enterprise, the others being merely secured to furnish the necessary number required by the statutes of New Hampshire for corporate organization. The court states that this is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter, but here there was no corporation; it was just the same as if the individual had done nothing at all in the way of establishing a corporation, but had conducted his business under the corporate name. The business was his personal business, which he transacted under that name. He was accordingly held liable on a contract for the purchase of goods, entered into by him under the corporate name. It was not sought to hold any other members of the pretended corporation liable.

state where a certificate of incorporation might be procured upon the subscription obtained, and there incorporate a company for the sole purpose of carrying on an undertaking in the home state.<sup>15</sup> The statutes of the state of incorporation are construed as not authorizing the creation of a corporation whose entire business was to be conducted in another state. The stipulation in the article of incorporation for a branch office in the state of incorporation does not remedy this, especially where it is shown that the sole design was to conduct the business in the other state, and no branch office was ever established in the state of incorporation.<sup>16</sup> Such an organization in a foreign state has been regarded as fraudulent where only the fact of organization there appears.<sup>17</sup>

On the contrary, it has been held that the residents of one state, who incorporate in another for the purpose of doing business in the former state, are protected against personal liability by the incorporation.<sup>18</sup>

<sup>15</sup> *Cleaton v. Emery* (1892) 49 Mo. App. 345; *Davidson v. Hobson* (1894) 59 Mo. App. 130.

In *Journal Co. v. Nelson* (1908) 133 Mo. App. 482, 113 S. W. 690, the members of a foreign corporation were held liable as partners on the theory that there had never been any legal existence to the corporation. In this case certain citizens of the state of the forum went into another state and there organized a corporation for the ostensible purpose of doing business in a third state. The representation that its capital stock was fully paid up was untrue, but a very small part of it having been paid. It had no home in either the state of its incorporation or that in which it stated that it was to transact business, but was lodged in the state of the forum. The entire transaction was held a fraud and the members thereof liable as partners. It appears, however, that all the members had actively participated in the transactions of the company.

<sup>16</sup> *Cleaton v. Emery* (Mo.) supra.

<sup>17</sup> In *Hill v. Beach* (1858) 12 N. J. Eq. 31, a corporation organized in one state by individuals who were interested in a stone quarry in another, for the purpose of operating the quarry, was held not to be a corporation, in an action by one of the stockholders to recover his share of the corporate property. "They are not a domestic corporation," says the court, "and cannot be sued as such; they are not a foreign corporation, for it is perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York with respect to corporations was a fraud upon the law of that state. These individuals, then, must be treated and dealt with by the law as L.R.A.1917B.

While it thus appears that corporate organization in one state has been held no protection against partnership liability in a state in which the business was being conducted, the cases in which this was held presented some very strong features of evasion of the laws of that state and, at least, in some of the cases, of the laws of the state where incorporation took place. In the absence of such exceptional circumstances, it seems that no partnership liability should be held to exist. This seems especially true in view of the extensive corporate organization of the present time in states whose laws are favorable to such organization. At least it should require more than a showing that the corporation was organized in the foreign state for the purpose of taking advantage of favorable laws, to impose a partnership liability.

Where a corporation chartered in one state is organized in another, in which the board of directors is elected and the business carried on, without any attempt to acquire corporate existence in the lat-

partners trading under the name they have assumed."

<sup>18</sup> *DeMarest v. Flack* (1891) 128 N. Y. 205, 13 L.R.A. 854, 28 N. E. 645. The state in which the corporation was organized had a policy favoring the formation of such corporations the certificate of incorporation was issued by the proper official of that state with knowledge of all the facts, and this was held to constitute the organization a valid incorporation in that state. The policy of the state in which the business was being conducted was held not to prevent the formation of such corporations, but to recognize them when coming into the state and conforming with the terms laid down by the statute as conditions of allowing them to transact business. The statute of the state of the incorporation provided for the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the state, and also for the keeping of the principal office of the corporation in any state or territory of the United States. It does not appear whether the first general meeting for the purpose of organization was in fact held out of the state of the incorporation.

A contrary decision appears in the early New York case of *Kruse v. Dusenbury* (1884) 1 N. Y. City Ct. Rep. Supp. 87, where the members of a foreign corporation who were engaged in the corporate business in New York were held liable as partners upon an obligation incurred while transacting such business, where the corporation had no office in the state of its incorporation, as fixed in the certificate of incorporation, and did no business there.

It is denied in *Second Nat. Bank v. Hall* (1878) 35 Ohio St. 158, that the incorpora-

ter state, the members are liable as partners.<sup>19</sup> In one such case<sup>20</sup> it is stated that "where a corporation has been legally created and organized under the laws of a sister state for the transaction of any business there, it may, by comity existing between the states, transact business in this state, provided it be not in contravention of our laws or public policy. Our general incorporating laws recognize the transaction of business by foreign corporations in this state, and, in the absence of express legislative assertion to the contrary, the courts of this state would be bound to recognize the comity existing among the states. While this is true, it is also well settled that a corporation created under the laws of one state cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions in its organization." If there is no organization of the corpora-

tion, the stockholders are liable as partners.<sup>21</sup>

Where a corporation is organized in one state to do business in another, where such business could not be legally carried on by a corporation, the stockholders are liable as partners.<sup>22</sup> At least, so many of the stockholders as assented to the conduct of the business and were associated therein are so liable.<sup>23</sup>

The alleged corporation not having a de facto existence, the fact that the party attempting to hold the members liable as partners contracted with it does not estop him to call in question the corporate character, where he did not know that it was an incorporated organization.<sup>24</sup> It has been held that the doctrine of estoppel does not apply to prevent one who has contracted with a corporation from denying the corporate existence, and holding the members thereof liable as partners.<sup>25</sup>

tion in one state of a corporation to conduct a business within another is a fraud upon the laws of the latter state. See further discussion of case, *supra*.

<sup>19</sup> *Taylor v. Branham* (1895) 35 Fla. 297, 39 L.R.A. 362, 48 Am. St. Rep. 249, 17 So. 552; *Duke v. Taylor* (1896) 37 Fla. 64, 31 L.R.A. 484, 53 Am. St. Rep. 232, 19 So. 172.

<sup>20</sup> *Duke v. Taylor* (Fla.) *supra*.

<sup>21</sup> In *Empire Mills v. Alston Grocery Co.* (1891) 4 Tex. App. Civ. Cas. (Willson) 346, 12 L.R.A. 366, 15 S. W. 505, it is stated that by the rule of comity a corporation organized under the laws of that state may conduct business beyond the borders of that state, but the corporation is required to organize, and that organization must take place under the laws of the state where the organization is authorized, and not elsewhere. An attempt to organize the corporation is not sufficient, and does not meet the requirement and demand of the law, nor does it comply with the rule of comity; the corporation must organize, else it is not a corporation. In the case at bar no organization by the defendant as a corporation at any time or place was shown. One of the witnesses testified that an organization

took place in the state where the business was to be conducted, but no evidence was introduced on that subject.

<sup>22</sup> *Empire Mills v. Alston Grocery Co.* (Tex.) *supra*.

<sup>23</sup> *Mandeville v. Courtright* (1905) 6 L.R.A. (N.S.) 1003, 73 C. C. A. 321, 142 Fed. 97, holding the stockholders in a corporation organized to carry on the denistry business in violation of local law, who were associated in the conduct of the business, personally liable for injury inflicted by the incompetence of an employee upon a person who submitted to treatment without knowing the pretended corporate character under which the persons were operating. See note appended to this case on the personal liability at common law of officers or stockholders of a corporation to the other party to an act or transaction in excess of the corporate powers, or in violation of law.

<sup>24</sup> *Duke v. Taylor* (Fla.) *supra*.

<sup>25</sup> *Cleaton v. Emery* (1892) 49 Mo. App. 345, it is stated that the doctrine of estoppel in that state has been confined to cases where the corporation, or those claiming under it, assert some rights under the contract.

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## UNITED STATES SUPREME COURT.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee, etc., of Frank E. Scott Transfer Company, Bankrupt, Appt.,  
v.

CHICAGO AUDITORIUM ASSOCIATION.  
(No. 162.)

CHICAGO AUDITORIUM ASSOCIATION,  
Appt. and Petitioner,  
v.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee, etc., of Frank E. Scott Transfer Company. (No. 174.)

(240 U. S. 581, 60 L. ed. 811, 36 Sup. Ct. Rep. 412.)

**Appeal — bankruptcy case — Federal question.**

1. A decision of a circuit court of appeals that a claim against a bankrupt estate for damages growing out of the anticipatory breach of an executory contract, while allowable as a provable debt for the term during which that court thought that the contract was mutually obligatory, should not be allowed beyond that period, is not reviewable in the Federal Supreme Court under the Bankrupt Act of July 1, 1898, § 25b-1, as presenting a Federal question which would sustain a writ of error to a state court.

*For other cases, see Appeal and Error, II. a, 2, in Dig. 1-52 N. S.*

**Bankruptcy — provable debt — damages for anticipatory breach of contract.**

2. The filing of an involuntary petition in bankruptcy against a baggage transfer and livery corporation, followed by an adjudication of bankruptcy, is the equivalent of an anticipatory breach of its executory contract with a hotel company for the latter's baggage and livery business, where the trustee in bankruptcy does not elect to assume performance, and gives rise to a claim provable in the bankruptcy proceedings, as one "founded," within the meaning of the Act of July 1, 1898, § 63a-4, "upon a contract, express or implied."

*For other cases, see Bankruptcy, IV. a, in Dig. 1-52 N. S.*

**Same — term of allowance.**

3. A bankruptcy court, in allowing as a provable debt a claim for damages arising out of the anticipatory breach by the bankrupt of its executory contract with a hotel company for the latter's baggage and livery business, should not limit it to the damages for the six months following such breach, although the contract reserved to the hotel company an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both

parties were to be released from further liability at the expiration of the six months. *For other cases, see Bankruptcy, IV. a, in Dig. 1-52 N. S.*

(April 3, 1916.)

**A** PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which, reversing a decree of the District Court for the Northern District of Illinois, Eastern Division, allowed as a provable debt against the bankrupt estate a part of the damages growing out of the bankrupt's anticipatory breach of an executory contract. **Affirmed.**

**C**ROSS APPEAL from, and Certiorari to, the United States Circuit Court of Appeals for the Seventh Circuit on behalf of the creditors to review the same decree. Appeal dismissed, and decree reversed on certiorari.

The facts are stated in the opinion.

Messrs. Edwin C. Brandenburg, Frederick D. Silber, and Clarence J. Silber, for the Central Trust Company:

Subdivisions 1 and 4, of § 63a, of the Bankrupt Act, must be construed together, and the words, "absolutely owing at the time of the filing of the petition," etc., appearing in subdivision 1, are to be read into and construed as a part of subdivision 4.

*Zavelo v. Reeves*, 227 U. S. 625, 67 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D. 664; 29 Am. Bankr. Rep. 493; *Re Roth*, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 24 Am. Bankr. Rep. 588; *Colman Co. v. Withoft*, 115 C. C. A. 222, 195 Fed. 250, 28 Am. Bankr. Rep. 328.

Anticipatory breach of an executory contract results from a positive, unconditional, and unequivocal declaration by a party thereto, of a fixed purpose not to perform the contract, in any event or at any time.

*Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773; *Zuck v. McClure*, 98 Pa. 541; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694; *Dalrymple v. Scott*, 19 Ont. App. Rep. 477; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 600, 9 Sup. Ct. Rep. 295; *Pennsylvania Steel Co. v. New York City R. Co.* 117 C. C. A. 503, 198 Fed. 735.

Neither insolvency nor the filing of an involuntary petition in bankruptcy, followed by adjudication, constitutes a breach of an executory contract, to which the insolvent

**Note.**—On the question of damages for anticipatory breach of contract as provable claim in bankruptcy proceeding, see annotation following this case, post, 585.  
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or bankrupt is a party, and from which a provable debt accrues.

*Phenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435, 23 Am. Bankr. Rep. 250; *Re Agra Bank*, L. R. 5 Eq. 160, 37 L. J. Ch. N. S. 121, 16 Week. Rep. 270; *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Re Inman*, 171 Fed. 185, 22 Am. Bankr. Rep. 524, 175 Fed. 312, 23 Am. Bankr. Rep. 566; *Lesser v. Gray*, 8 Ga. App. 605, 70 S. E. 104, affirmed in 236 U. S. 70, 59 L. ed. 471, 35 Sup. Ct. Rep. 227, 34 Am. Bankr. Rep. 8; *Re Imperial Brewing Co.* 143 Fed. 579, 16 Am. Bankr. Rep. 110; *Re Montague*, 32 Am. Bankr. Rep. 106; *Re Swift*, 50 C. C. A. 264, 112 Fed. 315, 7 Am. Bankr. Rep. 374; *Re Pettingill*, 137 Fed. 143, 14 Am. Bankr. Rep. 728; *Re Neff*, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57, 19 Am. Bankr. Rep. 23.

The resulting claim for damages, if bankruptcy is in fact a breach, constitutes nothing more than a contingent claim, which is nonprovable under the present Bankruptcy Act, § 63a.

1 *Remington, Bankr.* 2d ed. § 641; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, 10 Am. Bankr. Rep. 139; *Cotting v. Hooper*, 34 Am. Bankr. Rep. 23; *Re D. Levy & Sons Co.* 208 Fed. 479, 31 Am. Bankr. Rep. 25; *Re American Vacuum Cleaner Co.* 192 Fed. 939, 26 Am. Bankr. Rep. 621; *Williams v. United States Fidelity & G. Co.* 236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. Rep. 289, 34 Am. Bankr. Rep. 181.

For the same reason, as applied to leasehold contracts, subsequent instalments of rent or damages for alleged breach through bankruptcy of one of the parties are not provable in bankruptcy.

*Watson v. Merrill*, 69 L.R.A. 719, 69 C. O. A. 185, 136 Fed. 359, 14 Am. Bankr. Rep. 453; *Colman Co. v. Withoft*, 115 C. C. A. 222, 195 Fed. 250, 28 Am. Bankr. Rep. 328; *Re Roth*, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 24 Am. Bankr. Rep. 588; *Slocum v. Soliday*, 106 C. C. A. 56, 183 Fed. 410, 25 Am. Bankr. Rep. 460.

The contract involved passed by operation of law as part of the bankrupt's estate to the appellant as its trustee.

*Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687, 20 Am. Bankr. Rep. 18.

And as such, the appellant had a reasonable length of time after its election and qualification as trustee to either assume or renounce performance of the contract.

*Sparhawk v. Yerkes*, 142 U. S. 1, 13, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Atchison, T. & S. F. R. Co. v. Hurley*, 82 C. C. A. 453, 153 Fed. 503, 18 Am. Bankr. Rep. 396, L.R.A.1917B.

The cross appeal should be dismissed.

*Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; *Kenney v. Craven*, 215 U. S. 125, 54 L. ed. 122, 30 Sup. Ct. Rep. 64; *Blake v. Openhym*, 216 U. S. 322, 54 L. ed. 498, 30 Sup. Ct. Rep. 309; *New Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Missouri ex rel. Carey v. Andriano*, 138 U. S. 497, 34 L. ed. 1013, 11 Sup. Ct. Rep. 385.

Messrs. William D. Bangs, Rudolph Matz, and John C. Mecham, for the Chicago Auditorium Association:

Bankruptcy constitutes a material breach of executory contracts.

A. Disablement from performance is a breach of contract.

*Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780.

B. Insolvency is often a disablement.

*Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 331; *Bank Comrs. v. New Hampshire Trust Co.* 69 N. H. 621, 44 Atl. 130.

C. And similarly, the appointment of a receiver.

*Pennsylvania Steel Co. v. New York City R. Co.* 117 C. C. A. 503, 198 Fed. 721.

D. Or proceedings for liquidation under special statutes.

*Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295.

E. Bankruptcy is a complete disablement.

*Re Swift*, 50 C. C. A. 264, 112 Fed. 315; *Re Pettingill*, 137 Fed. 143; *Re Neff*, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; *Re Duquesne Incandescent Light Co.* 176 Fed. 785; *Re Dr. Voorhees Awning Hood Co.* 187 Fed. 611.

A claim for damages for a material breach of an executory contract caused by bankruptcy constitutes a provable debt.

*Zavelo v. Reeves*, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; *Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252; *Re Swift*, 50 C. C. A. 264, 112 Fed. 315; *Re Pettingill*, 137 Fed. 143; *Re Neff*, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; *Re Duquesne Incandescent Light Co.* 176 Fed. 785; *Re Dr. Voorhees Awning Hood Co.* 187 Fed. 611; *Pennsylvania Steel Co. v. New York City R. Co.* 117 C. C. A. 503, 198 Fed. 721; *Lesser v. Gray*, 236 U. S. 70, 59 L. ed. 471, 35 Sup. Ct. Rep. 227; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

The present case does not involve an anticipatory breach of contract.

*Williston, Wald's Pollock, Contr.* pp. 362,

363; *Lowe v. Harwood*, 139 Mass. 135, 29 N. E. 538.

The claim is provable, although the damages are unliquidated and the trustee has an option to continue the performance of executory contracts.

*Frederic L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332; *Re Swift*, 50 C. C. A. 264, 112 Fed. 315; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; *Cobb v. Overman*, 54 L.R.A. 369, 48 C. C. A. 223, 109 Fed. 65.

The rule as to the material breach of a covenant to pay rent does not apply to the material breach of executory contracts.

*Co. Litt.* p. 292b, §§ 512, 513; *Re Roth*, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667; *Watson v. Merrill*, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359; *Slocum v. Soliday*, 106 C. C. A. 56, 183 Fed. 410.

An option in one party of cancellation upon stipulated contingencies does not, after material breach by the other party, affect the recovery of damages for breach of contract by that party for whose benefit the option was inserted.

*Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757.

The general policy of the Bankruptcy Act favors the provability of claims for damages upon executory contracts matured by bankruptcy.

*Williams v. United States Fidelity & G. Co.* 236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. Rep. 289.

Mr. Justice Pitney delivered the opinion of the court:

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held contract relations with the Chicago Auditorium Association under a written agreement made between them February 1, 1911, which had been partially performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the city of Chicago; that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of \$6,000, in monthly instalments of \$100 each, and for L.R.A.1917B.

the livery privilege the sum of \$15,000, in monthly instalments of \$250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at reasonable rates at all times during the continuance of the privileges. It was further agreed as follows:

"The party of the first part [Chicago Auditorium Association], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so canceled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part [Scott Transfer Company] from liability on the covenants and agreements of this instrument."

The contract authorized the Association, in the event of default by the Transfer Company in the payment of any instalment of money due, or in the performance of any other covenant, if continued for thirty days, to terminate the privileges at its option, without releasing the Transfer Company from liability upon its covenants. Should either or both of the privileges be thus terminated before January 31, 1916, the Association was to be at liberty to sell the privileges, or make a new or different contract for the remainder of the term, but was not to be obliged to do this, and the Transfer Company, unless released in writing, was to remain liable for the entire amount agreed to be paid by it.

Up to the time of the bankruptcy this contract remained in force, and neither party had violated any of its covenants. The trustee in bankruptcy did not elect to assume its performance, and the Association entered into a contract with other parties for the performance of the baggage and livery service, and obtained therefrom the sum of \$234.69 monthly as compensation for those privileges. On February 28, 1912, it exhibited its proof against the bankrupt estate, claiming an indebtedness of \$6,537.94, of which \$311.20 had accrued prior

to the bankruptcy proceedings, and the remainder was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through the bankruptcy proceedings. Of this amount \$691.86 represented the loss incurred during the first six months of bankruptcy. Objections filed by the trustee were sustained by the referee, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings. On review, the district court sustained this decision. On appeal to the circuit court of appeals, the order of the district court was reversed, and the cause remanded with direction to allow \$691.86 upon the claim, and to disallow the remaining portion. 132 C. C. A. 452, 216 Fed. 308.

An appeal to this court by the trustee in bankruptcy was allowed, under § 25b-2 of the Bankruptcy Act (of July 1, 1898, chap. 541, 30 Stat. at L. 544, 553, Comp. Stat. 1913, §§ 9585, 9609), upon a certificate by a justice of this court that the determination of the question involved was essential to a uniform construction of the act throughout the United States. This is No. 162. Thereafter a cross appeal by the Auditorium Association was allowed by one of the judges of the circuit court of appeals. This is No. 174.

A motion is made to dismiss the cross appeal, and this must be granted. In the absence of the certificate prescribed by § 25b-2, the sole authority for an appeal from a decision of the circuit court of appeals, allowing or rejecting a claim, is found in § 25b-1: "Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States." This limits such appeals to cases where Federal questions are involved, of the kind described in § 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214). The motion to dismiss is resisted upon the ground that the claim of the Association to damages beyond a period of six months was denied by the court of appeals as not constituting a provable debt in bankruptcy, and that a Federal question is thus necessarily presented, provability depending upon a construction of the bankruptcy act. An examination of the opinion of that court, however, shows that while it held that damages for anticipatory breach of the contract were provable, it held that the contract itself, because of the option reserved to the Auditorium Association to cancel it on six months' notice, was mutually obligatory for that term only, and hence no damages beyond that period were

allowable. This involved no Federal question. *Chapman v. Bowen*, 207 U. S. 89, 92, 52 L. ed. 116, 117, 28 Sup. Ct. Rep. 32.

But, in view of the general importance of the question of the amount allowable in its relation to the questions involved in the trustee's appeal, we have concluded that a certiorari should be allowed in lieu of the cross appeal.

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. *Roehm v. Horst*, 178 U. S. 1, 18, 19, 44 L. ed. 953, 960, 961, 20 Sup. Ct. Rep. 780. And see *O'Neill v. Supreme Council*, A. L. H. 70 N. J. L. 410, 412, 57 Atl. 463, 1 Ann. Cas. 422. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. It was, however, held in *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 274, 28 L. ed. 423, 426, 4 Sup. Ct. Rep. 390, where a life insurance company became insolvent and transferred its assets to another company, that a policy holder was entitled to regard his contract as terminated and demand whatever damages he had sustained thereby. And see *Carr v. Hamilton*, 129 U. S. 252, 256, 32 L. ed. 669, 670, 9 Sup. Ct. Rep. 295. In support of the provability of the claim in controversy, *Ex parte Poliard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252; *Re Swift* (C. C. A. 1st) 50 C. C. A. 264, 112 Fed. 315, 319, 321; *Re Stern* (C. C. A. 2d) 54 C. C. A. 60, 116 Fed. 604; *Re Pettingill* (D. C. Mass.) 137 Fed. 143, 146, 147; *Re Neff* (C. C. A. 6th) 28 L.R.A. (N.S.) 349, 84 C. C. A. 561, 157 Fed. 57, 61, are referred to; and see *Pennsylvania Steel Co. v. New York City R. Co.* (C. C. A. 2d) 117 C. C. A. 503, 198 Fed. 721, 736, 744. To the contrary, *Re Imperial Brewing Co.* (D. C. Mo.) 143 Fed. 579; *Re Inman* (D. C. Ga.) 171 Fed. 185, s. c. 175 Fed. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *Re Ellis*, 98 Fed. 967; *Re Pennewell*, 55 C. C. A. 571, 119 Fed. 139; *Watson v. Merrill*, 69 L.R.A. 719, 69 C. C.



A. 185, 136 Fed. 359; *Re Roth*, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667; *Colman Co. v. Withoft*, 115 C. C. A. 222, 195 Fed. 250. Cases of the latter class are distinguishable because of the "diversity between duties which touch the realty, and the mere personality." *Co. Litt.* 292, b, § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9654), to the extent that it had an option to perform it in the place of the bankrupt (see *Sparhawk v. Yerkes*, 142 U. S. 1, 13, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 322, 35 L. ed. 1025, 1028, 12 Sup. Ct. Rep. 235); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and dissolving the corporation, in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the state, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in *Roehm v. Horst*, 178 U. S. 19, 44 L. ed. 960, 20 Sup. Ct. Rep. 780: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending con-

tracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams v. United States Fidelity & G. Co.* 236 U. S. 549, 554, 59 L. ed. 713, 716, 35 Sup. Ct. Rep. 289. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine of *Roehm v. Horst*, supra.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.* 212 U. S. 445, 448, 53 L. ed. 591, 593, 20 Sup. Ct. Rep. 332. It is true that in *Zavelo v. Reeves*, 227 U. S. 625, 631, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. As was held by the same learned judge in *Re Pettingill*, 137 Fed. 143, 147: "The test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disabling himself from performing the

contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenabling and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9647)." It was in effect so ruled by this court in *Lesser v. Gray*, 236 U. S. 70, 75, 59 L. ed. 471, 475, 35 Sup. Ct. Rep. 227, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the circuit court of appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim.

The denial of all damages except such as accrued within six months after the filing of the petition was based upon the ground that the contract reserved to the Association an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months. It was held that because of this the contract was mutually obligatory for that term only, and uncertain and without force for any longer term of service in futuro, within the ruling of this court in *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct.

Rep. 757. In that case the contract was to pay to a divorced wife "during her life, or until she marries, for her maintenance and support, yearly, the sum of \$500;" and it was held that for instalments falling due after bankruptcy the husband remained liable, notwithstanding his discharge, on the ground that the wife's claim for such payments was not provable because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. The court referred to the 1903 amendment of § 17 of the Bankruptcy Act (32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9601), relating to debts not affected by a discharge, and including among these a liability for alimony due or to become due for maintenance or support of wife or child. This, while enacted after the *Dunbar* suit was begun, and not applicable to it, was cited as showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support of his wife or children. The authority of that decision cannot be extended to cover such a case as the present. Here the obligation of the bankrupt was clear and unconditional. The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges. It does not lie in the mouth of the latter, or of its trustee, to say that its service would not be satisfactory, and there is no presumption that otherwise it would have been advantageous to the Association to exercise the option. It results that the decree, in so far as it limits the provable claim to a period of six months after the bankruptcy, must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

No. 162. Decree affirmed.

No. 174. Appeal dismissed, certiorari allowed, and decree reversed.

### **Annotation—Bankruptcy: damages for anticipatory breach of contract as provable claim.**

The decision in *CENTRAL TRUST CO. v. CHICAGO AUDITORIUM ASSO.* ante, 580, to the effect that damages for an anticipatory breach of contract constitute a claim provable in a bankruptcy proceeding as one "founded upon a contract, express or implied," within the meaning of § 63a-4 of the Federal Bankruptcy Act, having been rendered by the court of last resort, seems conclusively to settle the law upon this question as well as that, where the obligation of the bankrupt is clear and unconditional, the damages should be for the entire unexpired

term of the contract, and are not limited to the period of time which, by the terms of the contract, must intervene between notice of an option to revoke and the taking effect of the notice. And, in connection with these rules, it is also worthy of note that this case is also authoritative upon the proposition that bankruptcy proceedings, whether voluntary or involuntary, are the equivalent of an anticipatory breach of an executory contract (decisions of the earlier Federal courts both pro and con upon this question are cited in the opinion), and that

while debts provable under § 63a-4 include only such as existed at the time of the filing of the petition in bankruptcy (this rule was established by *Zavelo v. Reeves* (1913) 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664), damages for a breach of contract wrought by the filing of the

petition constitute an existing debt within the meaning of the rule.

As to effect upon liability of tenant for unaccrued rent, of re-entry of landlord after bankruptcy of tenant, see annotation to *Louis K. Liggett Co. v. Wilson*, L.R.A.1917A, 205. G. J. C.

## ARKANSAS SUPREME COURT.

OSCAR WILLIAMS, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 188 S. W. 826.)

### Contempt — refusal of convict to testify.

1. A court may punish for contempt a convict who refuses to testify when brought before it as a witness although there is no statutory authority to compel or to provide for his attendance.

*For other cases, see Contempt, I. c, in Dig 1-52 N. S.*

### Criminal law — suspension of sentence to punish for contempt.

2. The court which sentenced one convicted of murder cannot, after he has begun to serve his sentence, suspend it for the purpose of punishing him for contempt for refusal to testify in another case.

*For other cases, see Criminal Law, IV. g, in Dig. 1-52 N. S.*

### Same — solitary confinement — unusual punishment.

3. Solitary confinement not provided for by law is an unusual punishment within the meaning of a constitutional provision forbidding cruel and unusual punishment.

*For other cases, see Criminal Law, IV. b, in Dig. 1-52 N. S.*

(July 10, 1916.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Pulaski County convicting him of contempt of court. Reversed.

The facts are stated in the opinion.

Mr. Robert L. Rogers for appellant.

Messrs. Wallace Davis, Attorney General, and Hamilton Moses, Assistant Attorney General, for the State.

McCulloch, Ch. J., delivered the opinion of the court:

The appellant, Oscar Williams, has

brought here for review the record of the proceedings of the circuit court of Pulaski county, wherein he was adjudged by that court to be in contempt, and sentenced, as a punishment for said contempt, to "solitary confinement" in the county jail of Pulaski county for a period of four months. It appears from the record that appellant was, on April 19, 1916, tried upon an indictment charging him with murder in the second degree and was convicted of that offense and sentenced to the state penitentiary for a term of five years; and on April 28th he was duly sentenced by the court, and was delivered to the state penitentiary to begin his sentence.

L. B. King was indicted on the charge of being an accessory after the fact to the crime committed by appellant, and was placed on trial in the Pulaski circuit court. Appellant was brought out of the penitentiary to attend the trial of King, and was by the state introduced as a witness; but he refused to testify in response to certain questions propounded to him by the prosecuting attorney, whereupon the trial court remanded appellant to the county jail until the next day. It is stated in the briefs, and not denied, that King was acquitted, though it does not appear that that fact was brought into the record in the present proceedings. At any rate, the appellant was subsequently brought out of jail upon order of the trial court, and an order was made, setting aside the judgment of conviction, and he was put on trial before the court for contempt in refusing to testify in the King trial. Certain questions were propounded to appellant by the court and by the prosecuting attorney as to his reason for refusing to testify against King; and as he gave no satisfactory excuse for such refusal, the court adjudged him to be in contempt, and ordered him confined in the county jail in "solitary confinement" until September 16, 1916, a

**Note.** — As to punishment of convict for failure or refusal to testify or other contempt, see annotation following this case, post, 588.

Generally, as to power of court to suspend sentence or stay execution of sentence, see notes to *State v. Abbott*, 33 L.R.A. L.R.A.1917B.

(N.S.) 112; *Fuller v. State*, 39 L.R.A. (N.S.) 242; and *Re Hart*, L.R.A.1915C, 1169.

The power to commit after expiration of term of sentence is discussed in the note to *Ex parte Clendenning*, 19 L.R.A. (N.S.) 1041.

period of four months from the date of judgment.

It is contended in the first place that there was no statutory authority for the court to compel, or to provide for, the attendance of appellant as a witness; but we pass over that point without discussion, as we are of the opinion that when appellant was brought into court, by whatever means that were adopted, the court had the power to compel him to testify and to punish him for contempt for his refusal. The statute (Acts 1913, p. 961) makes a convict competent as a witness, and the court had jurisdiction over his person when he came, or was brought, into court.

We pass, therefore, to the more serious question whether or not the court had the power to set aside the former judgment of conviction of felony, which judgment was then being enforced, for the purpose of imposing punishment for contempt and enforcing the judgment. While the question is not entirely free from doubt, we are of the opinion that the court possessed no such power. The attorney general relies upon the established doctrine that all courts have continuing powers over their own judgments during the terms at which they are rendered; but, while that power is an undoubted one, there are limitations upon the extent to which it may be exercised. There seems to be no question about the power of the court to set aside a judgment of conviction before the convict has begun serving his sentence, nor is there any doubt that the court has the power, at any time during the term, to set aside a judgment for the correction of errors. Here we have a case of the court attempting to set aside a judgment, not before the term of the sentence was begun, nor for the purpose of correcting any errors, but merely for the purpose of imposing another sentence during the period of the suspension of the judgment.

The court, in its order imposing the punishment of confinement in the jail, ordered that the appellant be brought into court at the expiration of the term for further proceedings in the original cause. The law takes no account of parts of a term of sentence, which continues from beginning to end as one term. Therefore the court was without power to separate it into parts for the purpose of giving time to punish for other offenses. This does not mean, of course, that courts are without power to punish convicts for other crimes. On the contrary, we have held that a convict, serving a life term, may be tried and executed

for a capital offense. *Bell v. State*, 120 Ark. 530, 180 S. W. 186. That is so because the lower punishment of imprisonment is merged into the higher one, the infliction of the death penalty.

There can be no higher punishment for contempt than that which had already been imposed on appellant by his conviction of a felony. A punishment by confinement in the county jail might have been imposed to run after the expiration of his other sentence, but there is no such punishment known to our law as "solitary confinement." In that sense it is an unusual punishment, which is expressly prohibited by the Constitution of the state, which declares that cruel and unusual punishment shall not be inflicted. Const. 1874, art. 2, § 9. That provision of the Constitution is directed against the cruel or unusual character of punishment, and not against the duration of the punishment. *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34. And that provision applies to punishment for contempt. *Ex parte Keeler*, 45 S. C. 537, 31 L.R.A. 678, 55 Am. St. Rep. 785, 23 S. E. 865. The term "solitary confinement" is a relative one, and there is no way of knowing the precise extent to which it may be carried. A prisoner may be put in a cell to himself without being entirely excluded from communication, or he may be confined in a place so remote and under circumstances so peculiar that the severity of the punishment would be augmented to a very considerable degree. Misdemeanors are punishable in this state by fine or imprisonment, or both, and any other character of punishment must necessarily be regarded as unusual within the prohibition of the Constitution.

We conclude, therefore, that the judgment of the Circuit Court for the confinement of appellant in jail as a punishment for the contempt, to begin before the expiration of his term in the penitentiary, is void; and also that any judgment of confinement in any unusual manner is prohibited. It follows from this that the order of the court setting aside the judgment was without authority, and the judgment of conviction stands as if it had not been set aside, and appellant must be remanded to the keepers of the penitentiary for confinement under that judgment.

The judgment for the contempt is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Petition for rehearing denied.

### Annotation—Punishment of convict for failure or refusal to testify or other contempt.

**WILLIAMS v. STATE**, ante, 586, in declaring that a convict who has been brought into court may be compelled to testify and upon his refusal be punished, finds support in *Newsum v. State* (1885) 78 Ala. 407, which affirmed a judgment for contempt against a witness who refused to testify before the grand jury, he having been brought before the grand jury on order of the court, from prison, where he was undergoing sentence. The contention of this case was that the court had no power to impose a fine as the witness had not been subpoenaed; but the court held that a witness is subject to the penalty for contempt though not subpoenaed, where, being in prison, he is brought before the grand jury at their request by order of the court. The court stated that "it frequently happens that witnesses wanted before the grand jury are in prison, as this one was, and cannot be commanded by a subpoena. In such cases the custom is believed to be general, if not universal, to obtain from the court an order that the prisoner be carried before the grand jury, there to testify. We can perceive neither harm nor error in such practice."

The question involved in **WILLIAMS v. STATE**, as to the way or manner of punishing a convict who refuses to testify, does not seem to have been discussed in other reported cases.

The question of the authority of the court to compel or provide for the attendance of convicts as witnesses is not within the scope of this note. In this connection it is to be observed that the court in **WILLIAMS v. STATE** refused to discuss that point, stating that when a convict was brought before the court, by whatever means, it considered that it had the power to compel him to testify and to punish him for contempt for his refusal.

As to competency of criminals as witnesses before grand jury, see note to *Com. v. Hayden*, 28 L.R.A. 318.

As to pardon or commutation of sentence as affecting competency of witness convicted of crime, see note to *Thompson v. United States*, 47 L.R.A. (N.S.) 206.

Generally, as to the right to put upon trial one undergoing imprisonment for another offense, see note to *Re Trammer*, 41 L.R.A. (N.S.) 1095. J. H. B.

### ARKANSAS SUPREME COURT.

**AMERICAN NATIONAL BANK et al.,**  
Appts.,  
v.  
**THOMAS A. DOUGLAS.**

(— Ark. —, 189 S. W. 161.)

#### Garnishment — of bank deposit — dismissal — effect.

The dismissal of a proceeding in which a bank deposit had been garnished renders the deposit subject to check, although the bank has been notified of an intention to appeal, if no appeal has actually been taken or supersedeas bond given.

*For other cases, see Garnishment, II. c, in Dig. 1-52 N. S.*

(October 30, 1916.)

**A** PPEAL by defendants from a judgment of the Circuit Court for Sebastian County in plaintiffs' favor in a suit to com-

Note. — For possibility of appeal from dismissal of garnishment or attachment as affecting right to withhold property from debtor, see annotation following this case, post, 591.  
L.R.A.1917B.

pel payment of money on deposit in the defendant bank. Affirmed.

#### Statement by Wood, J.:

The United Mine Workers of America, district 21, is a voluntary unincorporated association, composed of many members. The appellees were members of that organization, and appellee Douglas was its secretary and treasurer. We will hereafter, for convenience, designate the organization as the "district."

On September 1, 1914, the district had on deposit with the American National Bank, of Fort Smith, Arkansas, which, for convenience, we will hereafter designate "bank," the sum of \$8,557.37. These funds were a general deposit and subject to the check of the district through Douglas, its treasurer. In September, 1914, the Coronado Coal Company sued the district in the United States district court for damages alleged to be due it on account of certain torts alleged to have been committed by the members of the district. Writs of garnishment and attachment were issued out of the district court and served on the bank on September 2, 1914. On October 20, 1915, the district court sustained a demurrer to the com-

plaint of the coal company and entered a judgment dismissing same. On October 25, 1915, the United States court entered a judgment dismissing the attachment and the garnishment against the bank and discharging the bank. On October 27, 1915, the district drew its check on the bank and presented same for the full amount of its deposit, which the bank declined to pay, and the check was protested for nonpayment. On the same day the district instituted suit in the Sebastian circuit court for the money. The bank answered, admitting that it had on general deposit the amount of funds claimed by the district; but alleged that said check had not been paid for the reason that the writ of garnishment had been issued by the United States court in a suit pending in that court between the coal company and the district, whereby the bank was ordered to hold the funds subject to the orders and directions of the United States court, and that the bank had been informed that the Federal court had dismissed the action wherein the writ of garnishment was issued, but that before demand was made upon the bank for the payment of the check the coal company notified the bank that it had prayed an appeal from the judgment of the Federal court dismissing the garnishment, and that the appeal would be perfected within the time allowed by law, and that a supersedeas bond would be given in the Federal court, and that the coal company would hold the bank liable if it paid out the funds in its hands belonging to the district.

The president of the bank testified that the bank had declined to cash the check for the reason that a day or two before it was presented he had been notified by the attorneys for the coal company in the Federal court that an appeal would be taken immediately in that cause from the judgment of that court, and that a supersedeas bond would be given. The bank was notified that, in the event the money was paid out before their appeal could be perfected and before the appellate court could pass upon the judgment dismissing the action of the coal company, that the bank would be held liable by the coal company for the funds. He had not only been notified orally, but the bank had been served with written notice. That on the 28th of October, 1915, the attorneys for the coal company had served the bank with written notice that they were preparing to take an appeal or writ of error from the judgment rendered by the United States district court and to supersede the judgment, which appeal, in their opinion, would have the effect to hold the funds in the hands of the bank pending such appeal. He stated that the bank was L.R.A.1917B.

perfectly willing to pay over the funds to the district, but that its attorney had advised that it would not be safe to do so, and that the bank only wished to protect itself, and had no other interest in the funds; that it feared that it might have to pay the same twice.

One of the attorneys for the coal company testified that, as soon as he learned that demand had been made on the bank by the district for the payment of the funds which had been garnisheed, he notified the bank that the plaintiffs in the Federal court case had appealed from the judgment of that court dismissing the suit therein, and that he later handed to the attorney for the bank a letter to that effect; that he had been instructed by his clients, the plaintiffs in the Federal court case, to perfect the appeal immediately therein, and that he had notified the bank that the appeal would be perfected at the earliest possible moment, and supersedeas bond given for the purpose of tying up and holding the funds garnisheed and attached in the hands of the bank.

A certified copy of the judgment of the Federal court was introduced in evidence, showing that that court, on October 25, 1915, entered a judgment dismissing the writs of garnishment and attachment, and discharging the bank from said writs. The record also shows that "plaintiffs at the time requested the court to allow a reasonable time in which to present to the appellate court the question of tendering a supersedeas bond so as to hold the attachments and garnishments herein in their present status. This request the court denied, and the plaintiffs at the time excepted to the ruling of the court in discharging the attachments and garnishments, and also in the refusal of the court to allow the above named."

Upon the above facts the court rendered a judgment in favor of the plaintiffs below, appellees here, for the full amount of their claim, and from that judgment this appeal comes.

Messrs. Hill, Brizzolara & Fitzhugh for appellants.

Messrs. Covington & Grant for appellees.

Wood, J., delivered the opinion of the court:

In *Lewis v. Faul*, 29 Ark. 470, this court, speaking of the remedy by attachment and garnishment, said it "is, at best, an extraordinary and harsh remedy, in derogation of the common law, depending upon positive legislation for its existence, and

he who invokes it must follow the law, at least in substance."

And in *Giles v. Hicks*, 45 Ark. 271, 276, we said: "Garnishment is a purely statutory proceeding, which cannot be pushed beyond the authority of the statute."

Our attention has not been directed to any statute, and we know of none, that authorizes the garnishee to hold funds in his hands belonging to the defendant in the action after judgment has been rendered dismissing the cause of action against the defendant and discharging the writ of garnishment. The effect of a judgment dismissing the cause of action against the defendant and discharging the writ of garnishment was to place the garnishee bank and the defendant district in the same relation that they sustained to each other before the writ of garnishment was served upon the bank. The bank, according to the undisputed proof, before the writ of garnishment was served, held the funds of the district as a general deposit, subject to the check of the district. Inasmuch, therefore, as it appears that no appeal had actually been taken from the judgment of the district court dismissing the writ of garnishment at the time the check of the district was presented to the bank for payment, the bank had no right to refuse such payment.

Of course, if an appeal had been actually taken from the judgment dismissing the writ of garnishment, or if a supersedeas bond had been given, then the bank would have been justified in refusing to cash the check, under the doctrine announced by this court in *Harrison v. Trader*, 29 Ark. 85. In that case, speaking of a lien by attachment, this court, quoting from *Mr. Drake*, on Attachments, said: "The dissolution of an attachment necessarily discharges from its lien the effects or credits on which it may have been executed, whether reduced to possession by the officer, or subjected in the hands of garnishees. When dissolved, the defendant is entitled to a return of the property on demand, unless the judgment of dissolution be suspended by writ of error or appeal. This, it is said, takes away the defendant's right to demand the property, and the officer, if he have notice of the writ of error or appeal, would not be justified in returning the property."

And further: "Our statute extends only to supersedeas of executions, all other features of the court's action are suspended by an appeal or writ of error; and if the cause is reversed, the rights of parties stand as though no action had ever taken place in the inferior court."

But the facts disclosed by this record are that at the time the district made demand on the bank for the payment of its check

there was no appeal actually pending from the judgment dismissing the writ of garnishment; neither had there been any supersedeas bond filed, or any order of the district court suspending or superseding the effect of the judgment dismissing the writs of attachment and garnishment. On the contrary, the record here shows that the district court in which the judgment was rendered expressly refused to grant the plaintiffs in the action time in which to present a supersedeas bond. True, the testimony showed that at the time the district presented its check to the bank the latter had been notified that an appeal would be taken immediately from the judgment dismissing the writ of garnishment, and that same would be perfected and a supersedeas bond given for the purpose of holding the funds in statu quo. But this testimony only shows that an appeal had not in fact been taken, but was only contemplated, and that no supersedeas bond had been filed, and that, in fact, no order of the district court had been made suspending or superseding the judgment dismissing the writs of attachment and garnishment.

It thus appears that at the time the district presented its check to the bank for payment the bank occupied precisely the same relation to the district as it did before the writs were served.

In the absence of a statute prescribing that where a judgment has been entered dismissing a writ of garnishment and discharging the garnishee, that the garnishee may retain possession of the property of the defendant during the time allowed for an appeal, or until a reasonable time within that period has elapsed for the perfecting of the appeal or filing a supersedeas bond, the garnishee would have no authority under the law, and therefore no right, to deprive the defendant of the possession of his property.

In *Sherrod v. Davis*, 17 Ala. 312, it is said: "But after the judgment of the court is final and complete in favor of the defendant, unless it is superseded by writ of error or appeal, the right of the defendant to have the property restored to him is unquestionable, and it is therefore the duty of the sheriff, on demand, to deliver it to him."

See also 8 C. J. § 1091, note 83, and other cases there cited.

The necessary consequence of the judgment in favor of the district dismissing the cause of action against it and discharging the bank from the writs of attachment and garnishment was to restore to the district the right to check out the funds deposited by it with the bank; and it follows from what we have said that simple notice to

the bank, that an appeal would be immediately prosecuted and supersedeas bond filed, would not justify the bank in refusing to pay over the money to the district.

The judgment of the Circuit Court so holding is therefore correct, and it is affirmed.

**Annotation—Possibility of appeal from dismissal of garnishment or attachment as affecting right to withhold property from debtor.**

There is a decided conflict among the authorities in those jurisdictions where in the question as to the length of time, if any, which property which has been garnished or attached must be held after dismissal of the writ for the purpose of allowing the plaintiff to perfect an appeal, has been considered, some of the courts holding that the officer or garnishee, in the absence of direction by the court or controlling statutory provision, is not bound to retain the property, or, in other words, that the lien is not preserved unless an appeal from the order of dissolution is taken instantaneously, or the court directs that the property be held until an appeal can be perfected; other courts holding that the property must be held for a reasonable time, which is such a time as is sufficient to enable the plaintiff to take a prompt appeal; and one court, at least, holding that the appeal may be taken at any time during which an appeal in an ordinary case could be taken, which means that the property must be held until the expiration of the period prescribed by general statutory provisions relating to appeals, unless a delivery is sooner ordered by the court. These classes of cases will be taken up in the order enumerated.

Thus in Alabama, under statutes which are silent as to the possession and control of money which has been garnished after dismissal of the garnishment, it has been held (*AMERICAN NAT. BANK v. DOUGLAS*, ante, 588) that the dismissal of a proceeding in which a bank account had been garnished rendered the deposit subject to the order of the depositor although the garnishee bank had been notified by the plaintiff of an intention to appeal, no appeal having actually been taken or supersedeas bond issued before the presentation of the order to the bank.

And in Minnesota, where the statute is silent upon the question of the disposal of property after dismissal of an attachment, the case of *Ryan Drug Co. v. Peacock* (1889) 40 Minn. 470, 42 N. W. 298, involved the question as to the duty of the sheriff to retain the attached property after the dissolution of the writ so as to enable the plaintiff to determine

whether he would appeal, and to perfect the appeal and stay if he decided to take that course; and it was expressly ruled that the officer was not bound to retain the property, the court saying: "As to what is the duty of the sheriff in respect to the attached property upon the dissolution of the attachment, *Drake*, *Attachm.* § 426, states the general rule that 'the special property of the officer in the attached effects is at an end, and he is bound to restore them to the defendant, if he is still the owner of them, or, if not, to the owner.' This is certainly the logical rule, for, the writ being his only authority for keeping the property from the owner, such authority is gone when the writ is dissolved. It is true that under our practice the plaintiff may, by appealing from the order dissolving the writ and giving the bond for a stay, suspend the operation of the order, and that such suspension will relate back to the date of the order, so that, if the officer still has the property, his right to hold it is restored; and it may also be, as between the parties to the writ, that, if between the date of the order and the appeal with a stay the sheriff has returned the property to the defendant, the appeal and stay reinstates the lien so that the plaintiff may require the sheriff to retake the property. Neither of these, however, is this case. Here the question is, Is it the duty of the sheriff to retain the property after the dissolution of the writ, which is his only warrant for holding it, to enable the plaintiff to determine whether he will appeal, and to perfect the appeal and stay, if he decides to take that course? The statute is silent on the point. If it be his duty to still hold the property, for how long must he hold it? Some authorities suggest that he should hold it for a reasonable time. But who is to determine what is a reasonable time? If that be the rule, the officer will be liable to the plaintiff in case he return the property to the defendant before the end of a reasonable time, and to the defendant in case he refuse to return it on demand after such reasonable time. The position of the officer would be a hard one if he must take the risk of the court or jury trying



the action against him agreeing with him as to what is a reasonable time. We think it is for the plaintiff, and not the sheriff, to do what may be necessary to preserve the interests of the former in case of a dissolution of the writ. This he may do by procuring and serving on the officer an order directing him, in case the writ shall be dissolved, to retain the property, or staying the operation of the order dissolving in case it shall be made."

And in Alabama it has been held that where an attachment has been dissolved the debtor is entitled to his property and that the sheriff cannot lawfully withhold it from him unless the dissolution was actually superseded by the writ of error or appeal of which the sheriff had notice before the property was returned. *Sherrod v. Davis* (1850) 17 Ala. 312, quoted in *AMERICAN NAT. BANK v. DOUGLAS*, ante, 588, and holding that the sheriff was not liable for returning the property to the debtor after dismissal of the attachment but before a writ of error was sued out, notwithstanding the plaintiff procured a reversal of the judgment and ultimately a judgment in his favor.

So in Wisconsin it has been held (*Stannard v. Youmans* (1901) 110 Wis. 375, 85 N. W. 967) that a discharge of a garnishee protects him in disposing of the property after such attachment and before a reversal, unless the lien has been continued prior to such disposal by proper order or stay of proceedings pending an appeal.

And in Kansas a constable has no right to hold attached property between the rendition of a judgment in a justice of the peace court in defendant's favor, in which the property is ordered to be returned to the debtor, and the filing of an appeal bond, even if such a bond would carry the attachment proceeding to an appellate court,—which it is held it would not do, the statute providing that if judgment be rendered for defendant the garnishee should be discharged. *Becker v. Steele* (1889) 41 Kan. 173, 21 Pac. 169. And the same is true of similar proceedings in the district court, unless the court orders that the lien be preserved pending proceedings in error, as by statute it has the power to do. *Miller v. Dixon* (1895) 2 Kan. App. 445, 42 Pac. 1014, holding that the debtor could transfer a good title to the attached property after the attachment was dissolved, the court not having ordered that the lien be preserved.

So in the New York case of *Moore v. L.R.A.* 1917B.

*Somerindyke* (1856) 1 Hilt. (N. Y.) 199, it was held that where an attachment was issued it was the duty of the officer to take the property and keep the same to satisfy any judgment that might be recovered on an attachment, but that as soon as defendant obtained judgment the right to retain the goods ceased and the defendant in attachment was entitled upon demand to have them restored to his possession irrespective of any appeal or right of appeal; but this evidently was upon the theory that even a reversal of judgment would not restore the lien, but that a new action to enforce the claim would be necessary.

And upon this phase of the question see *Harrison v. Trader* (1874) 29 Ark. 85, which quotes with approval from *Drake on Attachments*, §§ 411, 412. This case and the provisions quoted from *Drake* are in turn quoted in the *AMERICAN NAT. BANK CASE*, ante, 588.

As before stated, some decisions in effect lay down the rule that property should be retained a reasonable length of time after dismissal of a writ of garnishment or attachment, so as to enable the plaintiff, if he so desires, to perfect an appeal or writ of error. Thus in Iowa it has been held that as between the immediate parties the property must be retained a reasonable time, during which the plaintiff may appeal. *Danforth v. Carter* (1856) 4 Iowa, 230, holding that attached property was still liable, although it was returned to the debtor after dismissal of the attachment but before an appeal was taken, such appeal having been taken four days after the dismissal of the writ and within the term. The court in this case, in answering the question whether the officer must wait indefinitely to see whether an appeal would be taken before returning the attached property, said that he must wait only a reasonable time, the plaintiff being required to perfect his appeal "forthwith" or lose all right to same, and that if the defendant desired an immediate return of the property the proper procedure was to notify the other party and move the court for such a return. But the rule is otherwise in Iowa where the rights of third parties to the attached property are involved. Thus in *Danforth v. Rupert* (1861) 11 Iowa, 547, which was an action against the clerk of the court to recover money paid by him to defendant in attachment proceeding after dissolution of an attachment but before an appeal therefrom was taken, the court held that the clerk was

a third party within the meaning of the decision in *Danforth v. Carter*. (Iowa) supra, and upheld the following instruction: "The question for the jury to decide is, whether the defendant, Rupert, at the time he paid the money to Bissell [the debtor] did it under such circumstances as render him liable therefor in this action. If defendant knew, at the time he so paid it over, that the plaintiffs in the original attachment suit, Danforth, Davis & Company, were about to supersede the judgment of the district court dismissing the attachment, by an appeal to the Supreme Court, or if he had reasonable grounds for such a belief, in either event it would be your duty to find for the plaintiffs. On the other hand, if Rupert paid the money over in good faith, without any ground for such belief, and because the district court had dissolved the attachment, then your verdict should be for the defendant;" saying, "it is true that the safest and most correct course would be for the clerk to obtain an order of court directing him to pay over the money before so doing. Yet we cannot say that he is liable if he does pay over the money in good faith, after the attachment has been dissolved, the suit ended, and without any notice of an appeal given. Is it not the duty of the plaintiff, whose attachment has been dissolved, to be vigilant, if he desires his cause to stand in statu quo? The ruling is against him, and he is the only one who can determine whether it is final or not. Had the plaintiffs, who were the only parties interested in having the money remain in the clerk's hands, notified him that they had appealed, and after such notice the defendant had parted with the money, he would have been liable." Later in Iowa, by virtue of a statutory provision, the lien of an attachment was preserved for two days after dismissal, during which the plaintiff could appeal, provided he announced, at the time the order discharging the attachment was made, his purpose to appeal therefrom. See *Ryan v. Heenan* (1889) 76 Iowa, 589, 41 N. W. 367, construing and applying Iowa Code, § 3019. And upon the point that an appeal must be made promptly, i. e., within a reasonable time, to preserve the lien of a dissolved attachment, see the dissenting opinion of Biggs, J., in *Newman v. York* (1898) 74 Mo. App. 292, which is set out in the following paragraph.

In Missouri it has been held (*Newman v. York* (Mo.) supra, that the plaintiff

upon dissolution of an attachment has the full time allowed by law for taking appeals in ordinary cases, and that it is the duty of the officer having the property in his possession, if timely notified by plaintiff of an intention to appeal, to hold the property until the plaintiff has had time and opportunity to perfect such an appeal. However, Biggs, J., strongly dissented from this ruling, he maintaining that the officer was only bound to retain the property for a reasonable time so as to enable the plaintiff to take a prompt appeal, and that whether an appeal is perfected within a reasonable time under the circumstances is a question for the jury.

#### Under statute.

In a considerable number of jurisdictions, the statutes which created the right to procure a writ of attachment or garnishment also have provisions relating to the disposal of property involved after a dismissal of the writ, some of which, as is shown by the adjudications, are instructive upon the question under consideration in this annotation.

Thus in Nebraska it is expressly provided, by statute relating to "the retention of attached property pending a review on error of an order discharging the attachment," that "when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court or judge shall fix the number of days, not to exceed twenty, in which such party may file a petition in error, during which time the property attached shall be held by the sheriff or other officer." Under this statute the court upon dissolving an attachment may fix a time, not exceeding twenty days, in which to file a petition in error and to give the required undertaking, during which time the property must be held by the officer having possession of same without any undertaking having been given; but if no undertaking is given within the required period the officer must deliver the property to the person entitled to same. *State ex rel. Rieschick v. Cunningham* (1879) 9 Neb. 146, 1 N. W. 1011, construing Neb. Act February 17, 1873, and holding that the debtor could compel the return of the property where an undertaking was not filed within the twenty-day period. And see *Adams County Bank v. Morgan* (1889) 26 Neb. 148, 41 N. W. 993, construing Neb. Code Civ. Proc. § 236e, and holding that a failure to file an undertaking within twenty days of the dissolution of an attachment destroys the at-

tachment lien; and *McDonald v. Bowman* (1894) 40 Neb. 269, 58 N. W. 704, applying Code Civ. Proc. §§ 236e and 236f, and holding that the officer must in a proper case retain the attached property during the twenty days allowed for the perfecting of a writ of error.

And for a statute allowing a two-day period for the perfecting of an appeal, see the provisions set out in connection with *Ryan v. Heenan* (Iowa) *supra*.

And a number of statutes merely direct that upon dismissal of the writ the money or other property must be delivered to the debtor, which provisions, it is generally held, must be complied with, the attachment or garnishment being merely a creature of the statute.

Thus in *Loveland v. Alvord Consol. Quartz Min. Co.* (1888) 76 Cal. 562, 18 Pac. 682, it was held that a defendant was entitled to make any disposition of attached property which he saw fit after the dissolution of the attachment, and this irrespective of any appeal or right of appeal, under the statute providing that after judgment for defendant all proceeds of sale and money collected by the sheriff and all the property attached remaining in the sheriff's hands shall be delivered to the defendant, there being no express provisions allowing the sheriff to retain the property after judgment for defendant, and no provisions allowing his retaining of it pending an appeal from judgment. So in *Ranft v. Young* (1893) 21 Nev. 401, 32 Pac. 490, it was held that a statute directing a return upon judgment being obtained for defendant released the property from the moment the judgment was rendered, and that upon a refusal of the sheriff to return it he was answerable in an action of trover even though there was a motion for a new trial pending, there being no provision in the statute authorizing the sheriff to retain the property after judgment in favor of defendant was entered. And in *First State Bank v. Jones* (1910) 60 Tex. Civ. App. 523, 139 S. W. 671, on subsequent appeal in (1911) — Tex. Civ. App. —, 140 S. W. 116, a Texas statute (Rev. Stat. 1895, art. 216) which provided that upon vacation of an attachment "the court shall make the proper order making disposal of the property or the proceeds of the sale thereof, if the same has been sold under order of the court, directing that it be turned over to the defendant," was held to make it the duty of the court to order the return of the attached property when it yet remains in the custody L.R.A.1917B.

of the officer, of the attaching officer to carry the order into effect, and of the debtor to receive the property. And in the Wisconsin cases of *Clark v. Lamoureux* (1888) 70 Wis. 508, 36 N. W. 393; *Morawitz v. Wolf* (1888) 70 Wis. 515, 36 N. W. 392; and *Evans v. Virgin* (1888) 72 Wis. 423, 7 Am. St. Rep. 870, 39 N. W. 864, § 2764 of the Revised Statutes, which provided that upon dismissal of an attachment "an order shall be entered that the property attached be forthwith delivered up to the defendant," was held to be imperative even though it would be inoperative, as where possession had already been obtained; but in the *Evans* Case it was also held that an order made pursuant to the statute was sufficiently complied with by a payment of the proceeds of the attached property to execution creditors of the debtor. And in *Hey v. Harding* (1904) 25 Ky. L. Rep. 1454, 78 S. W. 136, the court construed Ky. Code, § 228, providing that upon discharge of an attachment the property attached or its proceeds shall be returned to the defendant, and § 747, providing that an appeal shall not stay proceedings upon judgment unless supersedeas be issued, holding that a judgment discharging an attachment entitled the defendant to a return of the attached property or its proceeds and that such a return could be made at any time before a supersedeas was issued. And see *Bowe v. Wilkins* (1884) 1 How Pr. N. S. (N. Y.) 21, which quotes a similar New York statute (Code, § 709), which was held inapplicable to the then present case (but in connection with the *Bowe* Case see *Henry v. Salisbury* (1898) 33 App. Div. 293, 53 N. Y. Supp. 834, 6 N. Y. Anno. Cas. 182, for a later New York statute, which provided for a stay of proceedings and the suspension of the effect of an annulment pending an appeal on which a reversal would revive the warrant); and *Jackson v. Burnett* (1896) 119 N. C. 195, 25 S. E. 868, which construed N. C. Code, § 373, which provided that upon discharge of an attachment the attached property shall be delivered to the defendant.

And it seems that where the statute directs a return, even the court has no power to continue the lien so as to justify the withholding of the property from the debtor pending an appeal, at least unless statutory authority is given. *Primm v. Superior Ct.* (1906) 3 Cal. App. 208, 84 Pac. 786.

But statutes providing that upon dissolution of an attachment the property

shall be returned to the defendant do not apply to cases where there has been a sale or transfer of defendant's interest in the property subsequent to levying of attachment, and in such case the property should be delivered to the true owner. *Jackson v. Burnett* (1896) 119 N. C. 195, 25 S. E. 868.

And a preservation of the lien and a consequent justification for the retention of property by the sheriff may be provided for by statute. See *Primm v. Superior Ct* (Cal.) supra, wherein Cal. Code Civ. Proc. § 946, which provided that the lien of an attachment may be preserved after judgment for defendant by the perfecting of an appeal and the filing of a proper undertaking, was under consideration, it being held that the fact that the statute prevented the immediate return of property to defendant did not deprive him of his property without due process of law; *Hey v. Harding*

(Ky.) supra, wherein Ky. Code, § 747, which is set out supra, was construed, it being held that a supersedeas issued after the return of property held by a sheriff under attachment to the debtor upon dismissal of the attachment had no retroactive effect upon the validity of the return.

And under the Wisconsin statutes it would seem that immediate notice of an appeal from dismissal of attachment would serve to warrant the withholding of the property; see *Meloy v. Orton* (1890) 42 Fed. 513, construing Wis. Rev. Stat. § 3061, which provided in effect that where a party shall give immediate notice of appeal from an order vacating or modifying a writ of attachment he may within three days serve an undertaking to save defendant harmless, and that upon the giving of such an undertaking the court shall continue the attachment. G. J. C.

#### CALIFORNIA SUPREME COURT. (In Banc.)

ED KIMBOL

v.

INDUSTRIAL ACCIDENT COMMISSION.

(— Cal. —, 160 Pac. 150.)

**Master and servant — workmen's compensation — injury by fall of ceiling — arising out of employment.**

Injury to a dishwasher in a restaurant from the fall of the ceiling due to the act of the occupant of the floor above, over which the restaurant keeper had no control, but which made the working place unsafe, arises out of his employment within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(Henshaw, Lorigan, and Melvin, JJ., dissent.)

(September 20, 1916.)

**Note.** — The general subject of workmen's compensation acts is treated comprehensively in the annotation in L.R.A.1916A, 23. The American cases on the question as to what injuries are deemed to arise out of and in the course of the employment are dealt with at pages 232 et seq. of that annotation, and the English cases on the subject at pages 40 et seq.

For later annotation and cases on questions arising under these acts, consult the L.R.A. Digest and Indexes to Notes covering volumes subsequent to L.R.A.1916A, under the title "Workmen's Compensation." L.R.A.1917B.

**P**ETITION for a writ of certiorari to review an award made by the Industrial Accident Commission to claimant, in a proceeding by him under the Workmen's Compensation Act, to recover compensation for injuries sustained while in petitioner's employ. Affirmed.

The facts are stated in the opinion.

Messrs. Boyer & Beach for petitioner.

Mr. Christopher M. Bradley for respondents:

The injury suffered by the applicant arose out of his employment.

*Fitzgerald v. Clark* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *McNicol's Case*, 215 Mass. 498, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Adams v. George Anderson & Co.* [1913] W. C. & Ins. Rep. 506, 2 Scot. L. T. 139.

Angellotti, Ch. J., delivered the opinion of the court:

Certiorari to review an award made by the Industrial Accident Commission to one Fred Douglas against petitioner, Ed Kimbol, for injuries received by him by accident in the course of his employment by said Kimbol, and alleged and found to have arisen out of said employment.

There is no doubt that the injury to Douglas was sustained "by accident," within the meaning of our Workmen's Compensation Law, and admittedly the accident happened "in the course of the employment." Our act requiring as an essential

to compensation that the injury must not only be received in the course of the employment, but must also arise out of the employment (§ 12), the claim is that the injury here did not arise out of the employment within the meaning of our act. A divided Commission has found against this claim. There is no dispute as to the material facts.

Kimbol was the owner of and was conducting a restaurant business on the ground floor of a building in Los Angeles. Douglas was in his employ as a dishwasher. While working as such, the floor immediately above the place where he was at work suddenly gave way, with the result that he was struck by some falling object or objects and injured. The giving way of this floor was due to the fact that it was overloaded, a large quantity of bottled grape juice having been stored thereon. This floor was not included in the lease under which Kimbol occupied that portion of the building devoted to restaurant purposes, and he had no control whatever thereof; nor did he have any knowledge that the floor above was being used for storage purposes. It was in fact rented for a rooming or lodging house, and the lease contained a clause that it should not be used for any other purpose. Under these circumstances, can it fairly be held that the injury arose out of the employment?

The supreme judicial court of Massachusetts has said, in regard to the meaning of the term, "arising out of the employment," as used in Workmen's Compensation Laws: "It [the injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, L.R.A.1917B.

and to have flowed from that source as a rational consequence." McNicol's Case, 215 Mass. 498, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522.

This appears to us to be a good general definition of the term "arising out of the employment," and we think it fairly includes such a case as this. It will be conceded, in view of the facts we have stated, that the place in which Douglas was employed was not an unsafe place in the sense that there was any structural defect therein likely to cause injury so long as the building was used for the purposes for which it was intended, and that the danger of a collapse of the ceiling of the restaurant and the collapse of such ceiling were due wholly to the unauthorized use by another of the floor above for storage purposes, and the consequent subjection of that floor to a greater burden than that for which it was designed; but because of this unauthorized use of the floor above for storage purposes those below were, in fact, in danger of injury from a collapse of the floor, and in that sense the place in which Douglas was required to do all his work was an unsafe place. The danger was one peculiar to that very place—an incident of the particular premises used as they were being used—and it is not unreasonable to say that Douglas was specially exposed to that danger by reason of his employment. Solely by reason of and in pursuance of such employment he was required to remain in this unsafe place exposed to this danger of a collapse of the ceiling of the room in which he was constantly at work. The risk was normally one incident to working in that place, one due solely to its unsafe condition. If this be so, we are of the opinion that the injury may fairly be said, in view of the authorities, to have arisen out of his employment. All the circumstances being considered, there is a causal connection between the conditions under which the work was required to be performed and the injury. The resulting injury was a natural incident of the work in view of the conditions under which it was being done, one that would have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment. The danger was peculiar to the particular place in which the employee was required to work. It is true that the accident was not actually foreseen or expected, but this is not necessary. It is sufficient that after the event it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

The question of special exposure by rea-

son of the employment has been considered in various cases. The general rule deducible therefrom is that, if the exposure of the employee to a particular danger differs substantially from the normal risk to which all are subject, if the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment, even though unexpected or unusual and in no way actually anticipated. See *Martin v. John Lovibond & Sons* (English Court of Appeals) 5 N. C. C. A. 985, and note, [1914] 2 K. B. 227, 6 B. R. C. 466, [1914] W. C. & Ins. Rep. 78, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, 7 B. W. C. C. 243; *Hoening v. Industrial Commission*, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; *State ex rel. People's Coal & Ice Co. v. District Ct.* 120 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; *Adamson v. George Anderson & Co.* [1913] W. C. & Ins. Rep. 306, 2 Scot. L. T. 139.

It seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have "arisen out of the employment" within the meaning of that term as it is defined in *McNicol's Case*, supra, and the other authorities cited herein, and that the conclusion of the Accident Commission to that effect must therefore be sustained. As we have seen, it can make no difference that the danger was not known or anticipated; nor can it make any difference that the employer was entirely without fault. The liability for compensation created by our law is not founded on any want of care on the part of the employer; nor is it material that the dangerous condition of the place in which Douglas was working was due entirely to the fault of some third party. The room in which Douglas was required to do this work *had become* an unsafe place in which to be because of the danger of a collapse of the ceiling thereof, and solely by reason of his employment in that unsafe place he was specially exposed to such danger. We have said that an accident arises "out of the employment" where "it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee," and that "it 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury." *Coronado Beach Co. v. Pillsbury*, — Cal. —, L.R.A.1916F, 1164, 158 Pac. 212. The italics are ours. Under the facts we apparently have here a risk to

which the employer's business specially exposed the employee. The danger was a constant one, inherent in the place itself under the conditions there existing, and the injury was one which a person cognizant of those conditions would reasonably expect to occur.

It has always been the law that it is the duty of the employer to use reasonable care to furnish an employee a safe place in which to do his work. If for any reason, whether due to the negligent, or even criminal, act of a third party or not, the place was in fact unsafe, the employer was liable to the employee for any injury due thereto, provided that if he had used reasonable care in the matter he would have known of the defect and would have remedied it. The condition as to the safety of the place in which the work was to be done is thus always a matter incident to the employment, and an injury arising from its unsafe condition has always been considered an injury arising out of the employment.

Under the old law, the employer's exemption from liability where he was not negligent in the matter existed solely because he was not negligent, and not because the injury did not arise out of the employment. Our industrial compensation system has dispensed altogether with the element of negligence on the part of the employer, but it still must remain true that injury to an employee which is due to the dangerous condition of the very room in which he is required to do his work is an injury resulting from a "risk reasonably incident to the employment." Of course, there is no analogy between such a case as this and such cases as *Coronado Beach Co. v. Pillsbury*, supra, and *Fishering v. Pillsbury*, — Cal. —, 158 Pac. 215, in which it is held that there is no liability on the part of the employer to the employee for an injury inflicted by the "skylarking" of a fellow employee, because such an injury does not arise out of the employment.

In view of the suggestion as to the impossibility of the employer insuring against such an accident as this, it is proper to observe that if, as we hold, the injury did arise out of the employment, it was one that would be covered by a policy insuring against liability for injuries to employees received in the course of employment and arising out of the employment.

The award is affirmed.

We concur: Shaw, J.; Sloss, J.; Lawlor, J.

Henshaw, J., dissenting:

I dissent. The case is the first of its kind before this court, and, because in my judg-

ment the award is supported by an altogether strained and unwarranted extension of the language and meaning of our law, it has seemed to me fitting that I should express my views at length.

It is a part of familiar knowledge that the fundamentals of our Compensation Act are taken from the English law,—a law which had been in existence for many years before the enactment of the similar measure by this state. The phrases of paramount and controlling importance in measuring the right to an award, namely, that the injury must have been sustained “in the course of the employment,” and also must have “arisen out of the employment,” are adopted bodily from the English law. As is to be expected, these phrases, as applied to accidents and injuries, came frequently before the English courts for interpretation. With only the latter of the two are we here concerned. Admittedly in this case, the injury was sustained while the employee was properly engaged in his labors. The one question calling for answer is whether, within the language and spirit of our law, it can be said that the accident “arose out of the employment.”

In considering the vast number of cases that have arisen and continue to arise under the terms of the English act and of the similar enactments adopted by our states, it will not create surprise to find amongst them extreme cases, and very doubtful cases. This is inevitably to be expected, since the jurists called upon to consider these acts are jurists trained in the principles of the common law, from which principles these acts are a wide departure, and also because these jurists are called upon to construe and to apply to these new conditions new phrases of description and definition. Nevertheless, in no one of these numerous adjudications which has passed under my review is there to be found any support for the extreme construction which is here given to our law in support of this award.

In so declaring, I accept unreservedly the definition of the Massachusetts court in *McNicol's Case*, which is adopted in the prevailing opinion, as being satisfactory and complete. But to my mind the very terms of that definition, in which the prevailing opinion finds support for this award, actually forbid it. I say this quite realizing the fact that my statement is necessarily a reflection upon my own powers of reasoning and understanding, or else that the language of the Massachusetts court furnishes a striking illustration of the grave limitations of English written words to convey exact thought.

It may not be amiss to consider for a moment precisely what these compensation

acts design to accomplish. They were enacted under the sanction of the police power because it was believed that direct provision should be made for the support of an employee whose injuries grew out of his work, and for the maintenance of his family and dependents where, under similar conditions, his injuries resulted in his death; and it was decreed that the employer—the industry—in all such cases should bear the burden of this compensation, the employer in some cases being allowed, in other cases being compelled, to insure against the losses which might arise from these causes. Elsewhere I have pointed out that the interest of the state in seeing that an injured workman receives compensation during the period of his incapacity is just as great whether that workman be injured in his hours of leisure or in his hours of labor, and equally that the loss to the workman and the economic loss to the state are just as great if the workman be injured in his hours of leisure as if he be injured in his hours of labor. Nevertheless, these laws limit their beneficence with much rigidity to injuries received by the employee during his hours of labor, which injuries must also arise “out of the employment.” If this last phrase, “arise out of the employment,” means any injury, not wilfully occasioned by the employee himself, which he sustains because as an employee he is working at a given place,—and this unquestionably is the meaning of the prevailing decision,—then there was no occasion for the law-makers to have used this phrase at all; for that construction is the exact equivalent of saying that a workman shall be compensated for any injury which he sustains during the course of his employment, or, in other words, while at work.

In the broadest sense, whenever accident and consequent injury befall a workman who is duly in the performance of his duties, it may be said that such accident and injury arose “out of his employment.” But some of them arise out of the employment only because of the fact that by virtue of his employment the workman was at a given place at the given time when the accident happened. Is this latter class of accidents included within the meaning of our law? The prevailing opinion holds that it is. I am convinced that it is not. I construe our law to embrace only that class of injuries which may for convenience be described as “occupational injuries,” precisely as we use the phrase, “occupational diseases.” To this broad class belong all injuries which result to an employee from the performance of his work, even though occasioned by his own negligent performance of it. Second, all of those injuries result-

ing to the employee with or without negligence on his part, because of the employer's failure to perform some duty which he owes to his employee. And in this large class belong all of those cases where injury results from unsafe and inadequate appliances, place of labor, etc. And, third, all of those injuries resulting from extra hazard either inherent in the character of the labor or occasioned by the act of the employer.

Into one of these three classes must fall every injury for which compensation may properly be awarded, or otherwise there is no limitation whatsoever to the right of an award if the employee has been injured while at his labors. But it will not be disputed that our law does not grant compensation for every injury sustained while the employee is engaged in his labors. For example, it is not questioned that, saving in exceptional cases hereinafter distinguished, the employee is not entitled to compensation for injuries sustained by the so-called acts of God. Indeed, this was very early held and decided by our accident commissioners in *Fensler v. Acc. Com.* 1 Cal. Ind. Accd. Com. Dec. No. 21, p. 41. There an employee engaged in piling and unpling bags of cement in a warehouse on a hot day was overcome by heat; and, after laying down the general principle that the employer is not liable for accidents occurring by the act of God, it was found that his employee was especially exposed by his employment to the danger of sunstroke, and that his injury was therefore compensable, thus following the unbroken line of authority of the English and American courts; nor yet, saving in exceptional cases, is an injury compensable which is occasioned by the tortious act of a fellow employee, or the tortious or negligent act of a stranger.

Touching injuries arising from the act of God, it is said by Mr. Ruegg (*Ruegg's Employers' Liability and Workmen's Compensation*, 8th ed. p. 338): "The question has arisen, Could an operation of the laws of nature, as earthquake, flood, lightning, or extraordinary tempest, occasioning personal injury to a workman whilst engaged in his employment, be said to be 'accident arising out of and in the course of the employment?' It is thought not. It may be granted that, but for the fact of his being engaged in the employment at the time, the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment. But in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause sine qua non, but we do not think it could L.R.A.1917B.

be regarded even as an effective cause of the accident."

As illustrating the application of the principle, and the exception to its application, may be cited *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, where a workman, engaged in cleaning out gullies to prevent the road from being flooded, was struck by lightning and killed. Compensation was denied him, the judge saying: "I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on the road. . . . It is only under very special circumstances, when the employment of the workman exposes him to peculiar risk from lightning, not shared by men in other employments, that an accident by lightning can be said to arise out of his employment."

The same principle was declared by the supreme court of Michigan in overruling an award granted by the Michigan Industrial Accident Board in *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213. *Klawinski* was a section laborer. During a violent storm, under directions of the foreman of the gang, all took refuge in a barn. A bolt of lightning struck the barn and killed *Klawinski*. It was conceded that he met his death in the course of his employment, but it was held that his death did not occur by reason of an accident arising out of his employment. Such also was the ruling of the supreme court of Wisconsin in *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A.1916A, 330, 150 N. W. 996, 8 N. C. C. A. 102, where *Hoenig* was killed by a stroke of lightning while working on a dam in the Fox river. The Industrial Accident Commission, notwithstanding the introduction of certain testimony seeking to show that a workman so employed was exposed to an extra hazard from lightning, declined to consider the evidence sufficient to establish this extra hazard and refused to grant an award. The judgment of the Commission was sustained by the supreme court. Upon the other hand, the exceptional case where an award from death by lightning has been sustained because of the extra hazard growing out of the special occupation are typified by *Andrew v. Falls-worth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429, 6 W. C. C. 11, where a bricklayer was killed by lightning while working on a scaffold 23 feet above the level of the ground. Expert evidence was given, showing that his position exposed the deceased to extra hazard and special danger from lightning. The county court held under this showing that compensation should



be allowed, and the award was sustained for the indicated reasons. Such also was the decision of the supreme court of Minnesota in *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129, under certiorari to review an award, where the driver of an ice company, compelled by his duties to be out in stormy weather, left his team and went toward a tall tree, either for protection, or in the performance of his duties soliciting orders. He was killed by a bolt of lightning. The authorities are reviewed and the award sustained on the ground of the unusual risk and special hazard.

It will be instructive at this point to consider other cases where the question of extra hazard pertaining to the employment has been considered and the claim allowed or disallowed. In *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648, the accident happened to a workman engaged in his work, through the wilful wrongful act of a fellow workman, and it was held the accident did not arise out of and in the course of his employment. *Falconer v. London & G. Engineering & Iron Ship Building Co.* 3 F. 564, 38 Scot. L. R. 381, 8 Scot. L. T. 430, arose under the following facts: The accident befell a workman through the negligence of a fellow workman who was indulging in horseplay, and it was held that the accident did not arise in the course of his employment. To the same effect are our own cases. In *Coronado Beach Co. v. Pillsbury*, — Cal. —, L.R.A.1916A, 1164, 158 Pac. 212, an employee going down a flight of stairs in the performance of his duties, was tickled by a fellow employee. He fell and seriously injured his knee. Compensation was denied him upon the ground that the injury was not from an accident arising out of the employment, or incidental to the employment. To the same effect is *Fishering v. Pillsbury*, — Cal. —, 158 Pac. 215, where an employee lost the sight of an eye by a missile fired into it from a trick camera operated by a fellow employee in sport. In the first of these cases this court accepts the unquestioned rule, so frequently noted above, that the injury must be the result of a "risk reasonably incident to the employment." Upon the other hand, in *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. A. 23, an engine driver received injuries resulting in his death through being struck by a stone thrown from a railway bridge at his engine by a malicious boy.

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Here Collins, Master of the Rolls, uses the phrase so often found in the decisions, "a risk incidental to the employment," and his exposition clearly shows the meaning with which he employs these words; for he says that an accident arising out of an employment necessarily involves the consideration of the question, "What risks are commonly incidental to the particular employment in question?" And it is held that the temptation of boys to throw stones, whether done maliciously or heedlessly, is so well known that the risk to which the engine driver was exposed from this source was an extra hazard of his business, even though it were not a hazard common to other businesses. And this is exemplified by the language of Cozens-Hardy, Master of the Rolls, in *Craske v. Wigan* [1909] 2 K. B. 635, where, discussing the *Challis* Case, he says: "That case really turned on this: That there was evidence which satisfied the county court judge that there was an irresistible temptation to small boys to drop stones onto a train as it passes under a railway bridge. In that case a boy dropped a stone which hit the glass of the cab of the engine where the driver was, with the result that the fragments of glass were driven into his eye. We there held that that was a risk incidental to his employment. To quote a few words from my own judgment in that case. I said: 'It seems to be that the risk of such an occurrence is one which may reasonably be looked upon as incidental to the employment of an engine driver, though it might not be incidental to other employments.'"

The principle that only risks incidental to the service are covered by the act stood established as the interpretation of the English law long before and at the time our own act, with identical language, was adopted. *Wilson v. Laing* [1909] S. C. 1230, 46 Scot. L. R. 843. This condition, namely, that the accident is incidental to the employment, must be found to exist in all cases, even those where the award is based upon the exceptional hazard. Thus in *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852, known as the *Stable Cat Case*, a stableman, in the recognized discharge of his duty, was taking his meal quietly in the stable, when the cat, without any provocation, flew at him and bit him. The cat was the proprietor's cat. It remained in and about the stable at the instance of the proprietor. For it and its conduct he was held responsible. His employees were thus subject to this extra hazard at the instance of the employer, and the injury which resulted to this one thus became incidental to his employment, the

court, in discussing the case in *Craske v. Wigan*, supra, declaring that "the stable cat was really a part of the furniture of the stable. . . . That was just as much an accident arising out of his employment as if he had been kicked or bitten by a horse in the stable."

In *Nisbet v. Rayne* [1910] 2 K. B. 639, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 64 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268, a cashier was traveling in a railway carriage to a colliery, with a large sum of money for the payment of his employer's workmen. He was robbed and murdered. It was held that he was the victim of an accident within the meaning of the law, and that the extra hazard which he underwent in carrying this large sum of money was "a risk incident to his employment and likely to have been in the contemplation of the parties when Nisbet was engaged," *Cozens-Hardy*, Master of the Rolls, affirming this view upon appeal, and declaring that Nisbet was exposed to this special risk incidental to his employment. The same view was taken and principle announced in *Anderson v. Balfour* [1910] 2 I. R. 97, 44 Ir. L. T. 168, 3 B. W. C. C. 588, where a gamekeeper was attacked by poachers. Notwithstanding the act of the poachers was criminal, it was held that this extra hazard to which the gamekeeper was exposed was incidental to his occupation. It is a generally accepted principle that risks to which all persons similarly situated are equally exposed are not risks incident to the business.

Having thus pointed out certain exceptions distinguishing those engaged in particular employments and exempting them from the operation of the rule upon the ground of a special hazard incident to the employment, another class of cases now merits mention. The ordinary perils of a highway or of a crowded street are common to all upon the highway or street. Yet it is held that, where the nature of one's employment compels his continuous presence on and use of the streets, and even, perhaps, where a special and particular service requires his presence upon a street for a limited time, if injured he becomes entitled to compensation, but always upon the same ground of the special hazard incident to the business. Thus a collector was kicked by a passing horse while riding in the street on his bicycle in the course of his employment, and was allowed compensation for the indicated reason. *M'Neice v. Singer Sewing Machine Co.* 48 Scot. L. R. 15. To like effect, in *Millar v. Refuge Assur. Co.* 49 Scot. L. R. 67. And in *Martin v. John Lovibond & Sons*, 5 N. C. C. A. 985, a dray-

man, whose duties took him into the street for many continuous hours while going his proper rounds, stopped outside a public house, left his dray, crossed the street, drank a glass of ale, and recrossing the street to his dray was run over and killed. The English court of appeal, first declaring that the drayman was still in his employment during this temporary absence for refreshment, held that the street risk that he ran was incidental to his employment, and that his hazard, since he practically spent his life upon the streets, was exceptional, and that he was "exceptionally exposed to street accidents; . . . whereas an ordinary member of the public not so exceptionally exposed would not be entitled to claim compensation." This principle was declared by the California Accident Commission in *Leary v. Fairchild, Gilmore, etc., Co.* (vol. 1, No. 3), where Leary, engaged in repairing pavements in the street, was struck by an auto truck. And finally, touching the proposition that it is not necessary that one's occupation should demand his continued presence upon the street, but that the same principle would apply to one who was required to be upon the street in the performance of some specially delegated duty, it is sufficient to refer to *Elliott, Workmen's Compensation Act*, 6th ed. p. 78, and to the language of *Cozens-Hardy* in *McDonald v. The Banana* [1908] 2 K. B. 926, where he says: "If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house, I should be liable. If, however, he, having a night off, goes—as he is at full liberty to go—to the Franco-British Exhibition for his own amusement, and meets with an accident at the same spot, I take it that I should not be liable."

I have heretofore said that all injuries to be compensable under our act must, in a broad sense, be occupational injuries, and that in the first subdivision will naturally fall all those injuries resulting to an employee and growing out of his performance of the work, even though the accident has its origin in his own negligent performance of it. The precise kind of accident or character of injury which an employee may thus sustain is immaterial, and the fact that it may be unusual or exceptional in character is equally immaterial. Thus in the case at bar, if this dishwasher had carelessly slopped water upon the floor and made it slippery, and then, taking up a knife for the purpose of cleaning it, had slipped and wounded himself with the knife, the accident would have been exceptional and unusual in character. But it would have arisen strictly out of the performance, though

the negligent performance, on his duty. No one, I take it, will question the soundness of this classification, nor of the right of the employee to compensation for any injury so arising.

As little doubt can be entertained over the soundness of the second classification,—the right of the employee to compensation where the employer has failed in a duty owing to the employee for this is but one of the forms of the familiar common-law right of action. It is within this class, as I read the prevailing opinion, that the accident to Douglas is placed. It calls for detailed consideration later. The third class, entitling the employee to compensation when the injury results either from an extra hazard inherent in the character of the labor or occasioned by the act of the employer, is typified by the cases above cited,—such as the Challis Case, where the engine driver was struck by the stone thrown by a malicious boy, and the award was upheld upon the ground that engine drivers are exposed to an extra hazard inherent in the character of the work, and the Andrew Case, where the award in the case of the bricklayer killed by lightning upon a high scaffold was sustained upon like ground. The cases where liability is imposed upon the employer for extra hazard to his employees occasioned by his own act are typified by the Rowland (or Stable Cat) Case, and by the McNicols Case, where the award was sustained because the deceased employee had been beaten to death by a fellow workman in an intoxicated frenzy of passion: it being known to the employer that the offending workmen did so become intoxicated and did fall into violent fits of rage and would be liable to assault his fellow workmen when in such condition, but that nevertheless he was retained in the service of his employer.

It is in this case that the definition of an injury arising out of the employment is given and found acceptable by this court. The definition, it is proper to say, is but a compilation of the utterances of English judges, and it will be of advantage in determining the meaning of the language to quote some of these utterances. Thus says Cozens-Hardy, M. R., in *Butler v. Burton-on-Trent Union* [1912] W. C. Rep. 222: "We have heard an argument from counsel for the respondent, that it did arise out of the employment because it took place on premises where Butler was engaged in working. If he was right in this argument, the words in the act providing that the accident must arise 'out of' the employment might be omitted, and the words providing that the accident should arise 'in the course of' the employment alone be left. The provision L.R.A.1917B.

that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment. . . . There was nothing peculiar to his employment which rendered the risk of this accident happening greater than it would have been otherwise."

And says Buckley, L. J., in *Fitzgerald v. Clarke* [1908] 2 K. B. 796: "The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incidental to the employment."

And says Kennedy, L. J., in the same case: "The words [arising out of] appear to point to accidents 'arising from such causes as the negligence of fellow workmen in the course of the employment, or some natural cause incidental to the character of a business.'" "We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. That this is so appears from an examination of *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Collins v. Collins* [1907] 2 Ir. R. 104; *Murphy v. Berwick* [1909] 43 Ir. L. T. 126; and *Blake v. Head* [1912] 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employee in undertaking the employment." *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Says Hardy, M. R., in *Craake v. Wigan*, [1909] 2 K. B. 635: "I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the court of appeal since these acts came into operation, namely, to hold that it is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that kind is established, the applicant must fail, because the accident is not one arising out of and in the course of the employment. In my view we should

not be administering law and justice if we did not hold that the learned judge was quite right. The appeal must be dismissed."

And says Lord Salvesen, in *Kinghorn v. Guthrie* [1913] 50 Scot. L. R. 863, after setting forth with approval the language just quoted from *Craske v. Wigan*: "It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but, as the master of the rolls said, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind."

That it may not be thought they have been intentionally ignored, it is pertinent to refer specifically to the cases cited in the prevailing opinion as supporting this award. The first of these is *Martin v. John Lovibond & Sons*. That case has already been considered. The drayman left his truck and crossed the street, drank one glass of ale, and, returning, was injured. The decision points out that the drayman, with his long hours of street service, was entitled, as a part of his employment, to adequate food, and that this included reasonable drink; that therefore he was engaged in his employment at the time the accident occurred, and, though he received his injuries upon the street, the nature of his employment exposed him to a peculiar hazard which brought the case within the compensatory terms of the act. *Hoenig v. Industrial Commission* also has been mentioned, and is the case where an employee working on a dam in the Fox river was killed by lightning, but the holding was that there was no special hazard in his employment which would entitle him to compensation. People's Coal & Ice Co. has also been mentioned. That also is the case of a special hazard by lightning growing out of the nature of the employment. The last case is *Adamson v. George Anderson & Co.* [1913] S. C. 1038, 50 Scot. L. R. 855, 6 B. W. C. C. 874. There a division of the Scottish court held that a workman who, during a violent gale, was engaged in erecting a stone-planing machine in an open yard, and who, while bending over, was struck and injured by a slate blown off the roof of an adjoining building, was entitled to compensation, because the character of his employment exposed him to this extra hazard. The case was declared by the court to one of the border line and doubtful cases. But immediately following that case, another division of the same court decided *Kinghorn v. Guthrie*, supra. There a carter, while leading his horse and wagon out of his employer's yard L.R.A.1917B.

in the course of his employment, was struck by a piece of corrugated iron blown by a high wind from the roof of an adjoining building, and it was held that the accident did not arise out of his employment. A not very successful attempt was made by the learned judges to distinguish this case from the preceding, the basis of the distinction seeming to be that in the *Anderson Case* the employee was bending over, looking at his work, and so was unable to detect his danger from the flying slate. It must be apparent, I think, that no one of these cases affords any support for upholding the award for an accident arising under the circumstances of the present case.

Attention may now be directed to a consideration of the definition in the *McNicol's Case*, and to the statement in the prevailing opinion, that "it seems clear that this case is one in which the accident and injury to Douglas can fairly be held to have 'arisen out of the employment' within the meaning of that term as it is defined in *McNicol's Case*."

But, before doing so, it should be pointed out that our own law is more specific than is the English law or the law of Massachusetts. With an apparent deliberate intent to limit the right of recovery to occupational or industrial accidents, it declares in terms the conditions which must exist before a recovery may be awarded, and one of those conditions is that the injury must have been "proximately caused by the employment." W. C. I. & S. Act, § 12, subdiv. 3, as amended by Stat. 1915, p. 1081, § 2.

Can it be said that this injury was proximately caused by the employment? If so, it is only in that very limited and discredited sense spoken of by Ruegg and again quoted: "It may be granted that but for the fact of his being engaged in the employment at the time the accident would not have happened to him. In this sense it may be said to have happened to him in the course of his employment, but in what fair sense could it be held to have arisen out of the employment? The employment may have been a cause *sine qua non*, but we do not think it could be regarded even as an effective cause of the accident."

And this, as we have seen from the quotations above, is the precise view taken by all the English and American courts; also, it is the precise view taken by the Massachusetts court. Says that court, compensation is to be allowed "if the injury can be seen to have followed as a natural incident of the work." But this accident was not an incident of the work, natural or unnatural. Compensation is allowed if the injury can be seen "to have been contemplated by a reasonable person familiar with the whole sit-

uation as a result of the exposure occasioned by the nature of the employment." There was nothing in the nature of this employment that exposed the injured person to this injury. Would any one say that, growing out of the nature of the employment of dishwashers, they are liable to be injured by the overloading of floors above the restaurants where they work? "It excludes," says the Massachusetts court, "an injury which cannot fairly be traced to the employment as a contributing proximate cause." This is nearly the language of our own statute just quoted and discussed. "The causative danger must be peculiar to the work," as the lightning stroke, or the stone throwing at locomotive engineers. Was this danger in the slightest sense peculiar to the work? "It must be incidental to the character of the business." Will it be said that it is incident to the character of the business of a dishwasher that he shall be injured by an outside agency in crushing down a ceiling over his head? "It need not have been foreseen or expected," which is perfectly true of most accidents, the precise form which they may take being beyond the reach of exact foreknowledge. But the accident "must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." This was a risk not in the slightest connected with the employment. It was an accident that happened to the man because his employment happened to place him where an independent tortious act of a third person inflicted injury upon him.

But it is said that the place where the injured man worked was unsafe, and that because it was unsafe the employer is liable. This pays not the slightest regard to all the other elements,—that the employer has failed in some duty, that the special condition was, or should have been, known to him. But the prevailing opinion reasons that because a place of employment has become unsafe, regardless of the acts and conduct of the employer, regardless of the means or measures by which it has been made unsafe, the employer is liable. Here, to my mind, is the grave mistake in reasoning leading to a most unwarranted extension of the law. The act of piling bottles of grape juice upon the floor above was negligent and tortious. It was the act of an independent third person, performed without the knowledge of the employer. Admittedly the employer was in no way responsible for this act. If, then, the employer is to be held responsible for all such kinds of accident upon the theory that the premises have become unsafe, and all this without regard to his chargeable knowledge

of the fact, it inevitably results in declaring the employer to be an insurer of his employees whenever accident has befallen them while engaged in their duties. There can be no distinction between a tortious act committed by negligence and one committed by design. The injury that results will be the same; the right of compensation to the injured person is the same, saving, of course, in the exceptional case where punitive damages may be added. What would be said, then, if the accident had occurred by the intent of the man who piled the bottles of grape juice to accomplish the result which his negligence brought about? The place of labor would have become equally unsafe. Is it possible that our law contemplates a recovery for such a wrongful act not within the legitimate hazard of a business? Assuming that a destructive bomb had either carelessly or intentionally been left in the room above, and by its explosion the same injury had resulted,—the premises were made equally unsafe,—is the employer liable? The length of time when the premises became unsafe, or the knowledge of the employer that they have become unsafe, is utterly eliminated. The premises become equally unsafe, whether to the bomb is attached a one-minute fuse, or clockwork which will explode it in forty-eight hours. And for any and all of these acts it is held that the employer is liable in compensation. Yet every decision is to the contrary and limits the employer's liability to accidents legitimately connected with the hazards of the business. Let us take the case of the boy descending the flight of steps and made to fall by the tickling of a fellow employee. Assume that, instead of so doing, the fellow employee, in horseplay, had greased the steps and so occasioned the fall. Here would be another instance of the premises being unsafe, and here, under the authority of the prevailing opinion, the employer would be liable. Yet the decisions, as we have taken pains to point out, hold the employer to be exempt from liability for the wilfully tortious act either of fellow employees or of outsiders, and for all the negligent acts of fellow employees, unless the negligent act has a bearing upon the performance of the duties of the injured employee. The boy who was tickled was in the performance of his duty. The other boy, who negligently tickled him, was not.

If the boy had greased the steps the employer would have been liable, but because he tickled his companion the employer is exempt. Can this be the law? And if the unsafeness of the place of labor is the sole controlling consideration, what becomes of the Kelly Case, 42 Ir. L. T. 23; the Klawnski Case, 185 Mich. 643, L.R.A.1916A, 342,

152 N. W. 213; and the Hoenig Case, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192,—where, precisely as in the Andrew Case [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 611, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429, 6 W. C. C. 11, the men were killed by lightning stroke? In all these cases indubitably the places of labor became as unsafe when the men were struck and awards denied as was the place where Andrew was struck and an award given. No one of these cases adopts for an instant the reasoning that an employer without fault can be held liable for an untoward and unexpected injury occasioned by act of God or a third person, nor accepts the theory

that an employer may so be held liable because at the instant of the accident the place of labor had become unsafe. So far as all the adjudications go, it is uncontradicted that acts by outside agencies, willfully tortious or negligently done, are not acts arising out of the employment, even though they make the place of labor unsafe, unless peculiar and exceptional circumstances distinguish them; a familiar proposition, typified, as has been said, by such cases as the Challis Case and the Bryant Case.

In my judgment the award should be annulled.

We concur: Lorigan, J.; Melvin, J.

### KENTUCKY COURT OF APPEALS.

HIGH L. BOGGS, Appt.,  
v.  
COMMONWEALTH OF KENTUCKY.

(172 Ky. 243, 189 S. W. 21.)

#### Intoxicating liquor — manufacturing on shares — sale.

The performance of a contract by which a distiller is to make brandy from a quantity of apples furnished by the other party and deliver to him one half the product when completed, keeping one half for his services, is not a sale within the Local Option Law.

For other cases, see *Intoxicating Liquors*, III. a, in Dig. 1-52 N. S.

(November 16, 1916.)

**A**PPPEAL by defendant from a judgment of the Circuit Court for Johnson County convicting him of selling intoxicating liquor in violation of the Local Option Law. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. John W. Wheeler for appellant.

Messrs. M. M. Logan, Attorney General, and D. O. Myatt, Assistant Attorney General, for the Commonwealth:

The facts as proven upon the trial of the case show that a sale was made within the meaning of the statute.

Com. v. Davis, 12 Bush, 240; Friedman v. Com. 26 Ky. L. Rep. 1276, 83 S. W. 1040; 2 Woollen & T. Intoxicating Liquors, § 686; Com. v. Clark, 14 Gray, 367; Barnes v. State, — Tex. Crim. Rep. —, 88 S. W. 804; Stanley v. State, 43 Tex. Crim. Rep. 270, 64 S. W. 1051.

Note. — For manufacturing intoxicating liquors as a sale, see annotation following this case, post, 606.  
L.R.A.1917B.

Clay, C., filed the following opinion:

High L. Boggs was convicted of the offense of selling intoxicating liquor in violation of the Local Option Law, and his punishment fixed at a fine of \$60. He appeals.

The only question presented is whether or not the facts show a sale within the meaning of the statute. It appears from the evidence that the prosecuting witness, Ernest Jayne, entered into an arrangement with the appellant, Boggs, who is a licensed distiller, by which Jayne was to deliver to Boggs a quantity of apples out of which Boggs was to make brandy. Boggs was to keep one half of the brandy for his services in distilling the apples and deliver to Jayne the other half of the brandy. Each party was to pay the internal revenue license on his half of the brandy. It further appears that in carrying out this arrangement the apples which Jayne delivered to Boggs were put in separate tubs and were separately distilled, and at no time were they mixed with apples belonging to Boggs or to other persons. On the contrary, the brandy that was actually divided between the parties was the product of the apples furnished by Jayne. In carrying out this agreement Jayne received between 19 and 20 gallons of brandy, and paid to Boggs, who was responsible therefor, his part of the internal revenue license. Jayne was neither a wholesale dealer nor a licensed retail dealer.

In addition to other instructions, the court instructed the jury as follows: "An arrangement or agreement between the prosecuting witness, Jayne, and the defendant, Boggs, by which Jayne delivered to defendant an amount or quantity of apples which were distilled into brandy, and one half of said brandy being delivered to Jayne by the defendant in consideration of said apples, constitutes a sale of liquor."

It is well settled that the transfer of H-

quor to another, in consideration of any article of value, or of services to be performed by the transferee, constitutes a sale within the meaning of the statute. Therefore, if this were a case where Jayne merely exchanged his apples for brandy belonging to Boggs, there can be no doubt that the transaction would have been a sale, and that Boggs would have violated the Local Option Law. *Com. v. Davis*, 12 Bush, 240; *Friedman v. Com.* 26 Ky. L. Rep. 1276, 83 S. W. 1040; *Com. v. Clark*, 14 Gray, 367; *Barnes v. State*, — Tex. Crim. Rep. —, 88 S. W. 805; *Stanley v. State*, 43 Tex. Crim. Rep. 270, 64 S. W. 1051.

Such a case, however, is not presented by the record. Here the prosecuting witness furnished a quantity of apples to be manufactured into brandy. Boggs was to have half of the brandy for his services. The brandy which the prosecuting witness received was the product of his own apples. The case is not unlike that of a farmer furnishing a particular quantity of wheat to a miller to be manufactured into flour, the miller to retain a certain portion of the flour for his services. Clearly the miller in returning to the farmer his portion of

the flour manufactured from the particular wheat furnished by the farmer cannot be said to have sold the flour to the farmer. In the case under consideration the apples belonged to Jayne. His half of the brandy also belonged to him. In this portion of the brandy Boggs had no interest whatever. In delivering to Jayne his half of the brandy, Boggs merely returned to Jayne the latter's property. In a case involving facts identical with those above set out, the supreme court of Alabama held that the distiller was not guilty of selling, giving, or otherwise disposing of the brandy to the party who furnished the apples. *Maxwell v. State*, 120 Ala. 375, 25 So. 235. With this conclusion we agree.

It follows that the trial court not only erred in giving the instruction above referred to, but in refusing the peremptory asked for by the defendant. This conclusion is based on the facts before us. If upon another trial, however, there be evidence tending to show that Boggs merely exchanged his own brandy for Jayne's apples, the case should go to the jury.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

### **Annotation—Intoxicating liquors: manufacturing under contract as a sale.**

Although there is some authority to the contrary, the cases seems to establish the rule that a contract for the manufacture of intoxicating liquors from materials furnished does not constitute a sale, which is in accord with the holding of *Boggs v. Com.* ante, 605, that the performance of a contract to make brandy from apples furnished by another, and to deliver to him one half thereof, the distiller to keep the other half for his services, is not a sale within the Local Option Law.

In *Maxwell v. State* (1890) 120 Ala. 375, 25 So. 235, it was held that one who distilled apples into brandy on shares, retaining one half of the brandy for manufacturing it, was not guilty of selling, giving, or otherwise disposing of the brandy. Whether the apples were divided before distillation and the portion belonging to their owner distilled separately, or whether all the apples were distilled and a division of the brandy made, was held immaterial, the result having been attained of converting the apples into brandy; one half thereof was the property of the owner of the apples, and this half the distiller had no interest in, but was simply bound to return to the former as his property.

In *Com. v. Clark* (1860) 14 Gray (Mass.) 367, where two persons carried

grain to defendant's distillery to have it distilled on shares, there was no evidence that either of them received liquor distilled from their grain. The defendant requested the court to instruct the jury "that, if they were satisfied, upon this evidence, that it was the bona fide intention of the parties that the grain should be distilled upon shares, the fact that either of them, when the grain was delivered, received from liquor then manufactured his proportional share of the product of his grain, that is, the same amount and kind that he would have received if he had waited for his grain to be distilled, would not constitute the transaction a sale by the defendant." The court declined so to rule, and instructed the jury "that delivering grain by these persons to the defendant under an agreement that he should distil that grain, and return a specific portion of the liquor distilled from it, and retain the rest as a compensation for his services in distilling, and his returning such proportion of the very liquor distilled from that grain, would not constitute a sale, within the meaning of the statute; but if the jury were satisfied beyond a reasonable doubt that these persons or either of them delivered grain to the defendant, and received back from him, either at the time or subsequently, a

quantity of intoxicating liquor, not distilled from that grain, in consideration for the grain so delivered, and intended as payment for the grain, such a transaction would constitute in law a sale, whatever agreement the parties may have made as to distilling the liquor on shares. The appellate court held that the jury were rightly instructed, and said: "The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties, that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property. If there can be any doubt on the question whether an exchange can be deemed a sale at common law, it is quite clear that no such doubt can exist under the provisions of law upon which the indictment in the present case is founded. By Stat. 1855, chap. 215, § 15, it is enacted that if any person 'shall, directly or indirectly, on any pretense or by any device, sell, or in consideration of the purchase of any other property give, to any person any spirituous or intoxicating liquor,' he shall be subject to the penalties in that section provided. The intention of the legislature by this provision was manifestly to cover every case of the transfer of intoxicating liquors for value, in whatever form the consideration for such transfer might be given or paid."

In *Barnes v. State* (1905) — **Tex.** Crim. Rep. —, 88 S. W. 805, where a conviction of selling liquor was reversed because of the refusal of the trial judge to give an instruction, required by the evidence, that the transaction constituted a gift, the court said: "We would further make the following observations as to this case: If the facts show that it was simply an exchange or barter of so much of prosecutor's peaches for brandy, it would constitute a sale. *Com. v. Clark* (Mass.) supra. There the rule appears to be laid down that one can have his grain or peaches manufactured into liquor, paying therefor toll out of his grain or peaches to the person manufacturing the same; but he must get his whisky or brandy out of the identical product furnished the distillery, and not

out of something else. In case he does not get it out of the identical product furnished, it would be an exchange on his part, and, as is held by this court, an exchange is a sale; that is, if one takes peaches to a distillery and there exchanges the same for so much brandy, the party exchanging with him and furnishing the liquor would be guilty of a sale of the same; or if the distillery should receive peaches for the purpose of being distilled into brandy, and furnish the party bringing such peaches brandy in advance, it would be an exchange, and consequently a sale. On another trial, if the evidence suggests these matters they should be presented to the jury."

In *Stanley v. State* (1901) 43 **Tex.** Crim. Rep. 270, 64 S. W. 1051, where the owner of a distillery made an agreement with the prosecuting witness to exchange a pint of brandy for every bushel of peaches furnished by the witness, and the latter delivered peaches and subsequently received brandy in payment therefor, it was held that these facts showed an evasion of the Local Option Law prohibiting a sale in the district where the trade took place.

In *Barnes v. State* (1905) — **Tex.** Crim. Rep. —, 88 S. W. 804, an employee of a distiller who delivered, to one who brought peaches to the still, brandy made therefrom, in exchange for the peaches and the price of the revenue license, was convicted of violating the local option law. The court, citing the preceding case, said that the charge of the trial judge that the exchange of peaches for liquor constituted a sale, was correct. It further stated that certainly the payment, by the furnisher of the peaches, of the revenue license to the defendant would itself constitute a sale of the brandy, since the brandy was delivered as part consideration for the revenue license paid and peaches furnished. The judge who wrote the opinion in the preceding case, however, dissented, stating, "The Stanley Case [the preceding case] was decided on a question of exchange, where fruit was traded for brandy. Here the party received only his half of the brandy out of his own peaches, paying the owner of the still the other half for his services and labor in making the brandy. Hill owned the still, and the other party owned the peaches. It was more nearly related to partnership on the results, and not a sale."

G. V. I.



## MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN  
v.  
FRANK B. LAY, JR.

(— Mich. —, 159 N. W. 299.)

**Grand jury — competency of member — one investigating charge.**

1. A United States commissioner who considers testimony taken in a bankruptcy proceeding against a corporation, and consults the district attorney with a view to issuing a warrant against one of the officers of the corporation for embezzlement, is not a prosecutor in an indictment in a state court against him for that offense within the meaning of a state statute making prosecutors incompetent to serve on the grand jury.

*For other cases, see Grand Jury, IV. in Dig. 1-52 N. S.*

**Pleading — duplicity — distinct facts.**

2. A plea to an indictment for embezzlement, alleging that a United States commissioner sat on the grand jury and read to it minutes taken by him in a proceeding against the corporation whose money is alleged to have been embezzled, is bad for duplicity.

*For other cases, see Pleading, I. v. in Dig. 1-52 N. S.*

**Indictment — effect of incompetent evidence.**

3. The consideration by the grand jury of incompetent evidence is not fatal to the indictment unless it was the only evidence considered.

*For other cases, see Indictment, etc., IV. in Dig. 1-52 N. S.*

**Same — incompetent juror — statutory provision.**

4. That a talesman called to act on the grand jury was acting as stenographer in the case, and that his name is not on the jury list, is not ground for quashing the

**Note.** — As to who is within protection of provision of Bankruptcy Act as to use in criminal proceeding of testimony given by bankrupt, see annotation following this case, post, 614.

The general subject of the qualification of grand jurors is treated in the note to *State v. Russell*, 28 L.R.A. 195; and see especially as to prosecutor, page 201 of that note.

The presence of an unauthorized person in grand jury room as affecting indictment is treated in the annotation following *Latham v. United States*, L.R.A.1916D, 1123. And as to effect of appearance of special attorneys or private counsel before a grand jury, see *Hartgraves v. State*, 33 L.R.A. (N.S.) 568, and note; and see later case *Collier v. State*, 45 L.R.A. (N.S.) 599.

For improper evidence as ground for quashing indictment, see note to *Noll v. Dailey*, 47 L.R.A. (N.S.) 1207. L.R.A.1917B.

indictment if the statute does not so provide.

*For other cases, see Indictment, etc., IV. in Dig. 1-52 N. S.*

**Embezzlement — money taken under guise of salary.**

5. An officer of a corporation may be found guilty of embezzlement if he takes money belonging to the corporation under the guise of salary, knowingly and wilfully, with the deliberate intention of embezzling it.

*For other cases, see Embezzlement, in Dig. 1-52 N. S.*

**Evidence — testimony in bankruptcy proceedings against corporation — use in criminal proceeding.**

6. Testimony given by an officer of a corporation in bankruptcy proceedings against it is within the provision of the statute requiring the bankrupt to submit to examination but forbidding the use of any testimony given by him as evidence against him in any criminal proceeding.

*For other cases, see Criminal Law, II. b, in Dig. 1-52 N. S.*

(September 26, 1916.)

**EXCEPTION** before sentence, by respondent, to rulings of the Circuit Court for Kalamazoo County, in an indictment for embezzlement which resulted in his conviction. Reversed.

**Statement by Brooke, J.:**

Respondent in this case was indicted by a grand jury, and in said indictment was charged, together with one Victor L. Palmer and George T. Lay, with having embezzled from the Michigan Buggy Company, a corporation, of which respondent was vice president and a director, the sum of \$42,446.52. To the information respondent interposed several pleas in abatement, the substance of which was as follows:

(1) That Joseph W. Stockwell, one of the grand jurors of the jury which found the indictment, was disqualified from acting, for the reason that said Stockwell was the United States commissioner for the western district of Michigan before and at the time he was drawn on said grand jury, acting as such in the western district of Michigan during all of the time he sat on said grand jury, and that before said grand jury was impeached, said Stockwell had before him as such commissioner the minutes of the testimony upon which respondent was indicted, given by respondent in the bankruptcy proceeding, with a view of issuing a warrant against this respondent under the statutes of the United States of America; and from his investigations, which included a consultation with the United States district attorney, said Stockwell became a part of the prosecuting force of the government of

the United States of America, to prosecute this respondent upon the same state of facts upon which he was afterwards indicted by said grand jury; and that said Stockwell had power in his discretion to have started a criminal proceeding upon said state of facts against respondent; and that said Stockwell was one of the prosecutors against him on said state of facts before he was drawn on said grand jury, and was disqualified from acting as a grand juror for that reason.

It is further alleged that said Stockwell acted as a stenographer in the taking of testimony before the referee in bankruptcy in the matter of the Michigan Buggy Company, a bankrupt, that in said proceeding said Stockwell took the testimony of the respondent, and that the minutes of said testimony were used in said contemplated proceeding before said United States commissioner.

It is further alleged that the testimony so taken by Stockwell in the bankruptcy proceeding was by him read before the grand jury as evidence against respondent.

(2) That the books and writings of the Michigan Buggy Company and the testimony of the bookkeepers and clerks having the same in charge were used to secure the indictment of the respondent, and that such use was illegal under the Federal Bankruptcy Act (Act July 1, 1898, chap. 541, 30 Stat. at L. 544, Comp. Stat. 1913, § 9585).

(3, 4, 5) These pleas set up that various members of the grand jury were disqualified to act as said jurors, for the reason that they were stockholders in various banks, which banks were creditors of the bankrupt Michigan Buggy Company.

(6) It is charged that the respondent was summoned by the grand jury to give testimony before it, and that he appeared in obedience to said summons and gave such testimony; that, being without the advice of counsel, he did not know what questions he was privileged to refuse to answer, and he avers that, without his testimony so obtained, no indictment would have been found against him.

(7) It is charged that the name of Stockwell was not among those in the grand jury box, although an attempt had been made by those in charge of the grand jury to have his name placed upon the list by the supervisors. It is further charged that one Pomeroy, a juror, having been excused, Stockwell, who at the time was seated at his desk in the courtroom, acting as official stenographer of the ninth judicial circuit, was called as a spokesman, and immediately ceased to perform his duties as such stenographer, and proceeded to act as a mem-

ber of the said grand jury, participating in all of its deliberations and voting for the indictment of the respondent.

The people filed a demurrer to said several pleas of abatement, contending that the same were insufficient in law to bar the people from prosecuting the said indictment. Respondent thereupon demanded a bill of particulars of the charges upon which the indictment in the cause was based. Such bill was presented by the people, and in it, it was charged that upon fifteen separate dates between June 2, 1913, and July 1, 1913, the defendant had embezzled certain sums of money, ranging from \$100 to \$3,900, and amounting in the aggregate to upwards of \$40,000.

A brief history of the facts leading up to the indictment of the respondent, together with his brother, George T. Lay, and Victor L. Palmer, is as follows: The Michigan Buggy Company was incorporated in 1883, and reincorporated in 1893. In 1909 it had a capital stock of \$300,000, all common stock, and that year \$200,000 of preferred stock was issued, and the company, which theretofore seems to have attained a fair degree of prosperity as a manufacturer of buggies, embarked upon the manufacture of automobiles. This business was continued by the company until its bankruptcy in the summer of 1913. Up to 1912, M. H. Lane, F. B. Lay, Sr., and Victor L. Palmer were the owners of all the common stock of the concern. They constituted the board of directors, and were for many years the officers of the corporation, M. H. Lane being president, Frank B. Lay, Sr., treasurer, and Victor L. Palmer, secretary. Some time in the year 1912 (probably April 20th), one hundred shares of the common stock of the company were given to each of the sons of F. B. Lay, Sr., viz., George T. Lay and respondent, Frank B. Lay, Jr. The board of directors was increased from three to five, and George T. and Frank B. Lay, Jr., were made vice presidents. The respondent commenced to work for the company when he was eighteen years of age, in 1905, at a salary of \$25 per month. This salary was increased from time to time, until, during the last year of the existence of the corporation, he drew, according to the books of the company, as assistant sales manager, the sum of \$300 per month. This salary was paid by two separate checks of the company each month of \$150 each. For some reason they were charged to two separate accounts upon the books. Prior to the year 1912, respondent's salary had never exceeded \$1,800 a year. On April 20, 1912, a meeting of the board of directors was held, at which all of the directors were present. At this meeting Mr. Lane was

deposed as president, and Frank B. Lay, Sr., was elected in his place. Mr. Lane was made chairman of the board and Mr. Palmer was elected secretary and treasurer. On February 8, 1912, at a meeting of the board of directors, the salaries of the officers of the company for the year 1912 were fixed as follows:

"Mr. Lane ..... \$6,000 00  
Mr. Lay ..... 6,000 00  
Mr. Palmer ..... 6,000 00"

—with further compensation of \$6,000 to Mr. Palmer, to be continued at the discretion of the board. In June, 1912, respondent and his brother having in the meantime been elected directors of the company, a meeting of four of the directors of the board, Mr. Lay, Sr., Mr. Palmer, George T. Lay, and the respondent, was held at the Burdick House in Kalamazoo. The fifth director, Mr. Lane, had no notice of this meeting. It was there talked over and agreed between the four directors attending that Mr. Lay, Sr., should draw a larger amount out of the business than he was then drawing according to the resolution of February 8, 1912, that Mr. Palmer's salary should be \$25,000 per year, and that the salary of George T. Lay and respondent should be \$12,000 per year each. The record does not disclose that any formal action was taken by the four members of the board at this meeting, or that any record thereof was made in the corporate books. Following this meeting, and commencing on July 1, 1912, respondent continued to receive, as before, his salary of \$300 per month in two checks (\$150 each), which were usually drawn and signed by himself, one of which being charged to "office and selling expense," the other to "personal account." In addition to this sum of \$300, respondent received in cash from Palmer each month the sum of \$700, which brought his salary up to \$12,000 per annum, the amount agreed upon at the Burdick House meeting. Commencing January 1, 1913, respondent received cash payments from Mr. Palmer each month in an amount sufficient to make his salary, from January 1 to July 1, 1913, \$25,000 per annum. No warrant for the payment of these sums by Palmer to respondent seems to have existed prior to March 29, 1913, upon which date the respondent, his brother, George T. Lay, and Palmer held a so-called meeting of the board of directors. Neither Mr. Lay, Sr., nor Mr. Lane was present. At this meeting the following business was transacted:

"Mr. George T. Lay moved that the following salaries paid to the officials of the company for the year ending January 31st, L.R.A.1917B.

1913, be hereby ratified and approved as follows:

M. H. Lane ..... \$ 6,000 00  
F. B. Lay, Sr., for salary paid and dividends paid upon both common and preferred stock, an amount less than ..... 35,000 00  
George T. Lay, an amount not exceeding ..... 25,000 00  
F. B. Lay, Jr., an amount not exceeding ..... 25,000 00  
V. L. Palmer, an amount not exceeding ..... 25,000 00

"Mr. Palmer supported the motion, and it was put to vote and carried.

"Geo. T. Lay moved that the following officials' salary list be approved for the year ending January 31, 1914, unless otherwise ordered by this board:

M. H. Lane .....\$ 6,000 00  
F. B. Lay, Jr. .... 25,000 00  
V. L. Palmer ..... 25,000 00  
George T. Lay ..... 25,000 00

"Mr. Palmer supported the motion, which, being put to vote, was carried. Mr. George T. Lay moved that the salary of president, Mr. F. B. Lay, Sr., for the year ending January 31, 1914, be fixed at an amount of \$35,000, provided, however, that the dividends paid Mr. Lay, Sr., upon both his common and preferred stock be construed as to apply against this authorization of salary, so that the combination of salary and common and preferred dividends do not exceed the amount stated, \$35,000. Mr. Palmer supported the motion, and it, being put to vote, was carried. Mr. George T. Lay moved that whereas, the salary paid the chief engineer, Mr. W. H. Cameron, for the past year, was \$10,000, and that while this salary was originally agreed upon to continue for a three-year period, for business reasons and commercial circumstances, he moved that for the second year the salary be fixed at \$16,000. Mr. Palmer supported the motion, which was put to vote and carried. There being no further business, the meeting closed in due form."

In order to possess himself of the necessary cash with which to satisfy the "salaries" thus provided for, Mr. Palmer caused checks to be drawn, payable to cash. These checks were, by Mr. Palmer, cashed, and the money distributed to the various officers, including respondent. For each payment of cash received by respondent from Mr. Palmer respondent gave a receipt, a sample of which is as follows:

\$1,783.33. February 1, 1913.  
Received of the Michigan Buggy Company  
\$1,783.33, balance January salary.  
F. B. Lay, Jr.

Most, if not all, of the checks drawn payable to cash and cashed by Palmer were charged upon the books of the company to "J. Roach & Company," and appeared on said books as an asset of the corporation. It is fairly inferable from the record that the "J. Roach & Company" account was a fictitious account, invented for the purpose of concealing the withdrawal of the funds represented by it.

The jury returned a general verdict of "guilty," and the case is now before us upon exceptions before sentence.

Messrs. Edwin M. Irish, Charles H. Farrell, and Allan H. Frazer, for respondent:

The facts are not sufficient to warrant the court in submitting to a jury the question of whether an embezzlement has been committed, and to sustain a verdict founded on such facts only.

Malcolimson v. Gibbons, 56 Mich. 459, 23 N. W. 166; People v. Bringard, 39 Mich. 22, 33 Am. Rep. 344; People v. Galland, 55 Mich. 628, 22 N. W. 81; People v. Hurst, 62 Mich. 276, 28 N. W. 838; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99; People v. Warren, 122 Mich. 504, 80 Am. St. Rep. 582, 81 N. W. 360; People v. Butts, 128 Mich. 208, 87 N. W. 224; People v. Messer, 148 Mich. 168, 111 N. W. 854; People v. Wilson, 157 Mich. 659, 122 N. W. 297, 17 Ann. Cas. 628; Taylor v. Com. 119 Ky. 731, 75 S. W. 244; Fleener v. State, 58 Ark. 98, 23 S. W. 1; Vonsender v. State, — Tex. Crim. Rep. —, 45 S. W. 725.

Respondent's right to refrain from testifying, without question or comment from court or prosecuting attorney, was absolute.

People v. Evans, 72 Mich. 367, 40 N. W. 473; People v. Payne, 131 Mich. 474, 91 N. W. 739; People v. Hammond, 132 Mich. 422, 93 N. W. 1084; People v. Cahill, 147 Mich. 201, 110 N. W. 520; People v. Mitchell, 164 Mich. 583, 129 N. W. 698; People v. Peterson, 166 Mich. 10, 131 N. W. 153.

Sustaining the demurrer to the pleas in abatement filed by respondent was error.

Sayles v. Newton, 82 Mich. 84, 46 N. W. 29; McCurdy v. New York L. Ins. Co. 115 Mich. 20, 72 N. W. 996; People v. Smith, 118 Mich. 73, 76 N. W. 124; People v. Lauder, 82 Mich. 109, 46 N. W. 956; People v. Reigel, 120 Mich. 78, 78 N. W. 1017; Amann v. People, 76 Ill. 188; Com. v. Carr, 114 Mass. 280, 19 Am. Rep. 345; United States v. Chambers, 135 Fed. 1023.

Respondent's testimony given in the bankruptcy proceedings against the Michigan Buggy Company, a bankrupt, could not be legally used against him on a criminal prosecution, and without such testimony, L.R.A.1917B.

and particularly his own before the grand jury, he could not have been indicted.

Stroh v. Detroit, 131 Mich. 114, 90 N. W. 1029; Hale v. Henkel, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; Edelstein v. United States, 9 L.R.A.(N.S.) 236, 70 C. C. A. 328, 149 Fed. 636; Glickstein v. United States, 222 U. S. 139, 56 L. ed. 128, 32 Sup. Ct. Rep. 71; United States v. Chambers, 135 Fed. 1023; Re Wilcox, 48 C. C. A. 567, 109 Fed. 628, 3 N. B. N. Rep. 876; Heike v. United States, 227 U. S. 140, 57 L. ed. 453, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 593, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Cameron v. United States, 231 U. S. 710, 58 L. ed. 448, 34 Sup. Ct. Rep. 244; Ensign v. Pennsylvania, 227 U. S. 592, 57 L. ed. 658, 33 Sup. Ct. Rep. 321; Re Moser, 138 Mich. 302, 101 N. W. 588, 5 Ann. Cas. 31; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303; Levy v. Superior Ct. 105 Cal. 600, 29 L.R.A. 811, 38 Pac. 965; Re Marx, 102 Fed. 676, 3 N. B. N. Rep. 665; Re Logan, 102 Fed. 876, 2 N. B. N. Rep. 1056; Re Gaylord, 50 C. C. A. 415, 112 Fed. 668; Re Leslie, 119 Fed. 406; United States v. Simon, 146 Fed. 89; Jacobs v. United States, 88 C. C. A. 554, 161 Fed. 694; Powell v. Pangborn, 161 App. Div. 453, 145 N. Y. Supp. 1073.

Messrs. Charles W. Nichols, Frank F. Ford, and Grant Fellows, Attorney General, for the People.

Brooke, J., delivered the opinion of the court:

The first matter requiring consideration is the assignment of error based upon the action of the court in sustaining the demurrer to the several pleas in abatement. The statute involved (Comp. Laws 1897, § 11881) provides: "A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside."

Section 11882 provides: "No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section."

This court has frequently held that no objection can be made to a grand jury, or to any member thereof, except for reasons specified in the statute. People v. Reigel, 120 Mich. 79, 78 N. W. 1017; People v. Salsbury, 134 Mich. 537, 96 N. W. 936. The

question, therefore, under the first part of the first plea in abatement, is whether Mr. Stockwell, at the time he was placed upon the grand jury, was a "prosecutor or complainant upon any charge against such person" within the meaning of the statute. It is strenuously urged on behalf of respondent that because Stockwell, before he was called to the grand jury, had the minutes of the testimony taken by him in the bankruptcy proceeding, and as a United States commissioner had made an investigation which included a consultation with the United States district attorney with a view to issuing a Federal warrant against the respondent upon the same state of facts relied upon in the case at bar, he should therefore be held to be a "prosecutor" within the meaning of the excluding statute. It should be observed that the plea does not allege that any warrant against respondent was issued by Stockwell, but only alleges that Stockwell considered the testimony taken in the bankruptcy proceeding "with a view of issuing a warrant." A "prosecutor" is said to be "one who instigates the prosecution upon which the accused is arrested." *State v. Cohn*, 9 Nev. 179, 191; *Phillips v. Bevans*, 23 N. J. L. 373; *United States v. Sandford*, 1 Cranch, C. C. 323, Fed. Cas. No. 16,221. As defined by Bouvier, a "prosecutor" is "one who prefers an accusation against a party whom he suspects to be guilty." A prosecutor cannot exist unless there is a prosecution, and a prosecution involves the idea of a formal complaint, information, or indictment filed against the criminal. *People v. Garnett*, 129 Cal. 364, 61 Pac. 1114; *Day v. Otis*, 8 Allen, 477. We think it clear that Stockwell was neither "prosecutor nor complainant" within the meaning of the statute.

The second part of the first plea avers, upon information and belief, that the minutes of the testimony taken before Stockwell in the bankruptcy proceeding were used and read before the grand jury as evidence against respondent by Stockwell. Assuming that this averment is intended by the pleader to strengthen the claim that Stockwell was a prosecutor within the meaning of the statute, it requires no further discussion; if, however, the pleader intended, by including this averment in the first plea, to charge that the indictment was founded upon incompetent testimony, the plea would fail for duplicity. *Findley v. People*, 1 Mich. 234, where it is held that a plea which states several distinct facts having no relation or dependence upon each other is bad for duplicity.

The mere fact that incompetent, improper, and irrelevant testimony was received and considered by the grand jury is L.R.A.1917B.

not fatal to the indictment, unless such testimony is the only testimony considered by them. *People v. Lauder*, 82 Mich. 109, 46 N. W. 956 and cases there cited and discussed.

The second, third, fourth, and fifth pleas in abatement are not discussed by counsel for respondent.

The sixth plea in abatement is argued by counsel for respondent, but the argument refers rather to the use of the testimony given by respondent in the bankruptcy proceeding before the grand jury than to the fact that respondent himself was required to give testimony before the grand jury, which is the gravamen of the plea. The same point was raised in the case of *People v. Lauder*, supra, and was there passed upon contrary to the contention of the respondent.

With reference to the seventh plea in abatement, it is sufficient to say that the matter urged as an objection to the validity of the action of the grand jury is outside the provisions of the statute, and cannot be considered on a motion to quash the indictment.

It is argued on behalf of respondent that the court erroneously refused to direct a verdict for defendant at the close of the people's case upon the ground that there was no evidence upon which the jury could properly predicate a verdict of "guilty." Of course, if there was any evidence of respondent's guilt, its weight and sufficiency were for the jury. *People v. Eaton*, 59 Mich. 559, 26 N. W. 702. The statute under which respondent was indicted (Comp. Laws 1897, § 11565) provides: "If any officer, agent, clerk, or servant of any incorporated company, or of any city, township, incorporated town, or village, school district, or other public or municipal corporation, or if any clerk, agent, or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing, to have committed the crime of larceny."

After a careful examination of the record in this case we are unable to agree with the contention of counsel for respondent that it contains no evidence tending to prove that the moneys taken and received by the respondent from the Michigan Buggy Company under the guise of salary were so

taken knowingly and wilfully, and with the deliberate intention of embezzling them. It would avail nothing to point out the evidential matter which in our opinion justifies this conclusion.

Reference is made to the preceding statement of facts. It should be said in this connection, however, that some of the facts stated may rest upon the admission of incompetent testimony, which will be herein-after discussed, but with the elimination of these there still remains sufficient, in our opinion, to carry the case to the jury.

Section 7, ¶ 9, chap. 3, of the Bankruptcy Act (Act July 1, 1898, chap. 541, 30 Stat. at L. 548, Fed. Stat. Anno. p. 560, Comp. Stat. 1913, § 9591) provides that it is the duty of the bankrupt to "submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

It will be remembered that in the bankruptcy proceeding involving the affairs of the Michigan Buggy Company the respondent was examined, and that during the period covered by his examination he was vice president and a director of the bankrupt corporation. Upon his trial in the case at bar, the people offered in evidence his testimony given in the bankruptcy proceeding. Strenuous objection was made on behalf of the respondent to its reception, but it was received, and much of it was read to the jury. To this action by the court, respondent duly excepted.

On behalf of the people it is argued that respondent is not the bankrupt, and therefore that the provision of the statute does not apply to his testimony. On the other hand, counsel for respondent insist that, as corporations can act only through their officers, who are natural persons, a reasonable interpretation of the statute would include officers of bankrupt corporations within the term "bankrupt." With this view of the statute we are inclined to agree. The purpose of the statute would seem to be to secure from the bankrupt all information with reference to the bankrupt estate which would facilitate its orderly and economic administration. If the testimony of officers of bankrupt corporations may afterwards be used against them in criminal proceedings growing out of facts involved in the bankruptcy, they will be found reluctant to testify, and probably relying upon their constitutional privileges in refusing to testify. L.R.A.1917B.

Under this view it follows that the admission of the testimony given by respondent in the bankruptcy case was erroneous, and we are unable to say that such error was without prejudice, although without the use of such testimony the jury might have reached the same result. Upon the trial Frank B. Lay, Sr., and Victor L. Palmer were both called as witnesses by the people. Both declined to testify as to facts within their knowledge concerning the charge against respondent claiming constitutional privilege. Respondent himself did not take the stand, but, as before pointed out, his testimony taken in the bankruptcy proceeding was read.

During the argument of the prosecuting attorney to the jury the following occurred.

He said:

I have not a word to say about this respondent or Mr. Palmer testifying here, but I do have a word to say about this. . . .

Mr. Irish: I except to that part of the argument.

The Court: I will say that the prosecuting attorney has no right to comment upon the failure of the accused to testify, and he should refrain from making any comment, or any suggestion of any sort, relative to the failure of the respondent to testify, and the jury will disregard the same absolutely. And, again, if this salary proposition that is here in question was operated only (openly), legally, and above board, why haven't the facts been put on here by those witnesses who refused to testify, who knew considerable about it?

Mr. Irish: We except to that, we are not responsible for that.

The Court: That is true, the respondent is not responsible for his father's failure to testify, or Mr. Palmer's, either.

Mr. Frazer: We ask the court to instruct the prosecuting attorney that he has no right to talk about that to the jury.

The Court: The refusal of Mr. Palmer or F. B. Lay, Sr., to testify, in and of itself, can raise no presumption against the respondent.

Mr. Frazer: Give me an exception.

And again: After we have brought all this before you, are you going out and say that this respondent is not guilty of improperly and illegally taking the funds of this company?

Mr. Irish: I would like to save the point as to the remarks of the prosecuting attorney giving his opinion.

Other remarks of the prosecuting attorney or his assistant were made in the course of the argument, referring to the fact that two of the witnesses, Lay, Sr., and

Palmer, had stood on their constitutional privilege. The statute (Comp. Laws 1897, § 10211) provides: " . . . That a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

This statute and alleged breaches of it have been under consideration by this court in the following cases: *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *People v. Payne*, 131 Mich. 474, 91 N. W. 739; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084; *People v. Cahill*, 147 Mich. 201, 110 N. W. 520; *People v. Mitchell*, 164 Mich. 583, 129 N. W. 698; *People v. Peterson*, 166 Mich. 10, 131 N. W. 153. In all these cases, remarks of the prosecuting attorney with

reference to the failure of the accused to take the stand were held to constitute reversible error. In the case at bar the record discloses no remarks on the part of counsel for respondent which would tend to excuse or justify the criticism of the prosecuting attorney. The statute does not prohibit reference to the fact that witnesses other than the accused have failed to testify, though in our opinion such reference might well have been omitted. Many assignments of error are based upon the charge of the court. Certain isolated sentences, taken alone, may be subject to criticism, but, as a whole, the charge is full, fair, and, in our opinion, carefully preserved every substantial right of the respondent.

Because of the errors pointed out, the judgment is reversed, and a new trial ordered.

### **Annotation—Who is within protection of provision of Bankruptcy Act as to use in criminal proceeding of testimony given by bankrupt.**

The provision of the Bankruptcy Act which is under consideration herein is found in § 7, clause 9, and is quoted in *PEOPLE v. LAY*, ante, 608. The question, then, is as to who is a "bankrupt" within the meaning of that provision, that being the term used therein. In this connection it may of course be assumed that there is no question that an individual becoming a bankrupt and giving testimony with respect to matters connected with the subject dealt with in such clause is entitled to the immunity therein provided for. The question then arises as to who else, if anyone, is a "bankrupt" within the meaning of the provision. Upon this phase of the question it has been expressly held that a reasonable interpretation of the statute would include officers of a bankrupt corporation, such being the rule laid down in *PEOPLE v. LAY*, wherein it was ruled that testimony given by a director and vice president of a corporation in bankruptcy proceedings against the corporation was within the protection of clause 9 of § 7 of the Bankruptcy Act. And this decision was followed and approved in *People v. Lay* (1916) — Mich. —, 160 N. W. 467, which involved another director and vice president of the same bankrupt corporation, the court holding that it saw no reason for modifying the conclusion reached in the earlier decision. And the court in *Re Alphin & L. Cotton Co.* (1904) 131 Fed. 824, 12 Am. Bankr. Rep. 653, apparently implies that the officers of a bankrupt corporation were within the meaning of

§ 7, clause 9. The case of *Cameron v. United States* (1914) 231 U. S. 710, 58 L. ed. 448, 34 Sup. Ct. Rep. 244, may also be of interest. In that case it was contended that testimony given by the president and treasurer of a bankrupt corporation on a hearing before a commissioner was inadmissible on a prosecution based upon alleged false swearing in the bankruptcy proceedings because within the immunity clause of § 7, subdiv. 9, of the Bankruptcy Act; but the court refuted same upon the ground that such provision had no application in prosecutions for perjury, no suggestion being made that the officer of the bankrupt who gave the testimony was not within the meaning of the provision. And see also *People v. Swarts* (1902) 8 Am. Bankr. Rep. (Ill.) 487, wherein it was questioned, but not decided, whether the provision of the Bankruptcy Act under consideration herein extends to officers of an insolvent bankrupt corporation.

And the immunity clause has been held applicable to the testimony of the individual members of a firm given by them when examined at the meeting of the creditors in bankruptcy proceedings against the firm. This view was taken in *Clark v. State* (1914) 68 Fla. 433, 67 So. 135, it being held that testimony given by a member of the firm in the bankruptcy proceedings was not admissible in a subsequent criminal prosecution against such member. So, in *Re Nachman* (1902) 114 Fed. 995, it seems

to have been assumed that the individual members of a bankrupt firm were within the meaning of the provision under consideration herein.

But in *United States v. Simon* (1906) 146 Fed. 89, it was held that the application of clause 9 was restricted to testimony given by a bankrupt in his own bankruptcy case and did not prohibit the use of a bankrupt's testimony given in any other case.

And in *Re Feldstein* (1900) 103 Fed. 269, 2 N. B. N. Rep. 982, the court recognized the fact that the immunity clause of § 7, subdiv. 9, was not in terms broad enough to apply to a witness other than the bankrupt himself. And see *Ensign v. Pennsylvania* (1913) 227 U. S. 592, 57 L. ed. 658, 33 Sup. Ct. Rep. 321, affirming (1910) 228 Pa. 400, 77 Atl. 657, which affirmed (1909) 40 Pa. Super. Ct. 157, wherein it was held that the testimony of an expert accountant based upon an examination of the bankrupt's books while they were in custody of the trustee in bankruptcy could not be excluded upon the prosecution of the bankrupt in a state court upon the theory that the provision of the Bankruptcy Act, that no testimony given by

a bankrupt upon his examination shall be offered in evidence against him in any criminal proceeding, was applicable.

As to admissibility of schedules filed in Federal bankruptcy proceedings in the prosecution of the bankrupt for concealment of property, see note to *Johnson v. United States*, 18 L.R.A.(N.S.) 1194. And generally, as to use in criminal proceedings of books which one has been required to produce in another proceeding as violation of his right against self-incrimination, see note to *Johnson v. United States*, 47 L.R.A.(N.S.) 263. And as to right of corporation, corporate officer, or other person having custody of its books and papers, to refuse to produce them on the ground that they may tend to incriminate, see note to *Burnett v. State*, 47 L.R.A.(N.S.) 1175. And as to right of officer of a corporation to refuse to turn over its books to a receiver upon the ground that they have a tendency to incriminate him, see note to *Manning v. Mercantile Securities Co.* 30 L.R.A.(N.S.) 725. As to incriminating evidence furnished by defendant acting under compulsion, see note to *State v. Turner*, 32 L.R.A.(N.S.) 772.

G. J. C.

# MINNESOTA SUPREME COURT.

GEORGE B. NORRIS et al., Receivers for Segerstrom Piano Manufacturing Company, Appts.,

v.

BOSTON MUSIC COMPANY, Resp't.

(129 Minn. 198, 151 N. W. 971.)

## Sale — bailment to sell — effect.

1. If the contract under which the owner delivers personal property to another to sell contemplates that the title shall never pass to the other, and imposes no obligation upon him ever to pay the purchase price, it does not constitute a conditional sale of the property.

*For other cases, see Sale, I. c, in Dig. 1-52 N. S.*

## Bailment — to sell.

2. A contract under which the owner delivers property to another to sell, and which provides that the title to the property

Headnotes by TAYLOR, C.

**Note.** — In the annotation to *D. M. Ferry Co. v. Hall*, post, 626, the question is covered as to the construction of contracts containing provisions peculiar to consignment and agency or sales contracts, and in a note appended to *Mishawaka Woolen Mfg. Co. v. Stanton*, post, 658, the question is covered as to the construction of conditional sale L.R.A.1917B.

shall remain in the owner until sold to an actual purchaser, and that all property not so sold, and the proceeds of all sales, shall be returned to such owner, and which imposes no obligation upon the other party to pay the purchase price for any of the property, constitutes a bailment with power of sale, and not a conditional sale.

*For other cases, see Bailment, I.; Sale, I. c, in Dig. 1-52 N. S.*

## Same — right to pursue property.

3. A bailor may pursue his property and reclaim it, even in the hands of a good-faith purchaser from or under the bailee, unless estopped by his own conduct from causing loss to such purchaser; and this is equally true where property is consigned to a factor to sell, who wrongfully disposes of it to satisfy his own debt.

*For other cases, see Factors, in Dig. 1-52 N. S.*

## Estoppel — sale by factor — reclaiming property.

4. Where the owner ships property to a factor and the factor wrongfully executes a bill of sale therefor to one having notice

contracts as affected by an express or implied permission to the purchaser to sell in the ordinary course of business.

As to right of one leaving his chattels in another's possession to claim title against the latter's vendees or creditors, see note to *Davis v. First Nat. Bank*, 25 L.R.A.(N.S.) 760.



of his wrongdoing, and thereafter such vendee sells to another, to whom he exhibits his bill of sale, and who, without the production of the bill of lading, and without knowing or inquiring the source of the factor's title, and without knowing or inquiring by whom or on what conditions the property had been shipped, takes it while still in the car in which it had been shipped to the factor, the owner is not estopped from reclaiming his property.

*For other cases, see Factors, in Dig. 1-52 N. S.*

(March 26, 1915.)

**A**PPEAL by plaintiffs from an order of the District Court for St. Louis County, denying a motion for a new trial after a finding in defendant's favor in an action brought to recover possession of certain pianos. Reversed.

The facts are stated in the opinion.

Messrs. Fryberger, Fulton, & Spear, for appellants:

The agreement between the plaintiffs and the Wisconsin Music Company was a consignment or agency contract.

Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147; Monitor Mfg. Co. v. Jones, 96 Wis. 619, 72 N. W. 44; National Bank v. Goodyear, 90 Ga. 711, 16 S. E. 962; McKenzie v. Roper Wholesale Grocery Co. 9 Ga. App. 185, 70 S. E. 981; B. F. Sturtevant Co. v. Dugan, 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Eilers Music House v. Fairbanks, 80 Wash. 379, 141 Pac. 885; Charles H. Childs & Co. v. Waterloo Wagon Co. 37 App. Div. 242, 57 N. Y. Supp. 520; National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514; Re Galt, 56 C. C. A. 470, 120 Fed. 64; John Deere Plow Co. v. McDavid, 70 C. C. A. 422, 137 Fed. 802; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 587; Re Columbus Buggy Co. 74 C. C. A. 611, 143 Fed. 859; Van Arsdale v. Peacock, 90 Kan. 347, 133 Pac. 703.

The mortgage made by the Wisconsin Music Company as bailee conveyed no title to Faltys or to the defendant.

Johnson v. Willey, 46 N. H. 75; Cox v. McGuire, 26 Ill. App. 315; Schenck v. Saunders, 13 Gray, 37; Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495, 33 N. E. 391; Rowe v. Sharp, 51 Pa. 26; Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; Hassett v. Sanborn, 62 App. Div. 588, 71 N. Y. Supp. 81; Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. 159; Roland v. Grundy, 5 Ohio, 202; Kitchell v. Vanadar, 1 Blackf. 356, 12 Am. Dec. 249; Nichols v. Monjeau, L.R.A.1817B.

132 Mich. 592, 94 N. W. 6; Van Arsdale v. Peacock, 90 Kan. 347, 133 Pac. 703; Stanley v. Gaylord, 1 Cush. 536, 48 Am. Dec. 643; 35 Cyc. 357; Ballard v. Burgett, 40 N. Y. 314; Taylor v. Applebaum, 154 Mich. 682, 118 N. W. 492; Alexander v. Swackhamer, 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908; Hall v. Pillsbury, 43 Minn. 33, 7 L.R.A. 529, 19 Am. St. Rep. 209, 44 N. W. 673; Hedderly v. Backus, 53 Minn. 27, 55 N. W. 116; Warder B. & G. Co. v. Rublee, 42 Minn. 23, 43 N. W. 569; Nesbitt v. St. Paul Lumber Co. 21 Minn. 491; Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950; Johnson v. Martin, 87 Minn. 370, 59 L.R.A. 733, 94 Am. St. Rep. 706, 92 N. W. 221; McCarthy v. Crawford, 238 Ill. 38, 29 L.R.A.(N.S.) 252, 128 Am. St. Rep. 95, 86 N. E. 750.

Messrs. Washburn, Bailey, & Mitchell, for respondent:

The pianos were sold to Wisconsin Music Company by a contract of conditional sale.

Rawson Mfg. Co. v. Richards, 69 Wis. 643, 35 N. W. 40; Thomas v. Richards, 69 Wis. 671, 35 N. W. 42; John Deere Plow Co. v. Edgar Farmer Store Co. 154 Wis. 490, 143 N. W. 194; Dyer v. Thorstad, 35 Minn. 534, 29 N. W. 345; H. H. Babcock Co. v. Williams, 75 Minn. 147, 77 N. W. 791; Bradley, C. & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Cortland Wagon Co. v. Sharvy, 52 Minn. 218, 53 N. W. 1147; Re Rabenau, 118 Fed. 471; Newmark, Sales, § 23; Kellam v. Brown, 112 N. C. 451, 17 S. E. 416; Ex parte White, L. R. 6 Ch. 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Thompson v. Paret, 94 Pa. 275; Bradley, A. & Co. v. McAfee, 149 Fed. 254; Re Morris, 156 Fed. 507; Smith v. Williams, 90 App. Div. 507, 85 N. Y. Supp. 506; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co. 152 Mo. App. 401, 133 S. W. 412; McKenzie v. Roper Wholesale Grocery Co. 9 Ga. App. 185, 70 S. E. 981.

Where a sale of property is secured by fraud on the part of the vendee, the sale is voidable only, the title to the property passes to the vendee, and before the sale is avoided by the vendor, the vendee may transfer a perfect title to a bona fide purchaser for value.

Will v. Key, 117 Ala. 285, 23 So. 6; Sadler v. Lewers, 42 Ark. 148; Williamson v. Russell, 39 Conn. 406; Kern v. Thurber, 57 Ga. 172; Doane v. Lockwood, 115- Ill. 490, 4 N. E. 500; Moore v. Moore, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673; Perkins v. Anderson, 65 Iowa, 398, 21 N. W. 696; Wilson v. Fuller, 9 Kan. 176; Wood v. Yeatman, 15 B. Mon. 270; W. H. Sawyer Lumber Co. v. Boston R. Co. 173

Mass. 502, 53 N. E. 912; First Nat. Bank v. Cook Carriage Co. 70 Miss. 587, 12 So. 598; Standard Oil Co. v. Meyer Bros. Drug Co. 74 Mo. App. 446; Porell v. Cavanaugh, 69 N. H. 364, 41 Atl. 860; Levy v. Carr, 85 Hun, 289, 32 N. Y. Supp. 1023; Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225; Schwartz v. McCloskey, 156 Pa. 258, 27 Atl. 300; Cochran v. Stewart, 21 Minn. 435.

Taylor, C., filed the following opinion:

In January, 1913, the Segerstrom Piano Manufacturing Company entered into the following agreement with the Wisconsin Music Company of Superior, Wisconsin:

#### Consignment Contract.

The undersigned Wisconsin Music Company, Superior, Wisconsin, hereinafter referred to as second party, hereby enters into mutual agreement with Segerstrom Piano Manufacturing Company, hereinafter designated as first party, to sell pianos furnished by first party on consignment, upon the following terms and conditions:

All pianos shipped to second party and all money, notes, contracts, and leases and proceeds of sales, shall be and remain at all times the property of first party free from liens and encumbrances or claim of creditors of second party until such pianos are sold to private purchasers and the proceeds thereof delivered to first party.

Purchaser's notes, contracts, or leases shall be made upon blanks furnished by first party, and shall draw interest at not less than 6 per cent, and all such papers, when approved by first party, shall be indorsed by second party, and the payment of the same, including the instalments, guaranteed at maturity; and the second party does hereby waive protest and notice of protest on the same.

Second party agrees to sell all instruments consigned, within four months from date of shipment; or if any of said instruments remain unsold after four months, second party agrees to pay interest after that time on the same, at the rate of 6 per cent per annum on the invoice price; but it is expressly understood that the charge of said interest and the payment thereof shall not be construed as indicating a sale of said instrument to second party.

The compensation for selling these instruments shall be such amount as second party shall obtain in excess over the price the said instrument is billed to him. On cash sales the commission shall be payable when the first party receives pay for the instrument. On time sales the first payment may be retained by the second party if the same does not exceed the commission on L.R.A.1917B.

the sale; the balance of said commission, if any, to be paid to second party as first party receives money from the purchaser after the invoice price has been paid.

All instruments taken back from customers on account of default of payments, or for other causes, and all new or secondhand instruments taken in exchange, or in part payment for instruments, consigned by first party, are to be regarded the same as goods consigned, and to be accounted for in the same manner. Second party agrees to send first party a statement the first day of each and every month of all instruments received and sold, and remaining on hand, unsold, and make prompt returns as sales are made.

Upon demand of first party or of its agent, second party will deliver as first party may direct, free of charge or expense of any kind to first party, any and all of the said goods remaining unsold at the time of said demand, including the original packing cases of same. All goods returned to first party to be passed to second party's credit at 90 per cent of original bill, the balance, 10 per cent, being deducted for the depreciation and shopwear of goods, except instruments which have been taken in exchange or trade from customers or for default in payment on notes or leases, such stock to be credited at a fair cash value, to be determined by first party. Second party agrees to pay all freight, taxes, and expenses, and to insure all stock against loss by fire, loss payable to Segerstrom Piano Manufacturing Company.

This agreement may be terminated at any time by either party, and any stock then on hand will be subject to the order of the first party.

Plaintiffs were appointed receivers of the manufacturing company, and, as such, shipped a carload of pianos to the music company. While the above agreement was made before the appointment of the receivers, it sufficiently appears that this shipment was made thereunder. When the car reached Superior, and before it had been unloaded, the music company gave a bill of sale of the pianos to one of their creditors, as security for his claim, under a verbal agreement that the pianos should remain in the car for ten days, and be returned to the music company if they paid the debt within the time. The bill of sale purported to transfer the property absolutely, was accompanied by an order directing the railway company to deliver it to the vendee. Contrary to his promise, the creditor, on the same day that he received his bill of sale, sold the pianos to defendant, and defendant took them from the car and placed them in its store at Duluth. As soon as knowledge

of these transactions reached plaintiffs, they demanded the pianos from defendant, and, the demand being refused, brought this action to recover possession of them. The trial court found that defendant was a good-faith purchaser for value; and held that the above agreement was a contract of conditional sale, and was void as against defendant because not filed in the office of the city clerk, as required by the Wisconsin statute; and that defendant was entitled to judgment. Plaintiffs moved for a new trial; the motion was denied, and they appealed.

1. The question to which both parties have devoted the greater part of their brief and argument is whether the above agreement constituted an agency and created a bailment only, or whether it constituted a conditional sale of the pianos. Agreements are occasionally so drawn that it is difficult to determine whether they constitute a conditional sale or a bailment; but there are certain distinguishing tests which usually make the matter clear. A sale contemplates that, at some time, the title shall pass to the vendee, and that, at some time and in some manner, he shall pay the purchase price. A bailment contemplates that the title shall not pass to the bailee, but remain in the bailor, and that the property shall be returned to the bailor, or be disposed of as he shall direct.

When we examine the contract in controversy to determine its purpose and effect, we find that the music company never becomes the owner of the pianos, and is not even given an option to buy them; that it nowhere obligates itself to pay for them, but only to account for the proceeds received upon sales to others; that it must return to plaintiffs all pianos not sold to actual purchasers whenever directed so to do; and that it may terminate the arrangement whenever it chooses and return all pianos then on hand. We further find that plaintiffs remain owners of the pianos until sold to private purchasers, with the right to recall them at any time before sale; that they can compel the music company to account for and turn over the proceeds of all sales, but cannot compel the music company, itself, to take any of the pianos or pay for any of them; and that they may terminate the arrangement at any time and thereupon must take back all pianos then on hand. The contract imposed onerous burdens upon the music company, including the obligation to pay interest upon pianos not sold within four months, and 10 per cent as depreciation upon those returned, but plainly does not intend that the company shall

ever own the pianos or pay the purchase price for them. It plainly does intend that they shall remain the property of the consignor until sold to an actual purchaser by the consignee, and shall be returned to the consignor unless so sold. The contract contains all the essentials of a factorage bailment, but does not contain the essentials of a sale. It constituted a bailment with power to sell, but did not constitute a conditional sale to the bailee, and is not within the statute requiring contracts of conditional sale to be recorded. *Re Columbus Buggy Co.* 74 C. C. A. 611, 143 Fed. 859; *Re Flanders*, 67 C. C. A. 484, 134 Fed. 560; *Re Galt*, 56 C. C. A. 470, 120 Fed. 64; *Metropolitan Nat. Bank v. Benedict Co.* 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 182; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.* 7 C. C. A. 660, 18 U. S. App. 438, 59 Fed. 49; *Eilers Music House v. Fairbanks*, 80 Wash. 379, 141 Pac. 885; *National Bank v. Goodyear*, 90 Ga. 711, 16 S. E. 962; *Furst Bros. v. Commercial Bank*, 117 Ga. 472, 43 S. E. 728; *Cortland Wagon Co. v. Sharvy*, 52 Minn. 216, 53 N. W. 1147; *Williams v. McGrade*, 13 Minn. 174, Gil. 165; *Monitor Mfg. Co. v. Jones*, 96 Wis. 619, 72 N. W. 44.

2. The trial court found that defendant was a good-faith purchaser for value. As the evidence was such that the court could have found either way upon that question, the finding must stand although the evidence to support it is weak. Defendant contends that, being a good-faith purchaser, it acquired a valid title as against plaintiffs, and in support of this contention cites *Cochran v. Stewart*, 21 Minn. 436, and other cases which hold that, if a vendee whose title is voidable for fraud sells the property to a good-faith purchaser, the purchaser acquires a valid title. Such cases show the desire of the law to protect good-faith purchasers, but are not in point, for there the original vendor in fact vested title in the vendee, while here he retained the title in himself. Being the owners of the property, plaintiffs have the right to reclaim it unless debarred therefrom by some principle of estoppel. They intrusted the property to an agent with power to sell. The agent, to secure his own debt, wrongfully purported to make an absolute sale of the property to one of his creditors. The creditor wrongfully sold the property to defendant, who purchased and paid for it in good faith.

It has always been the law that a bailor may pursue his property and reclaim it, even in the hands of a good-faith purchaser from or under the bailee, unless estopped by his own conduct from causing loss to such

purchaser. *Warder, B. & G. Co. v. Rublee*, 42 Minn. 23, 43 N. W. 509; *Hedderly v. Backus*, 53 Minn. 27, 55 N. W. 116; *Baker v. Taylor*, 54 Minn. 71, 55 N. W. 823; also, cases cited in note found in 25 L.R.A. (N.S.) at page 760. If the owner consigns his property to a factor for sale, and the factor pledges it for his own debt, or sells it to a creditor to apply on such debt, the same rule applies. In *Warner v. Martin*, 11 How. 209, 13 L. ed. 667, merchandise intrusted to a factor for sale was sold to one Warner, a creditor of the factor, to apply on the factor's debt, and a portion of it was thereafter sold by Warner to Heald, Woodward, & Company who were good-faith purchasers. The court says: "A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledger is ignorant of the factor's not being the owner. . . . By the common law, the transfer of the plaintiff's tobacco to Warner cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward, & Company. Heald, Woodward, & Company are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them."

The rule is stated in 19 Cyc. 174, as follows: "In the absence of statutes which furnish protection to persons dealing with factors, the principal can recover his property whenever he can trace it as distinct from that of the factor into whomsoever's hands it may have come. He is entitled to recover the specific goods themselves if they can be had, and if the goods themselves cannot be recovered, he may recover their proceeds if they can be traced. Thus, if a factor barter his principal's goods in a manner not authorized by the principal and not within the ordinary modes of transacting business, the principal may follow and reclaim the property, whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods, the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor."

In *Eilers Music House v. Fairbanks*, 80 Wash. 379, 141 Pac. 885, plaintiff consigned a quantity of player pianos to a factor for

sale. The factor sold one of them to apply on his own debt to a creditor having notice of the bailment. The creditor sold it to a good-faith purchaser. Plaintiff brought replevin against the purchaser. The Washington court quotes the above excerpt from Cyc. and then says: "This rule applies to a purchaser without notice from one who has acquired possession of property from a factor through barter or exchange, or in consideration of a pre-existing debt. *Warner v. Martin*, supra. This is true because one who purchases from a factor in consideration of a pre-existing debt, or in part consideration of a pre-existing debt and barter or exchange, acquires no title, and, having no title, can pass none. This rule, of course, is subject to the equitable principles of estoppel, where the facts are such as to bring the case within them; but there are no such facts present in the case at bar."

A large number of cases bearing upon the same question are cited in a note found in 28 Ann. Cas. at page 1290.

3. The remaining question is whether plaintiffs are estopped from reclaiming the pianos from defendant. When defendant purchased the pianos they were in a car standing upon a sidetrack in the railroad yard at Superior. Defendant's vendor exhibited a bill of sale from the Wisconsin Music Company, and an order from that company directing the railroad company to deliver them to such vendor. Defendant knew that the pianos were not being sold in the ordinary course of business, but considered that it was getting a bargain and that its vendor was responsible. Defendant did not know who had shipped the pianos; did not know from whom, or in what manner, or under what conditions, the Wisconsin Music Company had acquired them, and made no inquiry from anyone concerning any of these matters. Neither defendant nor its vendor ever had possession of the bill of lading, so far as the record discloses, and defendant never made any inquiry concerning it. Defendant knew merely that the pianos were in the car and that the music company had executed a bill of sale for them to defendant's vendor, accompanied by an order on the railroad company to deliver them, and frankly admits that it neither learned nor sought to learn anything more concerning them. We find nothing which can be held to estop plaintiffs from reclaiming their property. *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Kiewel v. Tanner*, 105 Minn. 50, 25 L.R.A. (N.S.) 772, 117 N. W. 231.

Order reversed.

## ALABAMA SUPREME COURT.

D. M. FERRY &amp; COMPANY, Appt.,

v.

SMITH HALL, Tax Collector.

(188 Ala. 178, 66 So. 104.)

**Sale — placing of seed on commission — passing of title.**

A consignment of seed in response to an order to be sold by the consignee at prices and upon terms to be fixed by him, the consignee to account on demand for all seed sold at invoice prices less commission, and the consignor to take back all seed unsold at invoice prices, constitutes a sale and the passing of title, although the order states that the seed is to be sold on commission and a label on the packages states that the seed is placed on commission, not sold outright.

*For other cases, see Sale, I. b, in Dig. 1-52 N. S.*

(June 30, 1914.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Houston County in defendant's favor in an action submitted upon an agreed statement of facts, for the recovery of taxes paid under protest by plaintiff to defendant. Reversed.

The exhibits mentioned in the opinion are as follow:

**Exhibit A.**

D. M. Ferry &amp; Co., Detroit, Mich.

Please forward in due season a number blank box of standard garden seed, flower seed, and field seed, to sell on commission for the year 191—, on the following terms, viz., 40 per cent commission on papers sold, and 25 per cent on packages sold from the invoice prices; the unsold seed with the boxes to be returned in good order when called for, and the amount due for all seed not so returned to be paid for at same time.

On the reverse side was certain printing and blank not necessary to be here set out.

**Exhibit B.**

Memorandum of shipment from D. M. Ferry & Company, Detroit, Michigan, to John Doe, Dothan, Alabama.

In compliance with your order we have this day forwarded you care of ———, box ——— of our standard garden seed, an itemized retail invoice of which you will find on inside of box cover. If at any time

**Note.**—As to construction of contract having some provisions peculiar to consignment and agency contracts, and others to sale contracts, see annotation following this case, post, 626.  
L.R.A.1917B.

you have not a sufficient supply of 5 cent papers, please order such as you may need, and we will promptly forward them by mail postpaid.

Then follow certain directions as to freight charges, etc., and the added caution: "Please have goods removed from depot promptly on arrival and avoid storage charges."

**Exhibit C.**

No allowance for exchange. Error or shortage must be reported at once. D. M. Ferry & Company give no warranty, express or implied, as to descriptions, surety, productiveness, or any other matter on any seed they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are to be returned at once. We agree to buy back all unsold seed with boxes at prices billed, less discount, when our traveler calls.

This invoice and memorandum of shipment, together with the order marked "Exhibit A," constitutes the original contract between D. M. Ferry & Company, and the original merchant. On the boxes shipped would be pasted the following paster, marked "Exhibit D." This case, including all papered seed and boxes invoiced on case cover are placed on commission, not sold outright.

D. M. Ferry &amp; Company.

The further facts are stated in the opinion.

Messrs. Standish Backus and Well, Stakely, & Vardaman, for appellant:

D. M. Ferry and Company were not liable for the taxes assessed to them on said seed, because the title to the seed had vested in the retail merchants at the time of its delivery to the merchants.

The contracts under which the seed were shipped into Alabama are contracts of sale under which title passes on delivery, and are not contracts of agency or of bailment.

35 Cyc. 41, 290, 291; 24 Am. & Eng. Enc. Law, 1026; Jackson v. State, 2 Ala. App. 226, 57 So. 110; Ex parte White, L. R. 6 Ch. 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488; 2 Benjamin, Sales, 794; Re Rabenau, 118 Fed. 471; Re Miller, 135 Fed. 868; Re Wells, 140 Fed. 752; Re Heckathorn, 144 Fed. 499; Bradley, A. & Co. v. McAfee, 149 Fed. 254; Coweta Fertilizer Co. v. Brown, 89 C. C. A. 612, 163 Fed. 162; Re Allen, 183 Fed. 172; Snelling v. Arbuckle Bros. 104 Ga. 362, 30 S. E. 863; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; David Bradley

Mfg. Co. v. Raynor, 70 Ill. App. 639; Independent Brewing Assn. v. Cooke Brewing Co. 169 Ill. App. 347; Aspinwall Mfg. Co. v. Johnson, 97 Mich. 531, 56 N. W. 932; People v. Newman, 99 Mich. 148, 57 N. W. 1073; De Kruif v. Flieman, 130 Mich. 12, 89 N. W. 558; Braunn & Fitts v. Keally, 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389; Bickling v. Stevens, 69 Mo. App. 168; Buffum v. Descher, 1 Neb. (Unof.) 736, 96 N. W. 352; Baker v. Turner, 19 App. Div. 223, 46 N. Y. Supp. 25; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; Conn v. Chambers, 123 App. Div. 298, 107 N. Y. Supp. 976.

The contracts are not conditional contracts of sale, but are that class of sales contracts ordinarily termed "sale or return."

Re Landis, 151 Fed. 896; Re Allen, 183 Fed. 172; Allen v. Maury, 66 Ala. 10; Robinson v. Fairbanks, 81 Ala. 132, 1 So. 552; Foley v. Felrath, 98 Ala. 176, 39 Am. St. Rep. 39, 13 So. 485; Cottonwood v. Austin, 158 Ala. 117, 48 So. 345; Hotchkiss v. Higgins, 52 Conn. 205, 52 Am. Rep. 582; Wells v. McNeerney, 74 Conn. 675, 51 Atl. 1064; House v. Beak, 141 Ill. 290, 38 Am. St. Rep. 307, 30 N. E. 1065; Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; Walker v. Blake, 37 Me. 373; McKinney v. Bradlee, 117 Mass. 321; Moss v. Sweet, 3 Eng. L. & Eq. Rep. 311; Re Wells, 140 Fed. 752; Re Miller, 135 Fed. 868; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; 35 Cyc. 290, § 5.

The use of the word "commission" in the contract, or the use of the word "consignment," or the use of words usually importing an agency, does not change the legal effect of the instrument.

Smith v. Barker, 102 Ala. 679, 15 So. 340; Jackson v. State, 2 Ala. App. 226, 57 So. 110; Chickering v. Bastress, 130 Ill. 200, 17 Am. St. Rep. 309, 22 N. E. 542; Snelling v. Arbuckle Bros. 104 Ga. 362, 30 S. E. 863; Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; People v. Newman, 99 Mich. 148, 57 N. W. 1073; Re Rabenau, 118 Fed. 471; Re Wells, 140 Fed. 752; Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3.

The paster marked "D," stating that the seeds "are placed on commission, not sold outright," is not a part of the original contract and cannot affect it, if the terms of the contract are not ambiguous.

Rose v. Lewis, 178 Ala. 507, 60 So. 146; Re Rabenau, 118 Fed. 471; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; Re Wells, 140 Fed. 752; People v. Newman, 99 Mich. 148, 57 N. W. 1073; Snelling v. Arbuckle Bros. 104 Ga. 362, 30 S. E. 863; Peoria L.R.A.1917B.

Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661.

Messrs. Espy & Farmer for appellee.

Gardner, J., delivered the opinion of the court:

This cause was transferred to this court from the court of appeals under the provision of Acts of 1911, p. 449.

The appellant brought suit against the appellee for the recovery of \$203 paid by appellant to appellee, as tax collector for Houston county, under protest; suit having been brought by said tax collector for said sum due as taxes and garnishment issued in aid thereof.

The cause was submitted in the court below upon an agreed statement of facts, in which it was agreed that the facts in said cause were set out in said agreement, and that the "cause be submitted to the jury upon said statement of facts, and that the liability, if any, of the defendant, arises out of said facts." The agreement further stipulates: "It is further agreed by and between the parties hereto that the only question presented for the court for its decision in this case is whether or not the assessment for the collection of the taxes due on said seed should have been made against the said D. M. Ferry & Company, or against the merchants to whom said D. M. Ferry & Company had shipped the seed, and in whose possession said seed were at the time the assessments were made, under the facts hereinafter set forth; and if the assessments for the collection of said taxes should have been made against said D. M. Ferry & Company, then the defendant is entitled to judgment; but if said assessments for the collection of said taxes should not have been made against D. M. Ferry & Company, then the plaintiff is entitled to recover."

The sole question, therefore, for determination, is: In whom, for the purposes of taxation, vested the title or property to the seed in possession of the retail merchants? If the seeds were the property of the appellant, then it is conceded and agreed the defendant is entitled to judgment, and, on the other hand, it is likewise conceded and agreed that, if the seeds were the property of the retail merchants, then appellant is entitled to judgment.

The order of the retail merchant, the letter of acceptance accompanied by the invoice, and the placing of the paster marked in the record "D" on the box when shipped, together with the method or course of dealing with reference to said transactions between the wholesaler and the retailer, as disclosed by said agreed statement of facts, are the matters upon which, according to

said agreement, we are to conclude the title to said seed.

The order has on it the word "consignment," and that which is signed by the retailer has the words "to sell on commission" showing the terms as 40 per cent commission on the papers sold, and 25 per cent on the packages sold, from the invoice prices; the unsold seed, with boxes, to be returned in good order when called for, and amount due for all seeds not so returned to be paid at the same time.

The invoice which accompanied the memorandum of shipment had thereon, among other things, the following: "Terms: To be settled for when traveler calls. Sold to Mr. John Doe, etc. We agree to buy back all unsold seeds with boxes at prices billed, less discounts, when our traveler calls."

The agreement shows that this memorandum of shipment and invoice, together with the order, constituted the original contract between appellant and the retail merchant, but that the boxes, when shipped, would have pasted on them the paper marked in record "Exhibit D," and which appears in report of the case. The reporter will set out Exhibits A, B, C, and D, as found on pages 12, 13, 14, and 15 of the transcript, in his report of the case.

The following extract from the agreed statement of facts explains the method or course of dealing as between the wholesale and retail merchants, as to such transactions:

"At the close of each season in which said seed was so sold, the traveling salesman representing D. M. Ferry & Company, would call upon the retail merchant and adjust the local dealer's account with D. M. Ferry & Company, taking back the unsold seeds in said box or boxes, allowing credit for the seed at invoice prices, and collecting cash for the balance of the seed at invoice prices, less the commission provided for in the original contract. The retailer, in selling the foregoing seed to his customers, would fix the price at which he would sell them, and would also have entire control of the seed while the seed was in his possession and control, and would also sell the seed and collect for the seed from his customers in his own name. D. M. Ferry & Company were in no way interested in the price which the retailer obtained for the said seed, but merely took back the unsold seed, allowing credit therefor at invoice prices, and collecting, for the seed not returned, the invoice prices less commissions. The said seed were in packages and papers. D. M. Ferry & Company printed a price upon said packages, but printed no price upon the papers; but, for the seed not returned by the retailer to D. M. Ferry & Company, the L.R.A.1917B.

retailer accounted to D. M. Ferry & Company for each package not returned, at the price printed on said package, and at the price of 5 cents for each paper, less the commission.

"The retailer renders no account to D. M. Ferry & Company of any sales made by him, and gives no information in regard thereto, but the representative of D. M. Ferry & Company goes annually to each retailer, makes his own investigation from the seed that the retailer has on hand, and states the account between the retailer and D. M. Ferry & Company.

"There was no agreement between the retailer and D. M. Ferry & Company that the seed would be sold at the prices named on the packages, nor as to the price at which the papers were to be sold; but the retailer was made to account to D. M. Ferry & Company for all seed not returned, at the prices printed on the packages, and at 5 cents for the papers, which is invoice prices."

"Ordinarily, where goods are consigned by one person to another for sale by the latter, the title thereto remains in the consignor; but whether the consignee is to be considered as a buyer or an agent depends upon the intention of the parties, and upon the real nature of the transaction, rather than the language which the parties may have employed. So, where the transaction is such that the consignee acquires complete dominion over the goods, with the right to sell them upon such terms and conditions as he may see fit, and is bound to pay the consignor a stipulated price therefor, it amounts to a sale and delivery, and the title passes to the consignee, and such transfer of title is not affected by the fact that the goods are not to be paid for until resold by the consignee, or that he has an option of returning the goods which he has not resold." 35 Cyc. 290, 291.

Mr. Mechem in his work on Sales, in vol. 1, § 46, has this to say: "The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute, of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a sale under the guise of an agency, while others have been drawn with a view to having them construed as contracts of sale or agency, as might best suit the convenience or subserve the purposes of their framers. In construing these anomalous instruments, courts look chiefly at the

essential nature and preponderating features of the whole instrument, and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract. . . . If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a 'special selling factor appointment,' or have expressly stipulated that the alleged factor 'shall never purchase such goods for his own account.' So with regard to the use of the term 'consign.' It may express the true state of the case, and, if so, it will be given effect; or it may be a mere subterfuge, and, if it be the latter, 'there is no magic in that word which can take from the transaction its real character.'"

This is peculiarly illustrated by the cases of Arbuckle Brothers, whose contracts have been the subject of review in some of the courts of last resort, notably those of Georgia, Tennessee, and Virginia, wherein it was held that, notwithstanding the contract was called, and purports on its face to be, a "special selling factor appointment," it stipulates for a retention of title, and that the goods shall be consigned and held by the party merely as a factor, and that such factor shall never purchase such goods on his own account, and the same to be sold in name of the factor, but only as the factor of Arbuckle Brothers, and only at such prices and on such terms as said Arbuckle Brothers may give from time to time. The contract provided also for certain "allowances and commissions." There were other provisions as to payments, etc., and these courts held that the entire contract disclosed a sale, and not an agency, notwithstanding the many such expressions to be found therein. *Arbuckle Bros. v. Gates*, 95 Va. 802, 30 S. E. 496; *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 864, 39 S. W. 3; *Snelling v. Arbuckle Bros.* 104 Ga. 362, 30 S. E. 863.

Speaking of this contract, the court in the latter case says: "It appears to have been drawn for the purpose of enabling Arbuckle Brothers to 'run with the hare' or 'hold with the hounds,' according as, in the exigencies of a given case, their interest might dictate."

In reference to the same contract, the supreme court of Virginia, in above case of *Arbuckle Bros. v. Gates*, said: "The agreement was an attempt to accomplish that which cannot be done,—to make a sale of personal property and at the same time constitute the buyer simply an agent of the seller to hold the property until it is paid for. The two things are incompatible and cannot coexist. The agreement had in it every element of sale. It was in substance L.R.A.1917B.

and effect a sale, and must be so declared. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision, its legal character and effect."

The following excerpt from the case of *Buffum v. Deacher*, 1 Neb. (Unof.) 736, 96 N. W. 352, is in point in this connection: "In all the cases it is held that the relation of the parties as principal and agent, or as vendor and vendee, is determined by the nature of the transaction, and not by the name which they give it, and the use of the words 'agent,' 'commissions,' etc., is of little significance. If the goods are delivered to the consignee under such circumstances as to confer upon him absolute dominion over them, and he becomes bound to pay a stipulated price for them at a certain time or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him."

The case often cited and referred to as a leading case among cases of this character is that of *Ex parte White*, L. R. 6 Ch. 397. In stating the transaction between the parties, *James, L. J.*, in his opinion, says: "Mr. Nevill was to dispose of the goods sent to him by *Towle & Company*, and was not to pay for them unless he disposed of them, and he was to return, at the end of every month, an account of sales that he had actually made; and then, after the lapse of another month, he was to pay in cash for the amount of the goods which he had so disposed of, according to their value as fixed by a price list sent to him. It does not appear that he ever was expected to return any particular contract, or the names of the persons with whom he had dealt. He pursued his own course in dealing with the goods, and frequently before sale he manipulated them to a very considerable extent by pressing, dyeing, and otherwise altering their character; . . . and he sold them on what terms he pleased as to price and length of credit."

The opinion then proceeds: "If he was entitled to alter them, to manipulate them, to sell them at any price that he thought fit after they had been so manipulated, and was still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he had sold them, or to anything else than the fact of his having sold them in a certain month, it seems to me impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of vendor



and purchaser existed between *Towle & Company and the different persons* to whom he sold the goods." (*Italics ours.*)

The opinion also says that "it has been admitted in the course of the argument that there is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser." It was held in that case that "Mr. Nevill was in the position of a person having goods 'on sale or return.'"

In the same case from which we have just quoted, Mellish, L. J., said: "But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different and at a time which may be different from those fixed by the contract. . . . If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B then sells to C, the natural inference from those facts is, beyond all doubt, that there is a sale made to B and another sale from B to C, and all the circumstances confirm the view that such was the nature of the dealing here."

The following authorities also may be cited in addition to the above, to the effect that the mere use of the words "agent," or "consignment," or "commissions," etc., does not determine the character of the contract, but that it is the duty of the court to reach the real intention of the parties and declare the relationship: *Chickering v. Bastress*, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; *Jackson v. State*, 2 Ala. App. 226, 57 So. 110; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661; *Heryford v. Davis*, 102 U. S. 235, 26 L. ed. 160; *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065; *Re Wells* (D. C.) 140 Fed. 752; *Re Carpenter* (D. C.) 125 Fed. 831; *Baker v. Turner*, 19 App. Div. 223, 46 N. Y. Supp. 25; *Bradley A. & Co. v. McAfee* (D. C.) 149 Fed. 254; *People v. Newman*, 99 Mich. 148, 57 N. W. 1073.

In this latter case it is said in the opinion that "calling profits 'commissions' does not change their character."

Mr. Mechem (vol. 1, § 43) thus distinguishes a sale from agency to sell in these words: "The essence of sale is, as has been seen, the transfer of the title to the goods

for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price, and not as an agent for the *proceeds* (*italics ours*) of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, *not as his own property, but as the property of the principal* (*italics ours*), who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent."

While, in the instant case, a portion of the contract has the words "sell on commission" and the word "consignment" written thereon, yet other portions (memorandum of shipment and invoice, etc.) make use of the words "sold to" and agreement to "buy back," and nothing is said as to the title to the seeds or that the retail merchant is in fact the agent of the wholesaler, and, from what is therein contained, it is difficult to determine the real intention of the parties. The agreed statement of facts however, contains the method of business, the course of dealing in reference to such transactions, and from such agreement it is disclosed that the retail merchant acquires complete dominion and control of the seeds, makes sales to whom he pleases at his own prices and on whatever terms he pleases, and makes no accounting whatever to the wholesaler. Indeed, from the agreed statement of facts it appears the retailer deals with the seed as his own. He need not sell at all, but may give away the seed or use them himself. He is to account to the wholesaler for the seed not returned at the invoice price, less the commission, when the traveling man calls and adjusts the accounts, giving the retailer credit for the unsold seed at invoice price. This settlement is not to be made as the seeds are sold, but the settlement is to be made when the "traveler calls:" that is, on demand, as it were. The retailer sold to his customer in his own name, and the wholesaler was in no manner interested in the price obtained, but merely took back the unsold seeds, allowing credit therefor at invoice prices. When sold by the retailer, the proceeds of the sale were his own, and no duty rested on him to account therefor to the wholesale dealer.

Under the agreed statement of facts as shown by the record, guided by the rules of law as found in the foregoing authorities,

we think it quite clear that the retailer was not a mere agent, but was in fact a purchaser of seeds. It is shown that the retailer had the right to return the unsold seeds, and that the wholesaler agreed to buy them back at invoice prices. What, then, is the relation between the parties?

In the case of *Allen v. Maury*, 66 Ala. 10, it was said: "A sale may properly be defined to be 'a transfer of the absolute or general property in a thing, for a price in money.' . . . If anything remains to be done by either party to the transaction, before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, but the contract is merely executory. . . . Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be defeated by the exercise of this option to rescind expressed within a reasonable time."

The case of *Robinson v. Fairbanks*, 81 Ala. 132, 1 So. 552, is somewhat in point in this connection, and in which the court said: "In our judgment the contract was not a bailment, or a 'sale on trial' or 'approval,' in which there is no sale until an approval is given, expressly or by implication. But it more nearly resembles a contract, or bargain of 'sale or return,' which vests the property in the goods, or so much of them as remained on hand at a fixed day in the future."

See also *Foley v. Felrath*, 98 Ala. 176, 39 Am. St. Rep. 39, 13 So. 485; *Cottonwood v. Austin*, 158 Ala. 117, 48 So. 345.

"In the case of a sale or return, the property in the goods passes to the buyer at once, subject only to a defeasance by a return of the goods, unless it appears that the intention is that the title shall remain in the seller, as where payment of the price is made a condition precedent to the passing of the property. If the buyer fails to return the goods within the time limited or within a reasonable time, the sale becomes absolute." 35 Cyc. 290.

"A contract of this nature . . . constitutes usually a present sale, subject to be defeated by a condition subsequent. Until return, therefore, the title is in the vendee." 1 *Mechem, Sales*, § 677.

"A contract 'on sale or return' is an agreement by which goods are delivered by a wholesale dealer to a retailer, to be paid for at a certain rate if sold again by the latter, and, if not sold, to be returned." *Story, Sales*, § 249.

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Speaking to the same subject, the court in the case of *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065, says: "Such sales may be regarded as subject to a condition subsequent; that is, upon condition that, if the goods are not sold, they are to be returned. Therefore the property vests presently in the vendee, defeasible on the performance of the condition. If the defendant disables himself from performing the condition, or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an *indebitatus assumpsit*. . . . The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller, but, if the seller does not want the property and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time."

We are of the opinion that the real transaction between D. M. Ferry & Company and the retail merchants, under the agreed statements of facts, was that of "sale or return," as disclosed by these authorities and definitions. The retailer was to pay for the seeds not returned at a certain price previously fixed by the parties, and at a certain time (that is, when the "traveler calls"), and he had the option of returning seeds not sold. We deem a further discussion unnecessary, and indeed recognize that this opinion is doubtless of undue length, but we trust pardonable on account of the importance of the principles involved.

We have examined the cases relied upon by counsel for appellee (*Fleet v. Hertz*, 201 Ill. 594, 94 Am. St. Rep. 192, 66 N. E. 858; *Thornton v. Cook*, 97 Ala. 632, 12 So. 403); but the contracts there were not of a similar character, nor was there such a state of facts as that disclosed here, and they are in no wise in conflict with the conclusion here reached. We therefore conclude that the transactions disclosed by this record, as appears from the agreed statement of facts, are not consignments, creating the relation of principal and agent, but are what are known as "sale or return," and that therefore the property vested in the retailer upon delivery, subject to be defeated by the condition subsequent. For the purpose of taxation, therefore, the seeds, under the agreed statement of facts, were the property of the retailer, and the appellant was not liable for such taxes.

The court below erred in giving the af-

firmative charge for the defendant and in refusing that asked by the plaintiff. The judgment of the Circuit Court is therefore reversed, and, as the cause was tried upon an agreed statement of facts, one will be

here rendered in favor of the plaintiff, for the sum sued for.

Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.

**Annotation—Construction of contract having some provisions peculiar to consignment and agency contracts, and others to sale contracts.**

- I. Construction as a question of law or fact, 626.*
- II. Controlling effect of designation of contract:*
  - a. Use of term "agent" or "agency," 627.*
  - b. Use of term "consign" or "consignment," 628.*
  - c. Use of apt terms of sale, 628.*
- III. As affected by particular provisions:*
  - a. In general, 629.*
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    - 2. Option of consignor, 637.*
  - d. Retention by consignor of title to proceeds of sale, 638.*
  - e. Provision making sale contingent upon resale by consignee, 643.*
  - f. Restrictions upon right, manner, and terms of resale, 645.*
  - g. Mere privilege to sell, 646.*
  - h. Provision for return of unsold goods, 646.*
  - i. Reservation of title in consignor, 648.*
- IV. Declarations, conduct, and prior dealings of parties, 649.*
- V. Delivery of product to be manufactured and sold, 650.*
- VI. Del credere agency, 651.*

The question of the construction of a conditional sale contract as affected by an express or implied permission to resell the goods in the ordinary course of business is covered in a note appended to *Mishawaka Woolen Mfg. Co. v. Stanton*, post, 658. The question as to when title passes under a consignment of goods for sale, with a provision in effect that the consignee shall purchase the balance of the consignment, is covered in a note appended to *Parlett v. Blake*, 39 L.R.A. (N. S.) 620; and the general question of the right of one person who leaves chattels in another's possession to assert title as against the latter's vendees or

creditors is covered in a note appended to *Davis v. First Nat. Bank*, 25 L.R.A. (N.S.) 760.

***I. Construction as a question of law or fact.***

The question here raised is as to the character of contracts which embody some provisions peculiar to contracts of sale, and others peculiar to contract of consignment or agency. In many of these contracts, owing to the incorporation therein of provisions peculiar to each of these classes of contracts, it frequently becomes a difficult matter to determine whether a contract is in fact one of sale, or consignment or agency. Much ingenuity has been employed by consignors in framing contracts to secure all the benefits, and at the same time avoid the disadvantages, of contracts of sale, and also to secure the benefits and avoid the detriments of agency contracts. The result is a hybrid contract, frequently involving essential elements both of sale and consignment contracts. In construing them the essential elements of each character of contract are used as tests to determine the character of the particular contract.

In contracts of this character, as in other contracts, however, the rule applies that, where the construction of any part is involved in doubt, an understanding of its meaning is to be sought in the light afforded by all the other parts of the instrument. Even though one part of the contract is somewhat repugnant to the remaining portions, which is frequently the case in this class of contracts, the true meaning of the contract as a whole is to be ascertained and enforced.<sup>1</sup> And the court will construe such a contract as a whole, weighing all the terms and provisions in connection with the reasonable and natural results of its performance, in order to gain a definite conception of the intention of the parties in this regard.<sup>2</sup>

For, of course, the intention of the

<sup>1</sup> *Federal Rubber Co. v. King* (1913) 12 Ga. App. 261, 76 S. E. 1083.

<sup>2</sup> *Mishawaka Woolen Mfg. Co. v. Westveer* (1911) 112 C. C. A. 109, 191 Fed. 465.

parties as gathered from the contents of the instrument as a whole, with such light as in proper cases, may be shed thereon by extrinsic proof as to their admissions and prior conduct and dealings, will control the court in determining the character of the contract. But it should be noted in this connection that the intention of the parties cannot thus control where to give effect to their express or implied intent would be violative of the principles of law applicable to contracts of sale or of agency, for a contract cannot be both. And while, as hereafter shown, the express intent of the parties is not to be ignored, nevertheless that intent is governed and controlled by the actual results accomplished by the contract.

The consignor cannot impose upon the consignee the burdens, obligations, and risks of a purchaser without at the same time exposing himself to the risks incident to the passing of the title from him to the consignee; nor can he impose upon the consignee these obligations and risks, and evade the risks due to a change in title, by asserting in the contract the expressed intention of the parties that it is to be construed as one of agency or consignment. And this pretense will not have the effect of enabling him to evade the necessity of recording the contract as one of conditional sale in order to make it valid as to the consignee's creditors or subsequent purchasers, if the effect of the contract is to charge the consignee as purchaser. Since the actual results of the contract control in its construction, the real question is as to the relation established between the parties by the contract, and this question is usually one of law to be deter-

mined from all its provisions,<sup>3</sup> except that where it is not clear whether a contract is one of sale or consignment for sale its interpretation becomes a mixed question of law and fact, based upon the acts of the parties thereunder.<sup>4</sup> As hereinafter shown, the conduct and dealings of the parties may be resorted to to determine the character of the contract, and under some circumstances these matters furnish the real test and are decisive in this regard.<sup>5</sup>

## II. Controlling effect of designation of contract.

### a. Use of term "agent" or "agency."

It being a rule of law relative to the construction of contracts containing provisions peculiar to contracts of sale and to contracts of agency or bailment for sale, that the parties thereto cannot change the real character of the contract by expressing therein their intentions in that regard, or by designating or agreeing as to its character, it follows that it matters but little what the parties style the agreement; its character, whether of sale or of agency, will depend upon the meaning and intent of the instrument as a whole.<sup>6</sup> For example, there is no magic in the word "agency." It is often used in contracts where the real relationship between the parties is that of seller and buyer,<sup>7</sup> and it is not uncommon for one to become the sole "agent" for the sale of specific articles obtained only by purchase.<sup>8</sup> Hence the term "agent" as used in a contract of this character does not have the effect of making it a contract of agency where other provisions make it one of absolute sale.<sup>9</sup> And the fact that numerous

<sup>3</sup> *Depew v. Keyser* (1854) 3 Duer (N. Y.) 335, holding that the construction of such a contract is a question of law.

<sup>4</sup> *American Seeding Mach. Co. v. Stearns* (1905) 109 App. Div. 192, 95 N. Y. Supp. 830.

<sup>5</sup> See *infra*, IV.

<sup>6</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1908) 90 C. C. A. 579, 164 Fed. 803.

<sup>7</sup> In *Poirier Mfg. Co. v. Kitts* (1909) 18 N. D. 556, 120 N. W. 558, it is said that "the word 'agent' is employed in more than one sense, and it is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in certain territory, when in fact no agency exists. The dealer in no sense represents the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public. The public in such case, and sometimes

the dealer himself, frequently refer to this as an 'agency' for the article."

*Ex parte White* (1871) L. R. 6 Ch. (Eng.) 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488.

<sup>8</sup> *Henry Bill Pub. Co. v. Durgin* (1894) 101 Mich. 458, 59 N. W. 812.

<sup>9</sup> *American Seeding Mach. Co. v. Stearns* (N. Y.) *supra*.

*Mennis v. E. N. Manning & Co.* (1907) 136 Ill. App. 406; *Bendix v. Staver Carriage Co.* (1912) 174 Ill. App. 589.

*Mitchell Wagon Co. v. Poole* (1916) — C. C. A. —, 235 Fed. 817, declaring that the fact that the contract is designated "agent's commission agreement," and that it purports to appoint one party thereto the other's agent for the sale of farm wagons, is not conclusive as to the character of the contract, and it may be of little weight, for it may turn out to be a mere pretense.

words and phrases usually found in agency contracts are employed in a contract of sale does not make it one of agency.<sup>10</sup> Nor does the fact that a contract for the sale of the product of one of the parties thereto recites that the other party shall have the sole agency for such product in a designated locality.<sup>11</sup> And where a contract is entered into in the form of an agency contract, for the purpose of evading the statute requiring all documents reserving title in the seller to be recorded, it will not be given the protection accorded agency contracts.<sup>12</sup>

**b. Use of term "consign" or "consignment."**

As already pointed out in referring to the use of the term "agency" or "agent" in a contract of this character, merely designating a contract to be of a certain character does not have the effect of making it of that character, where such a construction is contrary to its clear legal effect. And this rule also applies where a contract is designated a consignment contract. While ordinarily this term imports a reservation of title in the consignor and a mere transfer to the consignee of the possession of the

consigned article,<sup>13</sup> yet, where the contract by its terms is otherwise one of sale and the title to the consigned goods passes thereunder, either absolutely or contingently, the use therein of the terms "consigned" or "consignment" will not have the effect of changing the contract from one of sale to one of consignment.<sup>14</sup> But where title is reserved by the consignor in a contract containing apt words of consignment, it cannot be held to be a conditional sale rather than a bailment for sale, unless other provisions therein have the legal effect of rendering it in fact a sale without regard to the declared intent of the parties.<sup>15</sup>

**c. Use of apt terms of sale.**

On the other hand, where a contract purports to be one of sale, and not consignment, and describes the parties thereto as vendor and purchaser, it negatives the idea of agency, and it will be construed to be a contract of sale, especially where it evidences the intention of charging the consignee as purchaser, even though the consignor, by other provisions in the contract, seeks to secure for himself the benefits and immunities of a principal in a contract of agency.<sup>16</sup> Thus, a contract of sale is

<sup>10</sup> Compare with *Norton v. Melick* (1896) 97 Iowa, 564, 66 N. W. 780, wherein it is declared that, where the parties have plainly and unequivocally expressed in the contract that it is an agency agreement, and not a sale, and title does not pass, there is no room for any other construction.

<sup>11</sup> *Roosevelt v. Nusbaum* (1902) 75 App. Div. 117, 77 N. Y. Supp. 457.

<sup>12</sup> *Chickering v. Bartress* (1889) 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.* (1893) 38 W. Va. 158, 22 L.R.A. 850, 45 Am. St. Rep. 846, 18 S. E. 482.

*Sturm v. Baker* (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; *Harris v. Coe* (1898) 71 Conn. 159, 41 Atl. 552; *Powell v. Wallace* (1890) 44 Kan. 656, 25 Pac. 42; *B. F. Sturtevant Co. v. Cumberland, D. & Co.* (1907) 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675; *Wasey v. Whitcomb* (1911) 167 Mich. 58, 132 N. W. 572; *Rolker v. Great Western Ins. Co.* (1866) 3 Keyes (N. Y.) 23.

*Re Wells* (1905) 140 Fed. 752, holding that there is no magic in the word "consigned" as used in such a contract.

<sup>13</sup> Compare with *Smith v. Barker* (1893) 102 Ala. 679, 15 So. 340, holding that the mere fact that a consignment of goods to a dealer was for sale on commission only does not, without other evidence, show that the title did not pass as against attaching creditors of the consignee. L.R.A.1917B.

And *Bailey v. Capelle* (1834) 1 Harr. (Del.) 449, holding that a consignment fairly and regularly made passes the property to the consignee, and it cannot afterwards be seized as the property of the consignor.

<sup>14</sup> *Re Rabenau* (1902) 118 Fed. 471; *D. M. FERRY & Co. v. HALL*, ante, 620; *Snelling v. Arbuckle Bros.* (1898) 104 Ga. 362, 30 S. E. 863; *Arbuckle Bros. v. Kirkpatrick* (1897) 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; *Arbuckle Bros. v. Gates* (1898) 95 Va. 802, 30 S. E. 496.

<sup>15</sup> *Re Harris* (1914) 214 Fed. 482.

<sup>16</sup> *Mishawaka Woolen Mfg. Co. v. Westveer* (1911) 112 C. C. A. 109, 191 Fed. 465, holding that the use of such terms as "vendor" and "purchaser," and a provision that the goods are sold subject the vendor having them in stock, negative the idea of agency.

*McKenzie v. Roper Wholesale Grocery Co.* (1911) 9 Ga. App. 185, 70 S. E. 981, holding that a recital in a contract that the one party, in order to obtain goods and credit from the other party, covenants and agrees that he will purchase all goods to be used by him from the other party, does not indicate that the goods are merely consigned for sale with no obligation resting upon the consignee unless he sells them, but it evidences a plan whereby one party purchases from the other on credit, and secures the indebtedness by allowing the seller to reserve the legal title; hence the property is subject to execution in behalf of the creditors of the consignee.

not changed into one of agency by the fact that the purchase price in amount depends upon the amount for which the purchaser sells the goods;<sup>17</sup> or that he has the right to return the goods remaining unsold at the end of the season<sup>18</sup> and the selling price is fixed by the consignor;<sup>19</sup> or by a provision that the unsold goods shall be carried over the season,<sup>20</sup> or by designating the compensation of the consignee as a commission, fixing the selling price, and in other ways restricting the manner of sale.<sup>21</sup> And the fact that the consignee was to turn over to the consignor the notes he received from purchasers of the consigned goods, to be held as collateral to his own notes, does not change the transaction from a sale to an agency.<sup>22</sup>

### III. As affected by particular provisions.

#### a. In general.

While a contract will not be construed to pass title from one party thereto to the other, if it is ambiguous in this regard,<sup>23</sup> nevertheless, as already seen, the fact that it contains repugnant provisions will not prevent its being construed to pass the title to the subject matter. And since it is the results accomplished by a contract of this character that determine whether it is one of sale or agency, the decisive test is whether in its final results the contract creates the relationship of principal and agent or seller and purchaser, and this is, of course, to be determined by ascer-

*Henney Buggy Co. v. Cathels* (1899) 110 Iowa, 24, 81 N. W. 164, holding that a contract in the form of an order for buggies, and providing for a certain discount if cash is paid, is one of sale, and not of bailment, although there is a provision that the title to the articles and the proceeds of sales thereof shall remain in the consignor until the goods are paid for in cash.

<sup>17</sup> *Balch v. Ashton* (1880) 54 Iowa, 123, 6 N. W. 146, holding that a contract is one of sale, and not of agency, where it recites that one party thereto has received from the other a quantity of goods to be paid for by his note, the goods to be sold, and the amount to be paid therefor to depend upon the amount received from the sales.

<sup>18</sup> *Robinson v. Fairbanks* (1886) 81 Ala. 132, 1 So. 552, holding that a contract is a sale, and not a bailment, where it provides that the goods are to be delivered to one of the parties to be paid for at a designated time, and that the consignor shall take back any unsold goods; hence a purchaser of the goods prior to the time designated takes a good title thereto.

*Furst Bros. v. Commercial Bank* (1903) 117 Ga. 472, 43 S. E. 728, declaring that title passes under a sale of goods to a retail dealer, although the contract provides that he may return unsold goods, and holding that in this regard the contract differs from one providing that goods shall be sold on account of the consignor and that there shall be no sale until the goods are actually sold, since in the latter case the consignee is a mere bailee until the condition is met. He can, however, sell the goods and pass title to the purchaser.

<sup>19</sup> *Ex parte Flannagan* (1875) 2 Hughes, 264, Fed. Cas. No. 4,855, holding that, where a contract provided that the consignee was to be primarily responsible for all sales of the consigned goods he made, and he was to pay for the same by acceptances payable at sight or in a short time, and was to receive a commission based on the price of the article fixed in advance by the consignor, and at the end of the season to

be credited with goods remaining in his hands, it constituted a sale, and not a shipment on a del credere agreement, although the terms "agency," "guaranty," and "commission" were used therein.

<sup>20</sup> *Barnes v. Morse* (1890) 38 Ill. App. 274, holding that, where a contract between a manufacturer and retail dealer was in the form of an order for the goods designated therein at stated prices, the mere fact that it contained a provision that goods not sold that year would be carried on next year's time did not change the character of the transaction, and that it constituted a sale, and not a bailment.

<sup>21</sup> *Baldwin v. Feder* (1909) 135 App. Div. 97, 119 N. Y. Supp. 1044, holding that a contract appointing one party the other's sole and exclusive selling agent in the United States for certain articles for a designated period of time, the agent agreeing to purchase a certain quantity of goods each week, and not to sell the same for less than a certain price, and to account for the goods sold at a minimum price, is a contract of sale, although there are provisions restricting the sale of the goods by the agent.

<sup>22</sup> *Jackson v. State* (1911) 2 Ala. App. 226, 57 So. 110, holding that when a contract provides that goods delivered for resale are to be settled for by the purchaser in cash or in notes running to the consignor, and that, if notes are taken, they shall be held as collateral to the indebtedness of the consignee for the goods consigned, it is a contract of sale, and not a consignment.

*America Seeding Mach. Co. v. Stearns* (1905) 109 App. Div. 192, 95 N. Y. Supp. 830, holding that an instrument in the form of a contract of sale is not, as a matter of law, changed to a consignment contract by the inclusion therein of a provision that purchasers' notes will be accepted in payment of the consigned article.

*Atlanta Guano Co. v. Phipps* (1897) — Tenn. —, 41 S. W. 1087.

<sup>23</sup> *American Seeding Mach. Co. v. Stearns* (N. Y.) supra.

taining its controlling provisions. If these provisions are essential or fundamental to sale contracts, and inconsistent with the essentials of an agency or consignment contract, the contract will be construed to create the relation of buyer and seller. On the other hand, if the controlling provisions are essential to an agency or consignment contract, and inconsistent with a contract of sale, the contract will be construed to create the relation of principal and agent. While it is not practical to classify the cases presenting this question so as to bring in juxtaposition all the different subsidiary and incidental provisions of the contract, an attempt has been made to bring together the cases involving the fundamental principles peculiar to these different contracts, in order to indicate the effect of such provisions in construing the contract as to its character.

<sup>24</sup> *Coweta Fertilizer Co. v. Brown* (1908) 89 C. C. A. 612, 163 Fed. 162, holding that where the goods were consigned for resale, the consignor reserving title, and there was no right reserved in the consignee to return the unsold goods, and he was under obligation to settle and pay for the same at a certain time whether they were sold or not, the transaction constitutes a sale, and not a bailment, although the proceeds of resales were charged with a trust in favor of the consignor.

*Walter A. Wood Mowing & Reaping Mach. Co. v. Brooke* (1874) 2 Sawy. 576, Fed. Cas. No. 17,980, holding that where a contract gave an exclusive right to one party to sell, in a certain territory, machines manufactured by the other party, to be paid for at designated prices, it constituted a sale; and where subsequent shipments were ordered at different times, and they were shipped at the risk of the purchaser such shipments constituted sales, and not consignments with a reservation of title.

*Roach v. Whitfield* (1910) 94 Ark. 448, 140 Am. St. Rep. 131, 127 S. W. 722, holding that where goods are delivered by a wholesaler to a retailer at a fixed price, the latter having the absolute control over them with power to fix the selling price, although title is reserved by the wholesaler, the transaction constitutes a sale, and not a bailment for the mutual benefit of the parties.

*King Powder Co. v. Dillon* (1908) 42 Colo. 316, 96 Pac. 439, distinguishing between a contract under which goods were consigned for sale on commission, the consignee being charged the schedule price and allowed a designated commission, and it guaranteeing all accounts for goods sold, and a contract under which the consignor assumed the risk of the goods, retained the title to the property until sold, required no guaranty of payment of purchasers' accounts, and allowed the consignee a certain commission for selling the goods.  
L.R.A.1917B.

**b. Imposition upon consignee of obligation to pay the purchase price.**

As pointed out, a contract embodying the characteristics of both a contract of sale and of agency cannot be both, and its character in this regard will be determined by the controlling provisions, the contract being construed as a whole. If such provisions are essential to a contract of sale, and are inconsistent with a contract of agency, the contract will be construed to be a sale. For example, it is essential to a contract of sale that the title shall pass absolutely or conditionally from the one party to the other, and that a correlative obligation to pay the purchase price is imposed: hence, where a contract contains these features in such form as to operate to pass the title absolutely or contingently, it will be construed to be a contract of sale.<sup>25</sup>

*McKenzie v. Roper Wholesale Grocery Co.* (1911) 9 Ga. App. 186, 70 S. E. 981, declaring that "if the person to whom the possession of the property is delivered gets it by virtue of a contract of purchase (i. e., gets it under such circumstances that the person parting with the possession can sue for the purchase price, irrespective of whether the person to whom the possession is delivered has sold or otherwise disposed of the goods), the contract is one of conditional sale, notwithstanding it may impose limitations upon the purchaser's right to dispose of the property and may require a definite plan of accounting. On the other hand, if the effect of the contract is that the property is delivered from the bailor to the bailee with the understanding that the title is to remain in the bailor, and the bailee does not assume initial responsibility to pay the purchase price, it is ordinarily not a conditional sale, but is a consignment, although the bailee may have the option of purchasing the goods themselves by paying a stipulated price, or may have a right to sell them to other persons upon accounting to the bailor for a stipulated sum, and though the bailee's compensation in the matter may depend upon such profit as he shall realize on the difference between the price at which the goods are consigned and the price at which they are sold, and though the bailee may be responsible to the bailor for the value of such goods as he may sell on credit, whether he collects from the purchasers or not. So that in determining whether a contract is to be construed as a conditional sale or construed as a consignment, many of the details of the transaction may be disregarded, except in so far as they may be more or less evidentiary of the one thing by which these two forms of contract are legally differentiated,—and that thing is whether the bailee upon receipt of the goods assumes liability for the purchase price. If, upon delivery of the goods, credit is extended,

even though the purchaser is styled the agent of the seller, or the contract is

and the relation of debtor and creditor arises between the parties, and the creditor reserves the title to the goods as security, the transaction is a conditional sale, within the purview of our statute. In consignments the bailee is merely the agent of the bailor, and the bailor cannot force him to pay for the goods, unless he has sold them, has appropriated them to his own use, or has violated the contract of agency. The fact that the bailor has a right to rescind the contract and take back his goods with or without legal process is not a test; for, where the parties so stipulate, the sale may be rescinded for the breach of a condition subsequent, and in conditional sales this is essentially so, and, of course, an agency can ordinarily be revoked."

People use of Phoenix Nursery Co. v. Midkiff (1897) 71 Ill. App. 141, holding that a contract which charges the agent absolutely for the purchase price of the consigned goods, leaving him to obtain his remuneration by selling at prices fixed by him in excess of what he paid, constitutes a sale, although there is also a provision authorizing the seller to take over all the original orders and to deliver the goods thereunder and apply the proceeds upon his account against the agent, and, when the account is satisfied, to turn over the balance of the stock, to the latter.

David Bradley Mfg. Co. v. Raynor (1896) 70 Ill. App. 639, holding that, where a contract provides that the consignee shall pay for the goods consigned at designated prices and on certain terms, and that the consignor shall carry over all goods remaining unsold, the transaction constitutes a sale.

Alpha Checkrower Co. v. Bradley (1898) 105 Iowa, 537, 75 N. W. 369, holding that, although a contract purported to be one of agency, the fact that it fixed the price the agent was to pay and the time of payment precluded the idea of agency, and made it one of sale, there being nothing in the contract requiring the agent to sell in the name of his principal, or providing that the title to the property should remain in the latter.

Warder v. Hoover (1879) 51 Iowa, 491, 1 N. W. 795, holding that the fact that the person styled as agent in a contract of this character was to pay cash on delivery for the consigned goods is of controlling importance in determining whether the contract was one of agency or sale.

Albert v. Lindau (1877) 46 Md. 334, holding that if goods are in fact sold on credit instead of being trusted to the consignee for sale as agent, or if the agreement is merely colorable, and not made in good faith, but intended, under the guise of an agency contract, merely to protect the property until sold from the creditors of the purchaser, it constitutes a sale, and not an agency.

Norris v. Boston Music Co. (Minn.) ante, 615, holding that the absence of a provision entitling the consignee to acquire title to L.R.A.1917B.

the consigned goods, or imposing upon him any obligation to pay therefor, indicates the contract to be one of consignment, and not of sale. See *infra*, h.

Thomson v. Batcheller (1909) 134 App. Div. 506, 119 N. Y. Supp. 577, affirmed in (1911) 201 N. Y. 551, 94 N. E. 619, holding that a contract containing appropriate and apt words for the purchase and sale of a business, and a license to use the trademarks of the seller, is a contract of sale, and not in any sense a partnership contract, and hence a proceeding for an accounting cannot be based thereon.

Weston v. Brown (1899) 158 N. Y. 360, 53 N. E. 36, holding that a contract is one of sale, and not of agency, where it recites that one party thereto agrees to sell at a designated price and ship to the other party certain articles for export trade, which are to be kept by the consignee at a designated place until sold, and provides that the title to the property and the proceeds of the sales thereof shall be and remain in the consignor until the property is paid for in full, this latter clause, however, not in any way to limit or restrict sales of goods to bona fide purchasers.

Smith v. Williams (1904) 90 App. Div. 507, 85 N. Y. Supp. 506, holding that where the consigned goods were in any event to be paid for by the consignee at a designated price, and no right was reserved to control or in any way to interfere with sales he might make, except that the title was reserved, the transaction constituted a conditional sale with the title remaining in the consignor.

Vosbury v. Mallory (1902) 70 App. Div. 247, 75 N. Y. Supp. 480, holding that a contract by which one of the parties thereto agrees to purchase an article manufactured by the other party at a certain price, and to sell the same in a certain locality, and further agrees to advertise and push such sales and make such articles his leader, is one of sale, and not of agency.

Vereinigte Pinsel-Fabriken v. Rogers (1900) 52 App. Div. 529, 31 N. Y. Civ. Proc. Rep. 37, 65 N. Y. Supp. 478, holding that under a contract providing that one party thereto shall have the sale of all the goods the other party manufactures for the United States, and for making such sales shall receive a designated commission, whether the sales are made by the one party or the other, and that, where the sales are made by the consignee from stock on hand, he will also be allowed a certain discount from the invoice price, and that he shall run no risk for goods sold except such as are sold in his name from his stock on hand—as to sales from stock on hand the title passes to the consignee at the time the sales are made.

Kellam v. Brown (1893) 112 N. C. 451, 17 S. E. 416, holding that a contract is one of sale, and not a consignment for sale, where it provides that the seller will not sell to any other person in that locality,



styled one of agency<sup>25</sup> or consignment.<sup>26</sup> Thus, a person to whom goods are con-

and the buyer shall not handle similar goods of any other make, and that he will keep his stock of goods up to a certain amount, and will sell at the established price.

*Braunn & Fitts v. Keally* (1892) 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389, holding to be one of sale, and not of agency, a contract providing that the goods are to be billed at certain prices less a stipulated discount, the consignee to pay the freight and to receive for his services in selling the goods whatever price he obtains over and above the purchase price and the freight.

*Ruthrauff v. Hagenbuch* (1868) 58 Pa. 103, holding that, as between the parties, a contract is one of sale where it recites that the one party thereto agrees to and does sell to the other party certain property at a designated price, and the latter agrees to resell the same for the best price he can obtain, and account for all he receives over and above the stipulated price.

*Bridgeport Organ Co. v. Guldin* (1894) 3 Pa. Dist. R. 649, holding that a radical distinction between a bailment and conditional sale is the fact that in the former there is a right or duty to return the property, while in the latter there is a liability to retain and pay for it.

*Texas Brewing Co. v. Templeman* (1896) 90 Tex. 277, 38 S. W. 27, holding to be one of sale, and not of agency, a contract by one party to give to another the sole representation and sale of its products in a certain territory and to furnish such products at designated prices to be paid for by the consignee with his acceptances with each and every invoice, the consignor having also placed this construction upon the contract by suing thereon for the price of goods received thereunder.

Compare with *Mitchell Wagon Co. v. Poole*, *infra*, note 33.

<sup>25</sup> *Bendix v. Staver Carriage Co.* (1912) 174 Ill. App. 589, holding that, even though a contract is styled an agency agreement and purports to grant the exclusive right to sell the consignor's product in a certain territory, as between the parties it is nevertheless a contract of sale where the consignee is prohibited from contracting or selling in the consignor's name or behalf, and is required to pay cash on delivery of the consigned goods.

*Mennis v. E. N. Manning & Co.* (1907) 136 Ill. App. 406, holding that, although words of agency are used in a contract under which goods are delivered for resale, the contract is nevertheless one of absolute sale where there is no provision for the return of the goods if unsold, and the consignee is required to remit for the goods within a designated time after receiving them, without reference to whether or not he has sold them, and there are no restrictions upon the price or terms for which he is to make sales.

*Henry Bill Pub. Co. v. Durgin* (1894) 101 Mich. 458, 59 N. W. 812, holding that, L.R.A.1917B.

where a contract purports to be an agency contract and provides that the agent may return the unsold portion of the goods and have his account credited with the amount paid for them, and also that the goods shall be sold for cash on delivery, the transaction is a sale and the title to goods delivered without payment passes to the consignee, and he cannot be held liable for the wrongful conversion of the goods or the proceeds of the sale thereof.

*People v. Newman* (1894) 99 Mich. 148, 57 N. W. 1073, holding that, although styled an agency contract, the contract is nevertheless one of sale where it provides that the agent shall account at a certain price for all goods received, and that for his commission he is to have all he sells the goods for over and above this amount, with no restrictions upon his power to sell, even though there is also a provision reserving title in the consignor. In this case the consignee was held to have sold the goods (beer) on his own account without complying with the law relative to the sale of intoxicating liquors.

*Com. v. Banker Bros. Co.* (1909) 38 Pa. Super. Ct. 101, affirmed in (1911) 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38, holding that a contract between the manufacturer of automobiles and a retail dealer, by which the former agrees to sell to the latter its automobiles for a designated price to be paid in cash, containing agreements with reference to the protection of the territory given the dealer and for the cancellation of the contract under certain circumstances, is a contract of sale, and not of agency.

*Seyfert v. Herron* (1881) 11 W. N. C. (Pa.) 72, holding that a contract which recites that one of the parties thereto is to have the sole agency in a certain locality for the sale of the goods of the other party, the former binding himself to act as agent for no other person in the sale of similar goods during the continuance of the contract, and the latter party agreeing to sell his goods to the agent for a certain price and on designated terms, constitutes a sale, and not an agency.

*Texas Brewing Co. v. Anderson* (1897) — Tex. Civ. App. —, 40 S. W. 737, holding that, although the consignee is described in the contract as the agent of the consignor, the contract is nevertheless one of sale, and not of agency, where it provides that during the term of the agency the consignor shall furnish his manufactured product to the consignee for sale at a certain place, the latter to pay a certain fixed price therefor and to secure the payment thereof.

Compare with *Conable v. Lynch* (1876) 45 Iowa, 84, holding that, where a contract purports to be one of agency, it will be so construed although there is a provision that the agent is to guarantee all notes taken for the purchase price, and that he will sell all the property consigned, and

signed at a fixed price, to be sold at such price and on such terms as he may fix, is a purchaser, and not an agent,<sup>57</sup> and an agreement to supply a manufactured product at a certain price and to give the exclusive right of sale to the consignee is a contract of sale, and not of agency.<sup>58</sup>

So a contract has been held to be a sale, and not a bailment, although it purported to appoint one of the parties the agent of the other for the sale of the latter's product in a certain territory, and contained other provisions indicating that the contract was one of agency,

where, however, it contained a guaranty by the agent that he would sell the articles within a stipulated time, and an agreement to advance a portion of the purchase price and execute his notes for the balance, for the payment of which the consignor agreed to take notes given by the purchasers of the property.<sup>59</sup> And a contract has been held to be one of sale, and not of agency, notwithstanding the inclusion therein of apt words of agency, where the price to be paid by the consignee for the consigned goods was fixed, and he was required to execute his notes in payment thereof.<sup>60</sup>

if he does not he will pay for such goods as remain unsold, the title to remain in the principal until payment, hence a sale made by the agent in payment of his own debt is invalid.

<sup>55</sup> *Re Linforth, K. & Co.* (1877) 4 Sawy. 370, Fed. Cas. No. 8,369, holding a contract in form a consignment contract to be one of sale where it required that the consigned goods be paid for by the consignee at a certain time.

*Peoria Mfg Co. v. Lyons* (1894) 153 Ill. 427, 38 N. E. 661, holding that, although in form, and according to the designation given it by the parties, an agreement was for the consignment of goods for sale, and although the contract provided that the difference between the selling price and the purchasing price should constitute a commission for the retail dealer, and that the proceeds of each sale, whether in cash or notes, were to be delivered to the consignor, and the latter was authorized to require the return of all unsold goods and also to require the shipment of goods to other points before the expiration of the contract yet, where it in fact provided that the purchaser should execute and deliver his note for the purchase price, and there was no provision entitling the consignee to return the goods, it nevertheless constituted a sale of the goods when delivered, and they were subject to levy by the creditors of the consignee.

*Boehm v. Griebenow* (1898) 78 Ill. App. 675, holding that, where goods are delivered under an alleged consignment contract by the terms of which the consignee is entitled to fix the price of resale, the only restriction being with reference to the payment of the purchase price when a given quantity of the goods are sold, the transaction constitutes a sale, and not a consignment, although the latter term is employed in describing it.

*A. A. Cooper Wagon & Buggy Co. v. Wooldridge* (1903) 98 Mo. App. 648, 73 S. W. 724, holding that a contract reciting a sale to the consignee of certain articles at a designated price payable at specific times is one of sale, notwithstanding the inclusion therein of the words, "terms, commission contract."

*Arbuckle Bros. v. Kirkpatrick* (1897) 98 L.R.A.1917B.

*Tenn.* 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3, holding that a contract was a sale although designated a consignment, where the consignee was required to remit for goods within a designated time without reference to whether or not they had been sold, and that hence the consignor could not, as principal, hold the purchasers of the consigned goods for the amounts they were owing thereon to the consignee.

<sup>57</sup> *Gibney v. Curtis* (1884) 61 Md. 192.

<sup>58</sup> *Heywood Bros. & W. Co. v. Doernbecher Mfg. Co.* (1906) 48 Or. 359, 86 Pac. 357, 87 Pac. 530.

<sup>59</sup> *Norwegian Plow Co. v. Clark* (1897) 102 Iowa, 31, 70 N. W. 808, holding that a contract constituted a sale, and not a bailment, where it appointed one of the parties there-to the agent of the other for the sale of machinery in a certain locality, the agent to take care of the articles and keep them insured until sold, and to sell such goods exclusively, with authority to take notes running to the principal in payment thereof, and to receive payment of the notes and turn over to the principal the proceeds of the notes, and also of sales, until the latter was paid in full, the agent guarantying the sale within a certain time of all goods shipped to him, and agreeing to advance a certain portion of the purchase price and to execute his notes for the balance, in payment of which the principal was to take notes executed by the purchasers of the machinery. The contract being a sale, the notes received by the agent in payment of the machinery were subject to his debts although he still owed the principal.

<sup>60</sup> *Mack v. Drummond Tobacco Co.* (1896) 48 Neb. 397, 58 Am. St. Rep. 691, 67 N. W. 174, holding that title passed to the buyer when he executed his notes for the purchase price as required by the contract.

*Yoder v. Haworth* (1898) 57 Neb. 150, 73 Am. St. Rep. 496, 77 N. W. 377, holding that, although a contract provides that the goods shall be sold on commission on account of the manufacturer, it is nevertheless one of sale, and not of agency, where the price to be paid for the goods by the consignee is fixed, but not the selling price or terms, except that the sales are to be for cash or good notes running to the consignor and guaranteed by the consignee,

But very similar contracts containing words of agency have been held to be of agency, and not of sale, although the consignee was required to pay for unsold articles, where, however, the consignee in effect agreed to act in a fiduciary capacity and the consignor reserved the title to the unsold goods and to the net proceeds of goods sold.<sup>30a</sup> In general, however, to require a contract to be con-

strued to be a sale, it is not essential that the title shall absolutely and unconditionally pass to the purchaser. If it imposes upon him an obligation to pay, it is one of sale, although the seller reserves title to the property until such payment is made, with the express or implied authority given to the purchaser to sell it in the ordinary course of business.<sup>31</sup>

which, however, are to be held as collateral to notes executed by the consignee to the consignor at the time the goods were delivered, the contract further providing that unsold goods shall be held by the consignee subject to the order of the consignor, the consignee, however, having the privilege of paying for and keeping the goods.

And see *Moline Plow Co. v. Rodgers* (Kan.) *infra*, holding to be a sale an order for goods by which the consignee was to give his notes for the purchase price, and secure the same by notes taken from subpurchasers, and was to pay for unsold goods or store to same for the consignor at the latter's option. There were two contracts construed in this case. One was held to be a sale and the other an agency contract. The contracts were very similar except that, in the one construed to be a sale, the purchaser was to execute his notes for the purchase price and turn over to the consignor as collateral thereto notes he received from resales, while the contract construed to be one of agency required the consignee to settle for the goods by turning over to the consignor notes he received from resales.

<sup>30a</sup> *Martin v. Stratton-White Co.* (1896) 1 Ind. Terr. 394, 37 S. W. 833, holding that the fact that the consignee guaranteed to sell all the consigned goods within a specified time, and to settle for any unsold if called upon by the consignor to do so, does not make the transaction a sale where the contract contains a provision authorizing the consignor to resume possession of the consigned goods at any time, and retains title to them and to the proceeds of any sold by the consignee.

*Moline Plow Co. v. Rodgers* (1894) 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111, holding that a contract is one of agency where it provides that a person appointed as agent shall settle for the property by purchasers' notes or cash, and that all articles remaining unsold at the end of the season shall be settled for by the consignee's notes or stored as the property of the consignor.

*St. Paul Harvester Co. v. Nicolin* (1886) 36 Minn. 232, 30 N. W. 763.

*Re Chambers* (1897) 17 App. Div. 340, 45 N. Y. Supp. 264, holding that a contract to manufacture and ship goods for sale on commission, which fixes a minimum price at which the goods are to be sold, but requires that the goods shall be accounted for at the prices at which they are sold less an agreed commission, the goods to be L.R.A.1917B.

received and sold by the consignee as factor or agent of the consignor, and to remain the absolute property of the consignor until sold, he, however, having an option to charge the consignee a designated price for the goods remaining unsold at a certain time, creates the relation of principal and agent, entitling the principal to notes received by the agent for goods sold.

<sup>31</sup> *Re Carpenter* (1903) 125 Fed. 831, holding that, where goods are to be settled for by the notes of the consignee, and the proceeds of the sale of the goods are to belong to the consignor until the consignee's obligations are paid, and the title to the goods is also to remain in him, the transaction constitutes a sale, and not an agency, although the consignee is described as an agent.

*Sutton v. Baker* (1897) 91 Minn. 12, 97 N. W. 420, holding that, although designating the purchaser as the agent of the seller and reserving the right to cancel the agency and appoint another agent under certain conditions, the contract is nevertheless one of sale, where the price of the articles and the number and kind of each to be furnished are specifically fixed, and there is an absolute promise to pay the purchase price within a stated time, and the resale of the goods is entirely within the control of the purchaser, and there is no provision for the return of any unsold goods, except a provision that if the seller cancel the contract, he is authorized to take back the unsold goods.

*Poirier Mfg. Co. v. Kitts* (1909) 18 N. D. 556, 120 N. W. 558, holding that, as between the parties, a contract is one of sale, and not of agency, where it provides that the dealer is to purchase for his trade articles of the other party for designated prices and on designated terms, and contains an acceleration clause authorizing the consignor to declare the whole amount of the purchase price due under certain circumstances, the consignor also reserving title to the goods until sold by the consignee in the regular course of business; and this is true although the term "agent" is used in the contract in referring to the consignee.

*Arbuckle Bros. v. Gates* (1898) 95 Va. 802, 30 S. E. 496, holding that, although the contract described the consignee as a factor and purported to create an agency, expressly stipulating that the goods were to be sold by the consignee merely as a factor of the consignor, nevertheless the contract will be construed to be one of sale

But, as already suggested, the express intent of the parties as to the character of a contract cannot be ignored; hence, where the contract describes the parties as consignor and consignee, it cannot be held to be a conditional sale rather than a bailment for sale, unless the legal effect of the contract construed as a whole is to render it in fact a sale regardless of the declared intent of the parties that it shall constitute only a consignment.<sup>32</sup> And where the controlling provisions are inconsistent with the theory of a sale, and consistent with and essential to a contract of consignment, the contract will be construed to be a consignment and to create an agency, although it embraces provisions imposing at least a contingent obligation upon the consignee to pay for the goods.<sup>33</sup> For example, it has been held that provisions reserving title in the consignor and requiring the consignee to remit the cash proceeds and to insert, in all notes that he takes for the purchase price of

the consigned articles he sells on credit, a provision reserving title in the consignor, effectually fixes the character of the contract as one of consignment, although it also contains a provision that at the option of the consignor the consignee shall give his note for the purchase price of unsold goods, and shall guarantee the payment of all notes taken for articles sold.<sup>34</sup> And apparently controlling effect has been given the provision by which the consignor reserved title to the property until paid for, when construed in connection with a provision by which the consignee agreed to buy and pay for all goods remaining unsold at a certain time.<sup>35</sup> And a provision that the consignee was to pay the wholesale price for all the articles he received has been held to be limited in its operation to the balance due for goods actually sold, and hence not to have the effect of converting an otherwise consignment or agency contract into one of sale.<sup>36</sup> As between the parties it has been held that,

and to pass title to the property, where in effect it amounted to a sale of the goods for a fixed price payable at a designated time, and reserved the title in the consignor, there being no provision for the return of the goods, and the payment of the purchase price not depending upon the consignee's selling them.

<sup>32</sup> *Re Harris* (1914) 214 Fed. 482.

See *supra*, note 30a.

*South Bend Iron Works v. Cottrell* (1887) 31 Fed. 254, holding that a contract designated as one of consignment and agency is not changed by a provision by which the consignee guaranteed the sale of the consigned goods and agreed to pay for unsold goods either in good notes or other valuable consideration, where the effect of these latter clauses was restricted by a provision that the consignor would carry over to the next season all unsold goods.

*Re Columbus Buggy Co.* (1906) 74 C. C. A. 611, 143 Fed. 859, holding that the fact that a contract provides that the consignee may fix the selling price and may retain the difference between the consigned price and such selling price to recompense him does not constitute the agreement a sale where it does not impose upon the consignee an obligation to pay the purchase price and a correlative obligation on the consignor to transfer the title.

*Cortland Wagon Co. v. Sharvy* (1893) 52 Minn. 216, 53 N. W. 1147, holding that where a contract purports to be a consignment for sale and there is no agreement to transfer the property to the consignee, it is a consignment, and not a conditional sale.

*Bridgeport Organ Co. v. Guldin* (1894) 3 Pa. Dist. R. 649, holding that the fact that a contract of bailment contains a provision for the giving of notes by the con-

signee for the accommodation of the consignor, and not in payment of the consigned goods, does not change the contract from one of consignment to one of sale.

<sup>33</sup> *Conable v. Lynch* (1876) 45 Iowa, 84.

*Norton v. Melick* (1896) 97 Iowa, 564, 66 N. W. 780, holding that a contract styled an agency contract, by which the consignee agreed to receive and sell the goods of the consignor and at designated times to remit for all goods sold, the consignor reserving the title and right of possession until paid in full, was a consignment contract, and not a sale, although the contract also contained a provision by which the consignee agreed to buy any of the goods remaining unsold at a certain time.

And for a case applying this doctrine to the extent of putting it in conflict with the cases cited in notes 24 and 39, see *Mitchell Wagon Co. v. Poole* (1916) — C. C. A. —, 235 Fed. 817, holding that a contract was one of agency where it purported to be of that character and its terms were consistent therewith, except a provision giving the agent an option to purchase the property and receive a certain cash discount, and a provision by which he agreed to purchase the unsold property at the end of the selling season, or if he sold out or closed out his business.

<sup>34</sup> *Williams Mower & Reaper Co. v. Raynor* (1875) 38 Wis. 119.

<sup>35</sup> *Norton v. Melick* (Iowa) *supra*, holding the contract to be one of consignment, and not of sale.

<sup>36</sup> *Sioux Remedy Co. v. Lindgren* (1911) 27 S. D. 123, 130 N. W. 49, holding that under the Code definition of a factor or agent, as between the parties thereto, a contract is one of agency, and not of sale, where it provided that the consignor agreed

so far as concerns the breach of such a contract, if it purports to be one of agency it will be so construed, although it embraces terms sufficient to pass title to the property and imposes on the consignee an obligation to pay the purchase price.<sup>37</sup>

So, where a contract purporting to be one of agency provided that the agent shall execute to the principal his notes to cover the purchase price for the articles received, and that the execution of such notes shall not have the effect to pass the title in the property to the agent, it was held that, as a matter of law, the execution of the notes did not have the effect of changing the contract from one of agency to one of sale.<sup>38</sup>

to ship certain goods and refill the order as often as he saw fit to do so, unless the contract was canceled by one of the parties, and the consignee agreed to receive and sell the goods for designated prices, and upon demand to pay the wholesale price of all articles received. This latter provision was held to be of limited operation when construed in connection with other provisions of the contract indicating that the consignee was to act as agent for the consignor; for example, a provision limiting the scope of the consignor's warranty to the purchasers from the consignee.

*Baskerville v. Bates* (1913) 123 Minn. 339, 143 N. W. 909, holding that, although a contract for the purchase of articles for the purpose of resale provided that the agent was to remit each week an amount equal to one half his receipts from the business, and that upon the termination of the contract he was to settle in cash for the balance due the seller, it was nevertheless in the nature of an agency contract, and not one of absolute sale.

*Davis v. Woolsey* (1914) 34 S. D. 236, 147 N. W. 977, holding, that as between the parties, a contract was one of agency, and not of sale, where it required one party to ship to the other certain goods to be sold at retail at prices fixed by the consignor, the consignee to remit weekly an amount equal to one half the proceeds of such sales, to make weekly reports of the business done by him, and also, upon the termination of the contract, to settle in cash for any balance due the consignor. To the same effect, under a similar contract, is *Baskerville v. Culver* (1914) 33 S. D. 424, 146 N. W. 595.

<sup>37</sup> *Willcox & G. Sewing Mach. Co. v. Ewing* (1891) 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. Rep. 94, holding that, as between the parties, a contract was one of agency where it appointed a person the exclusive vendor of certain machines within a specified territory, the consignor agreeing to sell its product to the consignee and appointing him its agent, although by the contract the appointee was to purchase the machines at a certain discount, L.R.A.1917B.

*c. Optional provision as to payment for consigned goods.*

*1. Option of consignee.*

Where goods are received to be sold on commission, one of the tests to determine whether the transaction constitutes a sale or an agency is the question as to whether or not the alleged agent is given the option to pay for the goods and keep them; if he is, the transaction constitutes a sale and title passes to the consignee as a matter of law.<sup>39</sup> When the identical article is to be returned in the same or some altered form, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to return the

and was not to sell them at retail below the regular retail prices, and the consignor reserved the right to buy back from the consignee any unsold goods and also to terminate the agency.

<sup>38</sup> *John Deere Plow Co. v. McDavid* (1905) 137 Fed. 802, holding that, as to a trustee in bankruptcy of the consignee, the contract is one of agency, and not of absolute sale, where it provides for the consignment of goods for sale for cash, and that title thereto shall not pass to the consignee, who agrees to return unsold goods at any time on request to do so by the consignor. And this is true although the contract further provides that the consignee shall settle for the consigned goods at certain prices, either in cash or by purchasers' notes, and where purchasers' notes are taken that the consignee shall guarantee the payment thereof.

*Charles H. Childs & Co. v. Waterloo Wagon Co.* (1899) 37 App. Div. 242, 57 N. Y. Supp. 520, affirmed in (1901) 167 N. Y. 576, 60 N. E. 1108, holding that, where a contract purports to be one of agency and requires that the agent at a stated time shall account in cash or bank notes for articles sold by him, and that he shall sell within a stated time all the articles received, the contract is one of agency, and not of sale, as against creditors of the agent receiving goods in payment of an existing indebtedness; and this is true although at the time the goods are received notes have been given by the agent for the purchase price, the contract, however, providing that the execution of such notes shall not have the effect of passing title.

<sup>39</sup> *Re Wells* (1905) 140 Fed. 752, holding that the right to pay for the goods and retain them renders the transaction a sale.

*Re Rabenau* (1902) 118 Fed. 471, holding that where, by the terms of a contract styled a consignment contract, all risk of the consigned goods rested upon the consignee, and he was entitled to pay for them at any time, and the consignor had the option to require him to purchase un-

specific article, and another thing of value may be returned, the title to the property passes, and the transaction constitutes a sale with an obligation upon the part of the purchaser to pay the purchase price.<sup>40</sup>

This test to determine the character of a contract of this kind, while undoubtedly sound, is nevertheless subject to misconstruction. Contracts involving a provision authorizing the consignee to sell the consigned goods and turn the proceeds, or a specific portion of them, over to the consignor, should be distinguished in this regard from contracts containing a provision authorizing the consignee to sell the consigned goods and upon such sale pay a designated sum as the purchase price. In the latter case, of course, the consignee is giving to the consignor something of value other than the consigned goods or the proceeds of their sale; hence the contract is properly a sale, and not an agency or consignment contract. This rule applies whenever the language of the contract indicates that the purchaser buys the consigned goods and agrees to pay for them after he sells them. For, as subsequently shown,<sup>41</sup> in such case the sale is conditional and title passes upon the resale, and the proceeds of the sale belong to the consignee, the resale creating between him and the consignor the relation of debtor and creditor. But this is not true where the purchaser is required to account for or turn over to

the consignor the proceeds he receives from the sale of the goods intrusted with him for that purpose. In such case the title to the goods never vests in him, but passes directly from the consignor to the purchaser from the consignee, and the title to the proceeds of the sale passes directly from such purchaser to the consignor; hence the consignee does not return another thing of value, as that term is used in stating this test.<sup>42</sup>

### 3. Option of consignor.

The rule applicable to cases where the consignee is given the option to return something other than the consigned goods in payment thereof is based upon the doctrine of conditional or contingent sale. The right conferred by the consignor upon the consignee, to return for the consigned goods something other than the goods themselves, or the proceeds thereof, is inconsistent with the essential features of an agency or consignment contract, and consistent only with a contract of sale. A different question, however, is presented as regards an option reserved to the consignor of treating the contract as a sale. In such case the rule is that a provision in a contract reserving to the consignor the right to require the consignee to pay for unsold goods, either in cash or by note, does not in and of itself have the effect of making a contract, otherwise one of consignment or agency, one of sale.<sup>44</sup> But where the consignor exercises the

agreement on the part of the consignee to pay for the unsold goods, but merely a conditional agreement to do so in event of his default, provided the consignor terminates the contract and elects to have the unsold goods paid for in the manner designated.

Re Galt (1903) 56 C. C. A. 470, 120 Fed. 64.

Upham v. Richey (1895) 61 Ill. App. 654.

And see Yoder v. Haworth, *supra*, note 30.

Compare with Mitchell Wagon Co. v. Poole, *supra*, note 33.

<sup>40</sup> Sturm v. Boker (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Re Galt (1903) 56 C. C. A. 470, 120 Fed. 64; Re Flanders (1906) 67 C. C. A. 484, 134 Fed. 560; Chickering v. Bastrass (1889) 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542. And see David Bradley Mfg. Co. v. Raynor (1897) 70 Ill. App. 630.

<sup>41</sup> See *infra*, III. e.

<sup>42</sup> See *infra*, III. d.

<sup>44</sup> Re Harris (1914) 214 Fed. 482, holding that the fact that the consignor reserves the option, on default of the consignee, to retake all unsold goods, or require the consignee to pay for the same in notes, does not have the effect of making the transaction a sale instead of a bailment, where there is no absolute L.R.A.1917B.

Lenz v. Harrison (1893) 148 Ill. 598, 36 N. E. 567, holding to be one of consignment, and not of sale, a contract by which the consignee agreed to act as agent for the consignor to sell the latter's goods at a designated place, the consignee to transmit all money received from sales to, and take all notes for sales in the name of, the consignor, and guarantee the payment thereof, although the contract also contained a provision that the consignee was to take all the consigned articles unsold at the end of the year and pay for the same by his note if required to do so by the consignor, it, however, expressly providing that this stipulation was not to be a positive sale of the property to the consignee.

D. M. Osborne & Co. v. Rich (1894) 53 Ill. App. 661, holding that, where a contract between a manufacturer and retail

option and asserts against the consignee a demand for the purchase price, the title passes to the latter, even though the contract was originally one of consignment or agency.<sup>45</sup>

*d. Retention by consignor of title to proceeds of sale.*

As heretofore pointed out, one of the essential features of a sale is an absolute obligation on the part of the purchaser to pay the purchase price. On the other hand, a leading feature of an agency contract is the fact that the

agent is not primarily liable for the purchase price, except as he is responsible for the proceeds of sales which come into his hands. This distinction between contracts of sale and of agency frequently determines to which class of contracts a particular contract belongs. If a contract provides that the proceeds of sales by the consignee are the property of the consignor and must be remitted to him by the consignee, less, perhaps, a designated commission to be deducted by the latter, it constitutes a consignment or agency contract, and not a sale.<sup>46</sup>

dealer provided that the manufacturer might require the return of any unsold machines at the close of the season, or a settlement therefor by the dealer executing his notes to be indorsed by some responsible party, the title to the unsold machines remained in the manufacturer, as to the creditors of the retail dealer, where the latter did not give a note of the kind designated in the contract for the purchase price of the unsold goods.

*Moline Plow Co. v. Rodgers* (1894) 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111, holding to be one of agency, and not of sale, a contract which provided that the settlement for the purchase price of the goods covered thereby should be by notes of the persons purchasing the property of the consignee, with the privilege in the latter to pay the purchase money in cash and receive a certain discount, with the further provision that any articles remaining unsold at the close of the season shall be settled for by the notes of the consignee or the property shall be stored for the consignor, at the latter's option.

*Weir Plow Co. v. Porter* (1884) 82 Mo. 23, holding that, as to the creditors of the consignee, the contract was one of agency, and not of sale; where by its terms a manufacturer was to furnish a retail dealer with certain articles for resale in a certain territory for a designated commission, at a price designated by the consignor, the sales to be for cash or notes of the purchasers running to the consignor and guaranteed by the consignee, the contract also containing a provision entitling the consignor to cancel the contract at any time and retake all goods remaining unsold, and a provision entitling him at his option to have goods unsold at the end of the season kept over for him by the consignee or returned.

*Milburn Mfg. Co. v. Peak* (1896) 89 Tex. 209, 34 S. W. 102, holding that a contract was one of agency, and not of sale, where it provided that one party was to manufacture and ship to the other certain articles to be resold by the other for a designated commission, at prices fixed by the consignor, sales not for cash to be settled for by purchasers' notes payable to the consignor, payment to be guaranteed by the consignee, who agreed to pay cash L.R.A.1917B.

for such notes as were not paid within a certain time after maturity, the consignor reserving title to the property and the right to retake unsold goods, and also to terminate the agreement at any time, with the further right to require the consignee at the end of the season to return the property unsold, to hold and care for it as the property of the consignor, or to pay for it by his notes.

<sup>45</sup> *Favorite Carriage Co. v. Walsh* (1898) 71 Minn. 292, 74 N. W. 137, holding that, without reference to whether the contract is one of conditional sale or agency, where it contains a provision authorizing the seller at his option to treat the contract as a sale, as to goods then in the hands of the purchaser, if the seller exercises the option, the title passes and the goods are subject to the claims of a creditor of the purchaser.

<sup>46</sup> *Ludvig v. American Woolen Co.* (1913) 231 U. S. 522, 58 L. ed. 345, 34 Sup. Ct. Rep. 161, holding that an agreement that the consignee is to sell the goods for and in behalf of the consignor, collect the amounts due therefor, and immediately pay the same over to the latter after deducting the difference between the selling price and the invoice price, and that upon the termination of the contract unsold goods are to be returned, constitutes a bailment, and not a sale, as to the trustee in bankruptcy of the consignee.

*Re Reynolds* (1912) 203 Fed. 162, holding to one of bailment to sell, a contract retaining title to proceeds of sales, although requiring the consignee, at the consignor's option, to purchase all unsold goods at the end of the selling season, and at the end of each month to settle for all goods sold either by cash from the proceeds or, where they are sold on credit, by note.

*Re Smith* (1911) 192 Fed. 574, holding that, where a dealer went into bankruptcy shortly after receiving property under a contract in which he was styled the agent of the consignor to sell fertilizer described therein at designated prices, the proceeds of the sales to belong to the consignor and to be held by the consignee in trust, the transaction constitutes an agency, and not a sale.

*Thornton v. Cook* (1893) 97 Ala. 630,

And it is not essential that the contract expressly retains the proceeds of the

sales; it is sufficient in this regard if it by fair implication imposes upon the con-

12 So. 403, holding that an agreement by which the consignee is to resell the goods as agent for the consignor, and upon such resale pay a certain price for them out of the proceeds, constitutes a sale upon condition, and the property is not subject to execution by the creditors of the consignee.

*Harris v. Coe* (1898) 71 Conn. 157, 41 Atl. 552.

*National Bank v. Goodyear* (1892) 90 Ga. 711, 16 S. E. 962, holding that, as to creditors of the consignee, a transaction did not constitute a sale where the consignee was to receive, hold, sell, and account for and pay over the proceeds of goods less a certain compensation as agent, —the sale, payment by the purchaser, delivery to him, and remittance to the consignor to be simultaneous action.

*Fleet v. Hertz* (1903) 201 Ill. 594, 94 Am. St. Rep. 192, 66 N. E. 858, holding that, where goods are consigned for resale on the account of the consignor, the proceeds to be held in trust and turned over to him within a designated time, and the consignee has authority to sell at such prices above a minimum price as he may fix, and upon designated credit, and there is no provision entitling him to acquire title to the goods, the transaction creates an agency to sell, and is not an absolute sale as against the creditors of the agent.

*Brown v. John Church Co.* (1894) 55 Ill. App. 615, holding that, where the contract between a manufacturer and a dealer provides that the latter receives goods from the former on consignment and for sale for his benefit, the proceeds of the sale to belong to the manufacturer until the goods are paid for, and the dealer agrees upon demand to deliver all unsold goods, it constitutes a consignment of goods for sale, and not an absolute sale. The court distinguished *Chickering v. Bastress* (1889) 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542, and *Peoria Mfg. Co. v. Lyons* (1894) 55 Ill. App. 41, on the ground that the contracts construed in those cases provided that the retail dealer was to execute notes payable to the seller for the goods received and the proceeds of the sales were to apply on these notes.

*Rosencranz & W. Co. v. Hanchett* (1889) 30 Ill. App. 283, holding that, under a delivery of goods to a retail dealer to be sold by him for cash at not less than the invoice price, his compensation being the amount he sells the goods for above that price, he agreeing to turn the proceeds of the sale to the extent of the invoice price over to the consignor, title to the goods does not vest in the consignee, and they are not subject to the claims of the creditors.

*Holbert v. Keller* (1913) 161 Iowa, 723, 142 N. W. 962, holding that a contract is a bailment, and not a sale, where it provides that one party shall deliver to the other a number of breeding horses to be sold at a fixed price, the proceeds to be

accounted for and the title to remain in the owner with the right to recall any of the animals at any time, although payment of the notes taken for the purchase price is to be guaranteed by the consignee.

*McKinney v. Grant* (1907) 76 Kan. 779, 93 Pac. 180, holding that a contract is one of agency, and not of sale, where it is styled a consignment for sale for the consignor, and provides that the consignee shall account for each article as sold, and return articles unsold at the request of the consignor, who retains title thereto, although there is also a provision that the consignee shall pay, to cover the depreciation of the goods, interest upon the purchase price from the time of the consignment of the goods to him.

*Walker v. Butterick* (1870) 105 Mass. 237, holding that a contract was a consignment contract, and not a sale, where by its terms the consignee was to take goods from the consignor and at designated times remit the proceeds of sales at prices charged by the latter.

*Ferd Heim Brewing Co. v. Linck* (1892) 51 Mo. App. 478, holding that, where a contract provides that one party thereto shall furnish goods to the other to be sold by the latter as agent, and that he is to account for the proceeds, and there is no provision by which the agent can acquire title to the property, it is a consignment contract, and not a sale, and the creditors of the consignee can acquire no rights in the property as against the consignor.

*Lance v. Butler* (1904) 135 N. C. 419, 47 S. E. 488, holding that a consignment of goods to be sold for cash at retail for the consignor, at a certain price, the proceeds to be paid to him until a designated amount is obtained, and the balance of the proceeds to be divided between the consignor and consignee, constitutes a contract of consignment, and not a sale, as to a subsequent mortgage of the goods of the consignee, with which the consigned goods have been mixed.

*Barteldes Seed Co. v. Border Queen Mill & Elevator Co.* (1909) 23 Okla. 675, 101 Pac. 1130, holding that a contract is one of agency, and not of sale, where it purports to bind one party thereto as the other's agent for the sale of its product at a certain place for a specified commission, the property to be sold at a price fixed by the seller, and the title to remain in him until it is sold, together with the proceeds of such sales, and the agent to remit the proceeds upon designated dates.

*Keystone Watch Case Co. v. Fourth Street Nat. Bank* (1900) 104 Pa. 535, 45 Atl. 328, holding that, where goods are consigned to a retail dealer in trust to sell for the consignor for not less than a designated cash price, unless consent to sell on credit is expressly given, the sales to be made and billed by the consignee as agent for the consignor, and the proceeds



signee the duty of remitting the proceeds.<sup>47</sup> The rule also applies although

the purchase price is to be paid by notes given by purchasers of the consignee,

to be remitted at once, the consignor reserving the right at any time to terminate the contract and take back the unsold goods, the transaction amounts to a bailment, and not a sale.

*Hamilton v. Billington* (1894) 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904, holding an agreement to hold goods in trust for the owners, with liberty to sell the same for their account and pay over to them the proceeds, is a bailment for sale, and not a sale.

*Becker v. Smith* (1868) 59 Pa. 469, holding an agreement that one party may sell for the other articles on commission, and deposit the proceeds in a certain bank, and when they reach a certain sum the balance of the property shall belong to the consignee, is a bailment, and not a conditional sale.

*Hamilton v. Willing* (1889) 73 Tex. 603, 11 S. W. 843, holding that a contract is one of agency, and not of sale, where it provides that one party thereto shall furnish to the other goods to be sold on commission, the goods and proceeds of the sale to be the property of the consignor, the sales to be reported and remitted for semimonthly, and the transaction to terminate at the option of the consignor; and that the consignor, as against the administrator of the consignee, is entitled to the unsold goods which were in the possession of the consignee at the time of his death.

*Barnes v. Darby* (1898) 18 Tex. Civ. App. 468, 44 S. W. 1029, holding that, as to creditors of the consignee, the title did not pass upon the receipt by him of goods consigned for sale on account of the consignor, the consignee to remit the entire proceeds of the sales, and the consignor to apply the amount due the consignee as his commission upon an indebtedness owing by the latter to the former.

*Killers Music House v. Fairbanks* (1914) 80 Wash. 379, 141 Pac. 885, holding to be a consignment, and not a conditional sale, an agreement to take a consignment of articles and sell the same at a stated price, unsold articles to be subject to the order of the consignor after the lapse of a specified time after shipment to the consignee, who agreed to pay a certain per cent interest on the billing price of the articles for such length of time as the consignor permitted them to remain after such time, and to remit cash received from sales, and to take only approved notes for the articles sold if sold on credit. The contract being one of consignment, a subsequent purchaser acquired no title thereto where he took an article in payment of a pre-existing indebtedness.

<sup>47</sup> *Boston & M. R. Co. v. Warrior Mower Co.* (1884) 76 Me. 251, holding that, under a consignment of machines to be sold by the consignee on commission, either for cash or good notes, and to be accounted L.R.A.1917B.

for as fast as sold, the title to remain in the consignor until they are sold, no title passes to the consignee, and the latter cannot assign to a third person a cause of action for the detention of the machines, except, perhaps, to the extent of his interest therein, which is his special property in the machines under the consignment.

*Wight v. Wood* (1867) 57 Barb. (N. Y.) 471, holding that where an agent receives property to be sold, and as compensation he is to have a certain share of the proceeds of the sale, the contract gives him no title to any part of the property received.

*Thompson v. Paret* (1880) 94 Pa. 275, holding that an agreement to consign goods for sale, the invoice prices to be paid at least weekly and all above such prices to be retained by the consignee as his compensation, the consignor reserving the right at any time to reclaim the unsold goods, is a bailment, and the consignee has no interest in the goods subject to levy or sale by his creditors.

*McCullough v. Porter* (1842) 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, holding that an agreement to furnish goods to be sold at invoice prices, the consignee remitting the invoice price and retaining the balance for his own use, is a bailment, and the goods are not subject to the claims of the consignee's creditors.

*Kimball Co. v. First Nat. Bank* (1901) 1 Tenn. Ch. App. 505, holding that a contract is one of agency, and not of sale, as to the mortgagee of the consignee of goods received thereunder, where it provides that the consignee will take the goods on consignment and handle the same exclusively, and will sell at fixed prices and account for sales at designated times, either in cash or purchasers' notes, the payment of which is to be guaranteed by the consignee and the same to be credited upon his account, the notes representing a sale to be treated as a separate transaction, and when the wholesale price of the article is collected, the balance to belong to the consignee or be credited upon his account; and also that the goods are to be insured for the benefit of the consignor, the title to remain in him with the right to have the unsold goods returned after they have been in possession of the consignee for sale a certain length of time, and all unsold goods to be held subject to the order of the consignor in the event of the termination of the agency by either party.

*Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* (1913) — Tex. Civ. App. —, 159 S. W. 1013, holding that, as between the parties and as affected by the monopoly and conspiracy against trade laws, a contract was one of consignment, and not of sale, where the consignor agreed to furnish the consignee goods to a designated amount, to be stored in the name and under the control of the consignor, and insured

other provisions of the contract being consistent with a contract of agency.<sup>48</sup> Nor is the character of a contract in this regard affected by a provision that, if the consignee takes notes for the purchase price not satisfactory to the consignor, he shall pay the amount in cash or by

good notes, and that he shall indorse on the notes an agreement to pay the same if not paid at maturity;<sup>49</sup> nor by a provision that he will pay for unsold machines,<sup>50</sup> either in cash or good notes or notes approved by his principal,<sup>51</sup> especially where the contract contained

by the consignee for the former's benefit, the consignee to make full settlement for all goods sold and to be allowed a certain commission as a cash discount.

*Ames-Holden Co. v. Hatfield* (1898) 29 *Can. S. C.* 95, holding that, as to the creditors of the consignee, the transaction created an agency, and not a sale, where the consignee was to sell at retail goods furnished by the consignor, make weekly remittances of the proceeds of the sales, and have a share of the net profits of the business.

<sup>48</sup> *Monitor Mfg. Co. v. Jones* (1897) 96 *Wis.* 619, 72 *N. W.* 44, holding that, as to the creditors of the consignee, the contract is one of agency, and not of sale, where it purports to appoint one of the parties thereto the agent of the other to sell on commission the goods of the latter, the commission to be the amount received for the goods over and above the net prices fixed by the consignor, the purchase price to be paid by the purchasers' notes, the consignor fixing the terms of the sale and the retail price, and retaining title and the control of the goods until sold, with the right to have returned any that are not sold.

<sup>49</sup> *Martin v. Stratton-White Co.* (1896) 1 *Ind. Terr.* 394, 37 *S. W.* 833, holding that a contract providing that the consignor may resume possession of the goods at any time, and that he retains the title thereto and the proceeds thereof until the consignee settles for them, is one of agency, although the consignee guarantees to sell all the goods within a designated time and to settle for those unsold if called upon by the consignor to do so.

*Com. v. Parlin & O. Co.* (1904) 118 *Ky.* 168, 80 *S. W.* 791, holding that a contract purporting to appoint one of the parties thereto the agent of the other for the sale of goods to be furnished the agent at a certain price and to be sold by the latter either for cash or good notes, the principal reserving the right to reject any note, in which case the agent is to pay the amount in cash or by a satisfactory note, and the agent to keep the proceeds of the sales separate and apart from other transactions, and to indorse the notes with a promise to pay the same upon maturity if not paid by the maker, the ownership of the goods to remain in the principal until they are sold in the usual course of trade, and the proceeds of the sales, whether in cash or notes, also to be his property, constitutes an agency, and not a sale, within the statutory provision forbidding foreign corporations from selling goods within the state unless certain conditions are complied with.

*Wasey v. Whitcomb* (1911) 167 *Mich. L.R.A.*1917B.

58, 132 *N. W.* 572, holding that, as to the consignee's creditors, a provision that he should report all sales promptly, settle immediately for cash sales, indorse all contract and lien notes accepted for settlement, and make report of all stock on hand whenever requested to do so, cannot be given force and effect unless the contract is construed as one of consignment, and not of sale.

<sup>50</sup> *Milburn Wagon Co. v. Edwards* (1886) 7 *Ky. L. Rep.* 835, holding that title did not pass as to creditors under a contract in the form of an order for sale on commission of certain articles, the proceeds of sales to be remitted each month, although there was a provision for payment for all unsold goods remaining at the end of six months.

<sup>51</sup> *Bayliss v. Davis* (1877) 47 *Iowa*, 340, holding that a contract purporting to appoint one as agent for the sale of machines for a certain commission on each machine sold, the notes for the purchase price to be made payable to the principal, and providing that if any machines remain unsold at the end of the season the agent is to hold them over free of charge, but subject to the order of the principal, and if not ordered away the agent is to give the principal a satisfactory note therefor with interest, and providing further that the agent is to advance a certain amount in cash upon the purchase price of the machines, and give his note for the balance, and is to remit the proceeds of the sales after deducting the money advanced, and that there should be substituted for his notes, notes taken from the purchasers of machines, constitutes one of agency, and not of sale. The court said that the advancing of money by the agent and the giving of notes for the purchase price, while ordinarily indicating a sale, did not have that effect in the particular case, where the agent was to be repaid his advance and the notes he took for machines were to be substituted for his notes.

*Williams Mower & Reaper Co. v. Raynor* (1875) 38 *Wis.* 119, holding that, as between the parties, the contract is a consignment, and not a sale, and the consignee is therefore liable for a wrongful conversion if he uses the proceeds of the sale, where the contract does not purport to be a contract of sale, and it contains provisions restricting the agent as to the length of credit he may give in selling the articles, and a provision that the proceeds of sale shall be paid and delivered to the consignor, and that notes given for the purchase price shall contain a provision that the title to the article sold is to re-

a stipulation that the consignee acts thereunder in a fiduciary capacity.<sup>53</sup> Nor is the character of the contract affected by the fact that the maximum price for which the agent may sell the goods is discretionary with him, his only restriction in this regard being as to the minimum price,<sup>54</sup> or by an agreement to purchase at the termination of the contract all broken packages of goods then on hand.<sup>54</sup>

If a contract is actually one of agency, providing for the consignment of goods to be paid for at a fixed price out of the proceeds of a sale thereof, without any responsibility for the purchase price attaching to the consignee or agent, it will be construed to be an agency contract, and not a sale. In such case the title

never vests in the agent by whom the sale is made; it passes directly from the consignor to the purchaser. Neither do the proceeds of the sale vest in the agent, for the title thereto passes directly to the principal.<sup>55</sup> But even under such circumstances a contract of this character does not create the relation of principal and agent in the sense that the agent is entitled to recover for services rendered in securing an order for goods which the principal refused to fill.<sup>56</sup>

But provisions requiring the consignee to remit the proceeds of sales are to be construed with other provisions in the contract, and when thus construed their effect, as determining the character of the contract, may be largely nullified by

main in the consignor until the purchase price is paid in full, and the character of the sale is fixed by those provisions and is not affected by a provision that the consignee, at the option of the consignor, shall give his note for the purchase price of any unsold machines, and shall guarantee the payment of all notes taken for the purchase price of articles sold.

<sup>53</sup> *St. Paul Harvester Co. v. Nicolin* (1886) 36 Minn. 232, 30 N. W. 763, holding that, as between the parties, the contract is one of agency, and not of sale, although it provides that the agent shall pay for unsold machines by notes approved by the principal, it, however, also providing that the agent shall hold unsold machines for a certain period, and that he accepts the sale of any goods furnished under the contract in a fiduciary capacity, and will not appropriate or use any part of the net proceeds of such sales, and that the principal reserves the title to all unsold machines.

<sup>54</sup> *Barret v. Gracie* (1861) 34 Barb. (N. Y.) 20, holding that, as between the parties, the transaction is one of agency, and not of sale, where property is delivered for resale, the proceeds to belong to the principal and to be collected and transmitted by the agent, except a stipulated commission to be retained by him; and this is true although the maximum price for which the agent may sell the property is not stated, the only restriction in this regard being the fixing of a minimum price.

<sup>55</sup> *Butler Bros. Shoe Co. v. United States Rubber Co.* (1907) 84 C. C. A. 167, 156 Fed. 1, holding that a contract is a bailment for sale, and not one of sale, where it provides that the one party, upon orders of the other, would send the latter from its factory and warehouse goods of its manufacture, and that the consignee should make such advances thereon as the consignor might request, and would conduct the business and pay all the expense of selling the goods for a certain commission consisting of the difference between the purchase price and the selling price to

the purchasers, and that the consignee should keep the proceeds of sales in a separate bank account, and remit therefrom to the consignor, and should guarantee accounts for goods sold to the extent of his profits. The consignee also agreed that upon the termination of the contract it would purchase and pay for all broken packages of goods then on hand.

<sup>56</sup> *Federal Rubber Co. v. King* (1913) 12 Ga. App. 261, 76 S. E. 1083, holding that, although the contract does not provide for the return of the unsold goods or expressly require the remittance of the proceeds of the sales, the provision in this regard being that at a certain time in each month the consignee shall pay in cash for all goods sold during the preceding thirty days, and shall be allowed a 5 per cent discount for cash, nevertheless, if the other provisions of the contract indicate the intent of the parties to create the relation of agency, and not that of seller and purchaser, it will be construed to be one of consignment.

*Burton v. Goodspeed* (1873) 69 Ill. 237, holding that an agreement to receive coal, to remove the same from vessels, pay the freight, and dispose of the coal at a certain price for a designated commission, makes the consignee a factor or commission merchant. *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.* (1893) 38 W. Va. 158, 22 L.R.A. 850, 45 Am. St. Rep. 846, 18 S. E. 482.

<sup>56</sup> *Nagle v. McNorton* (1887) 65 Miss. 197, 3 So. 650, holding that an agreement by a manufacturer of a machine to supply a dealer with his machines for resale, the dealer to take orders for them, the manufacturer to send the machines direct to the purchasers, the proceeds of the sale to be divided between the manufacturer and retailer on a certain basis, does not make the dealer an agent of the manufacturer so as to render the latter liable in an action for services rendered in selling a machine which the manufacturer refused to furnish.

other provisions inconsistent with the contract of agency or consignment, and consistent only with the contract of sale. For example, although there is a provision that the invoice price of the consigned articles shall be remitted at once by the agent upon the sale of the article, yet where the contract as a whole embodies provisions essential to a sale, and the consignee is required to give his notes for the purchase price, which is designated in the contract as an advance, and it is stipulated that upon paying the same he is to be released from all obligation as to the article covered by the note, the contract constitutes a sale, and not a consignment for sale.<sup>57</sup> And this is also true where the contract imposes upon the consignee the primary obligation to pay for the consigned goods, for in such case the provision that the proceeds of the sale shall belong to the consignor until full

settlement by the consignee of his indebtedness is made will be construed to be a security clause merely.<sup>58</sup>

*e. Provision making sale contingent upon resale by consignee.*

The time in which the purchase money is to be paid,<sup>59</sup> even though upon the happening of some contingent event, such as a resale of the goods by the purchaser, does not affect the character of the transaction as a sale.<sup>60</sup> For a contract may be one of sale, and not of agency or consignment, although the passing of title is contingent upon the sale of the property by the consignee. For example, a contract constitutes a sale where the consignee agrees to pay a certain price for the consigned goods as he sells them, and there are no restrictions or limitations imposed upon his right to sell the goods or as to the selling price;<sup>61</sup> and this is true although

<sup>57</sup> *Chickering v. Bastress* (1889) 130 Ill. 206, 22 N. E. 542.

<sup>58</sup> *Coweta Fertilizer Co. v. Brown* (1908) 89 C. C. A. 612, 163 Fed. 165, holding that, as to the creditors of the consignee, a contract was a sale where it provided that the articles should remain the property of the consignor until sold by the consignee, and that the proceeds of the sale should be a trust fund for the consignor until he was fully paid, there, however, being no right reserved to return the unsold goods and the consignee being under obligation to pay the purchase price without reference to whether or not he had sold the goods.

*Peoria Mfg. Co. v. Lyons* (1894) 153 Ill. 427, 38 N. E. 661, holding that, where the consignee was required to pay for the consigned goods by his note and was given no option to return them, the contract was a sale, although the consignor reserved title to the proceeds of sales and the right to require the return of the goods.

*People use of Phoenix Nursery Co. v. Midkiff* (1897) 71 Ill. App. 141, holding that a provision authorizing the consignor to take all orders received by the consignee and fill the same and apply the proceeds upon the account of the agent does not make the contract one of agency where it charged the consignee for the purchase price.

*Adrianse v. Rutherford* (1885) 57 Mich. 170, 23 N. W. 718, holding that a provision that the proceeds from the sales of machines by the consignee shall be the property of the consignor until full settlement of the indebtedness of the latter under the contract does not necessarily indicate that the transaction was an agency, since the purpose may have been to hold such proceeds as security merely.

*Weston v. Brown* (1899) 158 N. Y. 360, 53 N. E. 36, holding that, where an obligation is imposed on the purchaser to pay L.R.A.1917B.

the purchase price, the contract is a sale, notwithstanding a provision therein retaining title to the property and to the proceeds of sales thereof.

And see *Moline Plow Co. v. Rodgers*, supra, note 30.

Compare with *Snook v. Davis* (1858) 6 Mich. 156, holding that title does not pass as to creditors of an agent under a contract by one agent to furnish goods to another for sale by the latter at retail, his compensation to be all he received for goods over and above a designated amount, which latter amount he was to be responsible for and was to pay over to the principal at any time he was called upon to do so.

<sup>59</sup> *Granite Roofing Co. v. Casler* (1890) 82 Mich. 466, 46 N. W. 728, holding that postponement of payment has no tendency to prove agency.

<sup>60</sup> *Blow v. Spear* (1869) 43 Mo. 496, 97 Am. Dec. 412.

<sup>61</sup> *Lemp v. Ryus* (1895) 7 Colo. App. 37, 42 Pac. 169, holding that an agreement by a retail dealer to pay for the goods as they were sold by him, and to furnish weekly statements of sales, where there was no restriction imposed on the manner of handling the goods or as to the selling price, constitutes a sale, and not an agency.

*Granite Roofing Co. v. Casler* (Mich.) supra, holding that title passes to the purchaser and the loss of the articles by fire falls upon him, under a contract giving him full authority to handle the property of the other party thereto in a certain locality, it being recited that such property is sold to the purchaser to be paid for as sold, settlement to be made monthly for all goods sold.

*Buffum v. Descher* (1901) 1 Neb. (Unof.) 736, 96 N. W. 352, holding that where goods are left by a manufacturer with a retail dealer to be sold by the latter at such prices as he might fix, settlement

the contract contains a clause giving the consignee the right to return unsold goods.<sup>62</sup>

And where on its face a contract is an undertaking to furnish certain articles at a fixed price, to be paid for when sold, without any provision for the return of any unsold articles, it is a conditional sale, and not an agency contract.<sup>63</sup>

Where a sale is conditional, contingent, or conditioned, upon the consignee's selling the goods, it, of course, does not become complete, and the liability of the consignee for the purchase price does not ordinarily become fixed, until he has sold the goods.<sup>64</sup> The contract, however, operates to create between the parties the relation of debtor and creditor, the title remaining in the consignor until a resale by the consignee.<sup>65</sup> And this is

true as between the parties even though the proceeds of the sale are to be applied by the consignee upon a debt owing him by the consignor,<sup>66</sup> but as to the latter's creditors, title passes to the consignee.<sup>67</sup> It has been held that, where goods consigned for resale to be paid for when sold are destroyed by fire while in the possession and custody of the consignee, the loss falls upon him;<sup>68</sup> but where the articles were charged to the consignee when delivered and he was to account for them at the charged price if he sold them, and if he did not sell them they were to remain in his hands subject to the order of the consignor, it was held that the title did not pass to the consignee, and that the property was not covered by an insurance policy insuring the property of the consignee, including his stock in trade.<sup>69</sup>

to be made with the manufacturer at a fixed price to be paid as the goods are sold, the transaction constitutes a sale, and the title passes to the retail dealer and is subject to the claims of his creditors.

<sup>62</sup> *House v. Beak* (1892) 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065, holding that, where goods are delivered by a wholesale dealer to a retail dealer for a certain price if sold, with the privilege of returning unsold goods, title passes upon delivery of the goods.

<sup>63</sup> *D. M. FERRY & Co. v. HALL*, ante, 620, holding that, where the contract permitted the consignee, a retail dealer, to sell according to his own judgment, and required him to account for only the goods sold, the unsold goods to be taken back by the consignor at the invoice price, the contract was a sale, and hence the goods were not subject to taxation as the property of the consignor, while in the possession of the consignee.

<sup>64</sup> *Re Martin-Vernon Music Co.* (1904) 132 Fed. 983.

<sup>65</sup> *Levi v. Allen* (1895) 15 Ind. App. 38, 43 N. E. 571, holding that a retail dealer receiving goods to be sold for the consignor and paid for as sold, the goods remaining the property of the latter until sold, is not liable for the purchase price of unsold goods.

*Depew v. Keyser* (1854) 3 Duer (N. Y.) 335, holding that an agreement to sell certain goods and account for the proceeds at a designated price constitutes a contract of sale, but the actual resale of the goods is a condition precedent to the liability of the consignee to the consignor as debtor.

*Ex parte White* (1871) L. R. 6 Ch. (Eng.) 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488, holding that, where the consignee was to dispose of the consigned goods for the consignor, and was not to pay for them unless and until he had disposed of them, and he was to make

weekly reports of sales and was entitled to alter, manipulate, and sell the goods for such prices as he might fix, being liable to pay for them only at prices previously fixed and at times based upon the date of sale, without reference to the selling price, terms of sale, or anything else except the mere fact that he had made a sale, the transaction constituted a sale depending upon a subsequent sale by the consignee, and the proceeds of such sales belonged to him, the relation arising between him and the consignor by reason of such sales being that of debtor and creditor.

<sup>66</sup> *Holleman v. Bradley Fertilizer Co.* (1898) 106 Ga. 156, 32 S. E. 83, holding that the title remains in the consignor under a contract for the sale of fertilizer, by which the consignee incurs no liability for the purchase price except as he sells the goods.

<sup>67</sup> *Collyer v. Krakauer* (1907) 122 App. Div. 797, 107 N. Y. Supp. 739, holding that a delivery of goods to be sold on commission, the net proceeds to be applied on notes held by the consignee against the consignor, does not constitute a sale of the goods entitling the assignee for the benefit of creditors of the consignor to recover the purchase price.

<sup>68</sup> *Sproule v. McNulty* (1841) 7 Mo. 632, holding that a consignment of goods to be sold and the proceeds applied upon a debt owing by the consignor to the consignee transfers the title to the latter as to the creditors of the consignor.

<sup>69</sup> *Blow v. Spear* (1869) 43 Mo. 496, 97 Am. Dec. 412, holding that, where property is delivered to another for resale, to be paid for when sold, title passes and the loss by destruction of the property by fire falls upon the purchaser. To the same effect, see *Bicking v. Stevens* (1897) 69 Mo. App. 168.

<sup>70</sup> *Planters' Mut. Ins. Co. v. Engle* (1879) 52 Md. 468.

Where the contract provides that the consigned goods are to be paid for when sold, and the consignee is given a certain length of time in which to sell them, it has been held that he becomes liable for the purchase price upon the expiration of such time without reference to whether or not he sells the goods.<sup>70</sup> It has been held that, even where the contract is one of agency and the title to the goods consigned remains in the principal until sold by the agent, nevertheless where by the terms of the contract the agent becomes responsible for the purchase price of the goods upon selling them, which is to be evidenced by his notes running to the principal upon the sale by the agent the proceeds belong to him and he becomes the debtor of his principal.<sup>71</sup>

In many of the cases referred to as holding that the title did not pass until the consignee had resold the goods, the holding was not inconsistent with other cases heretofore referred to which did not involve this specific point, but held that the transaction constitutes a sale, and not a contract of agency. Indeed, some of the cases specifically holding that title did not pass until a resale by the consignee also hold that the contract was one of sale, and not of agency. The question, while academic in some instances, becomes important in other cases; as, for example, where it involves

the right to the proceeds of resales by the consignee. In such case, if the contract is held to be one of sale, obviously the consignee is entitled to the proceeds, and is not guilty of embezzlement if he uses them, for, upon the resale, he becomes merely the debtor of the consignor for the purchase price. But if such a contract is construed to be one of agency, and not of sale, of course the title never vests in the consignee, but passes directly to the purchaser, and the right to the proceeds of the sale immediately vests in the consignor, the consignee being a mere agency for the transfer. In this connection it is to be noted that, while a very similar contract to the ones construed by the foregoing cases was held to be one of agency, and not of sale,<sup>72</sup> yet this holding was made in denying to the consignor the right to hold the consignee for the purchase price of the consigned goods which were unsold. The actual holding, therefore, is not inconsistent with the cases already referred to.

*f. Restrictions upon right, manner, and terms of resale.*

The requirement that the consigned goods shall be sold within a designated time is also inconsistent with dominion over property conferred by an absolute sale thereof.<sup>73</sup> It has been asserted that limitations and conditions as to the sale

<sup>70</sup> *Brayman v. Leslie* (1880) 16 R. I. 521, 17 Atl. 922, holding that a transaction evidenced by a statement reciting that one party has bought of the other a certain stock of goods for a designated price, to be paid for as sold, and that he is to have a certain time to sell the same, constitutes a sale, and the purchaser is liable for the purchase price of the goods at the end of the designated time.

<sup>71</sup> *Vermont Marble Co. v. Brow* (1895) 100 Cal. 236, 50 Am. St. Rep. 37, 41 Pac. 1031, holding that, where a dealer receives monuments by consignment, to hold subject to the order of the consignor and to be sold as his property, the proceeds of the sales to be remitted if in cash, and if in notes, the notes to be remitted as collateral to his own notes for the goods sold, the transaction constitutes a sale upon the condition of a resale, and until then the consignee is under no obligation to pay for the articles consigned, and may be compelled to surrender to the consignor the articles at any time before they are sold.

*Aetna Powder Co. v. Hildebrand* (1894) 137 Ind. 462, 45 Am. St. Rep. 194, 37 N. E. 136, holding that the principal cannot follow the proceeds of sales made by his so-called agent, or claim the goods as an undisclosed principal, under a contract pur-

porting to be one of agency, but making the agent responsible for the purchase price when the goods are sold.

*Conn v. Chambers* (1908) 123 App. Div. 298, 107 N. Y. Supp. 976, affirmed in (1909) 195 N. Y. 538, 88 N. E. 1117, holding that, as between the parties, the contract is one of sale, and not of agency, although it purports to create an agency and provides for the consignment of property to the alleged agent to be sold at retail and settled for as sold, except that goods subsequently ordered are to be settled for monthly, where it contains no provision that the agent shall transmit the proceeds of sales to the principal or receive any commission for making sales, or any stipulation as to price or terms for resales.

<sup>72</sup> *Federal Chemical Co. v. Green* (1906) 30 Ky. L. Rep. 223, 97 S. W. 803, holding that, where goods are delivered for sale on consignment with a provision that those sold shall be settled for at a certain time, the balance to be carried over to another season, the transaction constitutes an agency to sell, and not an absolute sale, and the consignee cannot be held for the purchase price of the unsold goods.

<sup>73</sup> *Metropolitan Nat. Bank v. Benedict Co.* 20 C. C. A. 379, 36 U. S. App. 604, 74 Fed. 184.

at retail of the product of a manufacturer are inconsistent with the dominion conferred by an actual sale.<sup>74</sup> But conditions and provisions restricting the sale by retail of consigned goods may sometimes be explained on the theory that the manufacturer, in giving an exclusive agency for the sale of his goods, was desirous of exercising some control over the price at which they were to be sold and the extent to which they were to be advertised, etc. Under such circumstances, of course, such provisions do not have the effect of changing a contract of sale into one of consignment or agency.<sup>75</sup>

*g. Mere privilege to sell.*

In cases holding that a contract for the sale of an article at a stated price to be paid when sold was one of sale, and not of agency, the terms of the contract indicated that the parties intended the consignee should become liable for the purchase price at and from the time of the resale. Upon the happening of this event the obligation to pay was to become absolute without reference to the dealings between the consignee and the purchaser, except the mere fact of the sale. Such contracts are not to be confused with contracts by which goods

are consigned for sale, the proceeds to be delivered to the consignor and accounted for by the consignee less the latter's commission. Contracts of this character are bailment or consignment contracts, and not contracts of sale.<sup>76</sup> In such cases, of course, the controlling question is whether the contract provides for a consignment of the goods to be settled for at a fixed price out of the proceeds of the goods when sold, or whether the consignee becomes liable as principal debtor for the goods when sold.<sup>77</sup> For, although the seller cannot, as against a bona fide purchaser, retain title to goods delivered to a retail dealer for resale, yet he may place goods in the hands of a general commission merchant or factor to be sold on his account without making the property thus delivered subject to levy by creditors of the agent.<sup>78</sup>

*h. Provision for return of unsold goods.*

Where the leading feature of a contract of this character is a reservation by the consignor of the right to have the unsold articles returned, the stipulation is inconsistent with the absolute sale of the property, and indicates an intent to retain the title in the consignor.<sup>80</sup> And it has been declared that

<sup>74</sup> *Velie Motor Car Co. v. Kopmeier Motor Car Co.* (1912) 114 C. C. A. 284, 194 Fed. 324.

*National Cordage Co. v. Sims* (1895) 44 Neb. 148, 62 N. W. 514, holding that a contract purporting to be one of agency for the sale of twine, which fixes the retail price of the twine, the terms of sale, and the compensation of the agent, and reserves title in the twine and the proceeds of the sales thereof, is an agency contract, and not one of conditional sale; hence the twine received thereunder is not subject to the claims of creditors of the agent.

<sup>75</sup> *Baldwin v. Feder* (1909) 135 App. Div. 97, 119 N. Y. Supp. 1044.

And see *Dr. Koch Vegetable Tea Co. v. Malone* (1914) — Tex. Civ. App. —, 163 S. W. 662, holding that, where a contract provides for the sale and delivery of designated articles as desired by the purchaser, and fixes the prices and limits their resale to a certain territory, the purchaser to make reports of sales and remittances whenever sales are made, it is a contract of sale as between the parties, and also as to a statutory provision relative to foreign corporations doing business within the state.

<sup>76</sup> *Sturm v. Boker* (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99.

*Dennistown v. Barr* (1893) 31 Abb. N. C. 21, 28 N. Y. Supp. 255, holding that an agreement to hold property in storage with the privilege in the bailee to sell the same and pay over the proceeds to L.R.A.1917B.

the bailor until certain bills of exchange for the purchase money accepted by the latter have been liquidated does not vest title in the bailee as to his creditors.

*Weyman v. People* (1875) 6 Thomp. & C. 696, 4 Hun (N. Y.) 511, affirmed in (1875) 62 N. Y. 623, holding that, where a person receives goods from another to be sold or returned, and if sold the proceeds of the sales to be transmitted, as between the parties the transaction constitutes an agency, and not a sale. See *supra*, III. d.

<sup>77</sup> *Monitor Mfg. Co. v. Jones* (1897) 96 Wis. 619, 72 N. W. 44.

<sup>78</sup> *Fleet v. Hertz* (1903) 201 Ill. 594, 94 Am. St. Rep. 192, 66 N. E. 858.

<sup>80</sup> *Hamilton v. Billington* (1894) 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904, holding an agreement to be a bailment, and not a sale, where it contains an acknowledgment of a receipt of certain goods to be held in trust for the owner as his property, with liberty to sell the same for the owner's account and turn the proceeds of the sale over to him, with a reservation by the owner of the right at any time to cancel the trust and retake the goods. To the same effect, see *Monjo v. French* (1894) 163 Pa. 107, 29 Atl. 907.

*Franklin v. Stoughton Wagon Co.* (1909) 94 C. C. A. 269, 168 Fed. 867, holding that, where the consignor of goods retains full control of the disposition to be made of them, in that he reserves the power to have the goods returned to him or shipped else-

one of the fundamental rights of the consignor of goods for sale on commission is the right to have the goods returned to him upon demand before sale, subject, of course, to the payment of advances and other expenses of the consignee, and where the provisions of the contract are such as to defeat or destroy this right, the transaction is not a con-

signment for sale.<sup>81</sup> So, a stipulation that the consigned goods are at all times subject to the order of the consignor until they are sold, and if any remain unsold at a designated time they are to be returned to him, indicates the contract to be a bailment for sale, and not a sale.<sup>82</sup> But the mere fact that a contract entitles the purchaser to return

where, an essential element of a contract of sale is lacking; hence, the contract will be construed to be one of agency, and not of sale, although the consignee is to guarantee the payment of all notes executed by the purchasers of the consigned goods, and agrees that at a certain time, if so required by the consignor, he will purchase all unsold goods and give in settlement therefor his notes.

Re Flanders (1905) 67 C. C. A. 484, 134 Fed. 560, holding that, as to the trustee in bankruptcy of the consignee, a contract is a bailment, and not a sale, where it provides for the consignment of goods to be sold on commission, the consignee to make advances to the consignor by giving to the latter his notes for a certain proportion of the invoice price of the goods, and to receive a certain commission and account monthly for the proceeds of sales, deducting advances, commissions, etc., the consignor reserving the right to have the goods returned upon demand subject to the repayment of advances received.

W. O. Dean Co. v. Lombard (1895) 61 Ill. App. 94, holding that, where goods are delivered to a retail dealer to be sold, and he is to have all the proceeds of sales over and above a designated price, any unsold goods to be taken away by the manufacturer, the title to the consigned goods remains in the latter as to the creditors of the consignee.

Eldridge v. Benson (1851) 7 Cush. (Mass.) 483; Thomas Mfg. Co. v. Knapp (1907) 101 Minn. 432, 112 N. W. 989.

Norris v. Boston Music Co. ante, 615, holding that, where a contract does not indicate the intention of the parties that the consignee shall purchase the goods or acquire title to them, and no obligation is imposed upon him to pay the purchase price, the only obligation in this regard being to account for the proceeds of sales he makes, and it is provided that upon the termination of the contract the consignee shall return to the consignor all unsold goods, the transaction constitutes a consignment, and not a conditional sale.

Kingman Plow Co. v. Joyce (1916) — Mo. App. —, 184 S. W. 490, holding that, although a consignee is designated the purchaser of goods, where they are not to be paid for until sold, and the consignor reserves the right to remove any of them at his pleasure to be sold at other points, the transaction is a consignment, and not a sale, and the loss of the goods by fire falls upon the consignor.

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Conn v. Reed (1905) 73 N. J. L. 112, 62 Atl. 271, 19 Am. Neg. Rep. 373, holding that, as between the parties, the contract is one of agency where it provides for the consignment of articles for sale to be paid for when sold, the consignee to have the right at his expense to return any of the consigned goods unsold at the end of the season.

Middleton v. Stone (1886) 111 Pa. 589, 4 Atl. 523, holding that a delivery of property to be sold for the owner at a minimum price, and if not sold by a certain time to be returned, constitutes a bailment.

Davidson v. Adams Exp. Co. (1910) 43 Pa. Super. Ct. 53, holding that title does not pass under a consignment of goods to be sold for a designated sum, and if not sold at that price to be returned. On appeal on a different point this case was affirmed in (1911) 230 Pa. 635, 79 Atl. 760, which was reversed by stipulation of counsel in (1913) 229 U. S. 629, 57 L. ed. 1358, 33 Sup. Ct. Rep. 776.

Langley v. Kahnert (1905) 36 Can. S. C. 397, holding that, where goods are delivered for sale at retail at prices which the retail dealer may fix, he, however, to account for the goods at designated prices within a designated time after making sale thereof, the consignor reserving the right to retake the goods at any time, and the unsold goods at the end of the season to be returned, the title remains in the consignor as to the creditors of the consignee.

<sup>81</sup> McGaw v. Hanway (1913) 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915A, 601, holding that where, by the terms of a contract purporting to consign goods to the consignee, the latter is given over and above his commission an interest in the proceeds of the sale of the goods above a designated amount, his interest in the consigned goods is such that the consignor is not entitled to their return before sale by paying advances or expenses, especially where, in addition to this interest in the goods, the consignee is entitled to sell to such persons, upon such terms, and at such times as he sees fit, and the transaction constitutes a sale, and not a consignment, and hence, where the consignee advances more money on the goods than he sells them for, the consignor is not responsible for the difference.

<sup>82</sup> Re Columbus Buggy Co. (1906) 74 C. C. A. 611, 143 Fed. 859.



the unsold portions of goods received thereunder does not convert it from a contract of sale into one of agency.<sup>83</sup>

#### 4. *Reservation of title in consignor.*

In the absence of a statutory provision requiring that conditional sales be recorded to be valid, a reservation of title in the seller is valid to the extent of securing him while the goods are in the hands of the buyer,<sup>84</sup> and in some

cases in the hands of subsequent purchasers from the buyer. The provision, however, ordinarily indicates a sale of the property, although it is in form an agency contract and purports to appoint the purchaser the consignor's agent to sell the consigned goods,<sup>85</sup> for a provision of this character is not essential if the contract is one of consignment or agency, since the title remains in the principal as a matter of course.<sup>86</sup> It is

<sup>83</sup> *Butterick Pub. Co. v. Bailey* (1898) 105 Iowa, 326, 75 N. W. 189, holding that a contract is one of sale, and not of agency, where it provides that the consignee shall act as the special agent of the consignor, the consigned property to be paid for according to designated terms with the right to return unsold goods. The court said the latter provision was one of repurchase.

*Hessig-Ellis Drug Co. v. Sly* (1910) 83 Kan. 60, 109 Pac. 770, Ann. Cas. 1912A, 551, holding that a contract by a foreign corporation for the sale of its product to a dealer in a certain community, including an agreement not to make sales to others in that locality and an agreement to take back unsold goods, is a contract of sale, and not an agency, and hence the act of the purchaser in selling the goods within the state does not constitute doing business therein by the corporation.

*William Frantz & Co. v. Fink* (1910) 125 La. 1013, 28 L.R.A.(N.S.) 539, 52 So. 131, holding that, where goods are delivered to a retail dealer under an agreement that he can retain them and pay a certain price, or return them, it constitutes a sale and title passes upon delivery.

*Omaha Nat. Bank v. Kraus* (1901) 62 Neb. 77, 86 N. W. 906.

*Houck v. Linn* (1896) 48 Neb. 227, 66 N. W. 1103, holding that a delivery of horses for sale at a price to be fixed by the person receiving them, who agrees to pay a certain price for the horses with the privilege of returning any unsold, constitutes a sale of the horses with the privilege of rescinding the contract.

*Marsh v. Wickham* (1817) 14 Johns. (N. Y.) 167, holding that a contract is one of sale, and not a consignment for sale, where it fixes the price to be paid for goods received, provides for a certain deduction, and permits the return on final settlement of any unsold goods.

*Capuano v. Italian Importing Co.* (1915) 89 Misc. 449, 151 N. Y. Supp. 994, holding that, as between the parties, a mere agreement by the seller of goods to take back any unsold goods, although a part of the contract of sale, does not prevent the title from passing to the purchaser.

*Peek v. Heim* (1889) 127 Pa. 500, 14 Am. St. Rep. 865, 17 Atl. 984, holding a contract to be a sale, and not a consignment, although purporting to be the latter, where the title is reserved by the consignor and the consignee agrees to pay a certain price

for the article within a designated time, or return it.

<sup>84</sup> *Ex parte Flannagans* (1875) 2 Hughes, 264, Fed. Cas. No. 4,855, 12 Nat. Bankr. Reg. 230.

<sup>85</sup> *Rickardson Drug Co. v. Plummer* (1898) 56 Neb. 523, 76 N. W. 1086, holding that a contract purporting to appoint one party thereto the agent of the other to sell a stock of goods at retail, and from the proceeds pay the purchase price by monthly instalments, and further providing that the title must remain in the seller until the purchase price is paid, is a contract of conditional sale, and not of agency. To the same effect are *Richardson Drug Co. v. Oberfelder* (1899) 58 Neb. 822, 80 N. W. 50, and *Richardson Drug Co. v. Teasdale* (1897) 52 Neb. 698, 72 N. W. 1028.

<sup>86</sup> *Re Wells* (1905) 140 Fed. 752, holding that conditions attached to contracts of this character, that the title shall not pass until the goods are paid for, amount to nothing as a restriction upon the character of the contract. Such a stipulation, however, is unnecessary if the transaction is in reality a bailment.

*Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1908) 90 C. C. A. 579, 164 Fed. 803, holding that, where a contract casts upon the consignee all the responsibilities of an owner, and he is not given the right to return the unsold goods, the retention of the title for security for the purchase price merely makes the contract one of conditional sale; the consignee is still the general owner and is responsible as such.

*Mark v. Story* (1889) 57 Conn. 407, 18 Atl. 707, holding that, where a wholesaler left liquor with a retail dealer under an agreement that the title should remain in the former until the goods were paid for, with permission to sell to customers and account for the quantity sold at an agreed price, the transaction constituted an absolute sale. To the same effect, see *Lewis v. McCabe* (1881) 49 Conn. 141, 44 Am. Rep. 217.

*Forrest v. Nelson* (1885) 108 Pa. 481, holding that, as to the creditors of the consignee, a contract is one of sale, and not a bailment, where it recites that the one party has agreed to sell to the other party certain articles at a designated price and at designated times of payment, and contains a provision reserving title in the consignor until such payment is made, and a provision for the return of the articles in event of a default by the consignee.

therefore useful only in contracts of sale, although the fact that a consignment contract contains a clause of this kind does not operate to make it a contract of sale. And a provision authorizing the seller or alleged principal to take possession of the goods and deliver them to the purchasers, or dispose of them and apply the proceeds upon his account against the buyer or alleged agent, does not prevent the contract from being a sale of the goods, since it is in the nature of an insecurity clause.<sup>87</sup>

*IV. Declarations, conduct, and prior dealings of parties.*

Where the contract contains apt words both of sale and of agency, and its character therefore is ambiguous in this regard, reference may properly be had to the declarations, acts, and conduct of the parties, including their previous course of dealing, to aid in the construction of the contract. Indeed, the course of dealing between the parties for a considerable period of time is often the most satisfactory mode of indicating their intention and the character of the relation existing between them.<sup>88</sup> For example, where the parties to such a contract have treated it as a consignment for sale, and not an absolute sale, it will be so construed.<sup>89</sup> But it has been held that a contract which purports to

be one of consignment, but which in legal effect is a sale, and which contains no latent ambiguity, does not authorize the receipt of extrinsic evidence of the conduct of the parties to show the construction they placed upon it.<sup>90</sup>

In line with the rule admitting extrinsic evidence to show the character of the contract, it has been held that as between the parties, the character of such a contract may be determined by a written acknowledgment by the consignee that he is the agent of the consignor, and holds the consigned goods as such.<sup>90a</sup> A printed billhead, however, can have little or no influence in changing the clear and explicit language of letters constituting a contract, and it in no way controls, modifies, or alters the terms of the contract.<sup>91</sup> And the term "invoice" as used in a contract of this character, to the effect that the property is invoiced at a certain price, does not conclusively indicate an absolute sale, since it may as properly be employed in a contract of bailment.<sup>92</sup> Nor does the fact that the consigned goods were invoiced at a stated price in and of itself make the transaction a sale unless the terms of the consignment are such as to make the consignee the purchaser and principal debtor when the goods are sold.<sup>93</sup> Where, however, goods are ordered by a merchant and shipped

<sup>87</sup> People use of Phoenix Nursery Co. v. Midkiff (1897) 71 Ill. App. 141.

<sup>88</sup> Ex parte White (1871) L. R. 6 Ch. (Eng.) 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488.

Weir v. Long (1906) 145 Ala. 328, 39 So. 974, holding that, where the issue is whether a contract ambiguous in that regard is one of sale or a consignment for sale, it may be interpreted in the light of previous dealings between the parties and evidence with reference thereto and the custom of the consignee to pay for goods received under similar contracts.

<sup>89</sup> Pam v. Vilmar (1876) 54 How. Pr. (N. Y.) 235, holding that where parties to a contract have treated it as a consignment for sale and not an absolute sale it will be so construed.

<sup>90</sup> Re Rabenau (1902) 118 Fed. 471.

Reno v. Western Star Mill Co. (1894) 53 Kan. 255, 36 Pac. 329, holding that a statement of account for goods to be sold for the account of the consignor, the proceeds to be remitted for as sold, does not show a sale of the goods, but a consignment for sale, and they cannot be mortgaged by the consignee.

<sup>90a</sup> La Société Anonyme De L'Union Des Papetries v. Markes (1893) 67 Hun, 648, 50 N. Y. S. R. 497, 21 N. Y. Supp. 706. L.R.A.1917B.

<sup>91</sup> Sturm v. Boker (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99.

<sup>92</sup> Dows v. National Exch. Bank (1875) 91 U. S. 618, 23 L. ed. 214; Velie Motor Car Co. v. Kopmeier Motor Car Co. (1912) 114 C. C. A. 284, 194 Fed. 324.

B. F. Sturtevant Co. v. Dugan (1907) 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675, holding that a provision that the agent may retain as compensation all that he receives over and above the invoice price does not destroy the relation of principal and agent and render the transaction a conditional sale.

Rolker v. Great Western Ins. Co. (1866) 4 Abb. App. Dec. (N. Y.) 76, holding that, as used in a commercial sense, to consign property to another implies trust for sale, and does not indicate the passing of title to the consignee, and this is true although an invoice accompanies the consigned goods.

Pam v. Vilmar (1876) 54 How. Pr. (N. Y.) 235, holding that merely stating in the invoice of a shipment the value of the goods shipped does not indicate an absolute sale, for even to a consignee or agent the invoice may properly state the price or value of the article.

<sup>93</sup> Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co. (1893) 38 W. Va. 158, 22 L.R.A. 850, 45 Am. St. Rep. 846, 18 S. E. 482.

by a wholesaler who sends an ordinary merchant's bill of sale of the parcels, the presumption is that the sale is absolute, and not a consignment.<sup>94</sup>

It has been held that the fact that goods were billed to a consignee as if sold to him, and that a petition to recover the value thereof was filed in a suit against him, does not seriously affect the character of the transaction.<sup>95</sup> And the fact that the invoice and other instruments attached to a shipping declaration indicated that a consignment of goods was an absolute sale will not control where the correspondence between the parties and their method of settlement clearly indicate that the transaction was in fact a consignment for sale.<sup>96</sup> As heretofore pointed out, however, there is no magic in the words "consignment" or "agency" which can change the real character of a transaction from a sale to a consignment or agency contract.<sup>97</sup> And where the form of the agreement is that of a consignment for sale, but the real purpose of this form was to cover up a sale and preserve a lien for the benefit of the consignor, it will be held to be a sale.<sup>98</sup>

So, where it is apparent that there is

no purpose to create an agency, except a mere executory agreement to create a so-called agency to transform the relationship of debtor into a relationship of agency in case of default in payment of the debt owing for goods sold, the contract does not create the relation of principal and agent, nor, as against creditors in bankruptcy proceedings, can the ownership of the fund be transferred in this manner to the seller for this purpose.<sup>99</sup>

#### *V. Delivery of product to be manufactured and sold.*

In harmony with the rule that, where the title to consigned property passes absolutely or contingently to the consignee, imposing upon him an obligation to pay the purchase price, the transaction constitutes a sale, it is held that a consignment contract does not constitute a sale where it amounts merely to delivery of some product to be manufactured and sold for a certain compensation or a share in the proceeds.<sup>100</sup> For in such case there is nothing in the transaction indicating an intention to pass title either to the raw or the finished product, and the manufacturer assumes no obli-

<sup>94</sup> Chapman v. Kerr (1883) 80 Mo. 158, holding that title passed to the retail dealer and the property was subject to the claims of his creditors.

<sup>95</sup> Stein Double Cushion Tire Co. v. Wm. T. Fulton Co. (1913) — Tex. Civ. App. —, 159 S. W. 1013.

<sup>96</sup> Deburghraeve v. Autenrieth (1904) 24 Pa. Super. Ct. 267, holding that, although an invoice, customhouse entries, and affidavit attached to the shipping declaration all show a consignment of goods to be an absolute sale, nevertheless where the correspondence between the parties and the act of the consignee in accounting for the proceeds of sales made by him clearly indicate that the transaction was intended by the parties to be a consignment for sale, and not an absolute sale, the intention thus evidenced will control.

And see Heywood Bros. & W. Co. v. Doernbecher Mfg. Co. (1906) 48 Or. 359, 86 Pac. 357, 87 Pac. 530, holding that, under an agreement by the consignee to receive and sell the entire product of the consignor, the issuing of a list of prices by the consignee as agent of the consignor did not render the contract of sale one of agency.

<sup>97</sup> Chickering v. Bastress (1889) 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Mennis v. E. N. Manning & Co. (1907) 136 Ill. App. 406; Ex parte White (1871) L. R. 6 Ch. (Eng.) 397, 40 L. J. Bankr. N. S. 73, 24 L. T. N. S. 45, 19 Week. Rep. 488.

<sup>98</sup> Chickering v. Bastress (Ill.) supra; Thompson v. Paret (1880) 94 Pa. 275. L.R.A.1917B.

<sup>99</sup> Re Carpenter (1903) 125 Fed. 831.

See Ellet-Kendall Shoe Co. v. Martin (1915) 138 C. C. A. 277, 222 Fed. 851, holding that a contract designated as a consignment, by which the consignee guarantees the sale of goods consigned at a designated price, and agrees to keep them insured and pay a certain per cent upon any goods which may be returned or which the consignor finds necessary to have returned, and to make weekly reports of sales, etc., as between the parties, is a consignment contract, and not an absolute sale.

<sup>100</sup> Johnson v. Allen (1898) 70 Conn. 738, 40 Atl. 1056, holding that, where the essential provisions of a contract were that one of the parties was to buy grain and deliver it to the other, who was to grind and sell it for such prices and on such terms as he might fix, and to be responsible only for what he sold, and the prices fixed in the contract were fixed without reference to the prices he sold for, the contract constituted a bailment, and not a sale.

Firat Nat. Bank v. Schween (1889) 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681, holding that under an agreement by a cheese manufacturer to take milk of producers, manufacture it into cheese and butter, and sell the product for a certain compensation per pound, the title to the product remains in the producers until sold.

Sattler v. Hallock (1899) 160 N. Y. 291, 46 L.R.A. 679, 73 Am. St. Rep. 686, 54 N. E. 607, affirming (1897) 15 App. Div. 500, 44 N. Y. Supp. 543, holding that the cred-

gations to pay the purchase price thereof, nor does he obtain any right to the proceeds of the sale except merely the right as agent to collect the same, deduct his compensation, and remit the balance to his principal.

# **VI. Del credere agency.**

If the factor undertakes to guarantee the payment of debts arising from the sale by him of articles for his principal, he is construed to sell on a del credere commission, and hence the contract to

guarantee the payment of notes he takes for the purchase price of articles he sells is not inconsistent with the theory of agency.<sup>101</sup>

A provision in a contract of this character which requires the consignee to guarantee the collection of all notes taken for articles he sells is merely a del credere agreement, and does not affect the title to the property to which it relates or the fiduciary relations of the parties.<sup>102</sup>

itors of the bailee under such a contract could obtain no title either to the raw or the manufactured product.

*Stewart v. Stone* (1891) 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595, holding that a delivery of milk to a cheese factory to be manufactured into butter and cheese and sold for a certain compensation constitutes a bailment, and not a sale, and the bailee is not responsible for the loss of the property by fire on the theory that the title had passed to him.

And see *Schenck v. Saunders* (1859) 13 Gray (Mass.) 37, holding that title did not pass under a contract to deliver leather to be manufactured into shoes, the shoes to be sold by the owner of the leather, and the manufacturer to receive as his compensation the proceeds of the sales less a stipulated commission and the cost of the leather.

And also *Ransom v. Joseph E. Wichstrom & Co.* (1915) 84 Wash. 419, L.R.A.1916A, 508, 146 Pac. 1041, holding that, where an automobile is delivered to be repaired and sold for the owner, the latter agreeing to execute a bill of sale of the automobile to the bailee as agent, in order that he might close any satisfactory deal therefor, the transaction constitutes an agency, and not a conditional sale.

<sup>101</sup> *Re Galt* (1903) 56 C. C. A. 470, 120

Fed. 64, holding that a guaranty of the payment of notes taken for the purchase price of the consigned article constitutes a del credere commission contract, and not a sale.

*Milburn Mfg. Co. v. Peak* (1896) 89 Tex. 209, 34 S. W. 102.

*B. F. Sturtevant Co. v. Dugan* (1907) 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675, holding that, where goods are consigned for sale to net the consignor a certain price, the consignee to have all he received above such price, and to guarantee the payment of the purchase price of all sales made, the transaction creates a del credere agency.

Compare with *Columbia Carriage Co. v. Hatch* (1898) 19 Tex. Civ. App. 120, 47 S. W. 288, holding that a contract was one of sale, and not of agency, and hence came within the provision of the statute against monopolies and conspiracies in restraint of trade, where it provided that the one party was to handle exclusively in a certain territory the manufactured products of the other party, all goods sold to be settled for by purchasers' notes guaranteed by the consignee.

Cases involving ordinary del credere agency contracts are not included herein.

<sup>102</sup> *Williams Mower & Reaper Co. v. Raynor* (1875) 38 Wis. 119. A. G. S.

## **MICHIGAN SUPREME COURT.**

**MISHAWAKA WOOLEN MANUFACTURING COMPANY**

v.

**HENRY T. STANTON, Trustee, Appt.**

(188 Mich. 237, 154 N. W. 48.)

**Sale — to retailer — condition — retention of title.**

1. The retention by a wholesaler of dry goods of title to the goods and their proceeds in a sales contract under which the

goods pass to a retailer for resale is effective against a chattel mortgage executed by the retailer to a trustee for creditors.

For other cases, see *Sales*, I. c, in *Dig. 1-52 N. S.*

**Contract — fraud — fine type — failure to inform.**

2. A retention of title to dry goods sold by a wholesaler to a retailer cannot be declared fraudulent because the provision therefor was in fine print and the attention of the purchaser was not called to it, if it was in the same type as the rest of the contract, of which there was very little excepting such reservation, while the parties had previously had similar dealings with each other.

For other cases, see *Fraud and Deceit*, I. in *Dig. 1-52 N. S.*

(September 28, 1915.)

**Note.** — For validity of conditional sale contracts as affected by express or implied permission to purchaser to sell in the ordinary course of business, see annotation following this case, post, 658. L.R.A.1917B.

**A**PPEAL by defendant from a judgment of the Circuit Court for Kent County in plaintiff's favor, upon a case made, in an action brought to recover possession of certain dry goods. Affirmed.

The facts are stated in the opinion.

Messrs. Corwin & Souter and A. D. Dilley, for appellant:

Personal property sold or delivered with the express understanding that the same is to be resold is an exception to the general rule applicable to conditional sales, and such a sale or delivery of property is inconsistent with the continued ownership of the vendor, and is void as to the creditors of, or subsequent purchasers from, said vendee.

Excelsior Iron Works v. Lee, 123 Mich. 499, 82 N. W. 207; Ludden v. Hazen, 31 Barb. 650; Devlin v. O'Neill, 6 Daly, 305, affirmed in 68 N. Y. 622; Poorman Bros. v. Witman, 49 Kan. 697, 31 Pac. 370; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Re Howland, 109 Fed. 869; Mishawaka Woolen Mfg. Co. v. Westveer, 112 C. C. A. 109, 191 Fed. 465; John Deere Plow Co. v. Mowry, 137 C. C. A. 539, 222 Fed. 1; Flanders Motor Co. v. Reed, 136 C. C. A. 250, 220 Fed. 642; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Re Carpenter, 125 Fed. 831; Pontiac Buggy Co. v. Skinner, 158 Fed. 858; Re Penny, 176 Fed. 141; Columbus Buggy Co. v. Turley, 73 Miss. 529, 32 L.R.A. 260, 55 Am. St. Rep. 550, 19 So. 232; Parry Mfg. Co. v. Lowenberg, 88 Miss. 532, 41 So. 65; Re Agnew, 178 Fed. 478; Loving Pub. Co. v. Johnson, 68 Tex. 273, 4 S. W. 532; Re Perkins, 155 Fed. 237; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 360; Flint Wagon Works v. Buttles, 153 Fed. 932; Bent v. Jerkins, 112 Ala. 485, 20 So. 655; Bass, Heard & Howle v. International Harvester Co. 169 Ala. 154, 33 L.R.A. (N.S.) 374, 53 So. 1014; Re Priegle Paint Co. 175 Fed. 586; Lawrence v. Owens, 39 Mo. App. 318; Wilder v. Wilson, 16 Lea, 548; Star Clothing Mfg. Co. v. Nordeman, 118 Tenn. 384, 100 S. W. 93; Coweta Fertilizer Co. v. Brown, 80 C. C. A. 612, 163 Fed. 162; Re Wells, 140 Fed. 752; Clark Bros. v. McNatt, 132 Ga. 610, 26 L.R.A. (N.S.) 585, 64 S. E. 795; Winchester Wagon Works & Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707; West v. Fulling, 36 Ind. App. 617, 76 N. E. 325; Steele v. Aspy, 128 Ind. 367, 27 N. E. 739; Andre v. Murray, — Ind. App. —, 98 N. E. 322; Troy Wagon Works Co. v. Hancock, 81 C. C. A. 595, 152 Fed. 605; Abe v. Summerville, 46 Ind. App. 348, 92 N. E. 658.

Where the property was to be dealt with in a manner inconsistent with the continued ownership of the seller, the title passed to the purchaser regardless of the wording of the contract.  
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Knowlton v. Johnson, 37 Mich. 47; Jenks v. Colwell, 66 Mich. 420, 11 Am. St. Rep. 502, 33 N. W. 528; Wickes Bros. v. Hill, 115 Mich. 333, 73 N. W. 375; Watson v. Alberta, 120 Mich. 508, 79 N. W. 1048; American Foundry & Mach. Co. v. Charlevoix Circuit Judge, 138 Mich. 167, 101 N. W. 210; Allis-Chalmers Co. v. Atlantic, 164 Iowa, 8, 52 L.R.A. (N.S.) 561, 144 N. W. 346, Ann. Cas. 1916D, 910.

The provision in a contract attempting to retain title to the proceeds of goods sold for resale is of little or no value in interpreting the contract.

Adrian v. Rutherford, 57 Mich. 170, 23 N. W. 718; People v. Newman, 99 Mich. 148, 57 N. W. 1073; Mishawaka Woolen Mfg. Co. v. Westveer, 112 C. C. A. 109, 191 Fed. 465; John Deere Plow Co. v. Mowry, 137 C. C. A. 539, 222 Fed. 1; Pontiac Buggy Co. v. Skinner, 158 Fed. 858; Re Agnew, 178 Fed. 478; Columbus Buggy Co. v. Turley, 73 Miss. 529, 32 L.R.A. 260, 55 Am. St. Rep. 550, 19 So. 232.

The signature of Van Sickle is not conclusive evidence of a contract.

Van Houten v. Metropolitan L. Ins. Co. 110 Mich. 682, 68 N. W. 982; Raymond v. Farmers' Mut. F. Ins. Co. 114 Mich. 386, 72 N. W. 254; Alfred Shrimpton & Sons v. Netzorg, 104 Mich. 225, 62 N. W. 343; Shrimpton & Sons v. Rosenbaum, 106 Mich. 68, 63 N. W. 1011.

An offeree is not bound by the unknown terms of a document by his acceptance of the same, without objection, where the document delivered to him purports to be, and would, by a reasonable man, be understood to be, merely a check, voucher, or order, and not a contract.

9 Cyc. 261, 262; Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Grossman v. Dodd, 63 Hun, 324, 17 N. Y. Supp. 855; Limburger v. Westcott, 49 Barb. 283; Woodruff v. Sherrard, 9 Hun, 322; Binsell v. Interurban Street R. Co. 91 App. Div. 402, 86 N. Y. Supp. 913; Neuman v. National Shoe & Leather Exch. 26 Misc. 388, 56 N. Y. Supp. 193; New York, N. H. & H. R. Co. v. Sayles, 32 C. C. A. 485, 58 U. S. App. 18, 87 Fed. 444.

Messrs. Boltwood & Boltwood and Buell & Lucas, for appellee:

The contract was valid as between Van Sickle and plaintiff, and is valid between defendant and plaintiff.

F. J. Dewes Brewery Co. v. Merritt, 82 Mich. 198, 9 L.R.A. 270, 46 N. W. 379; Pratt v. Burhans, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064; Edwards v. Symons, 65 Mich. 348, 32 N. W. 796; Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332; Bunday

v. Columbus Mach. Co. 143 Mich. 10, 5 L.R.A. (N.S.) 475, 106 N. W. 397; Hood v. Olin, 68 Mich. 165, 36 N. W. 177; Couse v. Tregent, 11 Mich. 65; Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231; Johnston v. Whittemore, 27 Mich. 463; Whitney v. McConnell, 29 Mich. 12; Smith v. Lozo, 42 Mich. 6, 3 N. W. 227; Marquette Mfg. Co. v. Jeffery, 49 Mich. 283, 13 N. W. 592; Kendrick v. Beard, 81 Mich. 182, 45 N. W. 837; Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; Pettyplace v. Groton Bridge & Mfg. Co. 103 Mich. 155, 61 N. W. 266; Pratt v. Burhans, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064.

Contracts of conditional sale are not void as against public policy.

Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Hirschorn v. Canney, 98 Mass. 149; Burbank v. Crooker, 7 Gray, 168, 60 Am. Dec. 470; Deshon v. Bigelow, 8 Gray, 159; Armour v. Pecker, 123 Mass. 143; Lorain Steel Co. v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; Mishawaka Woolen Mfg. Co. v. Westveer, 112 C. C. A. 109, 191 Fed. 465; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; Triplett v. Mansur & T. Implement Co. 68 Ark. 230, 82 Am. St. Rep. 284, 67 S. W. 261; Rogers v. Whitehouse, 71 Me. 222; Hirsch v. Steele, 10 Utah, 18, 36 Pac. 49; Re Pierce, 87 C. C. A. 537, 157 Fed. 755; Re Columbus Buggy Co. 74 C. C. A. 611, 143 Fed. 850; Re Dunlop, 86 C. C. A. 435, 156 Fed. 545; Re E. M. Newton & Co. 83 C. C. A. 23, 153 Fed. 841; Re Gray, 170 Fed. 638.

The contract reserving title in plaintiff was not void because purchaser did not read the same, nor because plaintiff did not call the purchaser's attention to the clause reserving title in the vendor.

Robert v. Morrin, 27 Mich. 306; Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Brown v. Dean, 52 Mich. 267, 17 N. W. 837; Edwards v. Edwards, 54 Mich. 347, 10 N. W. 164; Raymond v. McKenna, 147 Mich. 35, 110 N. W. 121; Hollister v. Loud, 2 Mich. 309; Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81, 15 Mor. Min. Rep. 675; Pettyplace v. Groton Bridge & Mfg. Co. 103 Mich. 155, 61 N. W. 266; Bonnot Co. v. Newman Bros. 108 Iowa, 158, 78 N. W. 817; McKinney v. Herrick, 66 Iowa, 414, 23 N. W. 767; McCormack v. Molburg, 43 Iowa, 561; Crim v. Crim, 162 Mo. 544, 54 L.R.A. 502, 85 Am. St. Rep. 521, 63 S. W. 489; Dowagiac Mfg. Co. Schroeder, 108 Wis. 109, 84 N. W. 14; Standard Mfg. Co. v. Slot, 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923; Bostwick v. Mutual L. Ins. Co. 116 L.R.A. 1917B.

Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; 14 Am. & Eng. Enc. Law, 2d ed. 115-117; Wallace v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 547, 25 N. W. 772; Roundy v. Kent, 75 Iowa, 662, 37 N. W. 146; Jenkins v. Clyde Coal Co. 82 Iowa, 618, 48 N. W. 970; Minneapolis & St. L. R. Co. v. Cox, 76 Iowa, 306, 14 Am. St. Rep. 216, 41 N. W. 24; Reid v. Bradley, 105 Iowa, 220, 74 N. W. 896; Bannister v. McIntire, 112 Iowa, 600, 84 N. W. 707.

Stone, J., delivered the opinion of the court:

This case is brought here by defendant, after judgment for plaintiff, upon a case made, in an action of replevin. The case was tried by the court without a jury. The facts, being stipulated, were adopted by the court, and made a part of the finding. The material facts in the case are as follows:

For some time prior to April 10, 1912, Joseph D. Van Sickle had been engaged in the general merchandise business at Carson City, Michigan, and on said date plaintiff's agent called upon said Van Sickle and took an order for goods in the usual way, on blanks furnished by plaintiff, a copy of which order appears in the record. The attention of Van Sickle, who signed the order, was not called to any of the agreements printed on said order blank, and he did not know that the fine print at the bottom of the order blank contained an agreement whereby "the title to, property in, and right of possession of said goods should be and remain in said first party until sold, and that upon sale thereof the proceeds received therefor, whether notes, accounts, or moneys, should be and remain the property of said first party until said goods are fully paid for in cash." Nor was said Van Sickle ever instructed or requested to keep a separate account of sales made from said goods, or of the cash, notes, or accounts received therefor. The goods mentioned in said order were shipped by plaintiff and received by Van Sickle some time in the month of September, 1912, and were billed to him by plaintiff at \$640.64. Said Van Sickle had previously purchased merchandise of the same or similar kind and quality from the plaintiff, parts of which remained in his stock at the time the goods in the above-mentioned order were received and placed in stock.

Upon receipt of the goods in question, Van Sickle placed the same in his store, together with his stock previously purchased from plaintiff, as well as with other goods comprising his general stock of merchandise. Sales were made by Van Sickle from his general stock of merchandise, including

goods received from plaintiff, in the usual course of trade, some goods being sold for cash; others were sold on credit and were charged in personal accounts, on which the customers paid on account from time to time, without reference to any particular item, and some merchandise was paid for by accepting in exchange butter and eggs, which in turn were sold for cash or on credit. No attempt was ever made by Van Sickle to separate the accounts or money received from the sale of goods ordered from plaintiff from money or accounts received from the sale of goods bought of other merchants or manufacturers, and the same was mingled together at all times and used by Van Sickle as a single fund.

On April 12, 1913, said Van Sickle, being financially embarrassed, gave defendant a trustee chattel mortgage upon all his merchandise and fixtures, including the goods ordered from plaintiff, to secure all his creditors alike, including plaintiff. Said Van Sickle, previous to April 12, 1913, had sold \$486.06 worth of the goods ordered from the plaintiff on April 10, 1912, having on hand \$154.58 worth of said goods. He also had on hand \$73.33 worth of similar goods bought from plaintiff previous to April 10, 1912. Van Sickle had paid plaintiff in full for all goods purchased previous to April 10, 1912, but had paid only \$100 on the purchase price of the goods ordered April 10, 1912, leaving a balance of \$540.64 due plaintiff on the goods so ordered. After accepting the trust under the mortgage and taking possession of the stock, defendant notified the various creditors of Van Sickle of the giving of the mortgage, and requested statements of their accounts in order that he might verify the same and make distribution of the proceeds of the property to be sold under the mortgage. He received a statement from plaintiff showing \$555.63, including freight and interest, amounting to \$14.99, due it from Van Sickle, and made one payment of 30 per cent to all creditors, including plaintiff. The plaintiff then caused an investigation to be made, and upon learning that there were certain of said goods on hand, paid back a proportionate amount of the 30 per cent received, and demanded the goods on hand from the trustee, claiming title under and by virtue of the clause in fine print at the bottom of the order, and, being refused possession by the defendant, acting as trustee under said mortgage, plaintiff brought replevin for said goods. It was agreed that the value of the goods replevied was \$154.56, and in case of judgment for defendant, return of the goods was waived, and a judgment in said sum was to be entered; and in case of judgment for plaintiff, then the damages L.R.A.1917B.

were to be assessed at 6 cents, with costs to be taxed.

Under the heading of "Guaranty," the pertinent clause in said order, which was just above the signature of said Van Sickle, was as follows: "It is agreed by and between the said Mishawaka Woolen Manufacturing Company, party of the first part, and the undersigned orderer of the foregoing goods, party of the second part, that the title to, property in, and right of possession to said goods, and to all other goods ordered by said second party of said first party within one year from the date hereof, shall remain in said first party until sold by said second party, and that upon sale thereof the proceeds received therefor, whether notes, accounts, or moneys, shall be and remain the property of said first party until the said goods are fully paid for in cash; that if payment for the same shall not be made when due, or if at any time before the same shall be fully paid for, said second party shall become insolvent, or shall, in the opinion of said first party, be in danger of insolvency, or if said first party shall, for any reason whatever, deem itself in danger of losing the price of said goods, then the said first party may reclaim, and take possession of so much of the said goods as shall remain unsold in the ordinary course of retail business, and may also take possession of any proceeds of sale of any such goods; that said second party shall not sell, ship, or reship, or in any manner directly or indirectly supply any retail or wholesale dealer with any such goods, nor dispose of them in any manner except in the ordinary course of business at retail sale, except with the express consent and approval of said first party previously obtained; that 'punched' goods are ordered subject to said first party's having them in stock; and that it does not guarantee quality or delivery. The party of the first part will not be responsible for delays by reason of strikes, fires, accidents, or other causes beyond its control."

Counsel for defendant filed certain requests for special findings of law. The conclusions of law by the trial court were as follows:

"(1) That Joseph D. Van Sickle, having signed the order, Exhibit A, he and his mortgagee are both bound thereby, even though he did not read the agreement in fine print above his signature; and the defendant's fourth and fifth requests are therefore refused.

"(2) That the delivery of all the goods by the plaintiff to Joseph D. Van Sickle under the contract order set out in the agreed statement of facts constituted a valid conditional sale.

"(3) That under the agreed statement of facts said Joseph D. Van Sickle was bound by the terms of the agreement that he entered into with the plaintiff, whether or not he knew the contents of the agreement he signed.

"(4) That the agreement signed by the said Joseph D. Van Sickle and the plaintiff clearly shows that the meaning of the agreement was that the title to the goods sold by the plaintiff to said Joseph D. Van Sickle under the contract was to remain in the plaintiff until the goods were sold by the said Joseph D. Van Sickle in the ordinary course of retail trade.

"(5) That the position of the clause retaining title in the plaintiff of the goods unsold and the type in which such clause is printed are sufficient to bind said Joseph D. Van Sickle to the terms of the agreement.

"(6) That the rights of the defendant under the trust mortgage are exactly the same as were the rights of Joseph D. Van Sickle in regard to the goods covered by the conditional sale contract and that were not sold in the ordinary course of retail trade.

"(7) The vital question of law in this case seems to be whether or not an absolute sale is made and title passes to the purchaser, where the property is sold and delivered to the buyer for the purpose of resale. . . . Without comment upon the cases which hold that it is against public policy to validate a contract which seeks to withhold title, and at the same time gives to a vendee the right to make immediate resale in his own name, it is sufficient to say that the supreme court of our state has decided adversely to the defendant's first, second, and third requests, and those requests are therefore refused.

"(8) I find, under the stipulated facts and the decisions of the supreme court of the state of Michigan, that the plaintiff is entitled to judgment in its favor of 6 cents damages, and costs to be taxed."

Proposed amendments were refused, and exceptions duly taken.

By appropriate assignments of error the following questions are presented by appellant:

(1) Can the vendor of merchandise sold expressly for resale retain title thereto, as against the creditors or subsequent purchasers, or encumbrances from the conditional vendee?

(2) Is the signer, or his legal representative, bound by the terms of a contract contained in fine print, which he did not read, under the circumstances here appearing?

1. In presenting the first question, counsel for appellant concede that personal property may be sold or contracted to a pur-

chaser, to be by him retained and used for his pleasure or business, and that such contracts are valid and binding upon the creditors of, or purchasers from, the conditional vendee, and they call attention to nearly a score of such cases.

They claim, however, that it is equally well settled, by the great weight of authority throughout the United States, that personal property sold or delivered with the express understanding that the same is to be resold is an exception to the general rule applicable to conditional sales, and that such a sale or delivery of property is inconsistent with the continued ownership of the vendor, and is void as to creditors of or subsequent purchasers from said vendee. In support of this proposition counsel cite the dissenting opinion of Justice Grant in *Excelsior Iron Works v. Lee*, 123 Mich. 499, 82 N. W. 207; *Ludden v. Hazen*, 31 Barb. 650; *Mishawaka Woolen Mfg. Co. v. Westveer*, 112 C. C. A. 109, 191 Fed. 465, and a large number of cases from other states; also *John Deere Plow Co. v. Mowry*, 137 C. C. A. 539, 222 Fed. 1.

In reply, counsel for plaintiff claim that upon this proposition the courts of this country may be divided into four classes:

(1) Those holding contracts of conditional sale void as against public policy, whether filed or recorded or not. Examples of such courts are those of Kentucky and Tennessee.

(2) Those holding such contracts valid between the parties and those having notice thereof, when they relate to specific articles, such as a horse, piano, etc., but void, as against public policy, when they relate to sales of merchandise intended for resale at retail, and that examples of such courts are those of New York, Indiana, Mississippi, and Texas.

(3) Those holding such contracts valid between the parties and those having notice thereof, no matter whether or not they relate to specific articles or to merchandise intended for resale, but invalid as against innocent purchasers, mortgagees, etc., unless filed or recorded in the proper clerk's office; and that examples of such courts are those of Ohio, Minnesota, North Dakota, and Wisconsin.

(4) Those holding such contracts valid, whether they relate to specific articles or to stocks of merchandise intended for resale, not only between the parties and those having notice thereof, but also as between the conditional vendor and an innocent purchaser or mortgagee of the vendee, or between the vendor and the attachment or judgment creditors of the vendee, or as between the vendor and the assignee in insolvency proceedings or trustee in bank-



ruptcy of the vendee, irrespective of whether or not such contracts are filed or recorded; that examples of such courts are those of Michigan, Massachusetts, Vermont, Connecticut, and Arkansas; and that no court has gone further to sustain contracts of conditional sale than has this court, and that in no case has this court held such contracts void or against public policy, whether they related to the sale of merchandise intended for resale or only to a specific article intended for use by the vendee.

In support of this claim plaintiff's counsel cites the following cases: *F. J. Dewes Brewery Co. v. Merritt*, 82 Mich. 198, 9 L.R.A. 270, 46 N. W. 379; *Pratt v. Burhans*, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064; *American Harrow Co. v. Deyo*, 134 Mich. 639, 96 N. W. 1055; *Edwards v. Symons*, 65 Mich. 348, 32 N. W. 796; *Hood v. Olin*, 68 Mich. 165, 36 N. W. 177; *Bunday v. Columbus Mach. Co.* 143 Mich. 10, 5 L.R.A. (N.S.) 475, 106 N. W. 397; *Worden Grocer Co. v. Blanding*, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332; *Wasey v. Whitcomb*, 167 Mich. 58, 132 N. W. 572; and many of our earlier cases. Many cases are also cited from other states.

We cannot here undertake to analyze all of the cases cited by counsel. We shall not refer to the many cases cited relating to the sale of personal property which has been attached as fixtures to the realty, as we are not dealing with that question. We shall refer to a few only of our own cases.

In *F. J. Dewes Brewery Co. v. Merritt*, supra, the plaintiff shipped beer to Lentz Brothers under the following contract:

Big Rapids, Mich., Dec. 18, 1888.

It is hereby agreed by and between the F. J. Dewes Brewing Company, of Chicago, Illinois, and Lentz Brothers, of the city of Big Rapids, Michigan: That the F. J. Dewes Brewing Company agree to ship to Lentz Brothers all beer ordered by them at the following price, \$5.75 per barrel, f. o. b., at Big Rapids, and that the right, title, and interest of said beer is to remain and rest in the F. J. Dewes Brewing Company until sold; and we, the said Lentz Brothers, agree to take the said beer, and pay for the same, on above conditions.

Signed by the parties.

The brewing company, under the above contract, sent to Lentz Brothers two carloads of beer, which were received by them at Big Rapids. After they had sold about one and one-half carloads, the remainder was levied upon by the defendant, as sheriff of Mecosta county, and was taken away by him upon an execution in his hands, issued L.R.A.1917B.

upon a valid judgment in favor of a creditor of one of the members of the firm of Lentz Brothers. The circuit judge instructed the jury that, under the terms of the agreement, the absolute title to the beer passed at once to Lentz Brothers and was subject to levy and sale under the execution, and a judgment in replevin was entered for the defendant. In reviewing that judgment this court said:

"Now, the contract was one which it was competent for the parties to make, unless it was void as being against public policy. The brewery company had a right to say: 'We will fill your order for beer, which you may sell as you choose, but the title shall remain in us until you do sell, and then the title will pass to the purchaser; in which case we will trust to your personal responsibility to pay us, at the rate of \$5.75 a barrel.' The effect of such contract was that the property not sold remained the property of the company, and the firm owed them for all they had sold. . . . This court has gone very far in sustaining conditional sales, and has never declared them void, or different from what the parties have intended by their agreement [citing cases].

"The authorities cited above show the principles upon which this court has proceeded in upholding such contracts, and it is unnecessary to restate them here or to review the decisions of other courts holding a different view."

In *Pratt v. Burhans*, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064, plaintiffs entered into a contract with the Owosso Cigar Company by which they agreed to send and deliver to it a quantity of cigars, the title thereto to be retained in plaintiffs until paid for or sold, and, when sold, the accounts to belong to them. The defendant, Burhans, had indorsed for the Owosso Cigar Company. Plaintiffs shipped goods to the cigar company, and shortly after it turned over all its stock, including the cigars shipped by plaintiffs, to the defendant, and gave him a bill of sale thereof, which the latter claimed was a bona fide purchase, in consideration of his indorsement. Defendant took possession of the goods. After demand and refusal plaintiffs brought replevin. In this court it was held that the sole issue for the jury was whether plaintiffs and the Owosso Cigar Company made a contract by which the title of the goods was to remain in the plaintiffs until they were paid for or sold in due course of trade. Justice Grant said: "The defendant did not buy them in the due course of trade; and therefore, if such a contract was made, the plaintiffs were entitled to recover. Such a contract is valid under the repeated deci-

sions of this court, and we are not concerned with the decisions of other courts upon the subject. Those who purchased in the usual course of trade would take a good title. Those who did not purchase in the usual course of trade could not rely upon the bare possession of their vendor as conclusive evidence of title."

Counsel for defendant claim that these two cases were really overruled by this court in *People v. Newman*, 99 Mich. 148, 57 N. W. 1073. We do not so understand it. The *Newman* Case did not involve the question of conditional sale. There the respondent was charged with selling beer at wholesale without having filed the bond and paid the tax required by law. His contention was that he was acting as agent of a brewing company, and he relied upon a contract, which appears in the opinion. The trial court instructed the jury that, under the terms of the contract there was practically a sale of the beer to the respondent, and that he was not an agent, but a purchaser. This court affirmed the conviction. In our opinion, the only cases in this court which might be claimed to be authorities against the application of the principle of conditional sale, as heretofore stated, are *Choate v. Stevens*, 116 Mich. 28, 43 L.R.A. 277, 74 N. W. 289; *Van Den Bosch v. Bouwman*, 138 Mich. 624, 110 Am. St. Rep. 336, 101 N. W. 832; and *Coeling v. Green*, 163 Mich. 27, 127 N. W. 792. A careful examination of these cases discloses the fact that they fully recognize the principle enunciated by this court in the cases above quoted from. This becomes more evident by the fact that we have in the subsequent cases of *American Harrow Co. v. Deyo*, 134 Mich. 639, 96 N. W. 1055; *Bunday v. Columbus Mach. Co.* 143 Mich. 10, 5 L.R.A. (N.S.) 475, 106 N. W. 397, and *Worden Grocer Co. v. Blanding*, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332, carefully distinguished the *Choate* and *Van Den Bosch* Cases from the former cases, and reaffirmed the principle established in the earlier cases. As we said in the recent case of *Atkinson v. Japink*, 186 Mich. 335, 152 N. W. 1079, whether a sale of personal property is absolute or conditional depends upon the contract of the parties. The distinction attempted to be made by counsel for appellant was also attempted in *Mishawaka Woolen Mfg. Co. v. Westveer*, 112 C. C. A. 109, 191 Fed. 465, in the circuit court of appeals,—a case arising under the law of Michigan. In that case Judge Warrington said: "It is argued that decisions passing upon contracts in terms reserving title in articles delivered for personal use of the original taker, like machinery, pianos, and sewing machines, are distinguished from de-

cisions under similar contracts relating to articles delivered for purposes of resale. We do not discover that the supreme court of Michigan has made such a distinction, and it is difficult to see any sufficient reason for its existence. Both classes of articles are delivered into the possession and control of the first taker, without notice to any other person of any title or interest retained in them. They are alike chattels, which, in such instances, connote ownership and the right of sale in their possessor. Anyone having dealings in respect to them with a person in possession and control, without notice and for a present valuable consideration, ought to secure the same rights with regard to the one class as the other."

It is true that in that case the court held that it was within the principles of *Choate v. Stevens* and *Van Den Bosch v. Bouwman*, supra. The contract in that case differed from the contract in the instant case, in that there was nothing in the agreement in that case which purported to give title to the vendor in any of the proceeds of sale, whether received in the form of notes, accounts, or cash. That fact is pointed out by the court. In that respect the form of contract was changed before it was signed by Van Sickle. It is true that in *John Deere Plow Co. v. Mowry*, 137 C. C. A. 539, 222 Fed. 1, Judge Denison said: "It is true that in the *Mishawaka* Case there was special reliance on the fact that the contract did not attempt to preserve to the vendor a substituted title to the proceeds when the goods were sold, and that in the present case this reservation is, in terms, made; but we are not satisfied, taking all the conditions together, to treat this as a controlling distinction."

After a careful review of our own decisions, we are of the opinion that the position of the plaintiff is the correct one, and that the trial court reached the correct conclusion upon the subject. The views of the defendant cannot prevail without overruling the repeated decisions of this court which have become fundamental in business transactions in this state. The legislature can readily change the rule by requiring the recording of such contracts, as in the case of chattel mortgages.

2. It is claimed that the reservation of title was fraudulent because the clause was in fine print, and the attention of the purchaser was not called to it. A facsimile of the contract is attached to the record. An inspection shows that the clause complained of was in the same sized type as the remainder of the contract. It was in the body of the instrument, just above Van Sickle's signature. There is very little other printed matter in the contract. He

should have read it, and if he did not do so, he alone is to blame. In the stipulation of facts it is stated that "plaintiff's agent called upon said Joseph D. Van Sickle and took an order for goods in the usual way, on blanks furnished by plaintiff."

There was no attempt on the part of plaintiff's agent to conceal this clause from Van Sickle. The latter had purchased goods in previous years of the plaintiff. It is fair to presume that the previous orders had been upon similar blanks. Weight must always be given to the fact of the execution of a contract; and the presumption which exists in favor of written instruments cannot be overcome, except upon evidence from

which an inference of duress, deception, misrepresentation, substitution, or artifice is clearly deducible. Such evidence is wanting here. *Sullivan v. Ross*, 98 Mich. 570, 57 N. W. 821, citing *Campau v. Lafferty*, 50 Mich. 114, 15 N. W. 40; *Houghton v. Ross*, 54 Mich. 336, 20 N. W. 66. See also *Pettyplace v. Groton Bridge & Mfg. Co.* 103 Mich. 155, 61 N. W. 266; *Bonnot Co. v. Newman Bros.* 108 Iowa, 158, 78 N. W. 817.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

The late Justice McAlvay took no part in this decision.

### **Annotation—Validity of conditional-sale contracts as affected by express or implied permission to purchaser to sell in the ordinary course of business.**

It is not intended in this note to consider the rights of the parties as affected by recording laws; for the cases on this question, see note in 38 L.R.A.(N.S.) 554. As to the right of the vendor in a conditional sale, as affected by the bankruptcy of the purchaser, and as to the duty of a purchaser of property from the conditional vendee with the right to sell to see that the latter's vendor is paid, see note in 26 L.R.A.(N.S.) 585.

As to the construction of contracts containing provisions peculiar to consignment, agency, or sales contracts, see note appended to *D. M. Ferry & Co. v. Hall*, ante, 626; and generally as to the right of a person leaving his chattels in another's possession to claim title against the latter's vendees or creditors, see note appended to *Davis v. First Nat. Bank*, 25 L.R.A.(N.S.) 760.

#### **As between the parties.**

As suggested by the title, this note is limited to the question of the construction of conditional-sale contracts as affected by express or implied permission to sell in the ordinary course of business.

Aside from one or two jurisdictions, the validity of contracts of conditional sale by which the seller reserves title to the property until the purchase price is paid is recognized and enforced, except that in some jurisdictions these contracts are required to be recorded in order to be valid against subsequent purchasers or creditors. The essential thing in a contract of conditional sale is the reservation of title in the seller; and the present question is as to the effect on such a contract of express or implied authority to the buyer to resell the property in

the ordinary course of his business. It has been urged, and even held, by some courts, that such authority is inconsistent with the essentials of a conditional sale, and that the effect is to make the sale an absolute one with title absolutely vesting in the buyer; and it has also been held that such authority was fraudulent as to subsequent purchasers and creditors of the purchaser, rendering the reservation of title void as to them. The courts are not in harmony on this question, however, and the weight of authority and certainly the better reasoning supports the view that authority to the purchaser to sell property purchased by conditional sale does not in any way affect the character of the contract, and in and of itself furnishes no proof of fraud on the part of the parties thereto. The owner of property, if he sells it, has the right to sell it upon such conditions as the purchaser may agree to; and it is lawful for the purchaser to agree that the title shall remain in the seller until the latter has been paid for the property. Such contracts are very common, and, as a rule, are of great benefit to the public at large, for worthy people without financial credit are enabled in this way to secure property necessary to their business, comfort, and convenience, and pay for the same in convenient instalments. As heretofore stated, the legality of these contracts is beyond question. There is no reason why the contract should become unlawful or fraudulent merely because express or implied authority is given the purchaser to resell it in the ordinary course of his business, in view of the fact that, as

shown in a note appended to *D. M. Ferry & Co. v. Hall*, ante, 626, it is entirely lawful to contract for the consignment of goods by one party to the other, to be sold by the latter as agent for the former. And although the goods are placed in the possession of the agent without anything appearing to indicate his lack of ownership, nevertheless his creditors or subsequent purchasers, with or without notice, paying a valuable consideration, can obtain no right to such goods as against the principal and owner. And in harmony with this view it has been held that when the seller of property by conditional sale expressly or impliedly authorizes the purchaser to resell the property in the ordinary course of his business, he does not thereby indicate any intention of vesting the purchaser with the title to the property; the reservation-of-title clause clearly discloses his intention to retain title, and it is valid as between the parties.<sup>1</sup>

**As to subsequent purchasers.**

The authority to sell merely indicates and evidences the intention of the seller to permit the conditional purchaser to resell the property as the agent of the seller. Upon the sale being made, the title passes directly from the original seller to the subpurchaser, and of course the latter obtains a good title to the property. It is the title of the original owner, and having authorized the sale, the latter is estopped to deny the subpurchaser's title, unless he can show that the latter did not purchase in accordance with the authority to sell.<sup>2</sup> For example, that he paid the purchase price by giving the conditional purchaser credit, or that he took the property in payment of an obligation owing him by the conditional purchaser.<sup>3</sup>

The courts are not agreed as to the rights of subsequent purchasers of a stock of goods in bulk, and which embrace goods sold by conditional sale. The view taken by the apparent weight

<sup>1</sup> *Armington v. Houston* (1866) 38 Vt. 448, 91 Am. Dec. 366, *infra*.

*Century Throwing Co. v. Muller* (1912) 116 C. C. A. 614, 197 Fed. 263, declaring that the authority to the vendee to sell in the usual course of business, or authority to sell and account for the proceeds of sales, does not destroy the title reserved by the vendor.

*Adrianse v. Rutherford* (1885) 57 Mich. 170, 23 N. W. 718, holding that where a contract contained a provision authorizing the consignor of machines for sale at retail to retake the unsold machines if at any time dissatisfied with the conduct of the consignee, the title to the unsold machines remained in the former, where the consignee died before any dissatisfaction was expressed by the consignor.

*Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co.* (1910) 26 S. D. 374, 128 N. W. 334, affirmed on rehearing (1904) 18 S. D. 105, 99 N. W. 854, and holding that where machinery is consigned for sale under a contract reserving title in the consignor until sold, and also the title to the proceeds of sales, as between the parties the title to unsold machinery does not pass to the consignee.

<sup>2</sup> *Armington v. Houston* (1866) 38 Vt. 448, 91 Am. Dec. 366, *infra*.

*Peek v. Heim* (1889) 127 Pa. 500, 14 Am. St. Rep. 865, 17 Atl. 984.

*Winchester Wagon Works & Mfg. Co. v. Carman* (1887) 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707, *infra*, holding that a reservation-of-title provision was fraudulent and void as to a subpurchaser where the property was sold for the purpose of a resale.

<sup>3</sup> *Albert v. R. Lewis Steiner Mfg. Co.* (1904) 42 Misc. 522, 86 N. Y. Supp. 162, holding that the seller is estopped to assert L.R.A.1917B.

title as to the subpurchaser, where he expressly or impliedly authorized his immediate purchaser to resell.

*Wilder v. Wilson* (1886) 16 Lea (Tenn.) 548, holding that a subsequent purchaser obtained a good title where the purpose of the original sale was to enable the purchaser to resell the property.

*Standard Implement Co. v. Parlin & O. Co.* (1893) 51 Kan. 544, 33 Pac. 360, holding that a provision that all goods and the proceeds of all sales are to be held as collateral security in trust and for the benefit of the seller until he has been paid in full renders the contract a conditional sale, and gives the seller the right to the property as against a subsequent mortgagee of the purchaser, where the mortgage was given to secure the payment of a pre-existing indebtedness, and it did not appear that the mortgagee had extended to the mortgagor any credit on account of the goods received under the contract.

*D. M. Osborne Co. v. Plano Mfg. Co.* (1897) 51 Neb. 502, 70 N. W. 1124, holding that a contract appointing one party the agent of the other for the sale of twine at a certain commission, fixing the price the agent is to pay, and providing that the sales shall be for cash, and that a settlement shall be made not later than a designated time, and reserving to the consignor the title to the twine and the net proceeds of the sales, is one of conditional sale, and the title remains in the consignor as against purchasers of the entire lot of twine, who had knowledge of the contract, and the purpose of the sale was to pay a debt of the consignee.

But see *Columbus Buggy Co. v. Turley* (1895) 73 Miss. 529, 32 L.R.A. 260, 55 Am. St. Rep. 550, 19 So. 232, holding that a provision reserving title in the seller of

of authority is that the power to sell given to a retail dealer is limited to sales by him in the ordinary course of business, and does not extend to sales of an entire stock in bulk; hence, such sales are not effective to cut off the title of the original owner, and he is not estopped to assert his title.<sup>4</sup> It has been held, however, that a reservation-of-title clause is not valid as to subsequent purchasers of the stock in bulk, which included the goods purchased on conditional sale, where the permission to sell was unrestricted.<sup>5</sup> And it has also been held that where a subpurchaser bought without actual or constructive notice of the reservation-of-title clause, he obtained a valid title as against the original seller.<sup>6</sup> But it has been held that the fact that goods were sold for the purpose of enabling the purchaser to place them in a certain building for another did not estop the original owner from asserting title thereto under his reserva-

tion clause, as against another purchaser of the goods for a different purpose.<sup>7</sup>

#### As to creditors or trustee in bankruptcy.

While the courts are in harmony in holding that the purchaser from the conditional-sale purchaser obtains a good title to the property, if he purchased in good faith and paid a valuable consideration, they are not agreed as to the rights of creditors of the conditional-sale purchaser. As heretofore pointed out, in some jurisdictions, and notably in the Federal courts, it is held that where the owner of property sells it and reserves title until payment of the purchase price, but authorizes the buyer to resell in the ordinary course of business, he thereby clothes the buyer with the indicia of ownership, and the reservation constitutes a fraud upon creditors, and hence it is void.<sup>8</sup> And, so far as the cases disclose, it is immaterial whether

goods sold for the express or implied purpose of resale is fraudulent and void as to a subsequent purchaser without notice of the condition, although he was a creditor, and the consideration was the satisfaction of his debt. To the same effect is *Parry Mfg. Co. v. Lowenberg* (1906) 88 Miss. 532, 41 So. 65.

<sup>4</sup> *Lett v. Eastern Moline Plow Co.* (1910) 46 Ind. App. 56, 91 N. E. 978, holding that a reservation-of-title provision incorporated in a contract for the sale of a stock of goods was valid and effective as against a subsequent purchaser of the stock in bulk. The *Winchester Wagon Works Case* *infra*, note 8, was distinguished on the ground that in that case the purchaser purchased in the ordinary course of trade.

*Burlbank v. Crooker* (1856) 7 Gray (Mass.) 158, 66 Am. Dec. 470, sustaining the validity of a contract for the sale of a stock of goods for resale, although the sale was upon condition that the title should not vest in the retail dealer until payment of the purchase price, and a purchaser of the entire stock of goods was held to obtain no title thereto, although sales at retail would have been valid.

<sup>5</sup> *Poorman Bros. v. Witman* (1892) 49 Kan. 697, 31 Pac. 370, holding that where goods are sold to a retail dealer it will be implied that the parties intend that they are to be resold, and where the manner of sale is not restricted, and the purchaser mortgages his entire stock of goods, including the consigned goods, the purchaser of the goods from the mortgagee acquires a good title as against the original seller.

<sup>6</sup> *Bass, Heard & Howle v. International Harvester Co.* (1910) 169 Ala. 154, 33 L.R.A. (N.S.) 374, 53 So. 1014, holding that a reservation of title to property sold for the purpose of resale at retail is not valid as to a subsequent purchaser of the prop-

erty, although he purchased it in bulk, and not in the usual course of trade, where he was without actual or constructive notice of the reservation clause.

<sup>7</sup> *Jermyn v. Schweppenhauser* (1901) 33 Misc. 603, 68 N. Y. Supp. 153, holding that where, on the sale of fixtures to a dealer, to be placed in a certain building, the title was reserved by the seller, the fact that he consented to their resale, to be placed in this building, did not estop him from asserting title as against some other purchaser.

<sup>8</sup> *Re Agnew* (1909) 178 Fed. 478; *Re Penny* (1909) 176 Fed. 141; *Coweta Fertilizer Co. v. Brown* (1908) 89 C. C. A. 612, 163 Fed. 162; *Pontiac Buggy Co. v. Skinner* (1908) 158 Fed. 858; *Flint Wagon Works v. Buttles* (1907) 153 Fed. 932; *Troy Wagon Works Co. v. Hancock* (1906) 81 C. C. A. 595, 152 Fed. 605; *Re Wells* (1905) 140 Fed. 752; *Re Galt* (1903) 56 C. C. A. 470, 120 Fed. 64; *Re Garceywich* (1902) 53 C. C. A. 510, 115 Fed. 87; *Re Howland* (1901) 109 Fed. 869.

*Brown v. Thurber* (1879) 1 N. Y. City Ct. Rep. 322, holding that if goods are sold to a retail dealer, to be placed by him in his stock and sold at retail, the reservation of title in the original seller is fraudulent and void as to the creditors of the purchaser. *Ludden v. Hazen* (1860) 31 Barb. (N. Y.) 650; *Bonesteel v. Flack* (1864) 41 Barb. (N. Y.) 435; but compare with the New York cases cited in note 10.

*Hamilton v. Billington* (1894) 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904, holding that a conditional sale is invalid as to creditors of the vendee, even where there is express or implied power to resell.

*Peek v. Heim* (1889) 127 Pa. 500, 14 Am. St. Rep. 865, 17 Atl. 984, holding that a reservation of title by the seller of goods intended for resale, while valid as between

or not the creditor was a subsequent creditor and extended credit in reliance upon the fictitious credit in this manner secured by the purchaser. Other cases, while not apparently following the theory of fraud, hold that the reservation of title is inconsistent with the express or implied authority to sell, and construe the contract to be an absolute sale and

the reservation to constitute a lien which is invalid unless recorded according to the law applicable to liens.<sup>9</sup> The weight of authority, however, upon grounds heretofore pointed out, holds that the mere fact that the conditional-sale purchaser is authorized to sell in the ordinary course of his business, as to his creditors puts him in substantially the same position as that occupied by an

the parties, is invalid as to his creditors. To the same effect, see *Thompson v. Paret* (1880) 94 Pa. 275.

*Star Clothing Mfg. Co. v. Nordeman* (1906) 118 Tenn. 384, 100 S. W. 93, holding that a conditional sale for the purpose of resale is fraudulent and void as to creditors of the buyer, including his trustee in bankruptcy.

In *Pontiac Buggy Co. v. Skinner* (1908) 158 Fed. 858, the court reasons that where the agreement is that the purchaser shall hold the proceeds of the sale in trust for the seller as collateral security for the purchase price, it implies that the title is in the purchaser, and hence the attempt to reserve title constitutes a fraud on the creditors of the latter, rendering invalid the reservation as to his trustee in bankruptcy. To the same effect is *Re Priege Paint Co.* (1910) 175 Fed. 586.

In *Re Garcewich* (1902) 53 C. C. A. 510, 115 Fed. 87, the rule is stated "that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors."

In *Winchester Wagon Works & Mfg. Co. v. Carman* (1887) 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707, a provision reserving title in the vendor is held to be fraudulent as against a subpurchaser from the original purchaser, where the property was sold for the purpose of resale. The court said that in such case the purposes for which the property was delivered to the original vendee were inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery were made must be deemed fraudulent and void as against purchasers from the original vendee. Based upon this case as authority, the rule there announced was held to apply to creditors of the trustee in bankruptcy of the vendee, in *West v. Fulling* (1905) 36 L.R.A.1917B.

*Ind. App.* 617, 76 N. E. 325. And in *Abe v. Summerville* (1910) 46 Ind. App. 348, 92 N. E. 658, the rule is declared that a sale of merchandise to be disposed of by the vendee cannot be made conditional, so far as concerns the rest of the creditors and purchasers. In *Lett v. Eastern Moline Plow Co.* (1910) 46 Ind. App. 58, 91 N. E. 978, the court, following *Hench v. Eacock* (1898) 21 Ind. App. 444, 52 N. E. 85, holds that a contract for the sale of a stock of goods, reserving title in the seller until the purchase price is paid, is valid as to a subsequent purchaser of the stock in bulk. In so holding the court distinguished *West v. Fulling*, on the ground that in that case the person asserting title to the goods was the trustee in bankruptcy of the purchaser, and his right was based upon a provision of the bankruptcy law that the trustee of a bankrupt shall take title to all property which, prior to the filing of the petition, the bankrupt could by any means have transferred; and it is also pointed out that in the *Winchester Wagon Works* Case the rule was announced as to a purchaser in the ordinary course of trade. In *Andre v. Murray* (Ind.) post, 667, the trustee in bankruptcy of the buyer was held to have no title to goods purchased by the bankrupt under a contract for the sale of a stock of goods, with a reservation of title to the proceeds, but with permission to resell.

<sup>9</sup> *Re Perkins* (1907) 155 Fed. 237, holding that, under the Maine law which requires agreements reserving title in the seller to be recorded to be valid, as well as under the bankruptcy law, the reservation of title to goods sold for resale is invalid as to the trustee in bankruptcy of the purchaser.

*Flint Wagon Works v. Buttles* (1907) 153 Fed. 932, holding that where articles were sold for resale, and there was a provision reserving title in the seller, appearing upon the back of notes executed by the purchaser for the purchase price, which was unknown to him, and the notes were not recorded, such provision is invalid as to the purchaser's trustees in bankruptcy.

*Troy Wagon Works Co. v. Hancock* (1906) 81 C. C. A. 595, 152 Fed. 605, following *West v. Fulling* (1905) 36 Ind. App. 617, 76 N. E. 325, holding that, under the Indiana law, a conditional sale of personal property by a manufacturer to a retailer, for the purpose of resale, with an agreement to reserve title in the original seller until paid for, is invalid as to the trustee in bankruptcy of the purchaser.

*Re Wells* (1905) 140 Fed. 752, holding

agent under a consignment contract, and the validity of the contract of sale is sustained as to creditors.<sup>10</sup>

that a stipulation that the title to goods consigned for resale shall remain in the consignor until paid for, even though valid as between the parties, is of no avail as against the trustee in bankruptcy of the consignee.

In *Re Rabenau* (1902) 118 Fed. 471, holding that where, by the terms of the contract, styled a consignment contract, all risk of the consigned goods rested upon the consignee, and he was entitled to pay for them at any time, and the consignor had the option to require him to purchase unsold goods, the transaction is a sale, and the property passes to the trustee in bankruptcy of the consignee, notwithstanding a provision reserving title in the goods to the consignor until paid for, where the contract was not registered as a conditional-sale contract.

*Re Howland* (1901) 109 Fed. 869, holding that, under the law of New York, where merchandise is sold on conditional sale, with an understanding that it is to be dealt with in the same manner as other property owned by the purchaser, the sale is inconsistent with the continued ownership of the property by the seller, and it is subject to seizure and sale upon execution by the creditors of the purchaser, and upon the bankruptcy of the latter, it passes to his trustee. To the same effect is *Re Garcewich* (1902) 53 C. C. A. 510, 115 Fed. 87. But see *New York cases* cited in the next note.

<sup>10</sup> *Bryant v. Swofford Bros. Dry Goods Co.* (1908) 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; *Ludvig v. American Woolen Co.* (1913) 231 U. S. 522, 58 L. ed. 345, 34 Sup. Ct. Rep. 161; following *Triplett v. Mansur & T. Implement Co.* (1900) 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261.

In *Re Pierce* (1907) 87 C. C. A. 537, 157 Fed. 755, holding that, under a statute of North Dakota declaring to be void as to subsequent creditors without notice, and purchasers and encumbrancers in good faith and for value, reservations of title unless recorded, the fact that property is sold for the purpose of resale does not render invalid a reservation of title thereto as against a trustee in bankruptcy of the purchaser, since the trustee is neither a subsequent creditor without notice nor a purchaser or encumbrancer.

In *Re Dunlop* (1907) 86 C. C. A. 435, 156 Fed. 545, holding that, as to the trustee in bankruptcy of the purchaser under the law of Minnesota, as well as under the general rule as established by the weight of authority, the fact that the sale of goods is for the purpose of resale by the purchaser does not render invalid a provision reserving to the seller title to the goods and the proceeds thereof until he has been paid in full, since the trustee in bankruptcy, in the absence of fraud, has no better title than the bankrupt and his creditors had at the time of filing the petition in bankruptcy L.R.A.1917B.

On this point there is in Michigan apparently a conflict between the state and Federal courts. According to the deci-

which resulted in the adjudication. And this rule is not affected by a statutory provision rendering voidable such a reservation as to bona fide purchasers, attaching and judgment creditors, unless the contract is recorded.

*Thornton v. Cook* (1893) 97 Ala. 630, 12 So. 403, holding that where a purchase is upon condition,—being the payment of the purchase price, with authority in the purchaser to resell and pay the purchase price from the proceeds,—in making such sales he acts as agent of the seller and the title remains in the latter; hence, the property is not subject to attachment by the creditors of the purchaser.

*Triplett v. Mansur, & T. Implement Co.* (1900) 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261, holding to be valid as to the creditors of the buyer a contract for the sale of goods which contained a provision reserving title to the goods and to proceeds of resales thereof, although the buyer was a retail dealer and was authorized to resell the goods.

*Perkins v. Mettler* (1899) 126 Cal. 100, 58 Pac. 384, holding to be a conditional sale, and valid as to the trustee in bankruptcy of the purchaser, a contract for the sale of a stock of goods, reserving title in the seller until the purchase price was paid.

*Lewis v. McCabe* (1881) 49 Conn. 141, 44 Am. Rep. 217, holding that a reservation of title in a contract for the sale of goods to be sold at retail is valid as to creditors of the retail dealer, for, where honestly made, such a contract is not violative of any principles of public policy, on the ground that it is calculated to give one clothed with the possession a false credit, or as holding the conditional purchaser out to the world as the absolute owner. Approved in *Wheeler v. New Haven Wire Co.* (1889) — Conn. —, 16 Atl. 393; *Mack v. Story* (1889) 57 Conn. 407, 18 Atl. 707.

In *Flint Wagon Works v. Maloney* (1911) 3 Boyce (Del.) 137, 81 Atl. 502, it is reasoned that "there can be no doubt about the intention of the parties to the contract in the present case. Unquestionably they intended that, as between themselves, the title to the property should remain in the seller until paid for. It may be very fairly presumed that the seller intended that the buyer should sell the property in the regular course of his business, and thereby become able to pay for the same. It may be just as fairly presumed that the seller intended that anyone who purchased the property from the vendee in the regular course of his business would have a good title thereto. This is all meant, or implied, in every conditional sale of goods to a retail dealer. But, can the contract, by any fair and reasonable construction, be held to mean that the creditors of the vendee could seize the property for the payment of his

sions of the state court, construed as a whole, including *MISHAWAKA WOOLEN MFG. CO. v. STANTON*, ante, 651, contracts

for the sale of property, with a reservation of title, are conditional sales, and are valid as to the creditors of the buyer,

debts? We think not. There is, as we have said, a provision in the contract that clearly negatives such a meaning. But, independent of that, we are of the opinion that such a construction would be unwarranted. In order that the property might be liable for the debts of the vendee the title must have been in the vendee, which certainly could not be under the law as we understand it. But it is not necessary for the protection of an innocent purchaser that title shall be in the vendee, because when a vendor makes a conditional sale to a retail dealer he agrees, not that the title to the property shall vest in the vendee, but that he will not assert his title against an innocent purchaser from such vendee, when he knew, and had impliedly agreed, that the property might be sold by the vendee in the regular course of his business."

See Indiana cases, note 8.

*Rogers v. Whitehouse* (1880) 71 Me. 222, holding that a reservation of title to the goods sold to a retail dealer for resale is valid as to creditors and the assignee in insolvency of the purchaser. It is said that there is no legal objection to the wholesale dealer making a conditional sale to a retailer with the understanding that he might dispose of the goods as they may be called for at retail, but, as between themselves, the property should not pass until the goods were paid for. In such case, while the purchaser at retail will get a title which the original vendor could not impeach, it will be the latter's title, and not that of the retailer, for he had none, and could convey none except in the manner in which his arrangement with the vendor is permitted.

*Bradley, C. & Co. v. Benson* (1904) 93 Minn. 91, 100 N. W. 670, holding that the fact that a contract for the sale of property to be resold by the purchaser reserves title thereto until the seller has been paid the purchase price does not change its character from one of conditional sale to one of absolute sale with the reservation of a lien, and where the statute does not require a conditional-sale contract to be recorded as against general creditors of the purchaser, it is valid, and the title remains in the seller, as against the trustee in bankruptcy of the purchaser.

*Cole v. Mann* (1875) 62 N. Y. 1, holding the fact that the purchaser was a dealer in goods of the kind purchased, and that authority was given to him to sell the articles, provided he remitted the proceeds immediately to the seller, did not operate to pass the title to him, for if he sold under this authority, he sold as agent of the seller and the authority to sell did not affect the contract as to his creditors.

*Prentiss Tool & Supply Co. v. Schirmer* (1892) 136 N. Y. 305, 32 Am. St. Rep. 737, 32 N. E. 849, holding that where the purchaser was permitted to manufacture ma-

terials embraced in a contract of conditional sale containing a clause reserving title in the seller, and to sell the manufactured articles upon condition that the proceeds of the sale shall be accounted for and paid to the seller, to apply upon the purchase price, the provision did not impair the rights of the latter under the instrument, or render it void as to the creditors of the purchaser. *Frank v. Batten* (1888) 49 Hun, 91, 1 N. Y. Supp. 705, holding that the fact that under a contract for the sale of property upon the condition that the title was not to pass until the purchase price was paid, the purchaser had the right to manufacture and sell it for the seller, turning the proceeds of the sale over to the latter to the extent necessary to pay the purchase price, does not render the contract invalid or unenforceable as to the creditors of the purchaser. The contrary, however, was held in the earlier decisions by the courts of inferior jurisdiction. *Ludden v. Hazen* (1860) 31 Barb. (N. Y.) 650, holding that a reservation of title in the sale of liquor to a retail dealer for the purpose of resale will not prevent the title from passing to the purchaser, and it is subject to execution by his creditors. To the same effect is *Bonesteel v. Flack* (1864) 41 Barb. (N. Y.) 435.

In *Devlin v. O'Neill* (1875) 6 Daly (N. Y.) 305, it is held that there can be no such thing as a conditional sale of goods which are placed in the possession of the purchaser, to be sold at retail, and they cannot be reclaimed by the seller from execution creditors of the buyer. This case was affirmed on appeal in (1877) 68 N. Y. 622, but the appeal did not present this specific question, for the holding of the lower court in this regard was in favor of the defendant, and the verdict was rendered in favor of the plaintiff as to other matters presented, and he did not appeal; the only appeal being by the defendant.

*E. M. Brash Cigar Co. v. Wilson* (1911) 32 Okla. 153, 121 Pac. 223, holding that where a person is appointed agent to sell goods for his principal, the title to remain in the latter until the goods are paid for in cash, and, in compliance with an order from the agent, the principal ships goods C. O. D. to a customer, the title remains in the principal, and the goods are not subject to attachment for the debts of the agent.

*Hirsch v. Steele* (1894) 10 Utah, 18, 36 Pac. 40, holding to be valid as to the creditors of the buyer a contract for the sale of goods to be resold at retail, which reserves title to the goods.

*Armington v. Houston* (1866) 38 Vt. 448, 91 Am. Dec. 366, declaring, where property is sold upon condition that the title shall not pass until payment, but upon the understanding that it is to be sold by the buyer in the ordinary course of his business, that the seller is estopped from asserting any right to it adverse to the right of a pur-



even though they contain a provision authorizing the buyer to resell the goods. This has been held where the contract contained a provision reserving title to the proceeds of the resale,<sup>11</sup> and also where there was no such provision.<sup>12</sup>

chaser in good faith and without notice of the condition; but, as between the original parties, the right to the property is to be determined according to their intentions and the contract, and the creditors of the purchaser have no greater rights in this regard than he would have.

<sup>11</sup> *Worden Grocer Co. v. Blanding* (1910) 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1332, holding that a note containing a reservation-of-title clause was a conditional-sale contract, and not a negotiable instrument.

In *Pratt v. Burhans* (1891) 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064, the title was reserved to goods sold for resale. The contract also provided that when the goods were sold, accounts therefor were to belong to the consignor. The reservation was held to be valid as to a subsequent purchaser who did not purchase in due course of trade. The court said that the contract was valid under their repeated decisions.

In *American Harrow Co. v. Deyo* (1903) 134 Mich. 639, 96 N. W. 1055, it is held that a contract for the sale of goods to a retail dealer for resale, in which the seller reserved title to the goods and to the proceeds of the sale thereof until the purchase price was paid in full, was a conditional sale, and not a mortgage, and hence, although the contract was not recorded, the seller was entitled to hold the property as against the purchaser's trustee in bankruptcy.

The latest decision of the Michigan supreme court on the question is the case under annotation, *MISHAWAKA WOOLEN MFG. CO. v. STANTON*, ante, 658. It was there held that a reservation-of-title clause, including the right to the proceeds of sales, was valid and enforceable against the trustee in bankruptcy of the purchaser. The court points out that the principles applied in *Pratt v. Burhans* and *F. J. Dewes Brewery Co. v. Merritt* were reaffirmed in the cases of *American Harrow Co. v. Deyo* and *Worden Grocer Co. v. Blanding*, and it is said that the distinction attempted to be made in the case under consideration was also attempted in *Mishawaka Woolen Mfg. Co. v. Westveer*; and while the court points out that the contract in that case and in the case under consideration differed in that the contract construed in the latter case contained a clause reserving a right to the proceeds of sales, which was absent in the contract construed in the former case, it is, however, pointed out that in *John Deere Plow Co. v. Mowry* it was conceded that in the *Mishawaka Case* special reliance was placed on the fact "that the contract did not attempt to preserve to the vendor a

When the question was first presented to the Federal court, it refused to follow these decisions, on the ground that later decisions of the Michigan court had overruled or limited the doctrine of these cases;<sup>13</sup> and it was pointed out that the

substituted title to the proceeds when the goods were sold, and that in the present case this reservation is in terms made; but we are not satisfied, taking all the conditions together, to treat this as a controlling distinction." The Michigan court concludes that, after a careful review of their decisions, "we are of the opinion that the position of the plaintiff is the correct one, and that the trial court reached the correct conclusion upon the subject. The views of the defendant cannot prevail without overruling the repeated decisions of this court, which have become fundamental in business transactions in this state."

<sup>12</sup> *F. J. Dewes Brewery Co. v. Merritt* (1890) 82 Mich. 198, 9 L.R.A. 270, 46 N. W. 379, holding to be valid as to the creditors of the buyer a contract for the sale of goods to be resold at retail, the seller reserving the right, title, and interest in the goods until sold, the purchaser agreeing to pay for the goods upon the prescribed conditions. In *Mishawaka Woolen Mfg. Co. v. Westveer* (Fed.) infra, the court refused to follow this case as authority upon this point even as to a Michigan contract. It is cited with approval, however, in *MISHAWAKA WOOLEN MFG. CO. v. STANTON*, and it is also approved in *Hirsch v. Steele* (1894) 10 Utah, 18, 36 Pac. 49, which also holds a similar contract valid as to the creditors of the buyer. And it is approved in *Triplett v. Mansur & T. Implement Co.* (1900) 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261, and in *Re E. M. Newton & Co.* (1907) 83 C. C. A. 23, 153 Fed. 841, which follows the *Triplett Case*, and which is affirmed in (1908) 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614.

<sup>13</sup> These Michigan cases, however, do not sustain the Federal court:

In *Van Den Bosch v. Bouwman* (1904) 138 Mich. 624, 110 Am. St. Rep. 336, 101 N. W. 832, the question presented was whether or not the seizure and sale of the property for default of the buyer operated to bar any right of action on notes given for the purchase price. According to the contract, the title, ownership, and possession did not pass from the seller until notes given for the purchase price were paid in full, and the latter had the right to take possession of the property at any time he deemed himself insecure, even before maturity of the notes; and, upon taking possession, he was authorized to sell the property, either at public or private sale, without notice, or he might retain the same without sale. In such case the amount paid upon the note would be deemed to be compensation only for the use, wear, and tear of the property. The court said that these provisions gave the seller two options.

rule had been applied by subsequent Michigan decisions only where the contract had contained a provision reserving title in the seller to the proceeds of any resales. And apparently upon the ground that the contract under consideration did not contain such a clause, it was held invalid as to the trustee in bankruptcy of the buyer.<sup>14</sup> This distinction between such contracts, however, was repudiated in subsequent decisions of the Federal court, and the doctrine was asserted that a reservation of title cannot stand as a conditional sale unless, taking the entire contract and circumstances together, it is clearly dominant over the right of resale and other inconsistent features of the contract. In other words, the facts as a whole must be consistent with the theory that resales are to be made by the vendee as agent or consignee.<sup>15</sup>

In the abstract this doctrine is not necessarily inconsistent with the result reached in the cases decided by the

Michigan court, for they seems to be based upon the ground that, as a matter of law, under such a permission to sell, the conditional buyer acts as agent for the seller. In the result reached, however, as pointed out, there is a conflict between the Federal and state courts. In this connection it is to be noted that *MISHAWAKA WOOLEN MFG. CO. v. STANTON* points out that the early Michigan cases referred to still represent the law of that state upon this point, and were in no way limited or overruled by the cases relied upon by the Federal court. The *STANTON CASES*, however, did not expressly disapprove of the *Westveer Case*, although it apparently did of the *John Deere Plow Co. Case*; but in subsequent cases the Federal court has apparently taken the position that the *STANTON CASE* did not disapprove of either of these Federal decisions.<sup>16</sup> The Federal court of appeals has also held that the decisions of the Federal Supreme Court, construing contracts of this

1. He could retake the property and treat the amount paid as a payment for its use, wear and tear. 2. He was authorized to seize and sell the property at public or private sale. Where he pursues the latter course, the question is, upon whose account that sale was made under the terms of the contract.

In *Choate v. Stevens* (1898) 116 Mich. 28, 43 L.R.A. 277, 74 N. W. 289, the question under consideration was as to the negotiability of notes given for the purchase price of a soda fountain which was not sold for the purpose of resale, and the case is hence inapplicable to the question under consideration. The provision relied upon was that the parties agreed that the title to the property should remain in the seller, and, in case of nonpayment at maturity of the notes given for the purchase price, he might enter and retain immediate possession of the property without process of law, wherever it might be, and remove the same. As to the character of this contract, the court said: if it can be said that this writing shows the sale of the soda fountain, as contradistinguished from a contract to sell, the provision as to title amounts to no more than a chattel mortgage.

<sup>14</sup> *Wishawaka Woolen Mfg. Co. v. Westveer* (1911) 112 C. C. A. 109, 191 Fed. 465, holding to be a chattel mortgage, and not a contract of conditional sale a contract for the sale of goods to a retail dealer, which contained a reservation of title, and authorized the resale of the property covered thereby, but which did not expressly reserve title to the proceeds of the sale. Upon this latter ground, the court very largely based its right to construe the instrument to be a chattel mortgage, and not a conditional-sale contract, apparently overlooking L.R.A.1917B.

the fact that the Michigan supreme court had made no distinction between the two classes of contracts, holding them both to be contracts of conditional sale, and valid as to creditors of the purchaser, although the property was sold with express or implied authority to resell it.

<sup>15</sup> In *John Deere Plow Co. v. Mowry* (1915) 137 C. C. A. 539, 222 Fed. 1, the contract provided that the title to and ownership of all the goods shipped as "herein provided, or upon the terms and during the life of this contract, and which shall embrace and include any and all goods that may hereafter be ordered shipped, shall remain in and their proceeds in case of sale shall be in law and in equity the property and moneys of," the seller, and shall be at all times at his order until full payment in cash shall have been made to and accepted by said seller. This contract was construed to be one of pledge or security, and not a conditional sale, and hence it should have been recorded, in accordance with the statute requiring the recording of chattel mortgages; and since not recorded, it was invalid as to the trustees in bankruptcy of the purchaser.

<sup>16</sup> *Re Stoughton Wagon Co.* (1916) 145 C. C. A. 562, 231 Fed. 676.

In *Walter A. Wood Mowing & Reaping Mach. Co. v. Croll* (1916) 145 C. C. A. 565, 231 Fed. 679, the court also refused to regard *MISHAWAKA WOOLEN MFG. CO. v. STANTON*, ante, 651, as controlling, although the contract there under consideration contained a provision by which the purchaser agreed to hold the goods on hand, and the proceeds of all sales of all goods received under the contract, as collateral security, in trust and for the benefit of and subject to the order of the seller until the purchase price was paid in cash, and to sur-

character according to the Arkansas decisions,<sup>17</sup> are not controlling as to a Michigan contract, although the question as presented was substantially the same.<sup>18</sup> In this connection attention is called to the fact that, by a recent statute (Mich. Pub. Acts 1915, act 64) in Michigan, conditional contracts of sale, with the right to resell, are required to be recorded except as to the immediate parties. It has been intimated by the Federal court that the effect of this statute will be to render valid contracts of this character which are recorded.

It is, of course, possible to point out many matters of minor difference in these different contracts. Yet in their essentials the contracts construed by the Michigan supreme court and the Federal Supreme Court cannot be distinguished from those construed by the Federal courts of inferior jurisdiction. They all reserve title to the consigned goods, and some of them to the proceeds. This clause, however, is absent both in contracts construed by the Michigan supreme court and by the Federal circuit court of appeals. Laying aside minor points of difference, it is clear that the Michigan supreme court and the Federal Supreme Court hold that such contracts are contracts of conditional sale, with the implied or express power in the purchaser to resell. The fact that this power exists, however, does not tend to invalidate the contract, nor does it affect its character. It is still one of conditional sale; the reservation clause

is valid, and the seller may reclaim the property from anyone other than a bona fide purchaser for value from the buyer, including the latter's trustee in bankruptcy.

It has been held that a provision by which the purchaser of a stock of goods sold with the intention that they be resold at retail agrees that the stock shall be kept up, and that the original stock and the repurchased portions shall belong to the seller until the purchase price has been paid in full, is invalid both as to creditors and subsequent purchasers of the buyer. This character of contract is to be distinguished from the ordinary reservation-of-title clause, for such an agreement shows a disposition and intention by the seller not only to protect his own property from seizure and sale by creditors of a purchaser, but also to have security extend to and embrace property acquired from others, thereby preventing such persons from securing their pay from any part of the purchaser's property, including such as they sold him.<sup>19</sup>

And it has been held that if it is not clear and definite whether or not a contract is a conditional sale or a chattel mortgage, in equity it will be construed to be the latter. And where a contract for the sale of a stock of goods authorized its resale, and contained a provision that the title to the property sold and that subsequently acquired by the purchaser in keeping up the stock should be and remain in the vendor until full payment of the purchase price, and, upon

render to the seller at any time he should demand the goods received under the contract, as well as their proceeds.

<sup>17</sup> *Bryant v. Swofford Bros. Dry Goods Co.* (1908) 214 U. S. 279, 53 L. ed. 997, 20 Sup. Ct. Rep. 614, following the law of Arkansas, and holding that a contract was a conditional sale, and not a mortgage, where it provided for the sale of a stock of goods to be resold and the stock kept up by the purchaser, and that a reservation by the seller of the right to the possession of the property and the proceeds thereof until he was paid was valid as to a trustee in bankruptcy of the purchaser. The court said that there was nothing in the nature of such a contract which would forbid the parties entering into it if it was valid by the laws of the state where made, and in bankruptcy proceedings the validity of such a contract must be determined by the local laws.

And see *Ludvigh v. American Woolen Co.* (1913) 231 U. S. 522, 58 L. ed. 345, 34 Sup. Ct. Rep. 161, construing a substantially similar contract under the Arkansas rule, which is similar to the Michigan law in that neither requires such contracts to be re-

corded, and holding that provisions reserving title in the seller are valid as to creditors and trustees of the buyer, although a resale was contemplated by the parties to the contract.

<sup>18</sup> *Re Stoughton Wagon Co.* (1916) 145 C. C. A. 562, 231 Fed. 676, holding to be inapplicable *Bryant v. Swofford Bros. Dry Goods Co.* and *Ludvigh v. American Woolen Co.* (U. S.) supra.

In *Walter A. Wood Mowing & Reaping Mach. Co. v. Croll* (Fed.) supra, the court reviews the *MISHAWAKA WOOLEN MILLS CO. v. STANTON*, and holds that this case does not affect the rule of construction as declared by the Federal courts, and the court also refuses to follow the Federal Supreme Court decision in *Ludvigh v. American Woolen Co.* (U. S.) supra, pointing out that the decision applied the Arkansas law, and, according to the contract there involved, the net proceeds of sales were to be accounted for to the consignor, and the consignee was pledged to sell the goods and collect and pay over the proceeds to the consignor.

<sup>19</sup> *Loving Pub. Co. v. Johnson* (1887) 68 Tex. 273, 4 S. W. 532.

default by the vendee, the vendor might take possession thereof, it will be construed to be a chattel mortgage, and not a conditional sale, and hence, where not recorded as required by the law relative to chattel mortgages, it is invalid as to creditors of the purchaser.<sup>20</sup>

Where a provision reserving title to

goods sold for the purpose of resale is not made in good faith, and is not intended by the parties to be actually complied with, and is not in fact complied with, it is invalid as to the trustee in bankruptcy of the purchaser, although such agreements are not required to be recorded.<sup>21</sup>

<sup>20</sup> *Andre v. Murray (Ind.) infra.*

<sup>21</sup> *Flanders Motor Co. v. Reed (1915) 136 C. C. A. 250, 220 Fed. 642. A. G. S.*

# INDIANA SUPREME COURT.

DAVID W. ANDRE, Appt.,

v.

JOHN G. MURRAY et al.

(179 Ind. 576, 101 N. E. 81.)

**Sale — condition — bankruptcy — priority.**

A stock of goods sold with reservation of title in the vendor until the purchase price is paid, but which may be resold at retail, will not pass to a trustee in bankruptcy of the purchaser as against the claim of the vendor to possession of the property for the purchaser's default.

*For other cases, see Bankruptcy, II. a, in Dig. 1-52 N. S.*

(March 11, 1913.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Fayette County in defendant's favor in an action brought to reform a contract of sale, to recover possession of goods found and taken on a writ of replevin, and the value of the goods not found. Reversed.

The facts are stated in the opinion.

Messrs. Finley H. Gray, L. L. Broadus, and George C. Florea for appellant.

Messrs. Wiles & Springer, Conner & Conner and E. G. Johnston for appellees.

Erwin, J., delivered the opinion of the court:

Action in replevin. The only error assigned arises on the sustaining of appellees' demurrer to the complaint. Appellant

alleges in his complaint that on May 28, 1906, he conditionally sold and delivered to appellee John G. Murray and one Edwards a retail stock of drugs and other property, located in a certain business room in Connersville, Indiana.

The contract of sale was in writing, and is as follows: "This indenture witnesseth: That David W. Andre, of the city of Connersville, in the county of Fayette, in the State of Indiana, has this 28th day of May, 1906, for the sum of two thousand (\$2,000) dollars, and full compliance with the terms and conditions thereof, sold and transferred to John G. Murray and J. Arthur Edwards, of said city, county, and state, the following described personal property and chattels, located in said city, county, and state, and described as follows, to wit: All the vendor's stock of retail drugs, sundries, paints, oils, liquors, the same to include all retail stock on hand of vendor of every description, now located in what is known as the Opera House Drug Store Room, at No. 128 W. Fifth street, in said city; also seven show cases, two pair of scales, and one prescription scale, located in said room. The terms and conditions, above mentioned, are that said vendees shall pay to said vendor the sum of two thousand (\$2,000) dollars, with interest thereon at the rate of six (6) per cent per annum from date hereof until paid, said sum and interest thereon to be payable in monthly instalments of not less than twenty (\$20) dollars each, the same to be applied, first, to the payment of interest, and the balance to said principal; the first instalment coming due at the expira-

**Note.**—The question as to the effect on a conditional-sale contract of express or implied permission to the buyer to resell the goods is covered in a note appended to *Mishawaka Woolen Mfg. Co. v. Stanton*, ante, 658, and the question as to whether or not a sale with a reservation of title and permission to resell, together with other provisions peculiar to contracts of consignment, is a contract of sale or agency, is covered, among other questions, in a note appended to *D. M. Ferry & Co. v. Hall*, ante, 626. It is to be noted that these notes deal with the substantive questions relative to L.R.A.1917B.

the construction of the contract. They include cases where the buyer had become bankrupt after purchasing the goods, and the rights of his trustee were involved, but they do not include cases which consider the effect on the rights of the vendor of the fact that the buyer's estate is being adjudicated in bankruptcy. This specific question is covered in a note appended to *Myrick v. Liquid Carbonic Co.* 38 L.R.A. (N.S.) 554, which is limited to the question of the right of the vendor, as affected by the bankruptcy of the purchaser.

tion of one month from the date hereof, and one instalment at the expiration of each month thereafter, until the whole amount of principal and interest is paid. The retail stock shall remain where the same is now located until said sum, together with all interest thereon, is paid in full; and until said principal sum and interest is paid said vendees shall keep said stock renewed and replenished, so that same shall at all times be maintained at not less than the cash value, at wholesale, in amount equal to the unpaid balance of said sum and interest, and said stock so added to stand hereunder in place of stock sold. That vendees shall pay to vendor, as rent for said room where said retail stock is now located, the sum of \$8.25 each week until said principal of \$2,000 and interest is paid; the first weekly payments thereof coming due one week from date hereof, and one payment of \$8.25 coming due each week thereafter until said principal and interest is paid, as above provided."

It is also averred in the complaint that by the mutual mistake of each of the parties to the contract, and by the mistake of the scrivener who drafted the same, the provision "that the title to all of said property shall be and remain in the said vendor until full payment of said purchase price, and that upon default of said vendees in any of the conditions, that said vendor shall be entitled to the possession thereof," was omitted from said agreement, as reduced to writing; that subsequently Edwards sold and assigned his interest in the property to Murray, who assumed the obligations of the original contract of purchase.

It is further averred that on July 28, 1908, Murray and Edwards made default, in that they failed and refused to pay the monthly instalment of principal and interest then due, and informed the appellant that they would pay no further amounts upon said contract, and that on said date there was a balance of said purchase price and interest unpaid in the sum of \$1,727.50; that on said day the vendees made further default, in that they had failed to keep said stock renewed, as provided, but had sold and reduced the same, so that said stock did not exceed \$1,000, wholesale value, including renewal goods, and that the value of the original goods remaining did not exceed \$200; that on said day appellee Murray, assuming to own said property, assigned the same as a failing debtor to appellee John Payne, as assignee for the benefit of his bona fide creditors; that after the bringing of the original action, upon petition of creditors of Murray and of the partnership of Murray & Edwards, said Murray, individually, and said partnership L.R.A.1917B.

were adjudged involuntary bankrupts, and that appellee Charles W. Neff was duly appointed trustee in bankruptcy; that by the proceedings in bankruptcy the assignment to John Payne was superseded and annulled.

The prayer is for a reformation of the contract, so that the same shall include the omitted conditions, as agreed upon, judgment for the possession of the goods found and taken on the writ of replevin, and for the value of the goods not found.

The appellees separately filed demurrers to the complaint for want of sufficient facts, which demurrers were sustained by the court. Appellant refusing to plead further, and electing to abide by his complaint and exception to the ruling of the court in sustaining the demurrer thereto, judgment was rendered for the return of the property taken on the writ of replevin to appellee Neff, trustee in bankruptcy, and that defendants recover costs.

As the demurrer admits the truth of all facts well pleaded, we must, in considering the legal sufficiency of the complaint, treat the same as including the omitted stipulation in regard to title remaining in the vendor.

The contention between the parties in this cause is the construction to be given the contract between appellant and the parties to whom he sold the stock of drugs.

It is contended by the appellant that the contract makes a conditional sale; and that the ownership of goods is, by the terms of the contract, retained by appellant until the price therefor has been paid. The appellees contend that the delivery of the goods with the provision that they should be sold by the purchaser at retail is inconsistent with a conditional sale; and that title passed to the purchaser, his creditors and assigns.

It is well settled by the authorities in this and other states that a sale of a stock of goods to be sold at retail authorizes the vendee to sell it in the regular course of trade at retail, and the purchaser will take title thereto. *Thomas v. Winter*, 12 Ind. 322; *Shireman v. Jackson*, 14 Ind. 459; *Hodson v. Warner*, 60 Ind. 214; *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311; *Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322; *Bradshaw v. Warner*, 54 Ind. 58; *Payne v. June*, 92 Ind. 252; *Lanman v. McGregor*, 94 Ind. 301; *Sears v. Shrout*, 24 Ind. App. 313, 56 N. E. 728.

Some of the decisions of the court in this state have seemingly gone so far as to hold that a transaction of this kind should be considered as an absolute sale, and that the contract should be treated as a chattel mortgage, holding that the right given the vendee to sell at retail is inconsistent with the retention of title in the vendor. In none of

the cases so holding has the exact question presented in this case been determined; none of them involving a sale other than at retail and in due course of trade.

In the case of Winchester Wagon Works & Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707, the facts shown were that the vendee had sold the wagons in question in due course of trade, and at retail. In the case of Steele v. Aspy, 128 Ind. 367, 27 N. E. 739, the vendor's administrator undertook to have a receiver appointed to take charge of a stock of goods sold to Steele by one Nelson, deceased. That case is not in point here, for the reason that there was no condition in said contract that the ownership of the goods should be retained by the vendor until payment should be made therefor; the only condition being that the goods should not be removed from the town of Geneva where located,—a thing he was not attempting to do.

It is well settled by the authorities in this and other states that a sale of goods, where title is retained in the vendor, with the privilege to the vendee to sell the same at retail, does not authorize the sale of such a stock of goods in bulk. McGirr v. Sell, 60 Ind. 249; Hench v. Eacock, 21 Ind. App. 444, 52 N. E. 85; Lett v. Eastern Moline Plow Co. 46 Ind. App. 56-63, 91 N. E. 978; Pratt v. Burhans, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064; Rogers v. Whitehouse, 71 Me. 222; Burbank v. Crooker, 7 Gray, 158, 66 Am. Dec. 470; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Triplett v. Mansur & T. Implement Co. 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261; Marvin Safe Co. v. Norton, 48 N. J. L. 412, 57 Am. Rep. 566, 7 Atl. 418; Bunday v. Columbus Mach. Co. 143 Mich. 10, 5 L.R.A.(N.S.) 475, 106 N. W. 397.

In the case of Hench v. Eacock, 21 Ind. App. 444, 52 N. E. 85, the same question was involved as is presented in this cause, and it was held that, while the contract would permit a sale of the goods in question at retail, it did not warrant a sale in bulk, and that the original vendor might retake the goods from a mortgagee of the vendee. In the case of McGirr v. Sells, supra, that being an action in replevin to recover two barrels of whisky, sold by appellee to one McCoy on a contract conditioned that the title should not pass until payment should be made in full, and which goods were levied on and offered for sale to satisfy an execution in the hands of a constable, which execution was issued upon a judgment in favor of other creditors than appellee, Warden, J., in that case (60 Ind. on page 257) uses this language: "If the plaintiff had authorized McCoy to sell the

whisky at wholesale, that would have ended the question; . . . but his authority to McCoy to retail, in his own name, did not necessarily carry the inference that the title to the liquors was in the latter. This was the purpose for which the liquors were placed in his possession, and was consistent with the plaintiff's ownership of the property."

In the case of Burbank v. Crooker, 7 Gray 158, 66 Am. Dec. 470, involving a sale of a stock of goods, in bulk, in a country store, bought conditionally that the title should not pass until paid for, the court, speaking by Dewey, J., held that the purchaser took no better title than that held by the original vendee, but says that, had sale been made of individual articles in the ordinary course of business, a different rule would prevail; and that the plaintiff might have been estopped to assert any right adverse to such purchaser.

In the case of Rogers v. Whitehouse, 71 Me. 222, supra, Whitehouse being assignee for the benefit of creditors, that court held that a conditional sale of goods to a retail merchant is binding upon him and his assignees, but not upon vendees in the regular course of business; and that one to whom he sells the whole stock took no title. Neither would his assignees in bankruptcy.

It is insisted that, as the contract of sale provides for the payment of rent, this is conclusive as to the nature of the transaction, and is conclusive that the instrument is a chattel mortgage. This is a question we are not called upon to decide, as the failure to pay rent is not alleged as one of the breaches of the contract. Neither does the contract make any provision as to return of the property on failure to pay rent.

The case of West v. Fulling, 36 Ind. App. 617, 76 N. E. 325, seems to hold that the right to retail carries with it in all cases title to the property transferred, and that a contract retaining title in the seller is void as against creditors and trustee in bankruptcy, citing the Bankruptcy Act, as follows: That the trustee of a bankrupt shall take title to all property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him. The stock of goods could not have been transferred in bulk, neither could it be levied upon by execution and sold to satisfy creditors other than the original vendor; and, in so far as that case holds that the same may be taken by the trustees in bankruptcy, the same is overruled.

It appears from the averments of the complaint that at least \$200 worth of goods,

originally purchased under the conditional contract, are still on hand. As to this property received from the original vendor, appellant herein is clearly entitled to recover; and the complaint stated a good cause of action as to that part of the property. As to the after-acquired property, we express no opinion.

The court erred in sustaining a demurrer to the complaint.  
Judgment reversed.

Morris, J., did not participate.

Petition for rehearing denied May 29, 1913.

### MINNESOTA SUPREME COURT.

LEWIS SHARPLESS, Respt.,

v.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF MINNESOTA, Impleaded, etc., Appt.

(— Minn. —, 159 N. W. 1086.)

**Insurance — murder of insured — effect.**

1. Though by murdering the insured the beneficiary forfeits the right to the proceeds of the policy, such murder does not absolve the insurer from liability to others.

*For other cases, see Insurance, VI. b, 2, a, in Dig. 1-52 N. S.*

**Same — right of heir.**

2. In such case the sole heir of the deceased, who would take upon the death of an eligible beneficiary, may recover.

*For other cases, see Insurance, VI. d, 2, b, in Dig. 1-52 N. S.*

(December 1, 1916.)

**A**PPEAL by the defendant lodge from an order of the District Court for Hennepin County sustaining a demurrer to its answer in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. W. B. Anderson, for appellant:

If there is any right of action, upon this contract, such right of action passed to the personal legal representatives of Leaming Sharpless upon his death.

Cleaver v. Mutual Reserve Fund Life Asso. [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

Mr. Mathias Baldwin, for respondent:  
The personal representative of a decedent

Headnotes by DIBELL, C.

**Note.** — On the question of murder of insured by beneficiary as affecting right to proceeds of policy, see annotation following this case, post, 671.  
L.R.A.1917B.

has no right whatsoever to the fraternal insurance of his testator. The fund goes to the heirs of the deceased as beneficiaries, and not by descent.

Devaney v. Ancient Order of Hibernians Life Ins. Fund, 122 Minn. 221, 142 N. W. 316.

In case the designation of a beneficiary proves for any reason to be invalid or ineffectual, the fund goes to such person or persons as are eligible to take the benefits in the manner prescribed by statute, or by the laws of the society, or the certificate of insurance, even though the beneficiary named was eligible at the time he was so named, but became ineligible thereafter.

29 Cyc. 156; Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; Caudell v. Woodward, 15 Ky. L. Rep. 63; Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Burns v. Grand Lodge, A. O. U. W. 153 Mass. 173, 26 N. E. 443; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; Holdom v. Ancient Order, U. W. 159 Ill. 619, 31 L.R.A. 67, 50 Am. St. Rep. 183, 43 N. E. 772.

If a beneficiary designated as a member of the insured's family subsequently loses his status and thus forfeits his rights as a beneficiary, the fund goes to those who constitute the family at the time of the insured's death.

Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451; Lister v. Lister, 73 Mo. App. 99.

If the beneficiary murders the member and so loses his rights as such, the fund may be recovered by such other person as would take, had no beneficiary been designated.

Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

Dibell, C. filed the following opinion:

The plaintiff, Lewis Sharpless, brings this action to recover upon a policy of insurance on the life of Leaming Sharpless issued by the defendant Grand Lodge A. O. U. W. Charlotta A. Sharpless was named as bene-

ficiary. She is a defendant. The Grand Lodge answers separately. The plaintiff demurred. The appeal is from the order sustaining the demurrer.

The pertinent facts appearing from the complaint are these: On March 6, 1905, the policy or benefit certificate was issued on the life of Leaming Sharpless. The beneficiary, Charlotta A. Sharpless, his wife, murdered him on November 14, 1914. By murdering him she forfeited the right to take as beneficiary. The plaintiff is the brother and only heir of the deceased except Mrs. Sharpless. These facts are admitted by the defendant order. It alleges that by its constitution a member has no right in the beneficiary fund except to designate a beneficiary; that when a member dies without having designated an eligible beneficiary the certificate is void; that if an eligible beneficiary dies before the member, and he dies without designating another, the proceeds shall be paid first to the widow, then to the children, then to the father and mother or the survivor of them, then to brothers and sisters, and, all failing, there is a reversion to the beneficiary fund; and it claims that the murder of the insured by the beneficiary absolves it from liability on the certificate.

Two questions are presented:

(1) Does the murder of the insured by the beneficiary absolve the insurer from liability, conceding that the right of the beneficiary is forfeited?

(2) If it does not, can the sole heir of the insured, who would take upon the death of an eligible beneficiary, recover?

1. An insurance company is not absolved from liability on a policy because the beneficiary murders the insured. *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; *Schmidt v. Northern Life Assn.* 112 Iowa,

41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Supreme Lodge, K. L. H. v. Menkhausen*, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567. The contract of insurance makes no exception in such case and no statute affects liability. The public policy which refuses a recovery for the benefit of the murderer does not prevent a recovery for the benefit of another who has done no wrong. Public policy may not permit the murderer to profit by a recovery on the policy; but it does not excuse the insurer from paying to those who would take in the absence of a beneficiary. The rule of public policy is invoked to prevent the murderer from profiting, not to relieve the insurer from paying.

2. The further question is whether the action is well brought by the plaintiff, who is the sole heir, and who would take in the event of the death of an eligible beneficiary and no subsequent designation. In *Cleaver v. Mutual Reserve Fund Life Assn.* and *Schmidt v. Northern Life Assn.* supra, it was held that the personal representatives of the deceased might recover and hold the proceeds for those entitled to them or the estate. In *Supreme Lodge, K. L. H. v. Menkhausen*, supra, it was held that the one entitled to the proceeds as a beneficiary upon the failure of the designated beneficiary could recover. This accords with the policy of our statutes and decisions and we follow it. This matter was considered at some length in *Devaney v. Ancient Order of Hibernians Life Ins. Fund*, 122 Minn. 221, 142 N. W. 316. We refer to the discussion there had.

Mrs. Sharpless is not interested in the two questions decided. She is not bound by the allegation of the plaintiff and the concession of the defendant order that her claim as beneficiary is forfeited. If she chooses, she can litigate the question.

Order affirmed.

### **Annotation—Murder of insured by beneficiary as affecting right to proceeds of policy.**

Other cases considering the question under annotation will be found in note to *McAlister v. Fair*, 3 L.R.A. (N.S.) 726.

The effect of the execution of insured for a crime on the right to recover life or accident insurance is considered in the note to *Collins v. Metropolitan L. Ins. Co.* 14 L.R.A. (N.S.) 356; and see later case, *Northwestern Mut. L. Ins. Co. v. McCue*, 38 L.R.A. (N.S.) 57.

As to homicide as affecting devolution of property, see note in 3 L.R.A. (N.S.) 726, and notes supplementary thereto, attached to *Re Kirby*, 39 L.R.A. (N.S.) L.R.A. 1917B.

1088, and to *Wall v. Pfanschmidt*, L.R.A. 1915C, 328.

The general rule, as evidenced by the cases herein and in the earlier note, is that in case an insured is murdered by a beneficiary the beneficiary forfeits all rights to insurance. It will be noticed that where the heirs of the beneficiary have been permitted to recover the proceeds of the policy, they have recovered not as such beneficiary's heirs, but as the heirs of the murdered assured. The question of whether the heirs of a beneficiary who has murdered insured are



precluded, as such, from recovering, in case there are no heirs or next of kin of insured, has never been before the courts, the case nearest in point to that question being *Anderson v. Life Ins. Co. (N. C.)* *infra*, which was a contest between representatives of insured and those of beneficiary; and see *Schmidt v. Northern Life Assn.* cited in earlier note.

A beneficiary in a life insurance policy, who intentionally kills the assured, forfeits all rights he may have in the policy. *Metropolitan L. Ins. Co. v. Shane* (1911) 98 Ark. 132, 135 S. W. 836; *Prather v. Michigan Mut. L. Ins. Co.* (1878) Fed. Cas. No. 11,368; *Filmore v. Metropolitan L. Ins. Co.* (1910) 82 Ohio St. 208, 28 L.R.A.(N.S.) 675, 137 Am. St. Rep. 778, 92 N. E. 26; *Equitable Life Assur. Soc. v. Weightman* (1916) — Okla. —, L.R.A.—, —, 160 Pac. 629.

And in *McDonald v. Mutual L. Ins. Co.* (1916) — Iowa, —, 160 N. W. 289, action on an insurance policy by administrator of insured, who died as the result of a criminal operation performed upon her, it was held that there could be no recovery, as the sole heirs of insured were her parents, who had aided in procuring the performance of the criminal operation.

So, also, the assignee of a beneficiary under an insurance policy has no better claim upon the proceeds than the beneficiary has, and so, if the beneficiary has murdered the insured, the assignee cannot recover. *Equitable Life Assur. Soc. v. Weightman* (1916) — Okla. —, L.R.A.—, —, 160 Pac. 629 (and see *Schmidt v. Northern Life Assn.* (1900) 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, cited in note in 3 L.R.A.(N.S.) 728).

And in *Anderson v. Life Ins. Co.* (1910) 152 N. O. 1, 67 S. E. 53, action on an insurance contract made by the insured, who was murdered by the beneficiary, the latter having at the same time committed suicide, the question before the court was whether the representatives of the insured or representatives of the beneficiary had the right to the proceeds of the policy; and it was held that the representatives of the insured were entitled to recover. The court added, as dictum, however, that this ruling would very likely not obtain in an ordinary life policy, where a valid contract of insurance had been made, and purported to be between the company and the beneficiary, and such beneficiary was, and continued to be throughout, the owner of the policy and of all interest in it. L.R.A.1917B.

In *Lillie v. Modern Woodmen* (1911) 89 Neb. 1, 130 N. W. 1004, which affirmed a judgment in favor of beneficiary, who had been convicted of murdering assured, in an action on a benefit certificate, the question of the right of a beneficiary who had murdered insured to recover on the certificate was not before the appellate court, the real question being as to whether a record of her conviction of murder in the criminal courts was admissible in evidence in the action on the benefit certificate, which question was decided in the negative. (For judgment in criminal action as *res judicata* in civil action, see notes in 11 L.R.A.(N.S.) 653, and 31 L.R.A.(N.S.) 670.)

It is not necessary that there should be an express exception in the contract of insurance forbidding a recovery in favor of a beneficiary who intentionally kills the assured. On considerations of public policy, the death of the insured wilfully and intentionally caused by the beneficiary of the policy is an excepted risk so far as the person thus causing the death is concerned. *Metropolitan L. Ins. Co. v. Shane* (1911) 98 Ark. 132, 135 S. W. 836.

It was held in *Supreme Lodge, K. L. H. v. Menkhausen* (1904) 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567, that the beneficiary (husband of the insured) having deprived himself of the right to enforce a benefit certificate by murdering the insured, the obligation of the society may be enforced by those designated by the statute and the rules of the society as entitled to the fund in the absence of a beneficiary named, who in this case were the children of the insured. The court said that the beneficiary (whose sentence had been commuted to life imprisonment) by his act in taking the life of insured (his wife) placed himself outside the class from among whom, under the rules of the society, she might designate a beneficiary, and he could not therefore take the fund, or any part thereof, either as a beneficiary named in the certificate, or as an heir of his wife; that the situation, so far as his rights and those of the children of the insured and the society are concerned, was precisely the same as though after the issuance of the certificate he had been divorced from the insured, and she had thereafter died without having any alteration made in the certificate; that in such circumstances he would have no interest in the certificate, but the proceeds thereof would be payable to the heirs of the insured, nothing

to the contrary appearing in the certificate, the constitution and by-laws of the order, or the laws of the state under which it operates. In reply to the suggestion that the certificate being payable alone to the husband no recovery could be had thereon except by him, or by those claiming through him, and as he could not recover no one could recover on the certificate, the court said that it did not regard the suit as upon the certificate, but rather as a suit to recover the benefit which the society had by its constitution and by-laws agreed to pay to the person (within certain classes) who should be designated by the insured; and that the action was upon the obligation of the society as evidenced by its constitution and by-laws, and not upon the certificate.

The court pointed out that, as the action was by those who claimed as heirs or next of kin of the insured, cases were distinguishable which have held that there could be no recovery where the suit was brought by a beneficiary who had murdered the insured, or by some one claiming through such beneficiary. The court further pointed out that the contract between the society and the insured contained no provision absolving the society from liability in the event that insured was murdered by the beneficiary, and stated that public policy did not require that such condition be read into the agreement. If it did, the court added, it would also require that it be held that the beneficiary could not recover on the policy if the insured were murdered by another acting independently of and against the desire of the beneficiary, because it is within the realm of possibility that such other, without the connivance or knowledge of the beneficiary, might commit the crime solely for the purpose of enriching the latter. If societies of this character, the court stated, desire to be protected from such contingency, that object must be accomplished by a condition to that effect written into their contracts, failing which the law will not absolve them from liability; and in the absence of a contract to that effect, public policy will not permit the society to appropriate unto itself the fund which it has agreed to pay, merely because the life of the insured has been unlawfully taken.

The following cases involve the construction of specific provisions of the by-laws of a beneficial society relating to rights under a certificate where a holder is murdered by the beneficiary, and so in L.R.A.1917B.

a sense are distinguishable from the other cases.

Thus in *Grand Circle, W. W. v. Rausch* (1913) 24 Colo. App. 304, 134 Pac. 141, action on certificate of a fraternal benevolent society by children of holder of such certificate, who was murdered by her husband, named beneficiary, he at the same time committing suicide, it was held that there could be no recovery, as the holder of the certificate having been killed by a beneficiary, the benefit reverted to the society under the provision of the certificate that "if the member to whom this certificate shall be issued shall be murdered by any beneficiary named herein, . . . or should any beneficiary named in the certificate . . . cause the death of such member directly or indirectly, intentionally or accidentally, then any benefit which such beneficiary might otherwise have received under the provisions of this certificate shall revert to the Grand Circle." In upholding the validity of such provision the court stated: "We are unable to see wherein upholding the conditions upon which the membership of the insured was accepted contravenes any question of sound public policy, while upon the other hand, we do see wherein it may eradicate from the minds of many morally weak beneficiaries temptations which might lead them on to murder. The removal by foul means of those standing between anxious beneficiaries and property interests is quite prevalent. With the publicity of these dangers through many indictments and trials prevailing throughout the country, it is not strange that this society should seek to remove the temptation of anxious expectants to bring about premature death of the insured, and to press the countersuggestion that if beneficiaries in any manner whatever cause the death of insured persons, the Circle penalty shall be a loss of all claims to the benefits provided in the certificate."

In a well-reasoned dissenting opinion, Judge Morgan, after discussing as to whether an insane person could "cause the death of such member, directly or indirectly, intentionally or accidentally," said: "Furthermore, this clause is ambiguous and indefinite in another particular: it is uncertain whether it was intended that the heirs could not recover if the beneficiary named in the certificate caused the death of the insured, or only in case they caused it themselves. The clause provides that 'should any beneficiary named in a member's certificate,

or (any beneficiary) who may claim benefits thereunder, (though not named in the certificate) . . . cause the death of any such member, then the rights of such beneficiary (who caused the death) . . . shall revert to the Grand Circle.'

Now aside from the question as to who died first, the husband or the wife, no beneficiary's rights revert, except the one who caused the death. Those who now claim the benefits never caused the death and their rights do not revert. Furthermore, it is not stipulated nor agreed as to which died first, and if the husband died before the wounds produced the death of his wife, his rights as a beneficiary died with him and the right of the heirs immediately took effect. As it was not stipulated nor proved that the wife died first, this defense must fail, because the burden of proof was upon the defendant to prove sufficient facts to establish the conditions of the forfeiture relied upon.

. . . Certainly, it could not have been the intention to impute the wrong of 'beneficiary named in the certificate' to those who 'may claim benefits thereunder,' and thus visit upon the innocent the sin of the guilty. And it would certainly be against public policy and common justice to permit the defendant to have the fund revert to it and thus profit by the crime of the beneficiary named in the certificate so long as these children live and claim it. If the beneficiary becomes ineligible, the heirs of the insured should have the fund. . . . As suggested in the majority opinion, it is a wise provision that prevents the intentional taking of the life of an insured and 'removes the temptation from anxious expectants to bring about premature deaths of the insured,' but are those words in harmony with the conclusion reached? They are in perfect harmony with my conclusion, that the provision was inserted for this purpose only, 'to remove the temptation from anxious expectants,' but not to defeat a recovery by innocent heirs because of the irresponsible act of an insane beneficiary, who killed himself, thus annihilating any suspicion that he was an anxious expectant. The construction of this provision adopted by the majority opinion is disastrous in its effect. Under such construction, no recovery could be had by the heirs if the husband should attempt to catch a runaway horse carrying his wife to certain death, in case the horse should stumble over and kill the husband, and falling, kill the wife; because, forsooth, the proviso says if he 'accidentally or indirectly cause the

death' the fund reverts to the Grand Circle. Further illustrations are unnecessary. The provision destroys itself unless it is given a reasonable construction in harmony with the beneficent purposes of the order."

And in *Greer v. Supreme Tribe of Ben Hur* (1916) — Mo. App. —, 190 S. W. 72, a case similar in many respects to the Rausch Case, which is cited in the *Greer* Case as sustaining its decision, it was held that the heirs at law of a member of the beneficial society, who was murdered by the beneficiary named in the benefit certificate, were precluded from recovering the benefits by reason of the provision of the by-laws (§ 111) that "if the death of a beneficial member be caused or procured by his beneficiary or beneficiaries, or any of them, then, and in that event, the amount payable under the terms of his beneficial certificate shall be forfeited to the society, and shall become a part of the benefit fund in the class in which he holds his membership in the society for the use of its surviving members, and shall not be paid to the beneficiary or beneficiaries, or his or their heirs, assigns, or personal representatives or to the heirs, assigns, or personal representatives of such beneficial member;" and the further provision (§ 101) that no benefit shall be paid on account of the death of a member who was killed by any of the beneficiaries; and this although the named beneficiary, who murdered the assured, himself committed suicide and died before the assured, and the benefit certificate contained the provision (§ 121) that in the event of the death of a designated beneficiary prior to the death of the member, the member having died without having made disposition of said portion or all of the certificate, the same shall be paid to the legal representatives of said decedent member for the use and benefit of the deceased and his heirs, if any survive. The court in this case said: "The plaintiff contends that the above policy provisions are somewhat conflicting, or at least ambiguous, and should be construed most favorably to uphold the contract and against a forfeiture. . . . The contention is that William Atkins, who is named beneficiary in the policy and who killed his wife, the insured or beneficial member, never in fact became the beneficiary under the policy since he died first by twenty minutes; that he was only a contingent beneficiary when he inflicted the

mortal blow; that, when the insured died, the named beneficiary being also dead, her heirs, the real plaintiffs here, became under the policy contract the beneficiaries; and that they did not cause her death. As a corollary to this, plaintiff says that the by-laws . . . providing for the forfeiture of the policy in case the insured's death is caused by the beneficiary, applies only when the designated beneficiary survives the insured member and thereby becomes the beneficiary in fact. This is certainly a very sharp and technical construction of this by-law, and if followed to its necessary conclusion, a beneficial member can never be killed by one who is more than a contingent beneficiary when the mortal blow is inflicted; for, perchance, lightning or some such quick agency might end the life of a slayer before that of his victim. Using the illustration suggested by plaintiff, that a boy is never his father's heir until after the father's death, so the beneficiary, as or being such, never kills the member, because he is not a beneficiary until after the killing is over. . . . It seems to us, however, that there is no conflict in the provisions above mentioned, as they were written for different purposes and accomplish different objects. The provisions of § 121, as the title indicates, relate to live policies,—policies which are valid obligations after the insured's death and are matured by such death,—and provide who shall be entitled to the benefits of such policy in case of the prior death . . . of the named beneficiary. The provisions of § 111, *supra* (and also § 101), of the by-laws, as the title indicates, relate to a totally different subject; to wit, for forfeiture of policies and the acts and conditions which make same void and have to do with dead policies incapable of enforcement by anyone. There are a number of acts there specified as forfeiting the policy and making it void. . . . Among these acts rendering the policy void and discharging the defendant from any liability to anyone by reason thereof is that of the death of the insured caused by the beneficiary. The by-law in the most positive terms provides that if the death is caused or produced by the beneficiary

the amount otherwise payable shall be forfeited to the society and become a part of its funds for the use of the other members; and, to avoid any possible misunderstanding, further specify that such amount shall not be paid to the beneficiary or his heirs, or to the heirs, assigns, or personal representative of such beneficial member, the very persons who are now claiming." The court in the Greer Case pointed out that the provision of the by-laws sustained as a defense in the Rausch Case is not as strong as the one in the Greer Case, since it does not contain the express provision prohibiting payment to the heirs of the insured in case his death is caused by the beneficiary, and said that the court arrived at its conclusion from the words making the benefits revert to the assured.

Under a policy upon the lives of two persons, a husband and wife, providing for the payment of the insurance fund to the survivor of the first decedent, it was held in *Equitable Life Assur. Soc. v. Weightman* (1916) — *Okla.* —, *L.R.A.* —, —, 160 *Pac.* 629, that where the wife murdered the husband the husband's representatives were entitled to recover. It was contended by the insurance company that the policy was a chose in action owned by the husband and wife as joint tenants; that on the death of the husband the benefits of the policy vested, if at all, in the wife, first, by the terms of the policy itself, and second, by ownership; that the wife by her crime forfeited the right to take by survivorship; that as the law at the time of the murder failed to designate who should take in her stead, the policy lapsed to the insurer. The court, however, denied that they owned the policy as joint tenants, and held that it was a separate policy upon the life of each of the insured for the wholly separate benefit of each of the insured.

And the court held further, that, inasmuch as the contract of insurance designated no alternative payee, in the absence of a statute providing for alternative payee, a resulting trust arose by operation of law in favor of the estate of the murdered assured, and so his representatives were entitled to recover.

J. H. B.

## MINNESOTA SUPREME COURT.

RE ESTATE OF SIMON MIRES, Deceased.

EMMA MATTHEWS, App't.,  
v.

CLARA MIRES, Resp't.

(— Minn. —, 160 N. W. 187.)

**Incompetent person — employment of guardian.**

1. A guardian of an insane person, clothed with the management and control of the ward's property and affairs, is authorized, without first obtaining the approval of the probate court, to employ an attendant to care for and render assistance to the invalid wife of the ward.

*For other cases, see Incompetent Persons, IV. in Dig. 1-52 N. S.*

**Guardian and ward — claim for services.**

2. When such employment is necessary, and the employment is in good faith, without purpose to unnecessarily burden the estate with expense, the reasonable value of the services rendered thereunder is a valid claim against the estate of the ward.

*For other cases, see Incompetent Persons, VI. in Dig. 1-52 N. S.*

**Executor and administrator — estate of ward — claim for services.**

3. If the ward dies before payment, the claim may be presented for allowance in the proceedings for the administration of his estate.

*For other cases, see Executors and Administrators, IV. a, in Dig. 1-52 N. S.*

(December 8, 1916.)

**A**PPEAL by an heir at law of deceased, from an order of the District Court for Goodhue County denying a new trial, and from a judgment affirming a judgment of the Probate Court allowing a claim against decedent's estate for services rendered by claimant under an alleged contract. Affirmed.

The facts are stated in the opinion.

Messrs. Mohn & Mohn, for appellant:

The contract is void, because the guardian had no power to bind her ward or his estate thereby, and if the claimant had a claim by reason of such contract, the only court which had jurisdiction to hear and pass thereon would be the probate court in the guardianship proceedings.

15 Am. & Eng. Enc. Law, 2d ed. p. 70; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Rollins v. Marsh, 128 Mass.

Headnotes by BROWN, Ch. J.

**Note.** — For power of guardian or committee of insane person to procure necessities for family of his ward, see annotation following this case, post, 678. L.R.A.1917B.

116; Wallis v. Bardwell, 126 Mass. 366; Phelps v. Worcester, 11 N. H. 51; Hardy v. Citizens' Nat. Bank, 61 N. H. 34; Turner v. Flagg, 6 Ind. App. 563, 33 N. E. 1104; Fessenden v. Jones, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445; Hunt v. Maldonado, 89 Cal. 636, 27 Pac. 56; St. Joseph's Academy v. Augustini, 55 Ala. 493; Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479; 21 Cyc. 115; Woerner, Guardianship, 185; Reams v. Taylor, 31 Utah, 288, 8 L.R.A.(N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089, 11 Ann. Cas. 51; Reynolds v. Garber-Buick Co. 183 Mich. 157, L.R.A.1915C, 362, 149 N. W. 985; Andrus v. Blazzard, 23 Utah, 233, 54 L.R.A. 354, 63 Pac. 888; Pearl v. M'Dowell, 3 J. J. Marsh, 658, 20 Am. Dec. 199; Western Cement Co. v. Jones, 8 Mo. App. 373; Michael v. Locke, 80 Mo. 548; Pharis v. Gere, 110 N. Y. 336, 1 L.R.A. 270, 18 N. E. 135; Person v. Merrick, 5 Wis. 231; Germania Bank v. Michaud, 62 Minn. 459, 50 L.R.A. 286, 54 Am. St. Rep. 653, 65 N. W. 70; Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352; Re Hause, 32 Minn. 155, 19 N. W. 973; State ex rel. Pope v. Germania Bank, 103 Minn. 129, 114 N. W. 651; McKee v. Hunt, 142 Cal. 526, 77 Pac. 1103; Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147; Truesdale v. Philadelphia Trust S. D. & Ins. Co. 63 Minn. 49, 65 N. W. 133; Ogden City Street R. Co. v. Wright, 31 Or. 153, 49 Pac. 975; Roger Williams Nat. Bank v. Groton Mfg. Co. 16 R. I. 507, 17 Atl. 171; Connally v. Lyons, 82 Tex. 670, 27 Am. St. Rep. 940, 18 S. W. 800; Carr v. Branch, 85 Va. 605, 8 S. E. 480; Iowa Loan & T. Co. v. Holderbaum, 86 Iowa, 11, 52 N. W. 553; Yeakle v. Priest, 61 Mo. App. 49; Staples v. Staples, 85 Va. 81, 7 S. E. 201; Lockett v. Rumbaugh, 45 Fed. 29; Griggs v. Nadeau, 187 C. C. A. 189, 221 Fed. 381; McGovern v. Bennett, 146 Mich. 558, 109 N. W. 1055; Stewart v. White, 44 Ind. App. 87, 88 N. E. 716.

Mr. A. J. Rockne for respondent.

Brown, Ch. J., delivered the opinion of the court:

Simon Mires with his wife, two daughters, and a son, resided in Goodhue county. On March 31, 1899, Mires was adjudged insane and by proper authority committed to the insane asylum for treatment, where he remained until his death, which occurred on June 12, 1914. At the time he was so adjudged insane he was the owner of a considerable property, real and personal, of the probable value of about \$25,000, for the management and care of which the court appointed one A. W. Eddy as guardian. Eddy continued to serve until 1902, when he re-

signed, and the wife of Mires was duly commissioned in his stead, and she continued to act as such until January 29, 1914, when she died. She was succeeded at her death by W. E. Weiss, who served until Mires died, in June following as heretofore stated.

During the last few years of her life, Mrs. Mires was an invalid and required the services of a competent person to attend to and care for her necessities and comforts. Her ailment did not affect her mental faculties. One daughter had married and moved from home, and the son had taken up his residence in the state of Oklahoma. The other daughter, respondent herein, about thirty years of age, was engaged as a saleslady in a mercantile establishment at Zumbrota. She was induced to give up her position at the store and return home for the purpose of taking care of her mother, upon the latter's agreement, acting as guardian, to compensate her from the Mires property. She remained in this service and nursed and cared for the mother until her death. In December, 1912, Mrs. Mires, acting as guardian, and respondent, entered into an agreement in writing whereby they mutually agreed that respondent's services were of the value of \$1,500; and that amount was agreed upon as full compensation therefor.

After the death of Mires, respondent presented this contract to the probate court as a claim against his estate for the services so rendered. The court allowed the same, and from the order an appeal was taken to the district court. After trial in that court the allowance was affirmed, and judgment ordered for the full amount thereof. The administrator declined further to contest the claim and one of the heirs prosecuted this appeal from an order denying a new trial.

It is contended in support of the appeal (1) That the guardian, Mrs. Mires, was without authority in law to enter into the contract of employment with respondent, and that the claim based thereon is not a legal charge against the estate of the ward; and (2) that the claim, if valid at all, should have been presented to the probate court in the guardianship proceedings in connection with the settlement of the guardian's account.

The questions presented must be considered as though the employment of respondent was by a guardian duly commissioned as such, who was a total stranger to members of the family. The fact that Mrs. Mires the wife of the incompetent, was the guardian, does not change the situation in its legal aspect, for the power of contract was vested in her to the same extent as a stranger acting in the same capacity. In this light the facts presented would seem to make a

clear case of a valid employment. There is no question but that Mrs. Mires became an invalid, and that because thereof she required the assistance of someone to attend to daily wants; there is no question that her husband, or, in his absence, his estate and property, was liable for the expense of her care, and that the claim of one lawfully employed to render the service would constitute a valid claim against him. In view of her condition, a guardian having control and management of the husband's estate would be under legal duty to provide for her support, in the performance of which he would be authorized to provide for the necessary care and assistance without first obtaining authority to do so from the probate court. *Humphrey v. Buisson*, 19 Minn. 221, Gil. 182; *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552; *Re Besondy*, 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366; 2 Notes to Minn. Rep. 633. He would thus be discharging the personal obligations of his ward, performing an act of no unusual character; and no sound reason appears for holding that the matter should first have been referred to the probate court. *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; *McCoy v. Lane*, 66 Neb. 847, 92 N. W. 1010; *Price's Appeal*, 116 Pa. 410, 9 Atl. 856. It is true as a general rule that the guardian has no authority to bind the estate of his ward by contract. *Germania Bank v. Michaud*, 62 Minn. 459, 30 L.R.A. 286, 54 Am. St. Rep. 653, 65 N. W. 70. But that rule should not apply to acts of the guardian of the character of those here disclosed; acts in performance of duties and obligations of the ward not of an unusual or extraordinary character, and which do not bind or attempt to bind the ward beyond his legal incompetency to act for himself. No question is raised as to the necessity of the employment of someone to care for Mrs. Mires, the good faith of the transaction is not challenged, nor is it urged that the compensation claimed is unreasonable or excessive.

In this state of the case, the abstract question of the validity of the written agreement of settlement, made between Mrs. Mires, as guardian, and respondent, need not be considered. The employment of respondent was lawful, and the rendition by her of services thereunder created a valid claim against her father's estate for the reasonable value of the same. The complaint filed after the appeal to the district court alleged that the services were reasonably worth the sum of \$25 per week, or a total of something over \$6,000 for the entire term of service. The court expressly found these allegations to be true, but limited respondent's recovery to the amount

specified in the settlement agreement, namely, \$1,500. In view of the legal liability of the estate, appellant is in no position to complain of the result. Nor does the fact that the trial court predicated its decision upon the written contract affect the case. The decision was right upon the facts stated, and it is not important what reasons were assigned therefor. The pleadings and evidence clearly present a case of liability on the ground of the reasonable value of the services rendered.

2. It is not fatal that the claim was not first presented to the probate court in the guardianship proceedings, for that court and the court administering the estate were the same tribunal. If there had been separate courts, a different question probably would

be presented. However, we do not so decide. All we hold here is that it was unnecessary to go through the form of presenting the claim to the same court under two different labels. But it may be stated that, if the guardian had paid the claim, no doubt a presentation thereof to the probate court in connection with the settlement of his final account would have been necessary.

This covers the case and all that need be said in disposing of the same. The employment of respondent was lawful, her compensation to the extent of the reasonable value thereof was a proper charge against the estate of deceased, and the allowance thereof is sustained by the evidence, without reference to the written settlement.

Order affirmed.

### **Annotation—Power of guardian or committee of insane person to procure necessities for family of his ward.**

Generally, as to power of guardian or committee to bind incompetent person or his estate by contract, see note to Reams v. Taylor, 8 L.R.A.(N.S.) 436.

On use of lunatic's property to carry out his presumed wishes or to fulfil his equitable obligations as to the support of his family, see note to Potter v. Berry, 34 L.R.A. 297.

A search has revealed but few cases bearing upon the question of the power of the guardian or committee of an insane person to procure necessities for the family of his ward, besides *RE MIREs*, ante, 676, which holds that a guardian may, without first obtaining the approval of the probate court, employ an attendant to care for and render assistance to the invalid wife of his ward.

In *Lake v. Hope* (1914) 116 Va. 687, 82 S. E. 738, under a statute providing that the committee of an insane person shall apply his personal estate, or so much as may be necessary, to the payment of his debts, and the rents and profits of the residue of his estate, real and personal, and the residue of the personal estate, or so much as may be necessary, to the maintenance of such insane person and of his family, it was held that a committee may use, when necessary, the corpus of the personal estate in the support and maintenance of the ward and his family, without first obtaining the sanction of the court L.R.A.1917B.

having jurisdiction over the ward's estate.

In *Deming v. Paynter* (1897) 19 Ky. L. Rep. 1123, 42 S. W. 1112, it was held that it was proper for the committee of a lunatic to incur more expense for the care and comfort of the ward and his wife than would be necessary for persons in good health.

In *Citizens' State Bank v. Shanklin* (1913) 174 Mo. App. 639, 161 S. W. 341, it is stated that the guardian of an insane person is entitled, upon his accounting, to credit for all proper expenditures for necessities for the latter's family.

In *Re Stewart* (1891) — N. J. Eq. —, 22 Atl. 122, it was held that a guardian was entitled to reimbursement from the proceeds of the sale of his ward's realty, for the funeral expenses of the latter's wife, although she made provision by her will for their payment from her separate estate.

But in *Pearl v. M'Dowell* (1830) 3 J. J. Marsh (Ky.) 658, 20 Am. Dec. 199, it was held that the committee of a lunatic had no power to bind him by a contract to pay for medical and surgical services to be rendered to the lunatic's wife. In this case it is stated, however, that the committee of such a person ought, at least as far as the profits of the estate would justify it, to engage medical or surgical aid for the wife, if necessary.

G. V. L.

## MINNESOTA SUPREME COURT.

ARTHUR LILLIGREN, Appt.,  
v.WILLIAM J. BURNS INTERNATIONAL  
DETECTIVE AGENCY et al., Reapts.

(— Minn. —, 160 N. W. 203.)

**Husband and wife — alienation of affections — negligence.**

In order to recover damages for alienating the affections of his wife, a husband must show that the defendant took an active and intentional part in causing the estrangement. Such an action will not lie where it is grounded solely upon the negligence of the defendant.

*For other cases, see Husband and Wife, III. a, in Dig. 1-52 N. S.*

(December 8, 1916.)

**A**PPPEAL by plaintiff from an order of the District Court for Hennepin County denying a motion for new trial of an action brought to recover damages for alleged alienation of the affections of plaintiff's wife. Affirmed.

The facts are stated in the opinion.

Messrs. Robertson & Bonner, for appellant:

The complaint states a cause of action as against defendants.

*Weicher v. Cargill*, 82 Minn. 265, 84 N. W. 1007; *Ames v. Brandvold*, 119 Minn. 521, 138 N. W. 786; *Robertson v. Corcoran*, 125 Minn. 118, 145 N. W. 812; *Seibert v. Minneapolis & St. L. R. Co.* 58 Minn. 39, 59 N. W. 822; *Commonwealth Title Ins. & T. Co. v. Dokko*, 71 Minn. 533, 74 N. W. 891; *Rotzien-Furber Lumber Co. v. Franson*, 128 Minn. 122, 143 N. W. 253; *Wacek v. Frink*, 51 Minn. 282, 38 Am. St. Rep. 502, 53 N. W. 633; 1 *Sutherland, Damages*, 3d ed. p. 269.

Mr. John Fitzgerald also for appellant.

Messrs. Selover, Schultz, & Selover, for respondents:

The order denying vacation of order of dismissal is not appealable.

*Gottstein v. St. Jean*, 79 Minn. 232, 82 N. W. 311; *Brown v. Minnesota Thresher Mfg. Co.* 44 Minn. 322, 46 N. W. 560; *Lockwood v. Bock*, 46 Minn. 73, 48 N. W. 458.

Taylor, C., filed the following opinion:

The following will serve as a brief outline of the allegations in plaintiff's complaint:

Headnote by TAYLOR, C.

**Note.** — The question whether an action for alienation of affections may rest upon a breach of contract or negligent tort is discussed in the annotation following this case, post, 680.  
L.R.A.1917B.

That defendants operated a detective agency in the city of Minneapolis, doing a general detective business for hire, and held themselves out to the public as skilful in such business and in obtaining private information; that plaintiff employed them to obtain definite and certain information regarding the actions and habits of his wife and the places where she spent her time when away from home; that defendants agreed to investigate and secure the desired information; that plaintiff gave defendant a full and accurate description of his wife, together with her name and place of residence; that through negligence and carelessness defendants, instead of shadowing plaintiff's wife and securing information as to her actions, whereabouts, and general conduct, shadowed another woman who was unknown to plaintiff, and reported her conduct to plaintiff as the conduct of his wife; that in consequence thereof defendants falsely reported that plaintiff's wife kept company with other men and conducted herself in an immoral manner; that, relying upon the truth of such reports, plaintiff charged his wife with misconduct; that his wife, being wholly innocent of any misconduct, abandoned him, and has ever since refused to live with or return to him; and that his home has been broken up and his wife's affections forever alienated. The complaint also alleged the amount paid defendant for its services, and demanded damages in a large amount for the alienation of his wife's affections. At the opening of the trial plaintiff expressly waived the right to recover back the sum paid for services, and rested his case solely upon the proposition that he was entitled to recover general damages for the alienation of his wife's affections. Thereupon the court sustained an objection to the reception of any evidence under the complaint and dismissed the suit on the ground that the complaint, as modified by the express waiver, failed to state a cause of action. Plaintiff appealed from an order denying a motion for a new trial.

The question presented is whether, upon the facts stated in the complaint, plaintiff is entitled to recover from defendant for the alienation of his wife's affections. To determine this question, we must consider and apply the rules of law governing that class of actions.

It is well settled that either husband or wife, in order to recover damages from a third party for alienating the affections of the other, must show that such third party took an active and intentional part in causing the estrangement. *Powers v. Sumblor*, 83 Kan. 1, 110 Pac. 97; *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 385; *Scott v.*



O'Brien, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260; Warner v. Miller, 17 Abb. N. C. 221; Tasker v. Stanley, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; Houghton v. Rice, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Sickler v. Mannix, 68 Neb. 21, 93 N. W. 1018; Waldron v. Waldron (C. C.) 45 Fed. 315; Heisler v. Heisler, — Iowa, —, 127 N. W. 823; 1 Bishop, Marr. & Div., § 1861; 1 Cooley, Torts, 3d ed. 468; Schouler, Dom. Rel. § 43; 3 Elliott, Ev. §§ 1643, 1646; 1 Enc. Forms, p. 684, Nos. 1097, 1098. See also Busenbark v. Busenbark, 150 Iowa, 7, 129 N. W. 332; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; Kroessin v. Keller, 60 Minn. 372, 27 L.R.A. 685, 51 Am. St. Rep. 533, 62 N. W. 438; Cornelius v. Cornelius, 233 Mo. 1, 135 S. W. 65.

According to the authorities, liability is imposed upon an intermeddler where he purposely and unjustifiably induces either husband or wife to abandon the other, but is not imposed upon him unless, by acts knowingly and intentionally committed for that purpose, he was the procuring cause of the separation. To incur liability, he must have been instrumental in causing the estrange-

ment by knowingly, if not maliciously, exerting a baneful influence upon the spouse who renounced the marital obligations. We have found no case based upon negligence only in which damages for alienation of affections have been awarded. The Iowa court remarks: "The action is for an intentional, not merely a negligible, tort;" the Kansas court states that plaintiff must show "that the acts of the defendant were done knowingly and intentionally, for the purpose of alienating the husband's affections."

In the present case plaintiff grounds his action wholly upon the claim that defendant was negligent in the performance of duties which plaintiff employed it to perform. No claim is made that defendant ever communicated with the wife in any manner, or caused any information to be given to her. Whether we assume that she left plaintiff on account of the charges which he made against her in consequence of the erroneous information furnished by defendant, or on account of his conduct in engaging detectives to watch her, the facts stated in the complaint are insufficient to establish a cause of action for the alienation of her affections.

Order affirmed.

### **Annotation—May action for alienation of affections rest upon a breach of contract or negligent tort.**

**LILLIGREN v. WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY**, ante, 679, seems to be a case of first impression as to right to predicate an action for alienation of affections solely upon the negligence of, or breach of contract by, defendant. The decision in that case, that such an action cannot be maintained upon the facts alleged and proved, is in harmony with the rule that malice is an essential ingredient to such an action.

As to malice as essential to an action for alienation of affections in the absence of meretricious relations, see *Geromini v. Brunelli*, 46 L.R.A.(N.S.) 465.

A case sufficiently analogous to be included in this note is *Work v. Campbell* (1912) 164 Cal. 343, 43 L.R.A.(N.S.) 581, 128 Pac. 943, which held that where a woman may sue for damages for enticing her husband from her, she may maintain an action for deceit in making false representations to her about her husband, which caused her to treat him cruelly and thereby drive him from her, where her treatment would have been justified if the representations had been true.

It is to be observed that in the *Work* L.R.A.1917B.

Case, the false representations were knowingly made; so that case would probably not be authority for an action for deceit predicated upon facts similar to those in the *LILLIGREN CASE*.

Although not within the scope of this note, attention is called to *Nieberg v. Cohen* (1914) 88 Vt. 281, L.R.A.1915C, 483, 92 Atl. 214, Ann. Cas. 1916C, 476, which held that a wife cannot, either at common law or under the married woman's act giving her a right to hold separate property and sue alone, recover damages for loss of companionship and support from persons who successfully conspired to induce her husband to commit an offense for which he was imprisoned, where they intended to injure him, and not her.

But see, however, *Flandermeyer v. Cooper* (1912) 85 Ohio St. 327, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983, which held that one who, with knowledge that a husband, by the constant and continued use of morphine, had become so weakened in body and mind that he was unable to resist his craving for the drug, and who, after repeated protests from the wife, con-

tinued to sell morphine to the husband until, by the use thereof, his mind became so impaired that it was necessary to confine him in an insane asylum, is liable to the wife for damages for her loss of consortium.

The court held in the Flandermeyer Case that malice is implied in an action

by a wife for the loss of consortium of her husband, resulting from the sale of morphine to the husband by the defendant, and it is not necessary that hatred, ill will, or actual malice be shown, nor that the act proceed from a spiteful, malignant, or revengeful disposition.

J. H. B.

# NORTH CAROLINA SUPREME COURT.

MRS. K. O. SANDERS

v.

W. H. RAGAN, Admr., etc., of W. W. Hinshaw, Deceased, Appt.

(— N. C. —, 90 S. E. 777.)

Contract — implied — to pay for services of illegal wife.

A woman deceived into marriage with a man having a wife living may recover from his estate the value of the services rendered by her to him as upon implied contract.

For other cases, see *Contracts*, 1. b, in *Dig.* 1-52 N. S.

(December 6, 1916.)

**A**PPEAL by defendant from a judgment of the Superior Court for Guilford County in plaintiff's favor, in an action brought to recover for services rendered and for money lent to defendant's intestate while plaintiff was living with him, under the belief that she was his lawful wife. Affirmed.

Statement by Hoke, J.:

The allegations and proof on the part of plaintiff tended to show that on or about September 20, 1913, she was induced to go through the forms of marriage with defendant's intestate, and lived with him as his wife, fully believing she was such, till the date of his death in February, 1915, when she ascertained that during all the time intestate had a lawful wife still living, resident elsewhere; that during said period and association plaintiff advanced him \$200 in money, to be used in building a home, and, in addition, had rendered him various services of value, in waiting on him in his last sickness, etc., and that said money, etc., was reasonably worth \$680.

There was denial of liability on the part of defendant, and, on general issue of indebtedness, the court submitted to the jury the question of money advanced and the amount of the same, and in reference to

**Note.** — As to right to recover for household services rendered while parties were living in illicit relations, see annotation following this case, post, 683.  
I. R. A. 1917 B.

the claim for work and labor charged the jury, among other things, in substance, that plaintiff could not recover if she had knowingly and voluntarily lived in illicit relationship with defendant during said time, and further, that if "plaintiff went through the form of marriage with W. W. Hinshaw, deceased, honestly believing she was marrying him, he knowing that he had a living wife and therefore could not marry, if she went into his house under those circumstances and resided with him in the apparent relationship of husband and wife, and she served him, labored for him, and those services and those labors had a value to him, that it turned out afterwards that she was not his wife, could make no claim upon his representative or his estate after his death, that in such case the law would raise for her benefit an implied promise to pay her for what the jury might find her services to be reasonably worth over and above, that is, in excess of, what benefits by way of food and clothing and keep and maintenance she received from him, if any you should find."

There was a verdict for plaintiff for \$422. Judgment on verdict, and defendant excepted and appealed.

Messrs. Roberson, Barnhart, & Smith and King & Kimball, for appellant:

Plaintiff cannot recover either for services rendered or for money loaned, as her claim grows out of and is so closely connected with the illegal association of himself and defendant's intestate.

2 Elliott, Contr. § 1369; Brown v. Tuttle, 80 Me. 162, 13 Atl. 583; Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145; Gilmore v. Woodcock, 69 Me. 118, 31 Am. Rep. 255; White v. Buss, 3 Cush. 448; Walraven v. Jones, 1 Houst. (Del.) 355; McDonald v. Fleming, 12 B. Mon. 285; Stringer v. Mathis, 41 La. Ann. 985, 7 So. 229; Brown v. Tuttle, 80 Me. 162, 13 Atl. 583; Robbins v. Potter, 11 Allen, 588; Vincent v. Moriarty, 31 App. Div. 484, 52 N. Y. Supp. 519; Emmerson v. Botkin, 26 Okla. 218, 29 L.R.A. (N.S.) 786, 138 Am. St. Rep. 953, 109 Pac. 531; Rhodes v. Stone, 63 Hun. 624, 44 N. Y. S. R. 17, 17 N. Y. Supp. 561; Davis v. Holbrook, 1 La. Ann. 176; Bartle v. Nutt,

4 Pet. 186, 7 L. ed. 826; *Trist v. Child* (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Mcguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899.

Even if plaintiff, in good faith, believed that she was married to the intestate, still she could not recover for alleged services, as there is no evidence tending to show any express or implied promise, on the part of the intestate, to pay, nor is there any evidence that the plaintiff expected to receive compensation for such services.

*Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892; 2 Elliott, Contr. §§ 1368, 1369, p. 618; *Wall v. Wall*, 69 Ill. App. 389; 2 Page, Contr. § 777, p. 1177; *Keener, Quasi Contr.* pp. 316-321; *Cropsey v. Sweeney*, 27 Barb. 310; *Dodson v. McAdams*, 96 N. C. 149, 60 Am. Rep. 408, 2 S. E. 453; *Williams v. Barnes*, 14 N. C. (3 Dev. L.) 348; *Avitt v. Smith*, 120 N. C. 392, 27 S. E. 91; *Stallings v. Ellis*, 136 N. C. 69, 48 S. E. 548; *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533; *Hicks v. Barnes*, 132 N. C. 146, 43 S. E. 604; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *Payne's Appeal*, 65 Conn. 397, 38 L.R.A. 418, 48 Am. St. Rep. 215, 32 Atl. 948.

There was no evidence of a loan by the plaintiff to the defendant's intestate, and, in the absence of evidence, the charge given in regard to it was erroneous.

*Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562; *King v. Wella*, 94 N. C. 344; *Burton v. Rosemary Mfg. Co.* 132 N. C. 17, 43 S. E. 480; *Joiner v. Johnson*, 133 N. C. 487, 45 S. E. 828.

Mr. Clifford Frazier for appellee.

Hoke, J., delivered the opinion of the court:

There is conflict of authority on the question presented in this appeal, but we are of opinion that the decisions in support of plaintiff's claim have the better reason, and that the judgment in her favor should be affirmed. True, the position is fully recognized in this jurisdiction that no recovery can be had for services rendered when they are given and received without expectation of pay. *Richmond Guano Co. v. Bennett*, 170 N. C. 345, 87 S. E. 102, citing *Winkler v. Killiam*, 141 N. C. 578, 115 Am. St. Rep. 694, 54 S. E. 540, and *Prince v. McRae*, 84 N. C. 675, but the principle should have no application to this record, where, on the facts as accepted by the jury, the plaintiff, being without default, has rendered services of value in ignorance of the essential relevant facts, and was induced thereto by the

fraud and wrong of the intestate. In such case we think that the general equitable principles of *indebitatus assumpsit* should apply, and the cases which so hold should be approved as controlling. *Fox v. Dawson*, 8 Mart. (La.) 94; *Higgins v. Breen*, 9 Mo. 497; *Hickam v. Hickam*, 46 Mo. App. 496; *Boardman v. Ward*, 40 Minn. 399, 12 Am. St. Rep. 749, 42 N. W. 202; *Keener, Quasi Contr.* p. 318.

Two of the cases opposing this position, *Franklin v. Waters*, 8 Gill, 322, and *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, and cited in several text-writers of recognized merit as upholding the better view, have been subjected to intelligent criticism in Mr. Keener's work, and the decisions rendered in these cases are expressly disapproved. *Keener, Quasi Contr.* pp. 321-325.

Speaking to the decision in *Franklin v. Waters*, a case where a slave, who had been freed by the will of his former owner, was kept in ignorance of the fact, and thereby made to serve for some length of time as a slave by the heir and successor of the testator, and recovery on a quantum meruit was denied, the author says: "The reason why a man who does not intend to charge for services rendered is not allowed to recover compensation therefor is because the gift of a thing is inconsistent with a sale or barter thereof, and therefore one to whom a thing has been given is not doing anything inequitable in refusing to pay therefor. The principle therefore clearly has no application to a case where the plaintiff has been induced by fraud to give services to the defendant, which the defendant knew he had no right to claim, and which he also knew would not have been rendered but for the belief of the plaintiff in the defendant's right thereto."

And in reference to *Cooper v. Cooper*, supra, a case as to a claim for services exactly similar to the one before us, in which a recovery was also denied, on a quantum meruit, the court holding that plaintiff's remedy should have been in tort for the deceit, it is said, among other things: "It is submitted with all deference that a different result should have been reached in this case. It is true that the intestate's accepting the plaintiff's services was an incident of a previous wrong, and not an independent tort. But it is also true that the intestate, by accepting the services, wrongfully enriched himself at the plaintiff's expense; and while, if he had received nothing of value from the plaintiff, the plaintiff could only have sued for breach of promise to marry, or in tort for deceit, yet it is submitted that, when he, because of his tort, enriched himself, the plaintiff, if she saw fit to sue, not for dam-

ages, but simply for compensation to the extent that the defendant had profited by his wrong, should have been allowed to do so."

And speaking further to this decision: "If, instead of receiving the services of the plaintiff, the defendant had, in the exercise of his supposed common-law marital rights, reduced to possession choses in action belonging to the plaintiff, it hardly seems possible that a court would hold that, as the right to sue in tort had been lost by the death of the intestate, the plaintiff could not recover against his estate the money received in extinguishment of choses in action, which in fact belonged to the plaintiff, and which the defendant unlawfully appropriated to his own use. Had the plaintiff in this case surrendered to the defendant money or other chattels to which the defendant asserted a right because of his marital rights as husband, it does not seem possible that a court would hold that, because of the loss of the right to sue in tort by the death of the intestate, no claim could be asserted against his estate for the value so received by him. And yet, in point of principal, it is submitted that it is impossible to distinguish between the receipt of money or other property by the defendant and the receipt of services. The plaintiff, whether she conferred a benefit on the intestate by rendering services or by delivering him money or other personal property, in either case parted with a right in rem under a mistaken supposition, induced by the fraud of

the defendant, that the defendant was entitled thereto,"—a line of reasoning which gives full support to plaintiff's right to recover for money advanced in the principal case, and, to our minds, equally sustains her recovery for services rendered and received by intestate to his pecuniary advantage. The action of indebitatus assumpsit, as stated, is dependent largely on equitable principles (*Mitchell v. Walker*, 30 N. C. (8 Ired. L.) 243); and, in the absence of a special contract controlling the matter, and unless in contravention of some public policy, it will usually lie where even one man has been enriched or his estate enhanced at another's expense under circumstances that in equity and good conscience call for an accounting by the wrongdoer.

Our decisions uphold recoveries when money not justly due has been paid under a mistake of fact. *Simms v. Vick*, 151 N. C. 78, 24 L.R.A.(N.S.) 517, 65 S. E. 621, 18 Ann. Cas. 669. When a man's property has been wrongfully converted or obtained by fraud or deceit, the owner is allowed to waive the tort and sue in contract (*Stroud v. Life Ins. Co.* 148 N. C. 54, 61 S. E. 626; *White v. Boyd*, 124 N. C. 177, 32 S. E. 495); and we see no reason for withholding the application of the principle from the present case, where it is established that valuable services were rendered and received, and plaintiff was induced thereto by the wrong and fraud of defendant.

There is no error, and the judgment is affirmed.

### **Annotation—Right to recover for household services rendered while parties were living in illicit relations.**

The earlier cases on this question are discussed in the annotation to *Emmer-son v. Botkin*, 29 L.R.A.(N.S.) 786.

As to right to recover what has been paid or transferred in consideration of illicit relations, see annotation to *Lanham v. Meadows*, 47 L.R.A.(N.S.) 592.

As appears from the prior annotation, a conflict exists on the question whether a woman who is deceived in her belief that she is lawfully married may recover for household services performed while living with her supposed husband. It will be noted that the court in *SANDERS v. RAGAN*, ante, 681, held that a recovery might be had under such circumstances, it appearing that the plaintiff was ignorant, until the death of the one to whom she supposed that she had been legally married, that he had a lawful wife living.

The only case on the question under consideration which appears to have been L.R.A.1917B.

decided since the prior annotation involved the right of a man to recover from a woman with whom he had lived in illicit relations, for work and services. In this case, *Gjurich v. Fieg* (1912) 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111, there was testimony for the defendant that, pursuant to advice of the plaintiff, she purchased property and established a roadhouse and saloon on it; that she and the plaintiff lived there for ten years, during which time the plaintiff worked on the place; that from the outset the parties lived together as husband and wife, although never married; that the relations commenced and continued without any specific agreement for the payment of wages by the defendant to the plaintiff; that she gave him money from time to time to purchase articles, and that he retained what he desired for his own use. The evidence in the case was held suffi-

cient to sustain a verdict for the defendant, although in many particulars the plaintiff's evidence was in conflict with the defendant's.

It was also held in this case that although ordinarily the law will imply a promise to pay for services rendered and accepted, this is founded on a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor, or that the services were intended to be gratuitous, or by particular circumstances from which the law will raise a counter presumption that the services were not intended to be a charge against the party who was benefited by them; and it was held that the relation existing between the parties in the case at bar, although meretricious, might be considered as illustrating the purpose and expectation with which work was done by each, and that the defendant was properly allowed to testify concerning her relations with the plaintiff, and that there was no error in permitting the

plaintiff to be cross-examined as to such relations, he having testified on direct examination to circumstances from which an obligation to pay for his services might be implied.

And an instruction was held not improper which referred to the case of a son working for a father, or a woman for a supposed husband, as they were mere illustrations of some of the circumstances which would justify an inference that services had been rendered gratuitously, and were appropriate as aids to the jury in determining whether compensation was expected in the case at bar.

And where the defendant's contention was merely that her relations with the plaintiff were to be considered in determining whether a claim for wages had ever existed, it was held that the court properly refused to charge that sexual intercourse would not constitute payment of plaintiff's claim for wages. J. T. W.

#### OHIO SUPREME COURT.

STATE OF OHIO EX REL. EMERY LAT-TANNER, Deputy Superintendent of Banks, Plff. in Err.,  
v.  
FRANK A. HILLS.

(— Ohio St. —, 113 N. E. 1045.)

#### Bills and notes — consideration — bank examination.

1. Where a note is executed to a bank for the purpose of meeting the requirement of the state superintendent of banks that deficiency of the assets of said bank be made good, and for the purpose and with the result of enabling such bank to continue its business for some period, during which debts are created and new depositors acquired, neither the defense of want of consideration nor failure of consideration for such note is available in an action brought to recover thereon by the state superintendent of banks.

*For other cases, see Bills and Notes, VI. o, in Dig. 1-52 N. S.*

#### Headnotes by the Court.

Note. — As to consideration for note or other obligation given to make good depletion of capital or assets of bank, see annotation following this case, post, 688.

As to contracts procured upon threats of prosecution of a relative, see notes to City Nat. Bank v. Kusworm, 26 L.R.A. 48; Williamson-Halsell-Frazier Co. v. Askerman, 20 L.R.A.(N.S.) 484; Ball v. Ball, 37 L.R.A.(N.S.) 539; and Embrey v. Adams, L.R.A.1915D, 1118. L.R.A.1917B.

#### Same — duress.

2. However, the defense of duress is available to the maker of such note, and if the execution thereof was induced solely by threats of criminal prosecution of a brother of the defendant, made for that purpose by officers of the payee bank and a representative of the state superintendent of banks, and under such circumstances as to constitute a reasonable and adequate cause to control the will of the maker of said note, he may be relieved from payment thereof.

*For other cases, see Duress, in Dig. 1-52 N. S.*

#### Appeal — disregarding issues.

3. Where, upon the issues made by several defenses to a claim sued upon, a general verdict is found for the defendant, it not being disclosed by answers to interrogatories or otherwise upon which issue the verdict was based, and the record disclosing no error touching either the presentation or submission of at least one of such issues, a finding upon which in favor of the prevailing party would justify a general judgment, which is rendered, error of the trial court in the submission of other issues will be disregarded.

*For other cases, see Appeal and Error, VII. m, 7, d, in Dig. 1-52 N. S.*

(April 25, 1916.)

**E**RROR to the Court of Appeals for Delaware County to review a judgment affirming a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

**Statement by the Court:**

The original petition filed by the relator, Emery Lattanner, deputy supervisor of banks, was for the recovery of \$2,000 and interest upon a promissory note of which the following is a copy:

\$2,000. Gambier, Ohio, Feb. 1, 1910.

On or before three years after date I promise to pay the Gambier Banking Co. or order two thousand <sup>no</sup>/<sub>100</sub> dollars for value received, payable at the office of said company, with interest at 3 per cent per annum, having deposited as collateral security for the payment of this note as stated on back hereof.

And I hereby give to the holder hereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in Ohio or elsewhere, at public or private sale, at holder's option, on the nonperformance of the above promise and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale, the holder may purchase without being liable to account for more than the net proceeds of such sale.

And it is also agreed that the holder or assigns may also hold said property as security for or out of the proceeds thereof may pay any other claims the holder may have against me while said property or the proceeds thereof remain in holder's hands.

Collateral note No. 6949.

Frank A. Hills.

On the back of the note are the following credits and indorsements:

"For the protection of the maker of this note the Gambier Banking Company deposits the one-twentieth part of the following securities: 9,988 shares Pref'd—32,488 shares common stock of the Cashier Mining & Milling Co.—1,950 shrs., Pref'd stock of the Oppenheimer Institute. Equity in 1,300-acre farm in Pike county, Ohio, and \$10,000 policy No. 57,612 in the Berkshire Life Insurance Company. In the event that these securities realize more than the face value of this note and interest due, the balance shall be the property of the said banking company.

"Int. Pd. to Feb. 1, 1911.

"Int. Pd. to Feb. 1, 1912—\$60."

By an amendment to the petition it is averred that the collateral mentioned on the back of the note, and which came into plaintiff's possession, was sold for the highest price obtainable, the total amount realized therefrom being \$5,774.34, which entitles defendant to a credit on the note in the sum of \$288.87.

L.R.A.1917B.

The defendant, by his amended answer, after admitting the execution of the note sued upon and denying other averments of the petition, set up further defenses, in substance as follows: Second, that there was no consideration for the execution of said note; third, that it was executed for the purpose of being held by said bank as a pretended asset to meet the requirement of the state superintendent of banks that the assets of said bank be replenished; that it was expressly understood and agreed that there would be no obligation upon the defendant to pay said note, and that the only purpose on the part of the superintendent of banks was to lead the creditors of said bank and the general public to believe that said note was a valuable asset of the bank; fourth, that said note was signed under duress, the defendant being induced to execute the same by threats of officers of said bank and the state superintendent of banks that his brother, a former official of the bank, would be criminally prosecuted unless the defendant executed said note; fifth, that said note was paid by subsequent cash contribution to the assets of said bank by the brother and brother-in-law of the defendant, and that it was understood and agreed that said payment constituted a settlement of said note as well as all notes theretofore given by said brother and brother-in-law of the defendant; sixth, that there was a failure of consideration for said note, in that said bank was not permitted to continue in business for a period of three years, and criminal prosecution was caused to be instituted against defendant's brother, contrary to an agreement made and in consideration of which said note was executed.

The court of common pleas having overruled a demurrer to the answer and each defense set forth therein, the plaintiff filed a reply which, in addition to admitting certain allegations and denying others, averred that by reason of the execution of the note said bank was permitted to continue until May 16, 1911, and that after the delivery of the note a large amount of deposits were received from persons who are now unpaid creditors of said banking company; that said note was listed among the assets of said banking company, and that the defendant is estopped to deny the validity thereof or his liability thereon as against plaintiff.

The case was submitted to a jury, which returned a general verdict in favor of the defendant, upon which the court of common pleas rendered judgment, which judgment was affirmed by the court of appeals. Error is now prosecuted to this court and a reversal sought.

Messrs. Edward T. Powell and John M. Elliott for plaintiff in error.

Messrs. Marriott, Freshwater, & Wickham for defendant in error.

Matthias, J., delivered the opinion of the court:

The substance of the pleadings heretofore stated sufficiently shows the issues upon which the case went to trial. The controlling facts may readily be gleaned from the record, and there is little conflict or dispute in the evidence.

Harry N. Hills, a brother of the defendant in this action, in the year 1900 opened a private bank in Gambier, Ohio, known as the Gambier Savings Bank, and as the president and general manager continued such business about five years. During that period he had borrowed large sums of money from the bank, executing his individual notes and pledging as collateral security therefor his equity in a Pike county farm, shares of stock of the Cashier Mining & Milling Company and the Oppenheimer Institute, and also a life insurance policy upon his own life in the sum of \$10,000.

In 1905 the Gambier Banking Company was organized under the laws of the state, and took over all the assets of the Gambier Savings Bank. Harry N. Hills then ceased to have any connection with the bank except as a debtor; the successor bank having among its assets the notes of Harry N. Hills and the property heretofore referred to as collateral security.

In the year 1909 the state superintendent of banks ascertained that the Gambier Banking Company had not assets sufficient to meet its obligations, and that it was in an unsafe and unsound condition to transact the business for which it was organized. Under authority of § 730, General Code, he required the bank to make good such deficiency in its assets or suffer its doors to be closed and its business liquidated. In accordance with the requirement of the superintendent of banks, the officers of the Gambier Banking Company raised the sum of \$25,000 as additional assets of the bank, included in which was the note for \$2,000 executed by the defendant, sued upon herein, a note for \$3,500 executed by Frederick P. Hills, another brother, and a note for \$2,000 executed by Dr. G. N. Ferris, a brother-in-law of said Harry N. Hills. At the time of the execution of these notes the property which had been assigned to the bank by Harry N. Hills and carried by the bank as assets was no longer carried as assets of the bank, the notes being substituted therefor, and the property, in accordance with the condition indorsed on the notes, was deposited for the protection L.R.A.1917B.

of the makers thereof. The bank was permitted to continue its business, but later a demand was made by the superintendent of banks for a further increase in the assets of the bank, in response to which \$27,741.69 additional assets were raised in September, 1910, of which \$11,741.69 was furnished by Frederick P. Hills and Dr. G. N. Ferris, the defendant, Frank A. Hills, having refused to contribute anything thereto. The Gambier Banking Company was permitted to continue its business until May, 1911, when the state superintendent of banks found it necessary to take possession thereof for the purpose of liquidation. Among the assets which came into the hands of the superintendent of banks was the note of the defendant, Frank A. Hills, herein sued upon.

At the close of the evidence counsel for plaintiff below, plaintiff in error here, moved the court for a directed verdict against the defendant, and also asked for specific instruction to the jury to disregard the claims made by the several defenses set up in the amended answer. These several motions were overruled, the case was submitted to the jury, and a general verdict rendered for the defendant. The action of the court in overruling the motions, and also in refusing to instruct the jury upon the issue of estoppel made by the reply, is urged as prejudicial error for which the judgment should be reversed by this court.

In our opinion, the trial court might properly have stated to the jury that, under the facts disclosed by the record, the defenses of want of consideration and failure of consideration were not available to the defendant. However, the court did instruct the jury in substance that if they found from the evidence that, at the time the note sued upon was made, the bank was in a failing condition, and that the note was executed for the purpose and with the result of enabling the bank to continue its business for some period, that would constitute a sufficient consideration for the note, and that the closing of the bank subsequently because of further impairment of its assets would not constitute a failure of consideration of said note. The jury could not have understood this instruction otherwise than as a direction not to consider the defenses of want of and failure of consideration, set up in the amended answer. By such instruction, therefore, the trial court did in fact sustain the motion of counsel in such respect, and properly took from the jury the consideration of the defenses indicated.

It clearly appears from the record that by reason of the execution of the note sued upon, and others which went to make up

the required amount of additional assets, the bank was permitted to continue business for a period during which further credits and deposits were acquired, and it would therefore be entirely inequitable to permit the defendant to avert liability on his note on the ground that there was a want or failure of consideration for said note, nor was the defense available that officers of the bank represented that such note would be treated as assets only for the purpose of misleading the public. No evidence was offered tending to support such claim, and, even if it had been, it would have been clearly incompetent. *Beecher v. Dunlap*, 52 Ohio St. 64, 38 N. E. 795.

We are also in accord with the contention of counsel for plaintiff in error that there was no evidence warranting the trial court in submitting to the jury an issue of payment. The defendant pleaded the payment of \$11,741.69 into the assets of the bank by Frederick P. Hills and Dr. G. N. Ferris, as a settlement of his note, and that question was submitted to the jury in the face of the statement made by the defendant himself that "he refused to contribute anything to that end," and the undisputed evidence that no reference whatever was made to the note of the defendant, directly or indirectly, either in the conversation at the time such sum was furnished by Frederick P. Hills and Dr. G. N. Ferris or in the receipt then given. Frederick P. Hills, who now claims to have then represented his brother, the defendant, testified that when that sum was paid no reference whatever was made to the note of the latter, and there is no evidence that the note of the defendant entered into the second transaction.

The trial court might well have followed the admonition of the judge announcing the opinion in the case of *Cincinnati Gas & E. Co. v. Archdeacon*, 80 Ohio St. 27, 88 N. E. 125, 21 Am. Neg. Rep. 251, who there said: "It is subversive of the public interests and promotive of no right of either party to continue a contest before a jury when nothing is involved but the application of the law to a state of facts conclusively established."

However, the defense of duress is available to the defendant, and as against that defense there are no facts warranting the imposition of the principle of estoppel. It clearly appears from the record that neither the defendant nor his brother, Frederick P. Hills, nor his brother-in-law, Dr. G. N. Ferris, prior to or at the time such notes were executed, had any relation whatever to the bank, either as officer, director, or stockholder, and that neither of them was a debtor or creditor of the bank, and that L.R.A.1917B.

neither would be affected financially if the bank were closed by order of the state superintendent of banks and its business liquidated. The only motive apparent, therefore, for the giving of their notes, was to avert the threatened criminal prosecution of Harry N. Hills. There is evidence that the president, vice president, and cashier of the bank, in their endeavor to procure the execution of these notes, had impressed upon the brother and brother-in-law of Harry N. Hills the very grave danger confronting him, and on several occasions had said to Frederick P. Hills that if the notes were not furnished the bank would be closed, and Harry N. Hills, the brother, would be prosecuted for a criminal offense, and it further appears that additional force was given these statements by clear intimations of similar consequences made by examiners of the banking department. It further appears from the record that these representations and threats were communicated by Frederick P. Hills to his brother, the defendant, and there is evidence in the record that by means of such threats the defendant was coerced into signing the note, and that but for such representations and threats he would not have executed the note now sued upon. The evidence further indicates that such threats were made under such circumstances as to constitute a reasonable and adequate cause to control the will of the defendant, and that it was intended that they should be communicated to and influence the action of the defendant and induce the execution of the note. It was therefore competent to show that they were in fact communicated to the defendant, and also to show what, if any, effect they had in inducing the defendant to sign the note. Objection made to such evidence was therefore properly overruled. *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1013D, 1185; *Henry v. State Bank*, 131 Iowa, 97, 107 N. W. 1034, and *Sharon v. Gager*, 46 Conn. 189.

In our opinion, the evidence disclosed by the record justified the submission of but one issue to the jury, that of duress; and the record does not disclose any error either in the admission or rejection of evidence touching the issue of duress, or in the submission of that issue to the jury.

The verdict returned by the jury is a general verdict. No request for a special verdict was made, and no interrogatories submitted; hence it is not disclosed upon which defense the verdict was based. If any presumption is to be indulged, it would be that the verdict is not based upon defenses which were not supported by any evidence whatever. The rule laid down in *Sites v. Haverstick*, 23 Ohio St. 626, ap-



proved and followed in *Beecher v. Dunlap*, supra, and *McAllister v. Hartzell*, 60 Ohio St. 69, 53 N. E. 715, clearly applies and requires an affirmation of the judgment. Applying that rule to the instant case, we hold that where, upon the issues made by several defenses to a claim sued upon, a general verdict is found for the defendant, it not being disclosed by answers to interrogatories or otherwise upon which issue the verdict was based, and the record

disclosing no error touching either the presentation or submission of at least one of such issues, a finding upon which in favor of the prevailing party would justify a general judgment, which is rendered, error of the trial court in the submission of other issues will be disregarded.

Judgment affirmed.

Nichols, Ch. J., and Johnson, Donahue, Newman, and Jones, JJ., concur.

### **Annotation—Consideration for note or other obligation given to make good depletion of capital or assets of bank.**

Not many cases have arisen in which the consideration for a note given a bank to make good a depletion in assets or capital is considered apart from other elements. For example, a note may be given to conceal such depletion. This question, so far as illegal transactions are concerned, has been treated in the notes to *Galena Nat. Bank v. Ripley*, 26 L.R.A.(N.S.) 993; *Lyons v. Benney*, 34 L.R.A.(N.S.) 105; and *Skagit State Bank v. Moody*, L.R.A.1916A, 1218. It is, of course, apparent that the note does not include cases in which a note is given to the bank to protect it against loss on a particular obligation, by agreement with the debtor in such obligation, so as to extend time for the payment thereof, or effect any change in the rights of the bank with reference thereto. In many instances notes are given under an agreement that they are not to be collected, but are to be paid out of profits. The effect of such an agreement, except as it may bear upon the consideration, is not considered herein.

As above stated, the cases passing upon the question under annotation are not numerous. The view is sometimes taken that even if there be no consideration for such an obligation, the maker is estopped to plead the defense of lack of consideration. The cases which have dealt with the question have, for the most part, involved notes given by persons financially interested in the bank. Such cases support the theory that the note is upon a sufficient consideration.

Thus, a note given to the bank by the president, and indorsed by members of the executive committee, all of whom are directors and stockholders in the bank, to take the place of worthless paper which had been carried upon the books of the bank for some time, rather than charge the amount thereof to the apparent surplus, and thus reduce the assets of the bank, was held upon a L.R.A.1917B.

sufficient consideration in *Union Bank v. Sullivan* (1915) 214 N. Y. 332, 108 N. E. 558. A factor in causing the execution of the note was that, if the loss was charged off the assets of the bank, it would result in a fall in the value of the bank's stock; and the court states that the prevention in the fall of the stock which was held by those who became liable on the note was a distinct benefit to them and constituted a sufficient consideration. The court, in conclusion of the foregoing discussion of consideration, states that there was sufficient evidence to go to the jury upon the question of consideration. The meaning is not altogether clear, but apparently is, not that the ultimate question of whether or not there is a consideration is for the jury, but that the determination of the facts upon which the consideration rests is for the jury.

It is held in *Sickles v. Herold* (1895) 11 Misc. 583, 32 N. Y. Supp. 1083, that a note given by the director of a bank to make good an impairment of its assets and thereby prevent the closing of the bank by the state bank department is upon a sufficient consideration where the bank was thereupon allowed to continue in business. The court states that even if the note were without consideration, the defendant would be estopped to allege the defense. That the director is estopped to allege such a defense is the opinion of the court upon what appears to be a second appeal of this case, reported in (1895) 15 Misc. 116, 36 N. Y. Supp. 488. This second appeal is affirmed without opinion on this point in (1896) 149 N. Y. 332, 43 N. E. 852. The action was by the receiver of the bank, upon the note.

A note executed and indorsed by the individual members of the board of directors of a bank, to make good an impairment of capital resulting upon the charging off of bad loans, with the un-

derstanding that it was to be paid out of profits, is upon a consideration sufficient to entitle a receiver of the bank, subsequently appointed, to recover thereon. *State Bank v. Kirk* (1907) 216 Pa. 452, 65 Atl. 932. The theory of this case apparently is that the makers of the note are estopped to plead the defense of want of consideration.

Notes given by the directors of a bank to the bank, upon some doubt arising as to its solvency for the purpose of making the bank unquestionably solvent, are stated in *Dykman v. Keeney* (1896) 10 App. Div. 610, 42 N. Y. Supp. 488, to have been supported by a sufficient consideration. The court states that "the defendants were directors and stockholders in the bank. It was to their interest and direct benefit that the bank should be permitted to continue to carry on and transact its business. This it could do only by making good any impairment existing in its capital. . . . While the question whether the capital was impaired at the time the notes were given was not determined, nor did the superintendent of the banking department make any requisition upon the directors to make good any specific deficiency, still the doubt existing on that question in the mind of the superintendent, arising out of the character of some of the debts and bills receivable due to the bank, and the interest of the directors in the continuance of the bank as a sound financial and business institution, constituted a sufficient consideration to support the notes of the defendants, given to make good any possible deficiency which did exist."

There was no direct question as to the consideration for the notes in this case, however, they having been paid prior to the action; the question being whether they constituted assets of the bank. Upon a second appeal of this case, reported in (1897) 16 App. Div. 131, 45 N. Y. Supp. 137, the court does not consider the question of consideration, but states simply that, the notes having been paid, the receiver should be held estopped from questioning their existence as an asset. Judgment upon the second appeal was affirmed by the court of appeals in (1899) 160 N. Y. 677, 54 N. E. 1090, without opinion.

A note given by the cashier (who was also a stockholder) of a bank as his contribution toward making good a loss which the bank had suffered through money being stolen out of the vaults, of which he had custody and control, is

upon a consideration sufficient to entitle the bank to recover thereon. *Utah Nat. Bank v. Nelson* (1910) 38 Utah, 169, 111 Pac. 907. Upon discovery of the loss, the cashier and president determined that it was necessary to make the loss good; the president agreed to put up a certain amount, and insisted that the cashier put up the amount called for in the note. Upon a dispute arising as to whether he should put up that amount, the matter was submitted to the vice president, who determined that the amount was correct, whereupon the note was executed. It thus appears that the note was executed as a mutual promise to contribute toward a common cause, and this is stated by the court to have been a consideration for the same also.

An action by the receiver of a savings bank upon a mortgage given by a trustee of the bank to a third person, and by such third person assigned to the bank for the purpose of making good a deficit in the assets of the bank, cannot be defeated on the ground that there was no consideration for the instrument. *Best v. Thiel* (1879) 79 N. Y. 15. This decision is based upon two grounds: First, that the mortgage was under seal, which was presumptive evidence of a consideration,—a presumption that was not clearly overcome. Second, that the defendant was estopped from denying the legal validity of the mortgage. Upon the evidence that was given to overcome the presumption of consideration arising from the sealed instrument, it is stated that the "defendant was one of the trustees of the bank, and there was a claim that he was personally liable for the deficiency. The bank superintendent informed the trustees that they were all so liable, and that unless they made up this deficiency their individual liability would be enforced. It was upon this requisition of the superintendent that the mortgage was given, and, if given to discharge a personal liability, it was not without consideration." It is further stated that it is true there was no finding that there was such personal liability for the deficiency, neither was there a finding that there was none; the claim of liability was made by one in authority, and the court adds that it is sufficient to say that the presumption of a consideration was not clearly overcome.

In *Skordal v. Stanton* (1903) 89 Minn. 511, 95 N. W. 449, the director of a bank had made and delivered his promissory note to the bank to cover the

amount of impaired capital; thereafter the bank became insolvent and the receiver brought an action upon the note and recovered judgment. This judgment was paid, and thereupon the maker filed his petition in the insolvency proceedings for leave to file his claim against the bank for the amount so paid by him. The director had raised the question of consideration for the note in the action by the receiver against him in which the judgment had been obtained, and the court states that the judgment in that action disposed of the defense which he had interposed, but adds that "even if this were not true, it is very evident from the facts appearing that Skordal has no claim upon funds in the hands of the receiver as against general creditors; the assets of the bank had become impaired, and, with other directors, he executed and delivered the note to make good the deficiency; he did this in order that the bank might keep its doors open and go on with its business. The bank continued to deal with depositors and others, all parties relying undoubtedly upon this, among other securities, and when the assets are being collected for the purpose of meeting its obligations Skordal cannot be heard to deny the validity of his note; as to creditors, he is estopped from asserting this defense."

A note given by the directors of a bank upon the demand of the state bank examiner, to make good the impairment of the capital of the bank, was held to be upon a sufficient consideration, in *Interstate Trust & Bkg. Co. v. Irwin* (1915) 138 La. 325, 70 So. 313. It does not appear whether or not the bank was the payee of the note. The note was

discounted at another bank, and the proceeds put to the credit of the bank for whose benefit it was given. It is apparent that there would be additional elements to constitute a consideration in case of a note given to a third person, who advances money thereon.

It will be noticed that the defendant in *STATE EX REL. LATTANNER v. HILLS*, ante, 684, was, so far as appears from the report, not financially interested in the bank. Whether there is a consideration for a note given by one not interested raises a different question from that presented in the foregoing cases. It has been held, however, in accord with *STATE EX REL. LATTANNER v. HILLS*, that such an obligation is upon a sufficient consideration. *Hurd v. Kelly* (1879) 78 N. Y. 588, 34 Am. Rep. 567, where a bond given by a number of obligors, who bound themselves severally in separate amounts, each for himself, and not for the others, to a bank, for the purpose of being exhibited as an asset, was held to be upon a sufficient consideration. The bond itself recited that it was upon the consideration that the bank, upon the request of each of the obligors, continue its ordinary business after a date therein stated, and upon the mutual covenants contained in the instrument. The bank did continue its business after the date stated, when a receiver was appointed. The court states that the "continuance of its business and the incurring of new obligations by the bank, incident to such continuance, was a good consideration." Apparently, the defendant in the case was not connected with the bank. Others of the obligors were trustees of the bank.

W. A. E.

#### TENNESSEE SUPREME COURT.

DR. RAYMOND WALLACE

v.

A. J. COX, Plff. in Certiorari.

(— Tenn. —, 188 S. W. 611.)

#### Parent and child — Liability for surgeon's bill.

A father whose advice is sought as to the desirability of an operation upon his minor daughter, earning her own living away from home, and who consents thereto, and sug-

gests that he would have chosen another surgeon had he known the full circumstances, may be compelled to pay the surgeon's bill, since the circumstances do not indicate that the daughter had been fully emancipated.

*For other cases, see Infants, I. b, in Dig. 1-52 N. S.*

(October 14, 1916.)

**C**ERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Hamilton County in defendant's favor, in an action brought to recover for a surgical operation and medical attendance upon his daughter. Affirmed.

The facts are stated in the opinion.

**Note.** — As to liability of parent for necessities furnished minor child who is living away from the parent's home, see annotation following this case, post, 693.  
1.L.R.A.1917B.

Messrs. Murray, Draper, & Daly, for plaintiff in certiorari:

The father is not liable where the child is emancipated, or is receiving the benefit of its own labor.

Gotts v. Clark, 78 Ill. 229; Johnson v. Gibson, 4 E. D. Smith, 231; Varney v. Young, 11 Vt. 258; Tyler v. Arnold, 47 Mich. 564, 11 N. W. 387; Farmington v. Jones, 36 N. H. 271; Keaton v. Davis, 18 Ga. 457; Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 572; Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255; Manning v. Wells, 85 Hun, 27, 32 N. Y. Supp. 601; Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538; Ramsey v. Ramsey, 121 Ind. 215, 6 L.R.A. 682, 23 N. E. 69; Glynn v. Glynn, 94 Me. 467, 48 Atl. 105; Weeks v. Merrow, 40 Me. 151; Foss v. Hartwell, 168 Mass. 66, 37 L.R.A. 589, 60 Am. St. Rep. 366, 46 N. E. 411; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Raymond v. Loyl, 10 Barb. 483; Ouellet v. Gauvin, Rap. Jud. Quebec 13 C. S. 542; Everitt v. Walker, 109 N. C. 129, 13 S. E. 860; Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195; Riddle v. Riddle, 5 Rich. Eq. 31; Jackson v. Mull, 6 Wyo. 55, 42 Pac. 603; Deane v. Annis, 14 Me. 26.

If the authority of the parent is abjured by the child, without any necessity or occasion by the parent, all legal obligation to provide for the child is at an end; and in such case the parent cannot be made liable for even necessities furnished his child except by his consent.

Tyler, Infancy, § 101; Parsons, Contr. 305; Chitty, Contr. 119; Toncray v. Toncray, 2 Shannon, Cas. 410; 2 Story, Eq. 1347a; Gordon v. Potter, 17 Vt. 350; Raymond v. Loyl, 10 Barb. 483; Mortimore v. Wright, 6 Mees. & W. 482, 151 Eng. Reprint, 502, 9 L. J. Exch. N. S. 158, 4 Jur. 465; Schouler, Dom. Rel. 328.

Mr. Joe Frassrand, for defendant in certiorari:

The daughter was a minor, and the father was liable for necessities.

29 Cyc. 1609, 6089, De Wane v. Hansow, 56 Ill. App. 575; Cooper v. McNamara, 92 Iowa, 243, 60 N. W. 522; Porter v. Powell, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295; Gay v. Ballou, 4 Wend. 403, 21 Am. Dec. 158; McGoon v. Irvin, 1 Pinney (Wis.) 526; Evans v. Evans, 125 Tenn. 115, 140 S. W. 745, Ann. Cas. 1913C, 294.

A medical bill or bill for an operation is a necessity.

Deane v. Annis, 14 Me. 26; Grace v. Hale, 2 Humph. 27, 36 Am. Dec. 296.

The fact that the child is living apart from the parent does not, of itself, emancipate such child, but emancipation must be by agreement or the conduct of the parties.

Tennessee Mfg. Co. v. James, 91 Tenn. L.R.A.1917B.

154, 15 L.R.A. 211, 30 Am. St. Rep. 865, 18 S. W. 262; Rounds Bros. v. McDaniel 133 Ky. 669, 134 Am. St. Rep. 482, 118 S. W. 956, 19 Ann. Cas. 326.

Emancipation must be proved, and is not presumed.

Lowell v. Newport, 66 Me. 78; Lisbon v. Lyman, 49 N. H. 553.

The mere fact that a child is living away from the home of the parents does not relieve the father of furnishing necessities, or of the duty of protection to the child.

29 Cyc. 1609; De Wane v. Hansow, 56 Ill. App. 575; Searsmont v. Thorndike, 77 Me. 504, 1 Atl. 448; Cooper v. McNamara, 92 Iowa, 243, 60 N. W. 522; Gay v. Ballou, 4 Wend. 403, 21 Am. Dec. 158; McGoon v. Irvin, 1 Pinney (Wis.) 526; Porter v. Powell, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295; Evans v. Evans, 125 Tenn. 115, 140 S. W. 745, Ann. Cas. 1913C, 294.

The knowledge of the father that the doctor was going to perform the operation raises an implied promise to pay on the part of the father, where he does not object.

Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195; Riddle v. Riddle, 5 Rich. Eq. 31; Jackson v. Mull, 6 Wyo. 55, 42 Pac. 603.

Williams, J., delivered the opinion of the court:

This is a suit by Wallace, a practising physician and surgeon, to recover for a surgical operation and attendance on Eva Cox, the seventeen-year-old daughter of defendant Cox.

Cox formerly lived in Chattanooga, but about three years before the occurrence here involved he had removed to the adjoining county of Bradley. Two of his daughters, Mary and Eva, decided to and did remain in Chattanooga to earn their own living. This they continued to do without aid from the father. The two girls were boarding at the Y. W. C. A. building when the younger sister, Eva, became ill. Dr. Wallace was called in by the matron, and, after prescribing for her for a time, decided that an operation was necessary to remove an ovarian tumor. Mary Cox telephoned the father that the doctor advised that Eva needed to be operated on. The doctor had stated that the operation would be a slight one, and when the father inquired whether an incision would have to be made, Mary replied that it would not, and that the operation would be a slight one. He replied, "Well, then, if it must be done, it must be done." Mary responded that Eva would go for the operation the next day.

Mary Cox testified that Dr. Wallace did not ask her to telephone to the father, and that she did not inform him that she had

done so for several days after the operation. The surgeon testifies that in performing the services, he looked to the father for compensation.

Defendant Cox testified that he failed to hear the name of the surgeon over the telephone; that had he been informed that an incision was required, he would have gone to Chattanooga and had the operation performed by another surgeon, with whom he was personally acquainted; and that he was not asked to and did not promise to pay for the operation.

The operation was successful. Bills were sent to the father, who paid no attention to them; whereupon suit was brought.

The circuit judge, sitting without the intervention of jury, held defendant Cox not liable. The court of civil appeals divided on the question, the majority holding that plaintiff was entitled to recover as upon an implied contract.

The liability of a father for necessary medical attention given a child who has not remained as a member of his immediate family is a question upon which the authorities are at least in apparent conflict. Cases fairly supporting either of the opposing rulings of the lower courts may be found, but a number of those holding with the judgment of the circuit court take color from English cases which proceed upon the principle that a father is under only a moral obligation to support his child.

The obligation of the parent to support his child at common law was not well defined, but in this state, it has been held, more nearly in accord with the natural sense of justice, that the obligation is not merely moral, but legal, and enforceable as a legal common-law duty. *Toncray v. Toncray*, 2 Shannon, Cas. 408.

It therefore follows that if the parent neglects that duty, any other person who supplies such necessary attention to the child is deemed, ordinarily, to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent.

The conflict in the authorities, above referred to, is due in large part to the view the respective courts entertain of the extent in the given case of the emancipation of the absent child.

"Emancipation" of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child. It may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent; it may be conditional or absolute, complete or partial. *Tennessee Mfg. Co. v. James*, 91 L.R.A.1917B.

Tenn. 154, 15 L.R.A. 211, 30 Am. St. Rep. 865, 18 S. W. 262; *Rounds Bros. v. McDaniel*, 19 Ann. Cas. 326, and note (133 Ky. 669, 134 Am. St. Rep. 482, 118 S. W. 956); 2 Words & Phrases, 2d series 242.

The emancipation of a minor is not to be presumed, and must be proved; and the burden of proof is on the father claiming immunity because of it. *Lowell v. Newport*, 66 Me. 78; *Lisbon v. Lyman*, 49 N. H. 553.

In our opinion defendant Cox did not successfully carry that burden. Any emancipation indicated by the proof was limited or partial, not general or complete. The effort of the daughter to earn her own support was praiseworthy and tended to lift a burden that rested on the father himself, and the courts should be slow to permit the fact to become a shield for his protection, at least where a full emancipation is not shown. The restoration of the daughter in consequence of the surgical operation was itself beneficial to the father, since it gave the daughter ability to further relieve him, unless we are to assume, to his and the law's discredit, that he no longer owed the duty to receive and provide for her as an invalid in his home.

A well-reasoned case in point as to emancipation is *Porter v. Powell*, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295, where it was held that a father was liable for a physician's services to his minor daughter, seventeen year of age, attacked by typhoid fever, 30 miles from her father's home, at a place where she had resided for a period of three years, earning and controlling her own wages, and providing herself with clothing, the father not furnishing or agreeing with the daughter to furnish her any means of support, but consenting to her absence from home. The court said: "There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control,

and support. There was no such emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished.

. . . As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter."

That there was in the case before us no complete emancipation, freeing the parent from liability for such necessary attention, is manifest from his own testimony, which shows he stood ready, in one aspect, to impose his own will as to the employment of another surgeon, preferred by him, and by the further fact that the daughters appealed to him for consent to the operation, which he gave.

The modern tendency among women and girls to earn a living frequently gives occa-

sion for absence from home, and that fact should not readily be held to deprive them of a claim to support in a time of need. Slight circumstances, if necessary, will be allowed to control the decision.

Thus, if a minor daughter is from home for temporary employment, leaving part of her clothing and bedding at home, even though she received wages for her labor for her own use, it is not so uncommon an occurrence as to authorize an inference of such a change in the parental and filial ties as to constitute an emancipation. *Searsmont v. Thorndike*, 77 Me. 504, 1 Atl. 448.

We have in this case no element of abandonment of the parent by the child, or defiance of authority by the latter, and no placing of herself under the protection of another. The ruling in the case of *Toncray v. Toncray*, *supra*, is not in point. There the suit was by a pure volunteer, and some of the elements just noted appeared.

We, therefore, are of opinion that in the circumstances, showing only a partial emancipation and the assent of the father to an operation being performed, there arose a promise on his part to pay, implied by law.

The proper result was reached by the Court of Civil Appeals, and its judgment is affirmed.

### **Annotation—Liability of parent for necessities furnished minor child who is living away from the parent's home.**

Earlier cases considering the question under annotation will be found in note to *P. J. Huneycutt & Co. v. Thompson*, 40 L.R.A.(N.S.) 488.

Since the earlier note it has been held in *Holland v. Hartley* (1916) 171 N. C. 376, 88 S. E. 507, that uncontradicted evidence that a father permits his son to work for himself, to remain away from the parental roof, and to receive and spend the earnings of his own labor, shows an intention on the part of the father to release parental control and emancipate his son, so that he will not be liable for the care and maintenance of such child, in the absence of an express promise to pay for the same.

In *Sassaman v. Wells* (1913) 178 Mich. 167, 144 N. W. 478, where a minor son left home to attend school, contrary to his father's wishes, the father during such time not contributing to the son's support, it was held that the father was not liable for medical services rendered to the son, where he had no knowledge of his illness, although information thereof could easily have been given to the father. The court refused to consider the question whether the son had been

emancipated, but predicated the nonliability on the lack of the son's authority, either express or implied, to pledge his father's credit, and also on the lack of an express contract between the physician and the father. The court stated that "it is manifest that the son had neither express nor implied authority to pledge his father's credit. The plaintiff made no express contract with the father, the defendant, nor were the services rendered under circumstances, such as the knowledge of the father, from which generally a promise to pay for them would be implied. If defendant is liable, it is because of some general moral or legal duty to provide necessities for his son, failing in which a stranger might supply them at his expense. . . ."

There was some evidence of a real need for medical services, none of a failure of duty on the part of the father. Nor was there any exigency, such as the imminent peril of the son and his distance from home, to take the case out of the rule that parental duty must be neglected before a stranger may supply what the parent ought to supply, at the expense of the parent." J. H. B.

## LOUISIANA SUPREME COURT.

MRS. THOMAS McC. HYMAN

v.

SUCCESSION OF WILLIAM S. PARKER-  
SON, Appt.

(— La. —, 72 So. 953.)

**Bills and notes — consideration — loss on investment.**

Where, in a suit by the payee and holder of promissory notes issued on their face "for value received," instituted against the legal representatives of the deceased maker, the defendants pleaded want of consideration, held, that a valuable consideration was proved by evidence showing that the maker, a prominent attorney, acting as the adviser and agent of the plaintiff, had unwittingly invested her money in forged mortgage notes certified to be genuine by a certain notary public, and who, on the discovery of the forgery, had substituted his own notes for the forged notes, stating at the same time to the plaintiff that he was in fault for not exercising more care in the investment of her money.

*For other cases, see Bills and Notes, I. c, in Dig. 1-52 N. S.*

(November 13, 1916.)

**A**PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans, Division E, in plaintiff's favor, in an action brought to recover the amount alleged to be due on two certain promissory notes. **Affirmed.**

The facts are stated in the opinion.

Messrs. Merrick, Gensler, & Schwarz, for appellant:

An agent acting gratuitously in purchasing mortgage notes for his principal from a notary of high standing, held in high regard at the time of the purchase, cannot be held responsible for loss resulting from the fact that the notes were forged. As between the maker and payee of a note, want of consideration, or partial want of consideration, is a good defense.

1 Dan. Neg. Inst. 6th ed. § 201, p. 290; Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378.

A valid donation of a promissory note can be made only by public act, and in any event a donation cannot be made of the donor's own note.

De Pouilly's Succession, 22 La. Ann. 97; Fink v. Cox, 18 Johns. 145, 9 Am. Dec. 191;

Headnote by LAND, J.

**Note.**—As to consideration for note or obligation given by attorney or agent to cover loss on transactions conducted by him for principal, see annotation following this case, post, 696.  
L.R.A.1917B.

Shugart v. Shugart, 111 Tenn. 179, 102 Am. St. Rep. 777, 76 S. W. 821; Parish v. Stone, supra.

Mr. Walter S. Lewis, for appellee:

A debt due by another is a sufficient consideration to support the written promise of a third party to pay it.

New Orleans Gaslight & Bkg. Co. v. Paulding, 12 Rob. (La.) 378; New Orleans & C. R. Co. v. Chapman, 8 La. Ann. 98.

Land, J., delivered the opinion of the court:

The plaintiff sued as payee and holder of two promissory notes executed and signed by the decedent on August 9 and 16, 1913, respectively; one for \$2,100, and the other for \$3,500, and both bearing interest at the rate of 6 per cent per annum from date.

The petition alleges payment of interest on the first note up to August 9, 1915, and on the second note up to August 16, 1914. Both notes recite that they were given for "value received."

The widow and testamentary executor of the deceased in her answer admitted that the plaintiff was the owner and holder of the said notes executed by the late William S. Parkerson, but denied that the plaintiff gave valuable consideration therefor.

The defendant for further answer recited the circumstances under which the said notes were given, which may be briefly stated as follows:

The decedent as plaintiff's agent invested \$5,600 of her money in three promissory notes, two purporting to have been signed by one Kate Regan Gardner, and the third by one John Reilly, the two first purporting to be secured by first mortgage and vendor's lien, and the third by first mortgage, on certain pieces of real estate in the city of New Orleans, as per acts of even date therewith passed before James J. Woulfe, late notary public. That upon the defalcation and exposure of the said Woulfe it developed that the said William S. Parkerson had been imposed upon and defrauded, and that the said notes so purchased for plaintiff from the said Woulfe were forgeries and worthless. That the said Parkerson thereafter gave the plaintiff his own personal notes (those sued on) for amounts equal to the amounts of the forged notes bought from the said Woulfe. That the said Parkerson was not responsible for the loss suffered by the plaintiff, having exercised all care and diligence that he was bound to exercise in making the said investment, and that the giving of his own notes for the amount thereof was a pure gratuity on his part, and was done solely out of his generosity and the desire to spare petitioner the loss which she would have otherwise suf-

ferred, and that the said notes so given by the said William S. Parkerson are without consideration and void."

The answer admits that Parkerson during his lifetime paid the interest on said notes, and took back from the plaintiff the said forged mortgage notes, and made a claim thereon in the concursus proceedings instituted by the surety on the notarial bond of the said Woulfe, and also filed a proof of debt in the matter, "In re James J. Woulfe, Bankrupt," in the United States district court. The answer further avers that there may be a small dividend declared in the concursus proceeding, which when received will be tendered by the defendant to the plaintiff. The answer contains a reconventional demand for \$126 for interest paid to the plaintiff by the defendant on certain conditions, which it is alleged were violated by the plaintiff.

The case was tried, and there was judgment for the plaintiff as prayed for, and against the defendant on her reconventional demand. The defendant has appealed.

It is not to be presumed that W. S. Parkerson intended to make a donation or gift to Mrs. Hyman. It is admitted that he purchased the three forged notes from Notary Woulfe, and turned them over to Mrs. Hyman as representing the investment of \$5,600 of her money. After W. S. Parkerson discovered that the notes had been forged by the said notary, he had an interview with Mrs. Hyman, the substance of which, according to her testimony, is as follows:

Mr. Parkerson, after informing Mrs. Hyman that the three notes held by her were worthless, stated he would buy them back from her, and in answer to her inquiry whether it was fair for him to lose the money, he said: "Certainly, it is my fault; I made a bad investment, and I ought to have been more careful in looking over it before investing your money." And he further said: "Besides, I am better able to stand that loss than you are. I make between \$25,000 and \$30,000 a year, and you have no means of making money; consequently I will buy these notes from you, and don't worry, they belong to me."

The next day Mrs. Hyman delivered the three notes to Mr. Parkerson, who gave her his written promise to pay 6 per cent interest on them until they were paid. Later the notes sued on were substituted. Mr. Parkerson paid the interest on the notes during his lifetime. Mrs. Hyman left the management of her business affairs to Mr. Parkerson, who was an intimate friend of her deceased husband.

In the concursus proceedings referred to in the answer, W. S. Parkerson appeared L.R.A.1917B.

as a creditor of Woulfe, the notary, in not only the amounts of said three notes, but of ten others, "acquired from James J. Woulfe upon the faith of the said Woulfe's official notarial paraph, notes purporting and officially represented by him to be genuine first mortgage notes," all of which said notes were forgeries.

The defendant argues this case as if it presented merely an ordinary business transaction, involving the execution or transfer of commercial paper. As a matter of fact, the transaction involved accounting and settlement between an agent and his principal. Parkerson, the agent, was bound to account for the money intrusted to him for investment. On discovering that the money had been invested by him in forged mortgage paper on the faith of the official paraph of a notary who proved to be a scoundrel, Parkerson did not attempt to excuse himself on the ground that he was not to blame, but, according to the testimony of Mrs. Hyman, confessed his fault and want of care in the premises. The fact that Parkerson on his own motion substituted his own notes for the three forged notes is strong corroboration of Mrs. Hyman's direct and positive testimony. Parkerson took the forged notes as a basis for a claim in damages against the notary, which he vigorously prosecuted until his death.

W. S. Parkerson, prominent lawyer and business man, considered the question of his liability as agent to Mrs. Hyman, and decided that he was in fault in not exercising more care in the investment of her money. He then called on Mrs. Hyman, admitted his fault, and expressed his determination to buy or take up the forged notes at their face value. This was done by the substitution of the notes sued on. This settlement was based on an admitted legal liability on the part of Mr. Parkerson, and there is no evidence in the record tending to show that no such liability existed. Defendant's contention that Parkerson was without fault because he purchased the forged notes on the faith of notarial paraphs excludes the consideration of all other facts and circumstances surrounding the transaction, and is repelled by the admissions of the agent himself. The notes sued on import a valuable consideration, and the record before us discloses a valid consideration based on the failure of the agent to exercise due care in the investment of the funds of his principal. The burden was on the defendant to show by clear evidence that the notes sued on were issued without adequate consideration.

The transaction between Parkerson and Mrs. Hyman was not a sale of the worth-



less forged notes, which, as stated supra, Parkerson used as a basis for his claim *ex delicto* against the notary, alleging that he (Parkerson) had acquired them from said notary.

We consider it unnecessary to decide whether the notes sued on may be valid as an assumption of the debt of a third person or as a security.

Judgment affirmed.

**Annotation—Consideration for note or obligation given by attorney or agent to cover loss on transactions conducted by him for principal.**

There is very little to be found on this subject. Cases of promises by attorneys to clients usually relate to preliminary promises and raise the question of champerty, though there is at least one case in which during a suit the attorney promised his client that if non-suited the attorney would pay all costs, and it was held that the promise was without consideration. *Mitchell v. Ball* (1800) 1 N. C. pt. 2, p. 157 (Conference, 17) 2 Am. Dec. 627. It would seem that in the principal case the court might, if necessary, very well have laid it down as a principle that an attorney who in a settlement with his client voluntarily shoulders a loss, and gives his client an obligation for the amount, will not afterwards be permitted to question the validity of the obligation.

There have been cases concerning others than attorneys where notes have been made for losses. The one next referred to, however, seems possibly based on the theory now generally discarded that a mere moral obligation will support a promise.

In *Scott v. Carruth* (1836) 9 Yerg. (Tenn.) 418, where a guardian had given his note to his ward on account of his failure to collect a claim against a third person, the court, while considering that the claim against the third person was one which the guardian ought to have collected, also said: "But in this case, if the legal liability of the defendant to the plaintiff before the giving of the note were doubtful, still, if the defendant, feeling that as guardian he had alike mistaken his duty and the rights of his ward, and deeming it improper for him to involve him who had been his ward in litigation with Vowell as to a claim which he himself should have investigated, if feeling thus, and believing, as well he might, that he was placed under a moral obligation to give the note in question, this would constitute a sufficient consideration to sustain an express promise."

In *Dexter Sav. Bank v. Copeland* (1885) 77 Me. 263, it was held that a note by a cashier of a bank to the bank, given to make up a loss for which the

maker is neither legally nor morally responsible, is without consideration and not binding on the maker; but this holding it seems was not necessary to the decision.

In *Tucker v. Haughton* (1852) 9 Cush. (Mass.) 350, where the executor and sole legatee of an indebted estate lent its money to his own firm and it was lost, Shaw, Ch. J., was of the opinion that if, after a compromise and release of such executor by his successor, the released executor made a promise to a creditor of the estate to replace the loss, such promise would be without consideration. He thought, however, that there had been no promise.

Reference may be made in this connection to *Hawley v. Farrar* (1828) 1 Vt. 420, in which it was held that where an agent purchases goods for his principal and delivers them unopened without negligence, a promise by the agent to allow something to the principal on the price paid, on account of the damaged condition of the goods, is without consideration, moral or legal.

The question is suggested whether an obligation given to protect one's business reputation rests upon sufficient consideration. An attorney or physician, an architect or broker, or other person, may feel it better for him voluntarily to shoulder a loss for which he is not to blame than to have such loss become generally known. If he voluntarily gives a note to his client for the amount under a promise of silence, such promise is a consideration, if it be a legal consideration. If he voluntarily gives such a note without any promise on the part of the client at all, feeling that his reputation will not suffer by knowledge of a repaired loss, it is not easy to find a technical consideration, but it is not a good thing that obligations given under those circumstances should be repudiated; and they perhaps are not likely to be unless in case of the death or bankruptcy of the promisor.

In England, while an obligation given for a lost bet cannot be collected in the courts, a promise to pay if the betting creditor will refrain from publishing the

default has been held to be a perfectly good promise.

Thus, in *Hyams v. Stuart King* [1908] 2 K. B. (Eng.) 696, 6 B. R. C. 962, 77 L. J. K. B. N. S. 794, 99 L. T. N. S. 424, 24 Times L. R. 675, 52 Sol. Jo. 551, it was held that a promise to pay a betting debt in a few days if the winner would forbear to declare the loser a defaulter was a good contract,—a bet being void, and not illegal.

In *Re Browne* [1904] 2 K. B. (Eng.) 133, 73 L. J. K. B. N. S. 446, 52 Week. Rep. 384, 90 L. T. N. S. 291, 20 Times L. R. 289, 11 Manson, 148, a betting creditor had written a letter to the committee of the debtor's club complaining of the debtor's conduct in not paying his debts of honor, and the debtor, wishing to have that letter withdrawn, gave certain cash and bills of exchange in exchange for a letter addressed to the club signed by the creditor withdrawing the

previous letter of complaint. It was held that the bills were given for an altogether new consideration which was not an illegal consideration. (The cash and bills together were apparently less than the amount of the debt.)

For the general principles reference may be made to the following notes: note to *Morgan v. Hodges*, 15 L.R.A. 438, on "Must a claim be doubtful to sustain a compromise;" note to *Armijo v. Henry*, 25 L.R.A. (N.S.) 275, on "May void, invalid, or unfounded claim be the subject of compromise;" notes to *Trimble v. Rudy*, 53 L.R.A. 353, and *Muir v. Kane*, 26 L.R.A. (N.S.) 520, on moral obligation as a consideration for a promise; note to *Morecraft v. Allen*, L.R.A. 1915B, 1, on consideration for new agreements abrogating, altering, supplementing, or supplanting prior contracts.

B. B. B.

## KENTUCKY COURT OF APPEALS.

### COMMONWEALTH OF KENTUCKY,

Appt.,

v.

J. H. RITCHEY et al.

(171 Ky. 330, 188 S. W. 397.)

**Partnership — name — sufficiency of surname.**

The use of the surname is sufficient under a statute permitting the transaction of a partnership business under a partnership name including the true real name of at least one of the persons conducting the business, without filing a certificate setting forth the names of the members of the firm, and therefore a business may be conducted by father and son under a name consisting of the father's surname followed by the words "& son."

For other cases, see *Name*, in *Dig. 1-52 N. S.*

(October 4, 1916.)

**A** PPEAL by the Commonwealth from a judgment of the Circuit Court for Cumberland County sustaining a demurrer to and dismissing a warrant charging defend-

**Note.**—The question, What names or designations are within statutes requiring the filing of a certificate giving certain information regarding a business conducted under an assumed or fictitious name, or a designation not showing the names of the persons interested, is considered in the annotation following *Bolen v. Ligett*, L.R.A. 1916D, 355; and see references therein to annotation on related questions. L.R.A. 1917B.

ants with conducting their mercantile business under an assumed name without having filed in the office of the county court the statement required by statute. Affirmed.

The facts are stated in the opinion.

Messrs. M. M. Logan, Attorney General, and D. O. Myatt, Assistant Attorney General, for appellant:

The mere use of the surname is not sufficient to support the provisions of § 199b of the Kentucky Statutes.

*North v. Moore*, 135 Cal. 621, 67 Pac. 1037.

Messrs. P. Sandidge and C. R. Hicks, for appellees:

Defendants, engaging in business under the firm name of "Ritchey & Son," were not engaged in business under an assumed name, did not violate § 199b of the Kentucky Statutes by failing to file the certificate in the clerk's office of the Cumberland county court as required by this statute.

*Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Castle Bros. v. Graham*, 87 App. Div. 97, 84 N. Y. Supp. 120, 180 N. Y. 553, 73 N. E. 1120; *Czatt v. Case*, 61 Ohio St. 392, 55 N. E. 1004.

*Settle, J.*, delivered the opinion of the court:

The object of the commonwealth in prosecuting this appeal is to obtain this court's construction of § 199b, Kentucky Statutes. The only provisions of the act necessary to be considered are contained in subsections 1 and 4, which are as follows:

"1. No person or persons shall hereafter

carry on or conduct or transact business in this state under an assumed name, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct or transact or intend to conduct or transact such business, a certificate setting forth the name under which said business is, or is to be conducted or transacted, and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the postoffice address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct, said business.

"4. This act shall in no way affect or apply to any corporation duly organized under the laws of this state, or any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall this act be deemed or construed to prevent the lawful use of a partnership name or designation, provided that such partnership name or designation shall include the true real name of at least one of such persons transacting business."

It appears from the record before us that the appellees, J. H. Ritchey and F. O. Ritchey, his son, have been for several years past, and are now, partners engaged in the mercantile business in Burkesville, Cumberland county, this state, under the style and firm name of "Ritchey & Son." The father and son alone compose the partnership, and are the only persons owning an interest in the business conducted by them. In April of the present year they were both arrested under a warrant issued by the judge of the Cumberland county court, which, in substance, charged them with the offense of conducting their mercantile business under an assumed name, style, or designation, without first having filed, as required by the statute *supra*, in the office of the clerk of the Cumberland county court, a statement setting out fully the name or style under which their business is conducted and the true or real full name or names of the person or persons owning or conducting it, with the postoffice address of such person or persons.

The trial of appellees under the warrant occurred in the Cumberland quarterly court and before the county judge, to whom the case was submitted upon a demurrer filed by appellees to the warrant and an agreed statement showing all the facts as to themselves, their business, and in what name the

business is conducted, as stated above, and, in addition, an admission by appellees that they had never filed in the office of the county court clerk the written statement which the warrant alleged to be necessary and required by the statute in question. By the judgment rendered the quarterly court overruled appellees' demurrer to the warrant, declared them guilty of the offense charged therein, and imposed upon each of them a fine of \$25. Appellees took an appeal from that judgment to the Cumberland circuit court, in which court a trial by jury was waived, and the case again submitted to the court upon the demurrer to the warrant and the same agreed facts. The trial resulted in a judgment sustaining the demurrer and dismissing the warrant. From that judgment the commonwealth, as previously stated, has appealed.

It will be observed that the offense defined by this statute is the carrying on, conducting, or transacting business under an assumed name, or under any designation, name, or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting the business, without first having filed in the office of the county court clerk of the county in which the business is conducted a certificate setting forth the name under which the business is to be conducted and the true or real full name or names of the person or persons owning or conducting the business and their postoffice address. Obviously the object of the statute is to fix the identity of the person or persons owning and conducting the business, that the public doing business with them may know with whom they are dealing and become advised as to their financial ability and commercial standing. The question here presented is whether J. H. Ritchey and F. O. Ritchey, father and son, by engaging in business as partners under the firm name of Ritchey & Son without filing in the county clerk's office the certificate referred to, are violating the provisions of the statute.

To sustain a prosecution against a partnership for a violation of the statute, it must be established that they are conducting the business under an assumed name. That fact is not made to appear from the record in this case. No part of this firm name is assumed or fictitious. The name "Ritchey" is the real or true name of each of the members composing it. In adopting the style "Ritchey & Son" as a firm name, appellees gave the world notice that the firm is composed of two persons each of the name of Ritchey, as certainly as if the firm name were Ritchey & Ritchey; and the style Ritchey & Son indicates that there are but two members of the partnership, the first

being the father and the last his son. There is not shown to be any other Ritchey & Son engaged in the mercantile business at Burkesville; therefore the surname Ritchey, followed by the words "& Son," as fully established the identity of the partners composing the firm as would the words "Ritchey & Ritchey" and the addition of the initials of the Christian name of each of them.

Subsection 4 of the statute expressly exempts from its operation any partnership name or designation that includes the true real name of at least one of the persons constituting the firm and conducting the business. So if, as well argued by counsel for appellees, the firm were composed of J. H. Ritchey, W. C. Smith, and O. C. Jones, and they were doing business under the firm name of Ritchey Mercantile Company, such a designation would exempt the firm from the operation of the statute. The surname "Ritchey" here used is equally applicable to each member of the firm, and as fully identifies the personnel of the partnership as if the Christian name of each of the partners were also given.

Although the question here involved has never been before this court for decision, it has been passed on in numerous other jurisdictions in construing similar and in some instances identical statutes. Thus, in Pen-

dleton v. Cline, 85 Cal. 142, 24 Pac. 850, it was held that a firm name showing the surnames only of the partners is not "a fictitious name nor a designation not showing the names of the partners." In Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566, it was held that, where the surname of all the members of the firm is Guiterman, the firm name of Guiterman Brothers is not a fictitious name, nor one not showing the names of the partners, within the meaning of § 3280, Civil Code of 1895, of that state (Rev. Codes, § 5504). In Castle v. Graham, 87 App. Div. 97, 84 N. Y. Supp. 120, it was held that the name "Castle Brothers" is not an "assumed name," nor one "other than the real name or names of the individual or individuals conducting or transacting the firm business;" and to the same effect is the opinion in Czatt v. Case, 61 Ohio St. 392, 55 N. E. 1004. Our attention has been called to no case which can be said to conflict with those referred to.

In the light of the above authorities it is our conclusion that the statute in question was correctly construed by the Circuit Court. Therefore its judgment dismissing the prosecution and discharging appellees is affirmed, and this opinion is certified to that court as the law of the case.

#### KENTUCKY COURT OF APPEALS.

WILLIAM R. HILL, by Next Friend, Appt.,  
v.

J. R. POINDEXTER, Impleaded, etc.

(171 Ky. 847, 188 S. W. 851.)

Master and servant — injury by leased machine — liability.

The owner of a steam roller is not liable for injury caused by the fright of a horse due to its operation while it is in possession of a municipality to which he has leased it, and which has agreed to pay the

wages of the servants operating it, and the cost of the fuel necessary to its operation. For other cases, see *Master and Servant*, I. b, in Dig. 1-52 N. S.

(November 1, 1916.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Harrison County sustaining a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

Note. — The general question, which of two or more persons is the master of a third, is considered at length in the note to *Hardy v. Shedden Co.* 37 L.R.A. 33. The special phase of that question which is presented by the question as to who is responsible for the acts of a driver furnished with a hired vehicle is treated in the notes to *Frerker v. Nicholson*, 13 L.R.A. (N.S.) 1123; *Burns v. Michigan Paint Co.* 16 L.R.A. (N.S.) 816; *Morris v. Tredo*, 25 L.R.A. (N.S.) 33; and *Ash v. Century Lumber Co.* 38 L.R.A. (N.S.) 973. For other phases of the general question consult the Indexes to L.R.A. Notes under the title, "Master and Servant," subtitle, "When the relation exists." And see also the title, "Automobiles." L.R.A. 1917B.

If the persons who were operating the roller had been held *pro hac vice* to be the servants of the defendant, the question might have arisen whether, as a contractor with the city, he would have been entitled to the latter's immunity from liability for damages. On this question, see the annotation to *O'Connell v. Merchants' & P. Dist. Tele. Co.* L.R.A. 1916D, 511, on the right of a contractor with the public to immunity which the latter enjoys from liability for damages; and in this connection see also the annotation to *Schneider v. Cahill*, 27 L.R.A. (N.S.) 1008, and *Ockerman v. Woodward*, L.R.A. 1916A, 1006.

Messrs. B. F. Graziani and T. E. King for appellant.

Messrs. C. M. Jewett and M. O. Swinford, for appellee:

The servants in charge of the roller and operating it at the time of the accident were the special agents or servants of the city of Cynthiana, and not the servants of the appellee, Poindexter.

*Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Messmer v. Bell & C. Co.* 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; *Ballard & B. Co. v. Lee*, 131 Ky. 412, 115 S. W. 732; *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218; *Houseman v. Philadelphia Transp. & Lighterage Co.* 141 Fed. 385; *McComb v. Baskerville*, 20 S. D. 353, 106 N. W. 300; *Samuelian v. American Tool & Mach. Co.* 167 Mass. 12, 46 N. E. 98, 1 Am. Neg. Rep. 447.

The court acted properly in instructing the jury that Coons was not the servant of appellee, Poindexter, for there is no conflict of testimony on that point and the evidence did not warrant its submission to the jury.

*Central Consumers Co. v. Booker*, 32 Ky. L. Rep. 794, 107 S. W. 198; *Western U. Tele. Co. v. Teague*, 134 Ky. 601, 121 S. W. 484; *Clark v. Young*, 146 Ky. 377, 142 S. W. 1032.

At the time of the accident the city of Cynthiana, in reconstructing the street, was performing a governmental function, and is therefore not liable for any negligence; neither would appellee, Poindexter, be liable for damages even if he were an independent contractor.

*Danville v. Fox*, 142 Ky. 476, 32 L.R.A. (N.S.) 636, 134 S. W. 883; *Ockerman v. Woodward*, 165 Ky. 752, L.R.A.1916A, 1005, 178 S. W. 1100; *Schneider v. Cahill*, — Ky. —, 27 L.R.A. (N.S.) 1009, 127 S. W. 143.

Clay, C., filed the following opinion:

Plaintiff, William R. Hill, an infant seven years of age, suing by his next friend, Riley B. Hill, brought this suit against J. R. Poindexter, Harold Poindexter, and the city of Cynthiana to recover damages for personal injuries. The city's demurrer to the petition was sustained. As to the defendant J. R. Poindexter, a trial was had, which resulted in a verdict and judgment in his favor. From that judgment, plaintiff appeals.

In March, 1913, the board of council of the city of Cynthiana passed a resolution providing for the reconstruction of Main street under the supervision of the city engineer. The committee, through its chairman, rented a steam roller from J. R. Poindexter, which was placed in charge of J. D. Coons as engineer and Obe Terry as fireman. L.R.A.1917B.

A pony which was being driven by plaintiff's mother took fright and ran away. Plaintiff, who was in the pony cart, was thrown out and severely injured. According to Mrs. Hill's testimony, she saw the roller when some distance away. It was moving in the same direction she was going. She followed behind the roller, thinking that when it reached the next street it would either continue on Main street or turn out of her way on Pleasant street. The roller, however, was reversed and began to back towards her. When the machine was about 60 feet away the pony began to show evidence of fright and shied to the west side of the street and stopped. At that time the fireman Terry seemed to be looking directly at her. As the roller continued to approach, the pony showed increased signs of fright and finally bolted and ran away. The evidence for defendant is to the effect that the pony never became frightened until it became even with or it passed the roller. The roller was immediately brought to a standstill, and it was then too late to stop the pony.

In its instructions to the jury the trial court assumed that Terry was the servant of J. R. Poindexter, and authorized a recovery by plaintiff if the jury believed from the evidence that Terry knew, or by the exercise of ordinary care could have known, of the pony's fright in time to have stopped the roller and prevented the accident, and failed to use ordinary care to do so. The jury were also told that Coons was not the servant of Poindexter, and that they could not find for plaintiff on account of his negligence, if any. It is insisted that a recovery should have been authorized not only for the negligence of Terry, but also for the negligence of Coons, and that the instructions given by the court were therefore erroneous. Clearly the case against Poindexter turns on whether or not Terry and Coons, the men in charge of the roller, were, at the time of the accident, Poindexter's servants or the servants of the city. The substance of the evidence on this point is as follows: Poindexter rented the roller to the city for \$6 per day, the city to furnish fuel and water and to pay the men for running it. Prior to that time Terry had been in Poindexter's employ and had operated the roller for some time. Coons had not been in Poindexter's employ, but was in the employ of a blacksmith. As he was a good engineer, it was suggested that he be engaged to take charge of the engine on that occasion. The work of reconstruction had been previously ordered by resolution of the general council. The work was to be under the supervision of the city engineer. No plans or specifications were provided for the work. Terry and

Coons brought the machine to Main street and reported to the city engineer. He told them what to do and how to do it. They were at all times subject to his directions and control.

In our opinion the facts of this case bring it within the rule announced in *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605. There a railroad company had rented to a bridge company its engine, engineer, and its fireman. While doing the business of the bridge company the plaintiff was injured through the negligence of the engineer. It was held that the railroad company, the owner of the engine, and the original employer of the engineer were not liable for the injury. In reaching this conclusion the court, speaking through Judge Taft, said: "On this state of facts we are clearly of the opinion that the court was right in holding that the railway company was not responsible for the acts of the engineer and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company. The question is one of agency. The result is determined by the answer to the further questions. Whose work was the servant doing? and under whose control was he doing it? The railway company had simply lent its general servants to become special or particular servants of the bridge company, had for the time parted with control over them, and was not responsible for their acts while in the service and under the control of their temporary master."

Among the cases cited to sustain this view are the following: *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629, 63 L. J. Q. B. N. S. 25, 4 Reports, 317, 68 L. T. N. S. 512, 41 Week. Rep. 455, 57 J. P. 583; *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188. In the first case mentioned above the defendants contracted to lend to a firm who were engaged in loading a ship at their wharf, a crane, with a man in charge of it. The man in charge received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. Plaintiff, who was a servant of the wharfingers, was struck by the crane and injured, by reason of the negli-

gence of the man in charge of it, and sued the defendants on the ground that the negligence was the act of their servant. It was held that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him in the work in which he was engaged, they were not liable for his negligence while so employed. In delivering judgment Lord Esher said: "In this case the crane and the man to work it were lent by the defendants to Jones & Company for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and, in consequence, anyone was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders, and under the entire and absolute control, of Jones & Company. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Company; and if they saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority, but there is authority for it, without going back to an earlier date, in the case of *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263."

Judgments were also delivered by Lord Justices Lindley and Bowen, who followed the same line of reasoning. A different rule applies in what is known as "carriage cases." The reason for this distinction is pointed out by Lord Justice Bowen in *Donovan v. Laing, W. & D. Constr. Syndicate*, supra, in the following language: "The principal part of the argument for the plaintiff was founded on what may be called the carriage cases (*Laugher v. Pointer*, 5 Barn & C. 547, 108 Eng. Reprint, 204, 8 Dowl. & R. 550, 4 L. J. K. B. 309, and *Quarman v. Burnett*, 6 Mees. & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969), but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under

the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving, and if the coachman acts wrongfully, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and an injury occurs to anyone, the hirer may be liable, not as the master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane and their responsibility for his acts ceased for a time."

In the case under consideration Poindexter did not contract to grade the street. He was not present and did not assume control of the work. He merely let the roller to the city under a contract by which the city, in addition to paying him \$6 a day, agreed to

pay the wages of the men in charge of the roller, together with the cost of fuel and water. The accident did not happen from any defect in the roller. It did not happen while the roller was being conveyed to the place of injury. It happened after the men had reported to the city engineer, and were then subject only to his control and directions. Even though, in a general sense, Terry and Coons were the servants of Poindexter, he is not liable for their negligence occurring while they were engaged in the special service of the city and acting solely under its orders and direction. It follows that Poindexter was entitled to a peremptory instruction. Plaintiff was not prejudiced, therefore, by the trial court's refusal to authorize a recovery based on the negligence of Coons.

Judgment affirmed.

#### MONTANA SUPREME COURT.

MICHAEL HERLIHY, Exr., etc., of Dennis Herlihy, Deceased, Resp't.,  
v.

DAN J. DONOHUE et al., Appts.

(52 Mont. 601, 161 Pac. 164.)

**Militia — personal liability for destruction of property.**

1. Militia officers called to suppress an insurrection are personally liable for destroying without hearing or adjudication the stock of a saloon keeper for neglecting to obey an order to keep his saloon closed between specified hours, where there is nothing to show necessity for such destruction, such as a threat of the rioters to break into the building to secure the liquor, so that its destruction was necessary to prevent the excesses which might follow the free access of disorderly persons to it.

*For other cases, see Militia, in Dig. 1-52 N. S.*

**Same — liability of subordinate officers.**

2. Subordinate militia officers are not personally liable for obeying an order of their superior to destroy a stock of liquor of one who neglected to obey an order to close his saloon between certain hours, if the order might have been justified under certain circumstances.

*For other cases, see Militia, in Dig. 1-52 N. S.*

(November 10, 1916.)

**A** PPEAL by defendants from a judgment of the District Court for Silver Bow

**Note.** — The civil and criminal responsibility of soldiers and militiamen is considered in the note to *Franks v. Smith*, L.R.A.1915A, 1141. L.R.A.1917B.

County in plaintiff's favor in an action brought to recover damages for alleged wrongful destruction of plaintiff's property. Affirmed against defendant Donohue.

The facts are stated in the opinion.

Messrs. J. B. Poindexter, Attorney General, W. H. Poorman, Assistant Attorney General, Jesse B. Roote, and H. C. Hopkins for appellants.

Messrs. M. J. Doepker, Edwin M. Lamb, and Maury, Templeman, & Davies, for respondent:

Defendants were liable to plaintiff, there being no necessity for the destruction of his property.

*McLaughlin v. Green*, 50 Miss. 465; *Fluke v. Canton*, 31 Okla. 718, 123 Pac. 1049; *Franks v. Smith*, 142 Ky. 232, L.R.A.1915A, 1141, 134 S. W. 484, Ann. Cas. 1912D, 319; *Ex parte Milligan*, 4 Wall. 2, 125, 18 L. ed. 281, 297; *Re McDonald*, 49 Mont. 454, L.R.A.1915B, 988, 143 Pac. 947, Ann. Cas. 1916A, 1166; *O'Shee v. Stafford*, 122 La. 444, 47 So. 764, 16 Ann. Cas. 1163; *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190; *Meadows v. Gulf, C. & S. F. R. Co.* 48 Tex. Civ. App. 466, 107 S. W. 83; 2 Hare, Am. Const. Law. pp. 760, et seq. p. 906, chap. 41; *Hogue v. Penn.* 3 Bush, 663, 96 Am. Dec. 274; *Lake Shore & M. S. R. Co. v. Felton*, 43 C. C. A. 189, 103 Fed. 227.

**Holloway, J.**, delivered the opinion of the court:

On September 1, 1914, the governor of this state issued a proclamation declaring the county of Silver Bow in a state of insurrection. A portion of the organized militia under the command of Major Dan J. Donohue, with William Morse and Wade Gobel,

subordinate officers, was ordered to the scene of the trouble for the declared purpose of restoring peace and good order and rehabilitating the civil authority in that county. Upon taking command of the troops, Major Donohue issued an order, closing saloons and other places where intoxicating liquors were for sale. This order was thereafter modified so as to permit such places to be open for business from 8 A. M. until 7 P. M. daily. On September 19th Major Donohue ordered Moree, Gobel, and certain enlisted men to take from the saloon of Dennis Herlihy the stock of liquors therein and destroy the same, and, the order having been executed, this action in trespass was brought to recover actual damages to the amount of the value of the property destroyed, and punitive damages in the sum of \$1,000.

The complaint alleges the ownership and value of the property, the trespass and destruction of the property, and that the defendants acted wrongfully and with malice. The answer consists of a general denial and certain affirmative allegations, which set forth the proclamation of the governor, the original and amended order by the commanding officer, and allege that the plaintiff, Dennis Herlihy, while the amended order was in full force and effect, and with knowledge of such order, wilfully violated the same by opening his saloon and dispensing intoxicating liquors within the prohibited hours on September 17th; that at the time there was great disorder in Silver Bow county; that the commanding officer "had reason to believe and to expect that certain of the insurrectionists in said county, and law breakers therein, would cause riots to occur, and do violence to both property and human life; that, in view of these facts, said commanding officer of said military forces believed that it was imperatively necessary to forbid the sale or distribution or giving away of intoxicating liquors later than 7 o'clock in the evening and before 8 o'clock in the morning; and, in order to prevent the plaintiff herein from furnishing liquors to persons within the hours during which persons were forbidden to sell or furnish liquors to others, the said commanding officer, with certain of his subordinate officers and soldiers, destroyed the said stock of liquors belonging to the plaintiff herein as a necessary measure to prevent drunkenness, breaches of the peace, and rioting, and as an example to other retail liquor dealers, to prevent them, as well as the plaintiff herein, from either selling or giving away intoxicating liquors later than 7 o'clock in the evening and before 8 o'clock in the morning."

The reply admits the official character of L.R.A.1917B.

each of the defendants; admits that the proclamation, the order, and amended order were issued; that the appealing defendants destroyed the property in question, and denies all other facts pleaded by way of defense. After issues were joined, but before trial, Dennis Herlihy died, and the executor of his last will was substituted as a party to the action. Upon the trial plaintiff abandoned his claim for punitive damages, made out a prima facie case in other respects, and called Major Donohue as a witness to prove the destruction of the property. On cross-examination counsel for defendants sought to prove the facts pleaded in the answer and denied by the reply, but the offered evidence was excluded as not within the range of proper cross-examination. In their case in chief, defendants again offered the same character of evidence, but it was objected to upon the following, among other, grounds: "That there is no plea in the answer that the destruction of the property or any of the property was at all necessary to prevent the increasing or spreading out of the insurrection or to aid in suppressing any insurrection."

The objection was sustained, and the evidence was excluded. The court dismissed the action as to certain other defendants originally joined, and directed a verdict in favor of plaintiff and against these appealing defendants, leaving to the jury for determination the amount of compensatory damages only. From a judgment entered upon a verdict for plaintiff, this appeal is prosecuted. The correctness of the trial court's ruling in excluding defendants' offered evidence is the question presented for review.

1. The right of a person to acquire, hold, and protect property, to be secure in his possession of it against unreasonable seizure, and to retain it until deprived of it by due process of law, is, as among English-speaking people, as old as the common law itself. Its origin antedates by many years the guaranty contained in Magna Charta. The right itself was the inheritance of our people who inhabited the territory acquired from Great Britain at the close of the Revolution, and was adopted by the people of the territory of Montana by its first legislative assembly, and was continued in force thereafter. It is now embodied in the Bill of Rights (article 3 of our state Constitution). When, therefore, plaintiff alleged and proved his ownership of the property, its destruction by these defendants without his consent, and his damages consequent upon that act, he made out a prima facie case. Indeed, in the light of the pleadings, little proof was required from plaintiff, for by their admission of plaintiff's ownership and



their destruction of the property, defendants rendered themselves liable in nominal damages at least, unless they could offer legal justification for their act. The answer, considered in its entirety, must be viewed as in the nature of a confession and avoidance,—an admission of the destruction of private property and an attempt to justify it.

That it is possible for a set of circumstances so to combine as to present a legal justification for the act of a public officer in destroying private property against the will of the owner, and leaving the owner remediless, cannot be gainsaid. The contention made in the trial court and here is that, though these defendants might possibly have set forth facts sufficient to constitute a defense, they failed to do so; in other words, that the facts pleaded do not constitute a justification for the destruction of plaintiff's property. That a defense of this character must be specially pleaded was the rule at common law. It is also the rule in most of the states where the Code system prevails, and in this jurisdiction by statute. Subdivision 2, § 6540, Revised Codes.

Let it be conceded in the first instance that the order of Major Donohue, closing the saloons from 7 P. M. until 8 A. M. daily, had the force and effect of a statute, and that for a violation of that order any reasonable punishment might have been inflicted, still we cannot concede to the organized militia, or to any department of our government, or to any function of government, the right to convict and punish without notice, a hearing, or an adjudication. Before any punishment could be inflicted upon Herlihy, notice of the charge against him, an opportunity for him to prepare and present his defense, if any he had, and an adjudication of his guilt by some competent tribunal, were indispensable. It is nowhere contended that Herlihy pleaded guilty, while the charges preferred against him in the answer are denied in the reply. The answer fails to allege that Herlihy was accused, notified, tried, or convicted before his property was confiscated; and, in the absence of these necessary allegations, the question of the extent of the punishment which might have been inflicted does not arise. Under this answer the destruction of the property cannot be justified as a penalty imposed for a violation of the order. Neither can it be justified as "a military necessity." The stock of liquors was not needed for, nor devoted to, the use of the troops. A state of war did not exist, and the destruction of the property was not necessary to prevent it falling into the hands of the enemy.

L.R.A.1917B.

The defense must rest upon the theory that the order was a reasonable and necessary police regulation, and the destruction of the property a valid exercise of the state's police power. The order in question as amended would read as follows: "(5) All saloons and places where intoxicating liquors are sold at retail as a beverage will be closed at once and kept closed (except from 8 A. M. until 7 P. M. daily) until further orders. The stock of liquors of any person or persons violating this rule will be destroyed and all violators severely punished."

By § 5, article 7 of the Constitution, the supreme executive power is vested in the governor, who is charged with the duty to see that the laws are faithfully executed. Section 6 provides the means available to the executive, when necessary, to execute the power or perform the duty devolved upon him: "The governor shall be commander-in-chief of the militia forces of the state, . . . and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion."

When the organized militia was called into the service of the state in 1914, it but performed the function of the strong arm of the executive, by which he could aid in executing the law or in suppressing the insurrection. Independently of the executive it had no power or authority, except possibly with reference to its own internal affairs. It acted as an executive agency, subject to the orders of the governor, and bound by the authority which he might lawfully exercise. The governor is at all times amenable to the Constitution and laws of the state. They are the charters of his powers, and in them he must find the authority for his official acts. While he may not exceed their bounds in any instance, he may invoke any remedy provided by them for the purpose whenever the exigencies of a particular case call for it. One of the instrumentalities, the use of which is sanctioned by the law for the preservation of peace and good order, is the police power of the state; and, while no court or text-writer has assumed to define with accuracy the limits of the power, it may be said generally that the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society. That the state may enforce a proper police regulation by the imposition of fine or imprisonment, or both, is conceded generally. That within the narrow limits of actual and

pressing necessity private property may be taken and destroyed for the public good scarcely admits of debate. The most common illustration of this is the demolition of a building to prevent the spread of a conflagration. But in every instance where such a right has been exercised and questioned, the decision upholding the right makes it clear beyond controversy that only the most overriding necessity will justify or excuse the officer ordering such destruction.

It is not alleged that the rioters in Butte were threatening or about to break into Herlihy's saloon to obtain intoxicating liquors, and that destruction of the stock was necessary to prevent the excesses which might reasonably be expected to follow the free access of disorderly disposed persons to the liquors. It is not pretended that the arrest and imprisonment of Herlihy and the closing of his place of business during the insurrection would not have been equally efficacious as a means of preventing drunkenness, disorder, or rioting. Under constitutional government such as ours, the destruction of private property without compensation to the owner must be the last resort, available only in the presence of imminent and overwhelming necessity which brooks no delay. In failing to allege facts sufficient to disclose such necessity, the answer fails to make out a justification for the trespass, and for this reason the offered evidence was properly rejected.

2. Upon the trial, evidence was introduced to the effect that defendants Morse and Gobel were concerned in the destruction of the property to the extent only that they obeyed the order of their superior officer. This was not controverted, and may be accepted as an established fact.

The circumstances under which a subordinate military officer may be acquitted for acts otherwise wrongful, upon the score that he merely obeyed a command from one over him in authority, have received much consideration. The authorities are not agreed upon the question presented here, and a review would be of little, if any, aid. To permit an inferior military officer to stop and question the validity of every command of his superior would at once destroy discipline, and convert an army into a debating society without a monitor or referee. The same Constitution which guarantees the security of life and property provides for organized military forces in this state. When our people adopted the Constitution with its reference to the militia, they must have had in contemplation militia organized, officered, and disciplined as such forces were

generally at the time. An army without discipline is a mob. The highest duty of the soldier is to obey, for upon obedience all discipline must depend. Necessity is the foundation for organized military forces, and to the extent that necessity requires it, obedience to orders is demanded. But necessity can never require obedience to an order manifestly illegal or beyond the authority of the superior to give, and therefore reason and common sense seem to justify the rule that the inferior military officer may defend his act against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority. If the order is one which the superior might lawfully make, the inferior cannot refuse obedience until he shall have investigated the surrounding circumstances and determined for himself that they justify the order in the particular instance. If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act, even though disobedience may subject the offender to punishment at the hands of a military tribunal.

In the present instance the order for the destruction of the property was one which Major Donohue might lawfully have made, if the circumstances of the case warranted it, and since it was valid on its face, the subordinate officers could not refuse obedience until they instituted and carried on their own investigation to ascertain whether the surrounding circumstances justified it. They could rely upon its apparent validity and justify their acts in obeying it. We believe the views expressed are in harmony with enlightened reason, and best serve the double purpose of securing private rights and protecting subordinate military officers in the execution of the duty which they may be called upon to perform.

The judgment against the defendant Donohue is affirmed. The cause is remanded to the District Court, with directions to enter judgment, dismissing the action as against defendants Morse and Gobel. The respondent may recover one half of his trial court costs and one half of his costs on appeal from the defendant Donohue. The defendants Morse and Gobel may recover from respondent one half of the trial court costs incurred by the appealing defendants, and one half of the costs incurred by appellants on appeal.

Brantly, Ch. J., and Sanner, J., concur.

**NORTH CAROLINA SUPREME  
COURT.**

EMMA GARLAND, Appt.,

v.

CAROLINA, CLINCHFIELD, & OHIO  
RAILWAY.

(— N. C. —, 90 S. E. 779.)

**Carrier — carrying passenger beyond destination — storm — proximate cause.**

A carrier which wrongfully carries a passenger beyond his station is not liable for injury due to his being caught in an unexpected storm while walking back to his home, at least, if he might have escaped the storm had he not stopped at the home of an acquaintance en route, or had he stayed there longer than he did.

*For other cases, see Proximate Cause, III. in Dig. 1-52 N. S.*

(December 6, 1916.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Yancey County in her favor in part only, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence in carrying plaintiff beyond her station. Affirmed.

The issues upon which the action was tried were as follows:

1. Did the defendant wrongfully carry the plaintiff by Forbes Station, as alleged?

Answer: Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: \$87.50.

The facts are stated in the opinion.

Messrs. Hudgins, Watson, & Watson for appellant.

Messrs. J. J. McLaughlin and Pless & Winborne, for appellee:

Defendant was not liable.

Cooper v. Southern Exp. Co. 105 N. C. 538, 81 S. E. 743; Hallman v. Southern R. Co. 169 N. C. 127, 85 S. E. 298; Smith v. Postal Teleg. Cable Co. 167 N. C. 254, 83 S. E. 475.

**Brown, J.**, delivered the opinion of the court:

The plaintiff testified that in September, 1915, she purchased a ticket from Erwin to Forbs, a flag station on defendant's rail-

way. The conductor took up her ticket, and slowed down at Forbs, but did not stop the train, in consequence of which plaintiff was carried to Toe Cane, 2½ miles from Forbs. She alighted from the train and walked to Forbs and crossed the river there and started home, carrying a heavy suit case. Her husband was to have met her at Forbs; but as the train did not stop, she failed to meet him. Plaintiff started home by a near path to her home 2 miles from Forbs. She carried the suit case as far as Wesley Deaton's and left it. She stopped there awhile, and then walked on to her home. She further testifies: "It was right pleasant when I got off at Toe Cane, but there came up a storm in the evening before I reached home."

She had then left Deaton's and was about 1½ miles from her home. It did not rain at all until after she left Deaton's. Plaintiff testifies that her body was wet, and that she suffered materially because of it. William Garland, the husband, testified that he was working at Wesley Deaton's; that he went to Forbs to meet his wife, but as the train did not stop, he returned to Wesley Deaton's to his work; that later in the day plaintiff came, bringing the suit case; that she went on home, leaving the suit case for him to bring home that evening.

The plaintiff requested the court to charge the jury that the plaintiff is "entitled to recover for the personal injury, inconvenience, annoyance, discomfort, and the physical effort incident to and flowing from defendant's failure in putting her off at her destination, and for the injury she suffered, if any of you find she suffered, by getting wet and carrying her suit case."

The court instructed the jury fully, but stated that plaintiff was not entitled to any damage for getting wet, and that they should not award plaintiff any damage on that account. To this charge the plaintiff excepted. This assignment of error is substantially the only question presented on this appeal. In actions founded on tort the wrongdoer is liable for all injuries resulting directly from the tort, whether they were in the contemplation of the parties or not. The rule laid down in Hadley v. Baxendale that the damage must be within the contemplation of the parties applies only to breaches of contract. But in torts the damages must be the legal and natural consequences of the wrongful act, and such as, according to common experience and the usual course of events, might have been reasonably anticipated. The legal proximate cause of all damage must be the tort. If the cause is remote in efficiency and does not naturally result from

**Note.** — As to measure of damages for carrying passenger beyond destination, see notes to Dalton v. Kansas City, Ft. S. & M. R. Co. 17 L.R.A.(N.S.) 1226, and Ft. Smith & W. R. Co. v. Ford, 41 L.R.A.(N.S.) 745; and see also Le Beau v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1917A, 1017. L.R.A.1917B.

the tort, it will not be considered as proximate. To be such it must be "a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 41, 50 S. E. 449; *Brewster v. Elizabeth City*, 137 N. C. 302, 49 S. E. 885.

Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." *Maxims*, Reg. 1.

No rule of damage embraces within its scope all the resulting consequences of a given act. Such a rule would be a serious hindrance to the ordinary affairs of life. The effect would be to impose a liability entirely disproportionate to the act committed, or to the failure to perform the duty assumed, as well as the compensation received therefor. There must be a limit, and the courts have set it at a point "where for the purpose of the law, a particular cause may be said substantially to have spent its force, and to have fallen into the great mass of circumstances which has ceased to be an active force." 1 *Sutherland, Damages*, 111b.

Therefore common carriers are held responsible only for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary. *Causa proxima, non remota, spectatur*. "Compensation is recoverable for consequential losses only when they are proximate. Consequences are natural and probable only when, according to common experience and the usual course of events, the effect of the wrongful conduct is to set in operation the intermediate cause; that is to say, when the intermediate cause was not independent." *Hale, Torts*, p. 213.

Following these well-settled principles, this court held that, though a carrier negligently delayed to forward goods delivered at its depot for shipment, it was not liable for the loss of the goods by fire, when it was not negligent in respect to the fire. *General Fire Extinguisher Co. v. Carolina & N. W. R. Co.* 137 N. C. 278, 49 S. E. 208. Likewise it is said that in case of delay by a carrier in the delivery of goods, whereby they are destroyed by flood, when the connection between the delay and the flood is merely accidental and fortuitous, the loss of the goods is a remote consequence of the delay. 1 *Sutherland, Damages*, § 119.

It is held in the Federal circuit court of appeals that where, by reason of delay in

constructing a vessel, it was crossing the sea at a later time than was intended, and was caught in a hurricane and destroyed, the loss of the vessel was a remote and unexpected consequence of the delay in construction. *De Ford v. Maryland Steel Co.* 51 C. C. A. 59, 113 Fed. 72.

A passenger was carried a short distance past his station on a dark night, and on leaving the train was misinformed by the conductor as to where he was. He soon discovered that he was south of a cross road he meant to take in going home instead of north of it, as he was told when he landed. In nearing a cattle guard en route home, his eyes deceived him, his foot slipped, and in trying to recover his balance, he fell into the culvert, which he supposed was farther off, and was seriously injured. Held that the carrier's negligence in carrying plaintiff past the station and in misinforming him was not the proximate cause of the injury, which was purely accidental, and he could not recover for it. *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744.

It was held by the Wisconsin court that, where a railway company carried a woman passenger beyond her destination, and she voluntarily and needlessly walked back instead of waiting for a returning train, the road was not liable for injuries sustained by her from exposure on her walk back, the damages not being the proximate result of the road's breach of duty. *Le Beau v. Minneapolis, St. P. & S. Ste. M. R. Co.* — Wis. —, L.R.A.1917A, 1017, 159 N. W. 577.

In *Elliott v. Norfolk Southern R. Co.* 166 N. C. 482, 82 S. E. 853, the plaintiff was carried beyond her station and compelled to alight at another station on a cold, snowy night, and remain at the depot for some time. There was no station house, as it had been burned down. In consequence of being carried beyond her own station and put off in the cold, sleet, and snow at a station without proper accommodation, and compelled to wait there some time, plaintiff was made ill and suffered serious injury. It was held that her injury was the proximate result of the carrier's negligence. The distinction between that case and this is too obvious to need discussion.

The sudden storm that caused plaintiff to get wet was an independent, intervening, and unexpected cause, and the act of God, for which defendant was in no way responsible. If she had not stopped at Deaton's, or if she had remained there longer, she might have escaped entirely. The negligence of the defendant did not set that independent cause in motion. It was one of these accidents against which human foresight can-

not provide, and was not the proximate result of the carrier's negligence.

As said by Chief Justice Cooley (Lewis v. Flint & P. M. R. Co. supra): "It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury

could have been charged to the defendant with precisely the same reason as now."

We are of opinion that the court properly excluded from the consideration of the jury the injuries sustained solely as the result of the thunderstorm. As there is no dispute as to the facts, and as only one deduction is possible to be drawn from them proximate cause thus became a question of law.

No error.

### NORTH CAROLINA SUPREME COURT.

J. W. BAILEY, Appt.,

v.

H. F. LONG.

(— N. C. —, 90 S. E. 809.)

**Hospital — negligence — death of wife — liability to husband.**

The owner of a private hospital, who, after undertaking to treat therein a woman with a broken hip, permits the room in which she is placed to be flooded with rain, causing her to contract pneumonia and die, is liable to her husband for the mental suffering and loss of society and services resulting to him therefrom.

*For other cases, see Hospitals, in Dig. 1-52 N. S.*

(December 13, 1916.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Burke County sustaining a demurrer to a complaint filed to recover damages for the death of plaintiff's wife, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Avery & Ervin, M. H. Yount, and D. L. Russell, for appellant:

Plaintiff is entitled to recover, not only actual damages for the loss of the services of his wife, but for mental anguish caused by seeing her suffer, and for the loss of her society and companionship.

Penn v. Western U. Teleg. Co. 159 N. C. 306, 41 L.R.A.(N.S.) 223, 75 S. E. 16; 13 Cyc. 41; Baker v. Bolton, 1 Campb. 493, 10 Revised Rep. 734; 1 Sedgw. Damages, 9th ed. 82.

Messrs. W. D. Turner and S. J. Ervin, for appellee:

An action for the recovery of damages on

**Note.** — The liability of a proprietor of a private sanitarium or hospital for negligence of nurse or attendant is discussed in the notes to Stanley v. Schumpert, 6 L.R.A. (N.S.) 306, and Broz v. Omaha Maternity & General Hospital Asso. L.R.A. 1915D, 334; and see series of notes there referred to as to liability of charitable institutions, including public hospitals. L.R.A.1917B.

account of the wrongful act, neglect, or default of another, which causes or results in the death of a party, can be instituted only by the personal representative of the decedent.

Howell v. Yancey County, 121 N. C. 362, 28 S. E. 362; Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873; Best v. Kinston, 106 N. C. 205, 10 S. E. 997; Bennett v. North Carolina R. Co. 159 N. C. 345, 74 S. E. 883; Hood v. American Teleg. & Teleph. Co. 162 N. C. 70, 77 S. E. 1096; Broadnax v. Broadnax, 160 N. C. 432, 42 L.R.A.(N.S.) 725, 76 S. E. 216; Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580.

All common-law rights of action growing out of personal injuries abate upon the death of the injured party, and all actions instituted for the recovery of damages on account of such injuries also abate.

Bolick v. Southern R. Co. 138 N. C. 370, 50 S. E. 689; Killian v. Southern R. Co. 128 N. C. 261, 38 S. E. 873; Harper v. Nash County, 123 N. C. 118, 31 S. E. 384; Scarlett v. Norwood, 115 N. C. 286, 20 S. E. 459; Hannah v. Richmond & D. R. Co. 87 N. C. 351; Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813; Rippey v. Miller, 33 N. C. (11 Ired. L.) 247; Strauss v. Wilmington, 129 N. C. 99, 39 S. E. 772; Morton v. Western U. Teleg. Co. 130 N. C. 299, 41 S. E. 484; Broom, Legal Maxims, 8th Ed. pp. 908-913.

Messrs. Spainhour & Mull also for appellee.

**Brown, J., delivered the opinion of the court:**

The cause of action, as stated in the complaint, upon demurrer, must, as to the facts alleged, be taken to be true. The facts alleged are substantially these: Plaintiff's wife was suffering with a broken hip, and taken to defendant's hospital at Statesville by the plaintiff for treatment. "The defendant not only undertook and contracted to attend and care for her in a proper and skilful manner as a physician and surgeon, but also undertook and contracted to provide for her a suitable and safe room in his said hospital, and to give her proper nura-

ing and attention while an inmate of his hospital."

The complaint further alleges that by reason of the defective condition and construction of defendant's hospital, and especially on account of the defective condition and construction of the windows of the room where plaintiff's wife was placed by defendant, the rains beat into the room to such an extent that the floor of the room was covered with water to a depth of more than 1 inch on several occasions while plaintiff's wife was a patient, and was allowed to remain so for the space of several hours, thus rendering the said room cold and damp, by reason of which the health of plaintiff's wife was greatly impaired, and on account of which she contracted a severe cold, which grew gradually worse, on account of the failure of the defendant to properly and skilfully treat, provide, and care for plaintiff's wife, which cold developed into pneumonia, from which she died on or about the 15th day of November, 1913.

That the unhealthy and improper condition of said room in which the sick wife of the plaintiff was placed by the defendant was due to the gross carelessness and negligent acts of the defendant, and his failure to have said room properly constructed and kept in repair for the purposes for which it was intended; that is to say, for the reception of sick patients while under treatment by said defendant in said hospital, and by reason of the careless and negligent acts and failure in duty of the defendant, as hereinbefore set out, this plaintiff has been greatly and seriously damaged and suffered great pain and mental anguish, as follows: (a) To his feelings and sympathies in witnessing the agony and suffering of his said wife, while lingering with such cold and pneumonia, and in the act and article of death, resulting therefrom. (b) In the loss to plaintiff of the society of his said wife, and the comfort, pleasure and happiness which he was accustomed to enjoy in the marital relations existing between them. (c) In the loss to plaintiff of the services of his said wife, who was in every way industrious, saving, and helpful to him in the management and conduct of his household affairs; the plaintiff by her death being left without any assistance and with no one to look after or care for the conduct of his domestic affairs.

The ground of the demurrer is that no cause of action is stated in the complaint that survived the death of the wife.

At common law the right of action for an injury to the person abated upon the death of the person injured, under the maxim "*Actio personalis moritur cum persona*." But causes of action accrued to those who

stood to the deceased in the relation of master, parent, or husband for recovery of damages for loss of service or society. In *Baker v. Bolton*, 1 Campb. 493, 10 Revised Rep. 734, Lord Ellenbrough held that the husband could recover for the loss of the wife's society, and the distress of mind the plaintiff had suffered on her account, from the time of the injury until the moment of her dissolution. "And," says Mr. Tiffany, "this distinction has been followed." Death by Wrongful Act, § 16, and notes.

It was further held in England in 1875, that when a passenger on a train was injured, and, after an interval, died in consequence, his personal representative might, in an action for breach of contract of safe carriage, recover the damages to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. It was subsequently held in *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 509, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784, by the Queen's bench that a prior recovery as administrator under Lord Campbell's Act was no bar to an action by such administrator to recover damages to intestate's personal estate by his inability to attend to his business from the time of the injury until death, as plaintiff sued in a different right in each case.

The supreme court of Michigan (*Hyatt v. Adams*, 16 Mich. 180) held that when death does not at once ensue, a person entitled to the services of the one injured may recover for the loss accruing between the injury and the death, and that such action is not barred by death.

It was again held in Kentucky, where a minor son was injured by a street car and subsequently died from the injury, that the father could recover all expenses incurred for the same, care in nursing, etc., and for the loss of service from the date of injury to death. In addition, we think plaintiff can recover damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom.

We see no reason why, if the husband can recover damages from a telegraph company for mental anguish for delay in delivering a telegram informing him of his wife's illness, he should not recover for the mental anguish occasioned by witnessing her suffering and death, against the alleged author of such suffering and death.

The demurrer is overruled, and the defendant will be allowed to answer.

Reversed.

## NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL.  
HENRY J. LINDE, Attorney General,  
et al.,

v.

FRANK E. PACKARD et al.

(— N. D. —, 160 N. W. 150.)

**Tax — constitutional exemption — self-execution.**

1. That portion of § 176 of the state Constitution which provides that "the legislative assembly shall, by a general law, exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," was addressed to the legislature, and not to the courts. Its terms looked forward to and required "ulterior action upon the part of the lawmaking branch of the government."

*For other cases, see Constitutional Law, I. a, 3, c, in Dig. 1-52 N. S.*

**Same — exemption of fraternal societies.**

2. The legislature did not exceed its constitutional powers by the enactment of subdivision 9 of § 2078 of the North Dakota Compiled Laws of 1913, which provided for the exemption from taxation of the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them for places of meeting and to conduct their business and ceremonies; provided, that such property is used exclusively for such charitable purposes.

*For other cases, see Taxes, I. f, 3, in Dig. 1-52 N. S.*

**Same — Masonic building.**

3. A building belonging to a Masonic organization, and devoted exclusively to Masonic use, the greater portion of said building being used for the place of meeting in which to conduct the business and ceremonies of various subordinate Masonic bodies, and a small portion thereof being occupied by the office of the Grand Secretary of the Masonic Grand bodies of this state, is exempt from taxation under the provisions of

Headnotes by CHRISTIANSON, J.

**Note.** — The effect of the fact that property otherwise exempt from taxation is devoted to purposes of a particular society is treated in notes to Widows' & Orphans' Home v. Com. 16 L.R.A. (N.S.) 829, and Re Wilson, 26 L.R.A. (N.S.) 696. Many cases cited in these notes involve property of Masonic bodies. Other related questions in relation to exemption from taxation are treated in annotations referred to in Indexes to L.R.A. Notes under the title, "Taxes," subdivision, "What taxable; exemptions." L.R.A.1917B.

subdivision 9 of § 2078, Compiled Laws, North Dakota, 1913.

*For other cases, see Taxes, I. f, 3, in Dig. 1-52 N. S.*

(November 14, 1916.)

**P**ROCEEDING to enjoin respondents from assessing and listing for taxation certain property belonging to relators and used for Masonic purposes. Writ issued.

The facts are stated in the opinion.

Messrs. Lawrence & Murphy, for relators:

In the absence of a constitutional provision specifically requiring all property to be taxed, the legislature has inherent power to exempt such property as it deems advisable for public need or welfare.

37 Cyc. 885; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 42, 8 N. W. 833; Gilman v. Sheboygan, 2 Black, 510, 17 L. ed. 306; Cooley, Taxn. 145; 1 Desty, Taxn. 124; Farris v. Vannier, 6 Dak. 191, 3 L.R.A. 713, 42 N. W. 31; Sumner County v. Wellington, 66 Kan. 590, 60 L.R.A. 855, 97 Am. St. Rep. 306, 72 Pac. 216; Francis v. Atchison, T. & S. F. R. Co. 19 Kan. 311; Ottawa County v. Nelson, 19 Kan. 237, 27 Am. Rep. 101; West Hartford v. Water Comrs. 44 Conn. 360; Wheeler v. Weightman, 96 Kan. 50, L.R.A.1916A, 846, 149 Pac. 982.

The legislature has the power to determine and define what institutions are charitable and what property is used exclusively for charitable purposes.

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Black, Const. Law, p. 71; 1 Kent, Com. 404; Sutherland, Stat. Constr. § 343; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 306, 23 N. E. 253; State ex rel. Clark v. Haworth, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 14 L.R.A. 570, 29 N. E. 595; Petersburg v. Petersburg Benev. Mechanic's Asso. 78 Va. 431.

Separate and apart from the use of the property, fraternal and beneficiary societies are charitable or benevolent societies within the meaning of constitutional and statutory provisions exempting such institutions from taxation.

Savannah v. Solomon's Lodge, 53 Ga. 93; Indianapolis v. Grand Master, G. L. 25 Ind. 522; Henderson v. Strangers Rest Lodge, 17 Ky. L. Rep. 1041, 17 S. W. 215; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Hibernian Benev. Soc. v. Kelly, 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 42 Pac. 3; Petersburg v. Petersburg Benev. Mechanics Asso. 78 Va. 431; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; Zable v. Louisville Baptist Orph-

ans' Home, 92 Ky. 89, 13 L.R.A. 668, 17 S. W. 212; Massachusetts General Hospital v. Somerville, 101 Mass. 319; Widows' & Orphans' Home v. Com. 126 Ky. 386, 16 L.R.A. (N.S.) 829, 103 S. W. 354; Cathedral of St. John v. Denver, 37 Colo. 378, 86 Pac. 1021; Brewer v. American Missionary Asso. 124 Ga. 490, 52 S. E. 804; Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675; Curtis v. Androscooggin Lodge, 99 Me. 356, 59 Atl. 518; Com. v. Y. M. C. A. 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522; Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921; Episcopal Academy v. Philadelphia, 150 Pa. 545, 25 Atl. 55; Burd Orphan Asylum v. School Dist. 90 Pa. 21; Gerke v. Purcell, 25 Ohio St. 229; Plattsmouth Lodge v. Cass County, 79 Neb. 463, 113 N. W. 167; Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427; Donohugh's Appeal, 86 Pa. 312; Saltonstall v. Sanders, 11 Allen, 470; Chamberlain v. Stearns, 111 Mass. 267; Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424; Norris v. Thomson, 19 N. J. Eq. 307; Suter v. Hilliard, 132 Mass. 413, 42 Am. Rep. 444; St. Joseph's Hospital Asso. v. Ashland County, 96 Wis. 636, 72 N. W. 43; Hinckley's Estate, 58 Cal. 457; State ex rel. Grand Lodge, A. F. M. v. Addison, 2 S. C. 499; Y. M. C. A. v. Douglas County, 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924; Hennepin County v. Brotherhood of Gethsemane, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595.

Messrs. George E. Wallace and F. E. Packard, for respondents:

All statutes exempting property from taxation must be strictly construed.

Bailey v. Magwire, 22 Wall. 226, 22 L. ed. 850; Indianapolis v. Grand Master, G. L. 25 Ind. 518; Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 360; National Council, K. L. S. v. Shawnee County, 63 Kan. 799; Wheeler v. Weightman, 96 Kan. 50, L.R.A. 1916A, 846, 149 Pac. 977; Lacy v. Davis, 112 Iowa, 106, 83 N. W. 784; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 388; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. ed. 1038; Petersburg v. Petersburg Benev. Mechanics Asso. 78 Va. 431; Book Agents of M. E. Church, South, v. Hinton, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; Baltimore v. Grand Lodge of Masons, 60 Md. 280; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940; Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; St. Louis

Lodge v. Koeln, 262 Mo. 444, L.R.A. 1915C, 694, 171 S. W. 329.

It is the use of the property itself, and not the use to which the pecuniary income or profit from the property is put, that determines whether or not it shall be exempt from taxation.

Parker v. Quinn, 23 Utah, 332, 64 Pac. 961; Cincinnati College v. State, 19 Ohio, 110; American Sunday School Union v. Philadelphia (American Sunday School Union v. Taylor) 161 Pa. 307, 23 L.R.A. 695, 29 Atl. 26; First M. E. Church v. Chicago, 26 Ill. 482; Orr v. Baker, 4 Ind. 86; Philadelphia v. Barber, 160 Pa. 123, 28 Atl. 644; Morris v. Lone Star Chapter, 68 Tex. 698, 5 S. W. 519; Cleveland Library Asso. v. Pelton, 36 Ohio St. 259; Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940; Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; Phi Beta Epsilon Corp. v. Boston, 182 Mass. 457, 65 N. E. 824; Amherst College v. Assessors, 173 Mass. 232, 53 N. E. 815; Salem Lyceum v. Salem, 154 Mass. 15, 27 N. E. 672; St. Louis Lodge v. Koeln, 262 Mo. 444, L.R.A. 1915C, 695, 171 S. W. 329; Mason v. Zimmerman, 81 Kan. 799, 106 Pac. 1005; Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632.

Under § 176 of the Constitution of North Dakota this property, in order to be exempted from taxation, must come clearly and specifically within the provision exempting property used exclusively for charitable purposes. An incidental charitable use will not suffice. It must be the paramount or predominant use to which property is put that governs.

Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369; Curtis v. Androscooggin Lodge, 99 Me. 356, 59 Atl. 515; Orono v. Sigma Alpha Epsilon Soc. 105 Me. 214, 74 Atl. 19; Orono v. Kappa Sigma Soc. 108 Me. 320, 80 Atl. 831; Mason v. Zimmerman, 81 Kan. 799, 106 Pac. 1005; St. Louis Lodge v. Koeln, 262 Mo. 444, L.R.A. 1915C, 694, 171 S. W. 329; Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; New England Theosophical Corp. v. Boston, 172 Mass. 60, 42 L.R.A. 281, 51 N. E. 466; State ex rel. Cunningham v. Board of Assessors, 52 La. Ann. 223, 26 So. 872; Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632; Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837.

Christianson, J., delivered the opinion of the court:

This is a proceeding against the state tax commission, the county auditor of Cass county, and the assessor of the city of



Fargo, to prevent them from assessing and listing for taxation certain property belonging to the relators. Four of the relators are separate and distinct fraternal corporations, and together constitute what is commonly known as the Scottish Rite Bodies of Fargo, North Dakota. The relators assert that they are constituent parts of the great body known as Freemasons; that the said Masonic order of which they are a part is a benevolent and charitable organization and institution, not organized for profit, but organized and existing in this state under and by virtue of the laws of this state relative to such organizations, and that the property sought to be assessed and listed for taxation is used exclusively for such charitable purposes, and is specifically exempted from taxation under the provisions of paragraph 9 of § 2078 of the 1913 Compiled Laws. The relators further assert that the state tax commission, under the alleged claim that the statute exempting relators' property from taxation is unconstitutional, have directed the city assessor to assess such property and the county auditor to place the same upon the tax rolls as taxable property, notwithstanding the provisions of the statute; and that, unless restrained from so doing, such officers will assess, and otherwise in all respects treat, such property as taxable; that the said state tax commission is endeavoring and threatens to require all other assessors and county auditors in the state to assess and cause taxes to be levied against all property of Masonic bodies throughout the state.

Respondents filed an answer wherein they deny that the property sought to be assessed is used exclusively for charitable purposes, and assert "that the paramount use to which the property of relators is put is that of a lodge, and that whatever charity is dispensed by relators is merely incidental, and that the dispensing of charity is not the object of the organization of Masonic bodies."

They further assert that paragraph 9 of § 2078, 1913 Compiled Laws, is unconstitutional and void for the reason "that it attempts to grant exemption from taxation not contemplated by § 176 of the Constitution, and is broader and more comprehensive than said constitutional provision, and is therefore unconstitutional as violating said § 176 of the state Constitution."

Relators request that we assume original jurisdiction for the reasons, among others, that the questions involved affect directly every organization whose property is declared to be exempted by the provisions of the statute in question; that the questions

involved affect directly not only thousands of citizens, but practically every taxing district of the state of North Dakota; that the taxing officers mentioned are asserting official power, not by virtue of, but contrary to, the laws established by the lawmaking body of the state; that such taxing officials have arrogated to themselves sovereign rights, and thereby infringed upon the rights and prerogatives of each and every citizen of the state. The jurisdiction of the court has not been challenged. The attorney general of the state, who appears as one of the relators, joins in the application requesting this court to assume jurisdiction, and the member of the state tax commission who appears as attorney for the respondents has filed a written request that this court assume such jurisdiction. While we are not wholly satisfied that the case presented is one in which we are required to, or necessarily should, exercise original jurisdiction, still in view of all the facts, including the request of the chief law officer of the state and the request of all parties to the proceedings, including the state tax commission, and as it is clearly a matter which affects directly or indirectly every taxpayer in the state, and involves the question of legislative power to deal with the subject of exempting property from taxation, we have decided to assume jurisdiction of the controversy.

It is well settled that one who is not prejudiced by the enforcement of a legislative enactment cannot question its constitutionality or obtain a decision as to such invalidity on the ground that it impairs the rights of others, and "it has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character," although "an exception to this rule has been recognized in some jurisdictions in the case where the jurisdiction of the court itself depends on the validity of a statute, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not actually interested in the case before the court" (6 R. C. L. p. 90).

And under the principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who has no interest in defeating it, it is generally held that a public officer who would not be personally liable for his acts has no such interest as entitles him to question the constitutionality of the statute. 6 R. C. L. p. 92. But there are certain well-recognized exceptions to this rule, as where

the officer, in the discharge of his duties, is required to determine which of two different superior boards (one acting under a constitutional and the other under an unconstitutional statute), issuing conflicting orders, has authority to direct him in the discharge of his official duties. *State ex rel. Miller v. Leech*, — N. D. —, 157 N. W. 492.

Whether the respondents in this case have sufficient interest to assert the unconstitutionality of the statute exempting realtors' property from taxation is a doubtful question, and one upon which we express no opinion, as the sufficiency of the answer setting forth this defense (while referred to on oral argument) has not been challenged by motion, demurrer, or reply, and all parties virtually concede that the prime and controlling question in this case is whether the statute under consideration is constitutional, and this is in reality the only question that has been properly argued and submitted to this court.

The sole question presented for our determination in this case, therefore, is whether subdivision 9 of § 2078 of North Dakota 1918 Compiled Laws is constitutional. The state Constitution as originally adopted provided that "laws shall be passed taxing by uniform rule all property according to its true value in money, but the property of the United States and the state, county and municipal corporations, both real and personal, shall be exempt from taxation; and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes. . . ." Const. § 176.

In 1897 the legislature, in compliance with the directions contained in the above-quoted constitutional provision, enacted legislation relating to revenue and taxation, and therein provided that "all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institution, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to, such institutions," should be exempt from taxation. Laws 1897, chap. 126, § 5, subdiv. 6.

The Act of 1897 as well as § 176 of the Constitution was construed by this court in *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577. In that decision this court held that the clause in § 176 of the state Constitution, that "the legislative assembly shall, by a general law, exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," was not self-executing, but "lays a command upon the legislative assembly,

and requires that body, by general law, to exempt certain property from taxation, among which is property used exclusively for charitable purposes." The court further held that the provisions of the act did not apply to property which was owned and operated by an individual, but that only property belonging to an institution was within the provisions of the statute. In disposing of the contention that the statute, if so construed, would be unconstitutional, the court said: "It may possibly have been the legislative purpose, in enacting the general exemption law embraced in § 1180, *supra*, to fully comply with this constitutional mandate; but we are not at liberty to indulge in mere conjecture as to what was intended. Our duty is to fairly construe the language actually employed by the legislature, and from it determine the legislative intent. In doing so, we reach the conclusion, as has been seen, that the legislature did not intend to go as far as the language of the Constitution required it to go. The legislature, by its language, has not exempted from taxation any and all property devoted exclusively to charitable uses, but has, on the contrary, only exempted so much thereof as belongs to 'institutions' which dispense public charity. But, in exempting only a part of the property which is or may be devoted to charitable uses, there has been no violation of any inhibition found in the organic law. The Constitution required the legislature to exempt what it has exempted; but the law making body has not, perhaps, gone to the full extent required by the very broad terms employed in the clause we have quoted from § 176 of the state Constitution. It is certainly clear to our minds that, notwithstanding the fact that the legislative branch has not seen fit to execute the constitutional mandate to the full measure intended, such omission cannot operate to annul a statute which does execute the mandate, but only in part."

The opinion in *Engstad v. Grand Forks County*, *supra*, was filed on November 22, 1900. The legislative assembly which convened in January, 1901, amended the law construed in *Engstad v. Grand Forks County*, *supra*, and incorporated therein subdivision 9 (the provision involved in this proceeding), which provides for the exemption from taxation of "the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them for places of meeting and to conduct their business and ceremonies; provided, however, that such property is used ex-

clusively for such charitable purposes." Laws 1901, chap. 152.

The legislative enactment of 1901 contained an emergency clause, declaring that an emergency existed "in that there is no exemption from taxation of the class of property mentioned in subdivision 9," and that therefore the act should take effect and be in force from and after its approval. The same legislature also enacted laws providing that "associations known as lodges, chapters, posts, encampments, councils, commanderies, consistories and other similar organizations, having a seal and working under a charter issued by some grand or sovereign body of a like character to themselves, of the fraternities or associations commonly known as the various organizations of Freemasons, Independent Order of Odd Fellows, Grand Army of the Republic, Knights of Pythias and other similar benevolent or charitable fraternities or associations, not organized for profit or for fraternal insurance, located in this state, shall, from and after the taking effect of this article, be deemed to be corporations, notwithstanding no articles of incorporation have been filed, and no charter granted by this state. . . . Any such association has power: . . . 9. To apply its funds and property to charitable and benevolent objects pursuant to the purpose for which such association is organized." Laws 1901, chap. 89, §§ 1, 6, §§ 5025, 5030, Comp. Laws 1913.

The legislative intent expressed in the above-quoted statutory provisions seems too plain for doubt. The legislature declared the various Masonic bodies and other like organizations to be "charitable associations." The legislature further declared that the property used by such bodies for places of meeting and to conduct their business and ceremonies is used for charitable purposes. The language used by the legislature is so plain and the legislative purpose and intent so manifest that no doubt can exist. But if the meaning of the statute be deemed doubtful, we are reminded that the foregoing provisions have remained part of the statute law of this state since 1901, although subsequent legislatures have made certain changes in the law designating the property declared to be exempt from taxation. That the same legislature which created the state tax commission also amended and re-enacted the law classifying the property declared to be exempt from taxation, and the provision involved in this controversy (subdiv. 9, § 2078, Comp. Laws 1913) was re-enacted without any modification whatever. Laws 1911, chap. 290. It was again re-enacted L.R.A.1917B.

by the legislature in 1913. Laws 1913, chap. 280.

The provision, therefore, has remained a part of the statute law of this state for fifteen years. During this time it has not only been treated as valid by the various administrative officers and boards, but has received the approval of three different legislative assemblies and three different governors. In fact, as we have already stated, it was re-enacted by the same legislative assembly and approved by the same governor, who respectively enacted and approved the law creating the state tax commission itself. The contemporaneous construction placed thereon by the various administrative officers and boards is entitled to great weight, and the acquiescence in and approval of such construction by subsequent legislative assemblies and chief executives ought to dispel all possible doubt as to the legislative intent. 36 Cyc. 1140, 1142; Lewis's Sutherland, Stat. Constr. 2d ed. §§ 472 et seq.

The state tax commission, however, contends that the Masonic bodies are not charitable associations, and that property used for their places of meeting and to conduct their business and ceremonies is not used for charitable purposes; that it was beyond the constitutional power of the legislature to so declare, and that consequently the provision under consideration is unconstitutional. The relators, on the other hand, contend that the Masonic bodies are charitable associations, and that property used exclusively for the Masonic purposes designated in the statute is in fact used exclusively for charitable purposes; that the legislature is vested with power to determine what property is used exclusively for charitable purposes, and that the legislature in exercise of this power has determined that the property of Masonic organizations, when used for places of meeting and to conduct their business and ceremonies of such organizations, is used exclusively for charitable purposes.

Much space has been devoted in the briefs of the respective counsel to, and many authorities have been cited upon, the question of what is meant by the word "charity" and its derivative "charitable." The word "charity," like many other words, has both a lay meaning and a legal meaning. 5 R. C. L. 291. The principle of charity was recognized, even before the adoption of Christianity, by the Roman law. 6 Cyc. 898. And while certain ingredients of the Roman law were incorporated into the common law of England, there was also incorporated with them the ecclesiastical element introduced with Christianity. 5 R. C. L. 296; 6 Cyc. 898. And the term "char-

ity," as used in our law, "no doubt takes shades of meaning from the Christian religion, which has largely affected the great body of our laws." Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427; First M. E. Church v. Donnell, 110 Iowa, 5, 46 L.R.A. 858, 81 N. W. 171; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450. And "the oft-recurring prayer, 'This do in work of charity,' in the earliest appeals to the English chancellor by those who had no remedy, shows that the common, if not the equitable, concept of the term under Christian influence was the same in remote and modern times." 6 Cyc. 898.

In the broadest sense charity includes whatever proceeds from the sense of moral duty or from humane feelings towards others, uninfluenced by one's own advantage or pleasure. 6 Cyc. 897.

Ruling Case Law (5 R. C. L. pp. 292, 293) says: "A precise and complete definition of a legal charity is hardly to be found in the books, but it is certain that in legal parlance the word 'charity' has a much wider significance than in common speech. Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition capable of being easily understood and applied is that given by Lord Camden as follows: 'A gift to a general public use, which extends to the poor as well as the rich.' The theory of this is that the immediate persons benefited may be of a particular class, and yet, if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity. Again, charity has been declared to be active goodness; the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind."

The question whether a Masonic lodge is, in law, a charitable organization, while a new one in this court, is by no means a new one in the legal annals of this country. This question has been presented to and determined by many different courts, and L.R.A.1917B.

while there is some conflict among the decisions, the greater weight of authority sustains the view that a Masonic lodge is a charitable organization. See *Morrow v. Smith*, 145 Iowa, 514, 124 N. W. 318, and extended notes to this decision as reported in 26 L.R.A.(N.S.) 606, and Ann. Cas. 1912A, 1183. See also *Fitterer v. Crawford*, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; *State ex rel. Bartel v. Board of Assessors*, 34 La. Ann. 574; *Indianapolis v. Grand Master G. L.* 25 Ind. 522; *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 194, Ann. Cas. 1914C, 940; *Plattsmouth Lodge v. Cass County*, 79 Neb. 463, 113 N. W. 167; *Cumberland Lodge v. Nashville*, 127 Tenn. 284, 154 S. W. 1141; 5 R. C. L. 373.

It is unnecessary for us, however, in this case, to determine whether a Masonic lodge is a charitable organization. The legislature has determined this question, and in positive and unequivocal terms declared that the several Masonic bodies are charitable organizations, and that their property, when used for the purposes specified in the statute, is used for charitable purposes, and as such, exempt from taxation. We are not called upon, nor is it our function, to review the correctness of this legislative determination. 6 R. C. L. p. 112. For it must be presumed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and the passage of the statute must be deemed a finding by the legislature of the existence of the facts justifying the enactment thereof. 6 R. C. L. pp. 102, 111, 112. We have no power to supervise the acts of the legislature, or substitute our judgment for its judgment upon any matter within the scope of its constitutional powers. Our authority is limited to an inquiry into and a determination of whether the legislature has exceeded its constitutional powers, and has arbitrarily classified property as entitled to exemption from taxation on the ground that it was used for charitable purposes, when clearly and unquestionably the property sought to be exempted is not within the class which the legislature has declared it to be.

Every reasonable presumption is in favor of the constitutionality of a legislative enactment, as it is presumed that the legislature acted within its constitutional powers and enacted a valid law. This presumption is conclusive unless it is clearly shown that the enactment is prohibited by the state or Federal Constitution. *State ex rel. Linde v. Taylor*, — N. D. —, 166 N. W. 564.

The primary duty of the courts is to construe statutes with reference to the Consti-

tution, and it is only when a statute clearly violates the provisions of the Constitution that the courts may declare the statute to be unconstitutional. 6 R. C. L. p. 102.

The authorities cited furnish small aid in determining the question before us. Most of the decisions cited involved the construction of some particular statute and a determination of whether a Masonic lodge (or some other fraternal body) was, in fact, a charitable organization within the meaning of the particular statute construed. That is true of the decision of the supreme court of Maine in the leading case of *Bangor v. Rising Virtue Lodge*, 73 Me. 428, 40 Am. Rep. 369. It is true of the decision of the supreme court of Massachusetts in *Boston Lodge v. Boston*, 217 Mass. 176, 104 N. E. 433; of the decision of the supreme court of Wisconsin in *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; and of the decision of the supreme court of Michigan in *Atty. Gen. v. Detroit*, 113 Mich. 388, 71 N. W. 632. And the statute construed in the latter case expressly provided that the exemption granted thereby should "not apply to fraternal or secret societies." The question of whether the legislature had constitutional power to classify Masonic lodges as charitable organizations, and exempt from taxation their property used exclusively for Masonic purposes, was not involved in any of those cases. And while in other decisions constitutional provisions are referred to and considered in connection with the construction of the statute involved, no authority has been called to our attention wherein a court was confronted with a legislative enactment (as in the case at bar) which specifically declared the different Masonic bodies to be charitable organizations, and the property belonging to such bodies and actually used by them exclusively for their corporate or associated purposes to be exempt from taxation, on the ground that such property is used for charitable purposes. And while in many of the different authorities cited, general statutes exempting the property of charitable organizations or property used for charitable purposes from taxation were construed, a great number, in fact a greater number, of the courts found, as a matter of fact, that Masonic bodies are charitable organizations, and as such entitled to the benefits of the general statutes exempting the property of such organizations from taxation. See *Morrow v. Smith*, 145 Iowa, 514, 26 L.R.A.(N.S.) 696, 124 N. W. 316, and authorities collated in an extended note to this case as published in *Ann. Cas.* 1912A, p. 1187. L.R.A.1917B.

The North Dakota Constitution was framed and adopted in 1889. Long prior thereto a number of the courts of this country had declared the society of Freemasons to be a charitable organization. It was so adjudged by the supreme court of Alabama in 1861 (*Burdine v. Grand Lodge*, 37 Ala. 478); by the supreme court of Indiana in 1865 (*Indianapolis v. Grand Master*, G. L. 25 Ind. 518); by the supreme court of Georgia in 1874 (*Savannah v. Solomon's Lodge*, 53 Ga. 93); by the supreme court of Maryland in 1879 (*Baltimore v. Grand Lodge*, 50 Md. 421); by the supreme court of Louisiana in 1882 (*State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574). And in the case of *King v. Parker*, 9 Cush. 71, decided in 1851, the supreme court of Massachusetts held that a trust expressed in a deed to individuals for the use of an unincorporated Masonic lodge was in its nature perpetual, since one of the leading objects of such lodge was that of charity. In *Burdine v. Grand Lodge*, supra, the supreme court of Alabama said: "The society known as Freemasons has long existed in this country, and in almost or quite every part of it. The purpose and object of the society have been made public in numerous books, periodicals, and public addresses. From all these sources of information, and from the generally received and accredited judgment of the public, the sole purpose and object with which Masonic institutions acquire money and property, beyond their current expenses as a society (furniture, lights, fuel, stationery, and the like), are for the bestowal of reliefs and charities to the needy. In addition, the third and fourth sections of the act to incorporate Masonic lodges in the state of Alabama tend to confirm the belief that the society is eleemosynary in its aims. Under these circumstances, we hold that we will take judicial notice that the grand and subordinate lodges of Freemasons within the state of Alabama constitute a charitable or eleemosynary corporation." 37 Ala. 482.

While not necessary to a determination of this cause, it may be mentioned that relators assert that the charitable nature of the Masonic organization is established by the following facts set out in the petition herein: "The object and purpose of the said order of Freemasonry is philanthropy, benevolence, and to carry out all charitable purposes and objects, all of which is not confined to its members, but extends to all people at large, and that among other objects and purposes is the object and purpose to nurse, care for, and provide for its sick, afflicted, and needy members and their families, and bury the dead; to care for the widows of its deceased members and edu-

cate their orphan children; to contribute to the maintenance and support of certain homes and public sanitariums for indigent and afflicted persons, located in this state and elsewhere; to furnish the funds necessary to build and maintain tubercular sanitariums; to contribute to and assist in the support of public institutions of charity; to care for and assist in caring for destitute persons, whether members or not, who may become a charge upon the public of the state of North Dakota; that such things as hereinbefore set out are not confined to the members of the said order and their families, but extends to all who are in need or distress; that among the specific things now being done in furtherance of said objects and purposes are these: The furnishing of the funds necessary to build and maintain a sanitarium for tubercular patients in the state of North Dakota, and to build and maintain a Masonic cottage at Dunseith Sanitarium for tubercular patients; to operate and maintain the Masonic Welfare Association, which organization collects and disburses to indigent and distressed persons who are members of the several Masonic orders funds of many hundred dollars per year, a portion of which said fund is disbursed as a public charity to non-Masons; the operation and maintenance of a fund known as an 'almoner's fund,' which fund is collected and disbursed by an officer known as the 'almoner' exclusively in general public charity to the extent of several hundred dollars per year, and which disbursement is made by the almoner secretary, and without being subjected to the supervision of any specific officer or board, and is devoted wholly and exclusively to the needy and distressed among the general public to whom the almoner is referred, or whom he finds by his own investigation; the collecting and disbursing, to organized public charities such as the State Children's Home, the Crittenton Home, the Front Street Mission in the city of Fargo, the Salvation Army, and like organizations, funds aggregating hundreds of dollars annually, all of which are exclusive public charities; the collecting and distributing to its indigent and distressed members and to non-Masons, funds amounting to several hundred dollars per year; the raising of funds and contributing to public charities such as the Belgian Relief Fund, Red Cross Funds, Associated Charities, and all matters of public need; the maintenance of and assistance in maintenance of employment agencies to assist without charge Masons and their families in finding places of employment; that the extent of said benevolent and charitable work of the said order is large and greater

than any public charity in the state of North Dakota, and that as an illustration thereof affiant alleges that the said Masonic organization contributes fully one half of the moneys and funds necessary to maintain the Children's Home in Fargo, an institution of great public charity and need.

Affiant further says that one of the general and primary objects of said order and institution is to apply in general to its members and to all persons the principle of benevolence and philanthropy, and to extend charity in its broadest and highest meaning to any and all persons with whom its members come in contact, and that all of the said property of the relator is used exclusively for the purposes as hereinbefore set out, and that the property in question is only to a minor extent used for administrative purposes, and that less than one tenth of the space of said building before referred to is used in providing offices for the officers engaged in the administration of the business of the said Masonic bodies, and that no revenue or income is received from the use of said properties except that such revenues and income, as hereinbefore set out and as derived from the dues of said members, is used exclusively for the maintenance of said buildings, and to be expended in the foregoing matters of benevolence, philanthropy, and charity, and to carry out the objects and purposes hereinbefore set forth, and that such property is not in any manner used for business purposes."

No attempt was made to define "charitable purposes" in the state Constitution, or to determine what organizations or institutions would be entitled to the benefit of the exemption which the Constitution directed the legislature to put into effect. Nothing was said to indicate any intent to exclude secret or fraternal societies from the benefit of such exemption, or (as in some states) to restrict such exemption to property devoted purely and exclusively to purposes of "public" charity.

When the constitutional convention framed, and the people adopted, the Constitution, they not only invested the legislature with power to exempt from taxation certain classes of property, but they in plain and unmistakable terms directed "that the legislative assembly shall by general law exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes." Const. § 176.

This constitutional command was addressed to the legislature, and not to the courts. 6 R. C. L. 58. The provision was not self-executing. Its terms looked forward to and required "ulterior action upon the part of the lawmaking branch of the

government." *Engstad v. Grand Forks Co.* 10 N. D. 54, 84 N. W. 577. The governmental policy therein declared depended upon, and could be put into effect only by, legislative action.

The provision related to taxation,—a matter peculiarly within the province of the legislative department of the government. 37 Cyc. 724. See also §§ 174 to 181, inclusive, State Const. It involved and required the exercise of legislative power to give effect to a governmental policy announced in the Constitution. Consequently the contemporaneous construction and interpretation given by the legislature is entitled to a great deal of weight, and should not be departed from unless manifestly erroneous. 6 R. C. L. p. 63. See also *Gaar, S. & Co. v. Sorum*, 11 N. D. 174, 90 N. W. 799.

The legislative construction and determination, as we have already stated, was in harmony with the weight of judicial authority in this country. And in our opinion we have no right to say that the legislature exceeded its constitutional authority

in enacting the statute under consideration.

It is also suggested by the respondents that the property is not exempt for the reason that the office of the secretary of the Masonic Grand lodge and other grand bodies is maintained in this building. The statutes which we have quoted are not susceptible of this construction. The intent was clearly to exempt from taxation all property belonging to Masonic organizations and devoted exclusively to Masonic use; i. e., "for places of meeting, and to conduct their business and ceremonies." The legislative intent seems plain. No part of the building is leased for profit or income for business or non-Masonic purposes. The entire property is devoted solely to purposes connected directly with and essential to the maintenance of the Masonic organization in this state. The property is clearly within the provisions of the statute, and it is our duty to give effect to the law as promulgated by the lawmaking branch of the government.

The writ will issue as prayed for.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

JAY E. CUNNINGHAM et al.  
v.

L. L. COKELY, Clerk of the Circuit Court  
of Ritchie County, et al.

(— W. Va. —, 90 S. E. 546.)

#### Election — primary — regulation.

1. Primary elections are so far matters of public concern that, within legislative discretion, when not restrained by any constitutional inhibition, they are proper subjects of reasonable statutory regulations under the police power of the state. Such regulations are vital to the accomplishment of the purpose and scheme of nominating elections.

*For other cases, see Constitutional Law II. c. 1, in Dig. 1-52 N. S.*

#### Same — party organization.

2. Statutes providing for such elections are based on a recognition of political parties as governmental agencies, and are usually intended to maintain party organizations and secure the integrity of party nominations.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

Headnotes by LYNCH, J.

Note. — As to constitutionality of primary election laws, see annotation to *People ex rel. Phillips v. Strassheim*, 22 L.R.A. (N.S.) 1135; *State ex rel. Miller v. Flaherty*, 41 L.R.A. (N.S.) 132; and *Waples v. Marrast*, L.R.A. 1917A, 259; and see also *Baer v. Gore*, post, 723. L.R.A. 1917B.

#### Same — participation.

3. No political party organization not comprehended within the definition found in § 1 of the Primary Election Law (Laws 1915, chap. 26), when properly interpreted, can participate in such elections.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Officer — nomination — certificates.

4. A political organization so excluded cannot nominate presidential electors, except by certificates signed by electors numerically equal to 5 per cent of all the votes cast therefor in the next preceding general election held in the state.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Elections — primary — constitutionality.

5. The provisions of Primary Law (Barnes's Code, chap. 3, § 26a) §§ 1, 23, 29, defining political parties on the basis of a fixed percentage of the vote cast at the last general election held in the state, requiring them to select their candidates by primary election and convention, and authorizing nominations by lesser groups of voters to be made solely by petition, do not constitute an infringement of any inhibition prescribed by the Constitution of this state.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Statutes — same subject — repeal.

6. When two statutes passed at different dates cover and fully provide for the same general subject, the subsequent one, not purporting to amend the earlier act, but manifestly intended to be a substitute therefor, is to be deemed and treated as the last legis-

lative expression on that subject, and as operative to repeal the former statute by necessary implication.  
*For other cases, see Statutes, III. in Dig. 1-52 N. S.*

(October 24, 1916.)

**P**ETITION for a writ of mandamus to compel respondents to place on the official ballot for the general election the names of the presidential electors nominated by the Prohibition party at a state convention. Refused.

The facts are stated in the opinion.

Messrs. Squire Halstead and J. Howard Holt, for petitioners:

If chapter 26, Acts of 1915, by any part of its provisions prevents the placing of the presidential electors of the Prohibition party on the official ballot at the election to be held on November 7th, 1916, it is unconstitutional and void as opposed to article 4, § 1, of the Constitution of West Virginia, giving to the male citizens of this state the right to vote.

*State v. Staten*, 6 Coldw. 233; *Britton v. Election Comrs.* 129 Cal. 337, 51 L.R.A. 115, 61 Pac. 1115.

Denying to a political party which cast less than 5 per cent of the votes at the next preceding election the right to the privileges and protection accorded to other political parties, and thereby prohibiting the members of such party from holding a nominating convention, is a deprivation of the right of franchise.

*Britton v. Election Comrs. supra.*

Denying to a political party which cast less than 5 per cent of the vote at the next preceding election the right to the privileges and protection accorded to other political parties, and thereby prohibiting the members of such party from holding a nominating convention, is special legislation and opposed to art. 6, § 39, of the Constitution of West Virginia.

*Britton v. Election Comrs. supra.* *Ladd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714; *Cooley, Const. Lim.* 758, 759.

A political party is a body of men in a state, district, county, or city, united in political thought and action for the accomplishment of a political end, or united in political opposition to another body of men joined in political action; and each body of men so united is entitled to the same and equal rights before the law.

*Fields v. Osborne*, 60 Conn. 544, 12 L.R.A. 551, 21 Atl. 1070.

A primary law giving to some political parties rights which it denies other political parties is special legislation.  
 L.R.A.1917B.

*Cooley, Const. Lim.* pp. 758, 759; *Eaton v. Brown*, 96 Cal. 375, 17 L.R.A. 697, 31 Am. St. Rep. 225, 31 Pac. 250.

The legislature may regulate the mode of exercising the right of suffrage, but this regulation must be subordinate to the Constitution and the rights of voters.

*Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Monroe v. Collins*, 17 Ohio St. 665; *State ex rel. Lamar v. Dillon*, 32 Fla. 579, 22 L.R.A. 124, 14 So. 383; *Sanner v. Patton*, 155 Ill. 563, 40 N. E. 290.

The power of the legislature is limited not merely by the express restraints imposed upon it by the words of the Constitution, but by certain principles inherent in the nature of free government by the people which are presupposed by, and implied in, the Constitution, and to which it owes all of its operative force.

*Cooley, Const. Lim.* 174-176; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 465; *Durkee v. Janesville*, 28 Wis. 467, 9 Am. Rep. 500; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Janesville v. Carpenter*, 77 Wis. 303, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Ingram v. Colgan*, 106 Cal. 113, 28 L.R.A. 187, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437.

Self-preservation is an inherent right of political parties as well as of individuals.

*Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172; *Britton v. Election Comrs. supra*; *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121.

A compulsory primary law forms a part of the general election laws of the state.

*Spier v. Baker*, 120 Cal. 370, 41 L.R.A. 198, 52 Pac. 659; *Britton v. Election Comrs.* 129 Ga. 337, 51 L.R.A. 115, 61 Pac. 1115.

The purpose of the legislature in regulating political parties by compulsory primary elections is to regulate,—not to destroy.

*Morrow v. Wipf, supra*; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690.

A statute requiring an unreasonable number of signatures to a petition for recognition upon the official ballot is unconstitutional.

*People ex rel. Hotchkiss v. Smith*, 206 N. Y. 231, 99 N. E. 568; *People ex rel. Woodruff v. Britt*, 206 N. Y. 246, 99 N. E. 573.

Where a primary law does not apply to the selection of presidential electors presidential electors may be properly nominated by convention.

*State ex rel. Allen v. Brodigan*, 34 Nev. 486, 125 Pac. 699.

Messrs. S. A. Powell and Adams & Cooper for respondents.



Lynch, J., delivered the opinion of the court:

The relators, Cunningham and others, alleging themselves to be citizens and voters resident within the state, and members of a political organization called and known as the Prohibition party, pray a writ of mandamus to compel the ballot commissioners of Ritchie county to place on the official ballot for the general election in November, 1916, the names of the presidential electors nominated by the party at a state convention held for that purpose at Clarksburg, June 7, 1916. Its nomination of candidates for President and Vice President of the United States was made by the national convention of the party held at St. Paul in the ensuing July. The usual certificates of nominations were tendered to the clerk of the circuit court of Ritchie county, accompanied by a request to receive and file them, with which it is alleged he refused to comply.

In response to the alternative writ awarded according to the prayer of the petition, the respondent Cokely, the clerk, and the other ballot commissioners appointed by him, admit the facts alleged, and deny the right of the relators to compel them to place the names of such candidates on the official ballot as so requested.

The pleadings present one question only for adjudication,—one purely legal. This question must be determined—indeed, it can only be determined—from an interpretation of the statutes of this state governing the nomination of candidates for public office. The advisability or propriety of the statutes are questions proper only for legislative consideration, unless they conflict with some constitutional provision. Except in so far as the organic law of the state forbids, it is competent for the legislature to enact laws regulating and controlling nominations and elections of public officials. Both are matters of public concern, and subjects of proper and reasonable legislative regulation, restriction, and control. The exercise of that function is limited and restrained only by that instrument. To deprive the legislature of its regulatory power and authority, it must appear affirmatively and unmistakably that it has exceeded the bounds so prescribed. It is not, however, so much a question of what the Constitution permits the legislature to do as what the Constitution prohibits it from doing. Unless the inhibition urged essentially is imperative or indubitably inferential, the courts are powerless to declare an enactment violative of the organic law. The unconstitutionality of law must obviously appear. This requirement generally is recognized in all jurisdictions.

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It is impliedly, if not actually, admitted that the Primary Election Law (Acts 1915, chap. 26; Barnes's Code § 26a, chap. 3) contains no provision for the nomination, by election or convention, or the candidates of any organization not comprehended within the definition of political parties found in the 1st section of the act; that the Prohibition party is not within that definition, because it is not a political "organization which at the last preceding general election polled for its candidates for representatives in congress in the several districts at least 5 per cent of the entire vote cast for that office in the state." Relators neither aver nor prove that their party did cast that number of votes. They make no such pretension.

Nor, for the same reason, did or could the Prohibition party assert any right to act under § 29 of the Primary Law, authorizing each "political party," in the month of August of each year in which a President of the United States is to be elected, to "hold a meeting . . . formulate and promulgate a state platform, and select presidential electors for the state at large, and each congressional district." To invoke this act, it is essential that an organization come within the definition of a political party found in § 1. Not having the required percentage of the vote at the last general election, the party represented by the relators could not claim the benefit of the statute.

However, relators do insist on two propositions; on being that, as the Prohibition party was an active political organization at and prior to the passage of the primary election law, it cannot lawfully be deprived of its right to representation on the official ballot through its party nominations made in what they claim to be a duly constituted convention, and duly certified to the clerk of the circuit court of Ritchie county. Reliance for that contention is placed solely on § 18, chap. 3, Code 1913. That statute did authorize the nomination of candidates for public office by an organized assemblage of voters or delegates of any political party which at the general election next preceding such convention polled at least 3 per cent of the entire vote of the state, or any division thereof for which the nominations are made, "or have had nominations on the official ballot for the state or any division or subdivision thereof, for the last preceding ten years." To show themselves qualified to invoke the provisions of the section in justification of the award of the final writ, the relators aver the continued existence of the Prohibition party as a national political organization and the regularity of its quadrennial nominations of presidential electors since and including the year 1872, and of its

state organization and nominations since and including the year 1884, and that in the year 1912 it polled in this state "in the neighborhood of 5,800 votes" for its candidate for governor, of which 160 were cast in Ritchie county. The first provision of the act, however, prescribes as the true test of the right to representation on the official ballot the required percentage of the votes cast in the general election held in 1914, as to which there is neither averment nor proof. But, in any event, the candidates of the Prohibition party received numerically less than 3 per cent of any combination of votes cast for any office filled by the general election held in this state in either year. So that, even if the section were still in force, its first clause does not inure to the advantage of any political organization whose adherents cast less than the required number of votes at the preceding general election. Nor is the latter clause of the section applicable. Manifestly, the entire section was repealed by the Primary Act. That statute contained a clause expressly repealing all prior legislation inconsistent therewith. Moreover, it covered the whole subject of nominations for public office. It required political parties, as defined therein, to designate their candidates by means of a primary election, except candidates for presidential electors, and judges, and these § 29 requires to be named by the convention thereby prescribed. With reference to political organizations not comprehended within the definition of a political party, a mode of nomination by petition was provided. It is obvious that the Primary Act, dealing comprehensively and fully with the matter of official nominations, was not intended to be amendatory of older statutes on the same subject, or supplementary thereto, but as an elaborate and ample scheme for the selection of political nominees. So construed, it repeals by necessary implication § 18, chap. 3, Code 1913, relating to conventions. As stated in *Grant v. Baltimore & O. R. Co.* 66 W. Va. 175, 66 S. E. 709: "A later statute, covering the whole subject matter of an earlier one, not purporting to amend it, and plainly showing it was intended to be a substitute for the earlier act, works a repeal of such earlier act by implication, even though the two are not repugnant in the usual sense of the term."

See also *Hawkins v. Bare*, 63 W. Va. 431, 60 S. E. 391; *Vansant v. Com.* 108 Va. 135, 60 S. E. 753.

The Primary Law of Minnesota defined a political party as one casting 10 per cent of the total vote of the last election for its leading candidate, and provided that the nomination of such parties should be made in accordance with that act, reserving the right to lesser groups of voters to nominate

their candidates by petition, as authorized by a prior law still in force. The Primary Act was held to repeal by implication the general statute providing for conventions. Hence, chapter 28, Acts 1915, must be regarded as prescribing the exclusive modes whereby political nominations may be made in this state.

Tersely stated, the second proposition advanced is that the primary statute if held effectual as a repeal of § 18, chap. 3, Code, is based upon an arbitrary and discriminatory classification of voters, operative to destroy minor political party organizations, and violative of various provisions of the state Constitution. Is the act amenable to that criticism? That is the paramount and vital inquiry.

The relators rely for support of their contention against the legal validity of the act on three California decisions, which, upon the particular facts and laws involved therein, do in fact adopt that view. *Britton v. Election Comrs.* 129 Cal. 337, 51 L.R.A. 115, 61 Pac. 1115, citing the other two cases. Therein the law of that state of 1899 was held invalid as to that provision prohibiting the election of delegates to a convention of any political party not representing 3 per cent of the votes cast at the last election; but the principal reason assigned for the decision was that the act provided no other way by which minor parties might get on the ballot for the general election. No legal method was rendered available to them whereby they might select candidates and thus secure representation at the polls. But in the later case of *Katz v. Fitzgerald*, 162 Cal. 433, 93 Pac. 112, after the California Constitution had been changed so as in general terms to sanction nominating primaries, the same court held constitutional a law classifying voters and excluding from the primary parties casting less than 3 per cent of the last vote in the general election. It was held there was "no discrimination between large and small political parties," and that the percentage clause was a necessary and rational provision. These restrictions, especially where other modes of making nominations are afforded the minor political groups, uniformly are deemed and interpreted as valid and essential to the efficiency of the primary system. *State ex rel. Hagedorf v. Blaisdell*, 20 N. D. 622, 127 N. W. 720; *Riter v. Douglass*, 32 Nev. 401, 109 Pac. 444; *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *State ex rel. Labauve v. Michel*, 121 La. 378, 46 So. 430; *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65. The percentage of the vote fixed as the basis of party classification by the statutes passed upon in these cases ranged from 1 to 10 per

cent. It may be well to summarize briefly other decisions.

In *State ex rel. Labauve v. Michel*, 121 La. 378, 46 So. 430, and *Ladd v. Holmes*, 40 Or. 187, 91 Am. St. Rep. 457, 66 Pac. 714, in response to the contention of discrimination, it was said the primary laws construed, defining political parties on the percentage basis and excluding the smaller groups from participation in the primaries, could not possibly be classed as local or special laws within the constitutional inhibition against the grant of special privileges and immunities. The acts, it was said, were but reasonable regulations of the larger parties designed to safeguard the privileges of the electors thereof, and not infringements of the rights of the minor parties or individual voters, to whom the right was reserved to nominate by petition, which was held a reasonable regulation, and not violative of any constitutional right. The same principles are enunciated in *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036, and *State, Ransom, Prosecutor, v. Black*, 54 N. J. L. 446, 16 L.R.A. 769, 24 Atl. 489, 1021. It was so held in Maryland, where the Primary Law was limited in its benefits to the two parties casting the highest number of votes at the last general election. *Kenneweg v. Allegany County*, 102 Md. 119, 62 Atl. 249.

Nor does the classification assailed conflict with a constitutional guaranty of freedom in the exercise of the elective franchise. *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *State ex rel. Webber v. Felton*, 77 Ohio St. 564, 84 N. E. 85, 12 Ann. Cas. 65. A statute of Ohio (Act April 18, 1892; 89 Ohio Laws, p. 434, § 6) provided that certified nominations of candidates for public office should be made by convention or primary election by political parties which, at the next preceding election, polled at least 1 per cent of the entire vote cast in the state. Apparently, no method was made available whereby lesser groups of voters might make and certify nominations. Yet, in *State ex rel. Plimmer v. Poston*, 58 Ohio St. 620, 42 L.R.A. 237, 51 N. E. 150, the law was held "not repugnant to any provision of the Constitution." "Some restriction upon the right to have nominations printed upon the blanket ballot is necessary to render it practicable." The right of a qualified elector to vote at all elections is not unreasonably impeded.

The election law of Pennsylvania (Act June 19, 1891; P. L. 350) provided that the nominations entitled to appear on the official ballots should be made either by the authorized nominating bodies of the political parties casting 3 per cent of the vote at the last election, or by papers signed by

qualified electors to the number of one half of 1 per cent of the largest vote cast at the preceding election for any officer elected for the state at large if the nomination is for a state office, otherwise to the number of 3 per cent of the largest vote cast at the preceding election for any officer elected in that portion of the state for which the nomination is made. It was held, in *De Walt v. Bartly*, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 185, that the law was not "in violation of the constitutional provisions that elections shall be free and equal, and that all laws regulating elections shall be uniform throughout the state." "While prescribing reasonable regulations, requisite to effect its object, it carefully preserves the right of each elector to vote for whom he pleases, without any unnecessary inconvenience." The court further said: "At the last general election the highest vote polled in this state was 790,040, and the vote cast for the Prohibition candidate was 18,429, . . . less than 3 per cent of the entire vote cast, and that under the provisions of the act a candidate nominated by the Prohibition party would not be entitled to have its ticket printed at the public expense, as in the case of the other two parties. It was contended that the provision or discrimination against the Prohibition party is in violation of that clause of the Constitution which declares that elections shall be free and equal, and . . . that all laws regulating the holding of elections by the citizens shall be uniform throughout the state; that these constitutional provisions were intended to secure to every citizen equality in the manner of voting, and to prohibit the legislature from passing any law which shall give, directly or indirectly, an advantage to some voters which will not equally apply to all voters. This contention is plausible, but unsound. The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which, at the last general election, polled less than 3 per cent of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley street assumed to be 'the people of England.' It follows, if an official ballot is to be used,

nominations must be regulated in some way; otherwise the scheme would be impracticable, and the official ballot become the size of a blanket."

Again, in *State ex rel. Fritz v. Jensen*, 36 Minn. 19, 89 N. W. 1126, the court held valid, on the ground of differences in party conditions, a statute excluding from primary elections parties casting less than 10 per cent of the total vote at the last election for their leading candidates. In its opinion the court said: "While it seems to some of us that the percentage of the vote selected as the basis of the classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification was arbitrary."

The supreme court of Wisconsin held, in *State ex rel. McGrath v. Phelps*, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, that, notwithstanding "the right of suffrage includes the right to form political parties, and the right of each party to have all the machinery, not reasonably prohibited by law, for making its organization effective as to the policy of its members, by electing officers in harmony therewith,"—principles for which the relators here contend,—and notwithstanding "constitutional inhibitions of legislative interference with the right to vote and rights incidental thereto, there is a legitimate field of legislative activity in the nature of regulation." Moreover, while denouncing as an unreasonable interference "a regulation which necessarily tends to afford one political party of substantial status a better opportunity for efficient existence than another, however large, or materially impair or prevent fair opportunity for any organization of voters of substantial numbers and standing to compete for favor," nevertheless "legislative regulations of the right to vote and rights incidental thereto are appropriate . . . to keep the ballot sheet within a reasonably workable compass, both from the standpoint of the party and individual right," not withstanding the express or implied constitutional inhibitions against class legislation, recognition of the existence and inviolability of inherent rights, and express guaranty of the right to vote. Therein was upheld as valid, because not an infringement of any constitutional guaranty, a requirement of a number equal to 20 per cent of the votes cast in the next preceding general election as a test of the competency of minor political organizations to have the use of the official Australian ballot system for their organic purposes.

So accordant with reason and principle, as we believe, is the doctrine of the case cited, and so responsive to the contentions of L.R.A.1917B.

the relators, that the liberal quotation therefrom seems justified. With the exception of California, no appellate court, so far as we can discover, has held unconstitutional percentage classifications of parties entitled to participate in primaries. Other jurisdictions uniformly sustain the validity thereof, noting generally the provision usually inserted for nominations of candidates by minor parties by conventions or by petitions containing signatures of the required number of electors voting in the preceding general election. Such a regulation renders competent nominations made as therein permitted, upon compliance with its terms, and is held uniformly by the cases herein cited to be reasonable and valid and an appropriate limitation upon the right claimed by relators.

Consonant with this approval regulation, the state Primary Law does make ample provision for the nomination of candidates by minor parties "otherwise than by direct primary election" (§ 23). Compliance therewith is made to depend only on certificates signed by 5 per cent of all the voters participating in the last general election within "the political division for which the candidate is presented." There is no limitation exclusively confining signatures to the membership of any particular party organization. By implication, any voter willing to affix his signature may do so, it would seem, without regard to his own party predilection. This mode of securing representation on the official ballots clearly was available to the adherents of the Prohibition party. If, for any reason satisfactory to them, they declined, or through inadvertence failed, to exercise the privilege or opportunity so offered, they cannot now reasonably be heard to assert the infringement of any right guaranteed to them by the Constitution of this state.

The writ is refused.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

IRA P. BAER

v.

WILLIAM GORE, Plff. in Err.

(— W. Va. —, 90 S. E. 530.)

Elections — primary — mandatory provisions.

1. A statute which provides that a voter

Headnotes by LYNCH, J.

Note. — As to constitutionality of primary election laws, see annotation to *People ex rel. Phillips v. Strassheim*, 22 L.R.A.

on entering the polling place "shall announce his name," "shall sign his name and place of residence in a book of the party whose ballot he wishes to cast," and subscribe an oath verifying his party affiliation, etc., before receiving and voting the ballot of the party so named, is mandatory, and prerequisite to the exercise of the elective franchise in a nominating primary.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Same—constitutional rights—violation.

2. A statute requiring each voter in a primary election to state on oath his party affiliation before he is entitled to cast his ballot does not violate the constitutional provision that no "political test oath shall be required as a prerequisite or qualification to vote," or that, with certain negative exceptions, all male citizens twenty-one years of age or over "shall be entitled to vote at all elections held within the counties in which they respectively reside."

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Same—purpose of requirement.

3. Such statutory requirement is only a mode of ascertaining the party affiliation of the voter, and thereby to identify him as one entitled to cast the ballot of such party, and is not intended as a test of his right to vote in a primary as distinguished from a general election.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Same—regulation—validity.

4. Primary elections are so far matters of public concern that, within legislative discretion, when not restrained by any constitutional inhibition, they are proper subjects of reasonable statutory regulation under the police power of the state. Such regulations are vital to the accomplishment of the purpose and scheme of nominating elections.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Same—purpose.

5. Statutes providing for such elections are based on a recognition of political parties as governmental agencies, and are usually intended to maintain party organizations and to secure the integrity of party nominations.

*For other cases, see Elections, IV. in Dig. 1-52 N. S.*

#### Courts—appellate jurisdiction.

6. The appellate jurisdiction of this court is not determined by the value of the subject matter of the controversy in cases "involving the constitutionality of a law."

*For other cases, see Appeal and Error, II. o, 2, and 4, in Dig. 1-52 N. S.*

#### Same—constitutional question.

7. Where a just determination of a controversy between opposing candidates, arising

(N.S.) 1135; *State ex rel. Miller v. Flaherty*, 41 L.R.A.(N.S.) 132; and *Waples v. Marrast*, L.R.A.1917A, 259; and see also *Cunningham v. Cokely*, ante, 718. L.R.A.1917B.

out of a canvass of primary election returns, appealed to the circuit court under § 26a22, chap. 3, Barnes's Code, virtually depends on the proper interpretation of a law charged to be invalid as in violation of the Constitution, this court has jurisdiction to review the proceeding on writ of error.

*For other cases, see Appeal and Error, II. c, 2, in Dig. 1-52 N. S.*

(October 24, 1916.)

**E**RROR to the Circuit Court of Logan County to review a judgment in favor of contestant Baer, in a controversy arising out of a canvass of primary election returns. Affirmed.

The facts are stated in the opinion.

Messrs. John Chafin and James E. Greever for plaintiff in error.

Mr. E. L. Hogsett, for defendant in error:

The supreme court has no jurisdiction, and this writ of error should be dismissed as improvidently awarded.

*Pittsburg, C. & St. L. R. Co. v. Board of Public Works*, 28 W. Va. 264; *Mackin v. Taylor County Ct.* 38 W. Va. 338, 18 S. E. 632; *Summers County v. Monroe County*, 43 W. Va. 207, 27 S. E. 307; *Re Union Mines*, 39 W. Va. 179, 19 S. E. 398; *Poteet v. Cabell County*, 30 W. Va. 75, 3 S. E. 97; *Brazie v. Fayette County*, 25 W. Va. 213; *Dunlevy v. County Ct.* 47 W. Va. 513, 35 S. E. 956; *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016; *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 465; *McClure v. Maitland*, 24 W. Va. 561.

To give the supreme court jurisdiction, it is necessary that the matter involved have pecuniary value. If this nomination has pecuniary value, there is no known way by which it may be computed.

*Dryden v. Swinburne*, 15 W. Va. 234; *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706.

The statute requiring the keeping of an affirmation book to be signed by the voters, and prescribing the manner of ascertaining the number of ballots cast at each precinct, is mandatory.

*Morris v. Board of Canvassers*, 49 W. Va. 262, 38 S. E. 500; *Cusick's Appeal*, 136 Pa. 459, 10 L.R.A. 228, 20 Atl. 574; 36 Cyc. 1157; 26 Am. & Eng. Enc. Law, 688; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *Mears v. Dexter*, 86 Va. 828, 11 S. E. 538; *White v. Grump*, 19 W. Va. 583; *Offield v. Davis*, 100 Va. 260, 40 S. E. 910.

Lynch, J., delivered the opinion of the court:

Between Ira P. Baer and William Gore has arisen a controversy as to which of them received a plurality of votes cast in

the June primary election for nomination as a candidate for justice of the peace of Logan district, Logan county, to be voted for in the general election to be held November 7, 1916. The returns of the election, as ascertained by the commissioners and clerks conducting it, and by the county court as a board of canvassers, showed a plurality in favor of Gore, while upon appeal the circuit court found Baer nominated as a candidate, and not Gore, who assigns error.

These findings resulted from variant interpretations of the section of the primary election law that requires each voter to state upon oath his party affiliations, his age and residence, etc., as a prerequisite to the right to exercise the elective franchise at the polling place where he offers himself as a voter in a primary. Section 26a (13), chap. 3, Barnes's Code. The section is: "On entering the election room, the voter shall announce his name, and if he is duly registered, or has obtained transfer as provided by law, he shall sign his name and place of residence in a book of the party whose ballot he wishes to cast, which book shall be paged alphabetically, and have at the top of the page thereof in form and effect the following oath or affirmation with blank spaces properly filled in as to the party and precinct as indicated: 'The undersigned do each for himself severally swear or affirm that I am a regular and qualified member and voter of the \_\_\_\_\_ party, and am a duly qualified resident and voter in precinct No. \_\_\_\_\_, \_\_\_\_\_ district, \_\_\_\_\_ county, West Virginia, and reside at the place designated opposite my name signed hereunder; that the one ballot which I am about to cast will be the only primary election ballot cast this day by me; that I have neither received, nor do I expect to receive, anything of value for myself or another, given or promised with the manifest intent to influence my vote or the vote of another or others at this time.' Having so signed, said voter shall be allowed to cast the ballot of the party named in said oath or affirmation."

The legal validity of this statute is in issue.

The election commissioners and the board of canvassers apparently interpreted the provision quoted as directory only, while the circuit court treated it as mandatory. This diversity constitutes the real cause of the controversy, although other questions arise as incidental to the main issues to be adjudged on the writ of review. The provisions of the enactment are expressed in imperative terms. They are positive and unequivocal.

Generally "shall," when used in Constitutions and statutes, leaves no way open for the substitution of discretion. 35 Cyc. 1451; L.R.A. 1917B.

*Madderom v. Chicago*, 194 Ill. 573, 62 N. E. 846; *Coleman v. Eutaw*, 157 Ala. 340, 47 So. 703; *State ex rel. Folk v. Talty*, 186 Mo. 559, 66 S. W. 361. All authorities coincide in holding mandatory all statutory requirements, although contained in an election law, if it appears reasonably certain the legislature intended them to have that effect. *Morris v. Board of Canvassers*, 49 W. Va. 282, 38 S. E. 500. This court in *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690, interpreted as imperative a provision requiring each voter to place the names of all persons for whom he desired to vote in one column of the ballot and to designate the office to be filled by each of them. Hence it seems obvious that the legislature intended that each elector who offers to vote in a primary should declare his party affiliation as a condition of the right to express his preferences between the candidates of his own party for any political office.

One of the many reasons assigned and argued by counsel to show that a writ of error does not lie from this court to the circuit court, in proceedings of this nature, is that the value of a nomination for an office is less than \$100. No value is alleged or proved; and, when measured by any recognized standard of pecuniary valuation, a nomination may not easily be appraised. But an exact appraisal of the subject matter of a controversy is not always indispensable. For an actual monetary value in excess of \$100 is not essential to empower this court, on writ of error or appeal, to determine causes "involving the constitutionality of a law." Const. § 3, art. 8; Code, § 4, chap. 113, and § 1, chap. 135; *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706; *Underwood Typewriter Co. v. Piggett*, 60 W. Va. 532, 55 S. E. 664. Of course, to be adjudged the right to invoke this jurisdiction, it must appear with reasonable certainty, as obviously in this case it does appear, that a correct interpretation and construction of the challenged statute is vital to a just determination of the litigation. These provisions manifest an intention to make this requirement essential to confer on this court power and right to determine, on writ of error or appeal, controversies between parties where the matter in dispute is less in value than the jurisdictional amount. Not every charge of infirmity in an enactment, however, will so operate. A mere factitious or spurious assertion of constitutional invalidity will not suffice. "The court will examine and determine for itself whether such claim is well founded; and, in order for jurisdiction to attach, it must affirmatively appear that a fairly debatable constitutional question was and is necessarily involved." 3 C. J. 391. That an in-

terpretation of the provision requiring an oath of party affiliation, in view of the constitutional provisions found in § 11, art. 3, is vital to a correct solution of the questions herein involved, seems too obvious to permit of argument. The essential rights of the parties—those rights upon which the board of canvassers and the circuit court wholly disagreed—depend conclusively upon the legal validity of that requirement. It marks the point of divergence between the different results reached in ascertaining the returns from two precincts in Logan district, so far as can be discovered by an examination of the record.

Again, it is contended that the writ does not lie, because, although an appeal lies in such cases to the circuit court under the authority of the statute, it vests that court only with such power as, and no more than, the board of canvassers had and exercised, and that the action of both was ministerial. In support of this contention are cited *Pittsburg, C. & St. L. R. Co. v. Board of Public Works*, 28 W. Va. 264, and *Mackin v. Taylor County Ct.* 38 W. Va. 338, 18 S. E. 632, holding that by no appellate process can this court review the action of inferior tribunals exercising merely ministerial or administrative functions; that, to be appealable, the action must essentially be judicial in nature. If sound, the proposition urged against the right denied or restricted applies with the same degree of consistency to the right conferred by the Primary Act on the circuit courts. On them is bestowed generally functions purely judicial. Nevertheless, they may and do act, under legislative authority, in matters not strictly judicial. If the legislature may clothe, and has clothed, circuit courts with power so to act, why may it not also confer the same authority on this court? But we may inquire whether a canvass by the circuit court of primary election returns, under authority of the statute, is purely ministerial or administrative in nature. Does it not possess the essential elements of a judicial function? An affirmative answer seems to be justified by the distinctions noted in some of our decisions in tax assessment proceedings. The two cases cited to sustain the argument referred to limit the power of circuit courts to review assessments made by assessors as revised by the county courts when apparently administrative. But an adjudication of the taxability of any species of property results from the exercise of a judicial function, though involved in a tax assessment proceeding. *Hannis Distilling Co. v. County Ct.* 62 W. Va. 442, 59 S. E. 1061. And, while conceding the administrative character of the acts performed in assessing property for taxation by an assessor, L.R.A.1917B.

and the review thereof by the county court, yet upon appeal by the party aggrieved, alleging illegality in the assessment, the action of the circuit court partakes of the nature of a judicial inquiry. *State v. South Penn Oil Co.* 42 W. Va. 60, 24 S. E. 688. A circuit court acts judicially in determining whether property is assessable for the purpose of taxation, although the assessor, in making the assessment, and the board of review and equalization in reviewing his action, perform merely administrative functions. *Copp v. State*, 69 W. Va. 439, 35 L.R.A.(N.S.) 669, 71 S. E. 580. So that limitations on the powers granted by statute to agencies charged with performance of administrative or ministerial duties do not always necessarily operate to prescribe within the same limits the action of courts of record empowered to determine on review the correctness of the conclusions reached by the former; and, as regards the right to hear de novo and adjudge questions arising out of a primary election, it may well be doubted whether the legislature intended so to circumscribe such right of review.

Nor can the right of review on writ of error reasonably be denied on the ground that the legislature did not expressly authorize it. As later announced herein, a recanvass by the circuit court, under the statute providing therefor, partakes of the nature of a contest between rival claimants in an election for an office, and is to be governed and controlled by the same procedural regulations. When so considered and treated, both are contests and "controversies" within the contemplation of § 4, chap. 113 (§ 4592), and § 1, chap. 135 (§ 4981), Code. There was no special authorization regarding the right of review by this court in post election contests under § 3, chap. 6 (§ 200), Code. But if, as held in *Williamson v. Muckick*, 60 W. Va. 59, 53 S. E. 706, a contest for an office is reviewable here on writ of error, so is a contest for a nomination under § 26a22 of chap. 3. Both contain the essential elements of a controversy.

Passing to the assignments, it is argued that the circuit court erred in its adverse rulings on the motions severally made by Gore, who appeared specially for the purpose, to dismiss the appeal on the ground that the bond and notice required by chapter 6 of the Code were not given, and the record made by the board of canvassers was insufficient to warrant the appeal. To these rulings he timely excepted, as he also did to the action of the court on his objection to its hearing the controversy de novo. Baer gave neither notice nor bond. However, we are led to believe he did offer to execute the bond, but Gore later agreed not to insist upon it or to raise any objection for the

want of it. This was, in effect, a waiver of that requirement, estopping him to take any advantage of the omission thereof.

The same conclusion seems warranted as to the notice, although for different reasons. "The action of the board of canvassers, or of any political committee, at any primary election, may be appealed from by any candidate thereat, to the circuit court of the county. All such contests shall be governed by the provisions of the Code of West Virginia, so far as the same are applicable, as found in chapter 6 thereof." Barnes's Code, § 26a22, chap. 3. Chapter 6 does, of course, contemplate a notice to set in motion contest proceedings. The apparent purpose is to advise the adverse party of the defects or irregularities relied on to show the particulars in respect of which the contestant claims an office denied to him as the result of a canvass of the votes cast therefor, and to designate the votes cast for him and not counted, or cast for his opponent and counted, which erroneously have been included in the count or excluded from it in numbers sufficient to work an alteration of the result favorable to him. But it is not of individual votes cast and not counted, but of the exclusion of the votes at two precincts of Logan district, deemed illegal because the electors entitled to vote thereat failed to designate their party affiliation as required by the Primary Law, that Gore complains. Both contestants knew this was the sole meritorious contention between them. They had that knowledge from the beginning. That was the chief cause of the subsequent proceedings, the obvious origin and basis of the divergent opinions expressed respecting the votes cast and counted or excluded for that reason. The essence of the inquiry was the power to ascertain the result by excluding the votes so cast. Upon that issue the case was heard and determined. Gore and Baer remained personally present during the progress of the canvass, and to the same extent participated therein. Thus it seems that every purpose to be served by a notice was accomplished without it; and no prejudice resulted so far as can be observed.

By the next objection, Gore challenged the right of the circuit court to hear the matter *de novo*. The statute amply clothes that court with authority so to hear and determine the results of a primary. Why it may not perform that function under the power given, no convincing argument asserts, and no sufficient answer suggests. By allowing an appeal, the legislature evidently intended to confer the jurisdiction exercised in contest cases between rival claimants of an office arising out of a general election, as required by § 3, chap. 6, Code, and to hear *de novo* and justly determine the actual re-

sults of the primary. The section authorizing an appeal denominates the appellate proceeding a contest, and points out the regulatory proceedings therefor. Apparently the act placed both controversies in the same category, and prescribed the same procedural regulations to govern the mode of ascertaining the rights of the claimants of a primary nomination and the contestants for an office.

The vital contention is the assault made upon the constitutionality of the act, requiring the voter to indicate by his oath his party affiliation before he is entitled to express by ballot a choice between candidates in the primary election. In this discussion, it must be remembered always that we are dealing exclusively with a primary election law, and not with the right to vote in a general election. That right is not in issue now. The elections are fundamentally different. In a primary the voters of each political organization participating are conceded the privilege to determine for themselves by ballot who shall be their candidates for the different elective offices. Although voting at the same place and time, for the same purpose, they vote only within the party with which they affiliate. No impropriety appears, and none is urged, against the classification of voters by parties in a nomination election.

Moreover, primary elections are so far matters of public concern that, within legislative discretion unrestrained by any provision of the organic law of the state, they are objects of proper and reasonable regulations in the exercise of governmental police power. *Hopper v. Stack*, 69 N. J. L. 562, 56 Atl. 1; *Ladd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714; *Ledgerwood v. Pitts*, 122 Tenn. 594, 125 S. W. 1036; *Hager v. Robinson*, 154 Ky. 489, 157 S. W. 1138; *Riter v. Douglass*, 32 Nev. 400, 109 Pac. 444. Such regulations are vital to accomplish the apparent purpose and scheme of nomination elections. Classifications by parties are unavoidable. They are essential requirements. Courts universally uphold them as such. Primary election statutes are based on a recognition of political parties as governmental agencies, and are usually intended to maintain party organizations and to secure the integrity of their nominations. The adherents of each organization participating in a primary may join in selecting the candidates of his party for offices to be filled by the electors of all political parties at the succeeding general election; and, while he may finally determine to vote therein for one or more of the nominees of any other party, he cannot, with propriety, participate in nominating them. That is a privilege he has no inherent right to exer-



cise, and of a denial thereof he cannot justly complain. These propositions are so fundamental as to be axiomatic. None but unreasonable partisans will controvert them. By many text-books and decisions an important distinction is noted between a general and a primary election. They treat a primary election merely as a substitute for a nominating caucus or convention, and not as an "election" within the meaning of that term as used in constitutions. So treated, it is a mere matter of statutory regulation within a reasonable exercise of the police power of the state, predicated on rights reserved by the people, when not forbidden by the organic law of the municipality. This principle is especially emphasized with reference to the qualifications of electors and tests of party membership prescribed by primary laws. *Ledgerwood v. Pitts*, 122 Tenn. 587, 125 S. W. 1036; *Hanna v. Young*, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674; *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388; *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65; *Hager v. Robinson*, 154 Ky. 480, 157 S. W. 1138; *State ex rel. Zent v. Nichols*, 50 Wash. 522, 97 Pac. 728; *Riter v. Douglass*, 32 Nev. 400, 109 Pac. 444; *State ex rel. Gulden v. Johnson*, 87 Minn. 223, 91 N. W. 604, 840; *Line v. Election Canvassers*, (*Line v. Waite*) 154 Mich. 329, 18 L.R.A. (N.S.) 412, 117 N. W. 730; *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121; *Dooley v. Jackson*, 104 Mo. App. 21, 78 S. W. 330; *Gray v. Seitz*, 162 Ind. 1, 69 N. E. 456; *State ex rel. Miller v. Flaherty*, 23 N. D. 313, 41 L.R.A. (N.S.) 132, 136 N. W. 76; *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294; *Kelso v. Cook*, — Ind. —, 110 N. E. 987.

Finally, it is contended that the provision requiring each voter to state on oath the political organization with which he affiliates before he is entitled to vote in the primary violates the constitutional provisions that "no religious or political test oath shall be required as a prerequisite or qualification to vote," and that with certain negative exceptions all male citizens twenty-one years of age or over "shall be entitled to vote at all elections held within the counties in which they respectively reside." But is the requirement of the Primary Election Law of the political identification of the voter, verified by his signature and affidavit, in the nature of the test oath forbidden by the organic law? That identification is essential to effectuate the statute. Without that requirement, the law would be useless and inefficient. If electors can exercise the elective franchise in primaries indiscriminately, adverse partisans may dictate or procure the nomination of persons as candidates not desired by a majority of L.R.A.1917B.

the voters of a different party organization, and thereby impose upon it undesirable nominees. But such requirement is not a test oath. It is a reasonable regulation, operating as a reciprocal protection and security against imposition by the voters of one political organization upon the adherents of another. It does not tend to impair the elective franchise, or impinge upon any constitutional guaranty or inhibition. No one is denied the right to vote. It is merely a mode of ascertaining the party affiliation of the voter. It does not assume to test the right to vote, but to identify him with the party organization for whose candidates he desires to vote in the primary. As such it is upheld in *Eadd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714; *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *Riter v. Douglass*, 32 Neb. 400, 109 Pac. 444; *State ex rel. Zent v. Nichols*, 50 Wash. 522, 97 Pac. 728; *Hopper v. Stack*, 69 N. J. L. 562, 56 Atl. 1; *Ex parte Wilson*, 7 Okla. Crim. Rep. 624, 125 Pac. 739; *Kelso v. Cook*, — Ind. —, 110 N. E. 987; *State ex rel. Miller v. Flaherty*, 23 N. D. 313, 41 L.R.A. (N.S.) 132, 136 N. W. 76. As announced by these and other authorities, to prescribe reasonable regulations for exercising the elective franchise in primaries is within legislative power and competency. The statute assailed is not an unreasonable regulation. Frequently, to protect the integrity of the ballot, it is necessary to demand and require a voter to show by his oath a valid claim of right to vote in a general election. Statutes authorizing a denial of the right, except upon verified proof showing the requisite qualifications of the proposed voter, have never been assailed in this state as violative of the constitutional provisions now in force. Electors have acquiesced in the enforcement thereof as essential and valid, without objection or complaint.

These conclusions necessitate an affirmation of the judgment of which Gore complains.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RICHARD H. STAATS, Plff. in Err.,  
v.  
BIOGRAPH COMPANY.

(236 Fed. 454.)

Corporations — dividend — right to rescind.

A declaration of dividend on corporate

**Note.** — As to power of corporation to rescind declaration of dividend, see annotation following this case, post, 736.

stock, to be paid in scrip certificates which might be converted into cash, stock, or interest-bearing obligations, may be rescinded by the directors before the scrip is issued if adverse conditions affect the business, although enough surplus remains to satisfy the dividend.

*For other cases, see Corporations, V. c. 4, in Dig. 1-52 N. S.*

(July 3, 1916.)

**E**RROR to the District Court of the United States for the Southern District of New York to review a judgment in defendant's favor in an action brought to recover damages alleged to have been sustained by the rescission of a resolution by defendant declaring a dividend on its corporate stock. Affirmed.

Statement by Rogers, Circuit Judge:

The defendant is a corporation organized in 1895, pursuant to the laws of the state of New Jersey. It has an authorized capital of \$2,000,000, and of this amount \$1,999,000 is outstanding, and is engaged in the moving picture business.

The plaintiff is a citizen of the state of New York, and is the record owner of 550 shares of the par value of \$55,000 of the stock of the defendant company, and has been since prior to January 1, 1913.

On December 28, 1914, the board of directors of defendant declared a dividend of 50 per cent on its outstanding capital stock, payable February 1, 1915, to the stockholders of record of January 18, 1915. The dividend as declared was payable February 1, 1915. It was to be paid in registered scrip certificates containing upon their face an agreement by the defendant that they might be converted on or before December 31, 1916, at par, without interest, wholly or partly in cash, wholly or partly at par, or wholly or partly in such form of interest-bearing obligation as might be deemed by the directors to be the best interests of the company. Announcement of this action was made in a circular to the stockholders, dated December 28, 1914.

Without authorization from the stockholders and on August 10, 1915, and without the plaintiff's consent, the directors passed a resolution rescinding the declaration of the dividend previously declared, and this action was announced in a circular to the stockholders dated August 26, 1915.

On September 14, 1915, the plaintiff made a demand on the defendant for the delivery of the registered scrip certificates which he claimed pursuant to the resolution of December 28, 1914. The demand

was not complied with, and this action is brought to recover \$27,500; that being the face amount of the scrip certificates which were issuable to him in respect of the \$55,000 par value of the stock held by him. At the close of the trial of the action a motion was made to dismiss the complaint. That motion was denied. Both sides asked the court to direct a verdict, and a verdict was directed for the defendant; an exception being reserved for the plaintiff.

Argued before Coxe, Ward, and Rogers, Circuit Judges.

Messrs. Van Vorst, Marshall, & Smith, and Alexander B. Siegel for plaintiff in error:

A dividend, when declared, becomes an absolute obligation, owing by the corporation to the stockholder; and it follows that since it is such an absolute obligation, its binding force cannot be destroyed by the party from whom it is owing.

*Ford v. Easthampton Rubber Thread Co.* 158 Mass. 84, 20 L.R.A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036; *Leroy v. Globe Ins. Co.* 2 Edw. Ch. 657; *Lowene v. American F. Ins. Co.* 6 Paige, 482; *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480; *Anglo-American Land, Mortg. & Agency Co. v. Lombard*, 68 C. C. A. 89, 132 Fed. 721; *Schofield v. Goodrich Bros. Bkg. Co.* 39 C. C. A. 76, 98 Fed. 271; *San Diego Flume Co. v. Souther*, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *King v. Paterson & H. R. Co.* 29 N. J. L. 82; *Jackson v. Newark Pl. Road Co.* 31 N. J. L. 277; *Stevens v. United States Steel Corp.* 68 N. J. Eq. 373, 59 Atl. 905; *Wheeler v. Northwestern Sleigh Co.* 30 Fed. 347; *Hopper v. Sage*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; *Coleman v. Columbia Oil Co.* 51 Pa. 74, 3 Mor. Min. Rep. 483; *Bailey v. New York C. & H. R. R. Co.* 22 Wall. 604, 22 L. ed. 840; *Billingham v. E. P. Gleason Mfg. Co.* 101 App. Div. 476, 91 N. Y. Supp. 1046, affirmed in 185 N. Y. 571, 78 N. E. 1099; *Bankers Trust Co. v. R. E. Dietz Co.* 157 App. Div. 594, 142 N. Y. Supp. 847; *Robinson's Trust*, 218 Pa. 481, 67 Atl. 775; *McLaran v. Crescent Planing Mill Co.* 117 Mo. App. 40, 93 S. W. 819; *Dock v. Schlichter Jute Cordage Co.* 167 Pa. 370, 31 Atl. 656; *Hollingshead v. Woodward*, 35 Hun, 410; *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. N. S. 22, 17 Times L. R. 625; 2 Cook, Corp. 6th ed. § 535; 2 Clark & M. Priv. Corp. 1600; 5 Thomp. Corp. 2d ed. § 5277.

It was no defense that the property of the corporation, if sold in liquidation at a

forced sale, would not bring the amount at which it was valued on its books.

*Bankers Trust Co. v. R. E. Dietz Co.* 157 App. Div. 594, 142 N. Y. Supp. 847; *Davenport v. Lines*, 77 Conn. 473, 59 Atl. 603; *Washburn v. National Wall-Paper Co.* 26 C. C. A. 312, 51 U. S. App. 380, 81 Fed. 17; *Ottinger v. Bennett*, 144 App. Div. 525, 129 N. Y. Supp. 819; *Goodnow v. American Writing Paper Co.* 73 N. J. Eq. 692, 69 Atl. 1014; *Hyams v. Old Dominion Copper Min. & Smelting Co.* 82 N. J. Eq. 507, 89 Atl. 37, affirmed in 83 N. J. Eq. 705, 92 Atl. 588.

The evidence required the direction of a judgment for the plaintiff for the par value of the certificates which were payable to the plaintiff.

*E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 134 C. C. A. 161, 218 Fed. 353; *New York News Pub. Co. v. National S. S. Co.* 148 N. Y. 39, 42 N. E. 514; *Hand v. Gas Engine & Power Co.* 167 N. Y. 142, 60 N. E. 425; *Murphy v. Dernberg*, 84 App. Div. 101, 82 N. Y. Supp. 585.

Mr. David Gerber, for defendant in error:

The scrip dividend of December 28, 1914, assuming it not to have been rescinded, only gave the limited rights therein specified; and under it, the directors reserved the right to retire the scrip by issuing a stock.

*People ex rel. Williamsburgh Gaslight Co. v. Board of Assessors*, 76 N. Y. 202; *Gibbons v. Mahon*, 136 U. S. 549-569, 34 L. ed. 525-531, 10 Sup. Ct. Rep. 1057; *Wilson v. American Ice Co.* 206 Fed. 736; *Terry v. Eagle Lock Co.* 47 Conn. 141; *Blinn v. Gillette*, 208 Ill. 491, 100 Am. St. Rep. 234, 70 N. E. 704; *State v. Baltimore & O. R. Co.* 6 Gill, 363; *Harris v. San Francisco Sugar Ref. Co.* 41 Cal. 393; *Green v. Bissell*, 79 Conn. 547, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287.

The directors are the sole judges whether or not a dividend should be declared, unless they act in bad faith, and the courts will not control or change the character of the dividend declared by them.

*Re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Williams v. Western U. Teleg. Co.* 93 N. Y. 162; *Union P. R. Co. v. Frank*, 141 C. C. A. 510, 226 Fed. 906.

The discretion of the directors respecting the declaration of a dividend extends to the right to revoke a scrip dividend at any time before the scrip is issued.

9 Am. & Eng. Enc. Law, 2d ed. 692; *Terry v. Eagle Lock Co.* 47 Conn. 141; *Hollingshead v. Woodward*, 35 Hun, 410; *MacLaran v. Crescent Planing Mill Co.* 117 Mo. App. 40, 93 S. W. 819; *Ford v. East-L.R.A.* 1917B.

*Hampton Rubber Thread Co.* 158 Mass. 84, 20 L.R.A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036; *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. N. S. 22, 17 Times L. R. 625.

This action being at law to recover damages, and the plaintiff having failed to show any damage, the court properly determined the question of law in favor of the defendant.

*Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; *Adenaw v. Piffard*, 202 N. Y. 122, 95 N. E. 555; *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L.R.A.(N.S.) 922, 96 N. E. 99; *Werner v. Werner*, 169 App. Div. 9, 154 N. Y. Supp. 570; *Terry v. Eagle Lock Co.* 47 Conn. 141; *Gibbons v. Mahon*, 136 U. S. 549-569, 34 L. ed. 525-531, 10 Sup. Ct. Rep. 1057; *State v. Baltimore & O. R. Co.* 6 Gill, 363.

Rogers, Circuit Judge, delivered the opinion of the court:

The question involved herein concerns the power of a board of directors of a corporation to rescind a resolution declaring a scrip dividend, after the resolution declaring the dividend has been announced, and notwithstanding the existence of a surplus at the time of the adoption of both resolutions. It is conceded that no dispute as to the facts exists. The decision below was limited by its terms to a decision against the plaintiff on questions of law alone.

Prior to 1913, the defendant company had paid cash dividends at the rate of 12 per cent annually; but on February 28, 1913, the directors decided to reduce the rate to 6 per cent annually.

The company had purchased land in the Bronx borough in New York City, upon which it proposed to construct a new plant. The reduction in the dividend was for the purpose of facilitating the completion and equipment of this new plant. On December 31, 1912, the company had a surplus of \$831,149 after deducting a reserve for depreciation. All of this surplus was profit earned by the company in excess of dividends paid to the stockholders. The balance sheet of the company on June 30, 1915, shows that there was on that day a profit and loss surplus of \$1,101,696.83. The evidence shows that at the end of every month during the year of 1915 the surplus always was in excess of \$1,000,000. Nevertheless on August 10, 1915, the board adopted the following resolution:

"Resolved, that the action taken at the meeting of the board of directors held December 28, 1914, declaring a scrip dividend of fifty (50) per cent, be and the same is hereby rescinded."

It is not claimed that the corporation had, between the time of the declaration

of the dividend and its rescission, suffered any unforeseen or material loss. All the surplus which existed when the resolution declaring the 50 per cent scrip dividend was passed still existed when the revoking resolution was adopted, and in fact at the time the latter resolution was passed the surplus had been somewhat increased above what it was when the original declaration was made, and at no time since has it fallen below \$1,000,000.

But it appears that, intermediate the passage of the resolution declaring the dividend, December 28, 1914, and its rescission, August 10, 1915, the business of the company was seriously affected by the European War. Conditions had so changed that the officers of the company voluntarily consented that their salaries should be reduced. On his own request the president's expense allowance of \$7,500 per annum was discontinued, and his salary, which had been \$18,750 a year, was reduced to \$15,000. The company had to borrow cash from its directors to meet its needs. The operating expenses of the company were about \$50,000 a week. A few days prior to the adoption of the rescinding resolution, it borrowed from its president \$27,000, who, with others, accepted the notes of the company unsecured by any collateral.

The president testified that "at the time the dividend was declared, the business had fallen off considerably, but it was believed from the best information obtainable that it would be only temporary shrinkage. Early in the following year, or say in the spring of the following year, the business fell off very rapidly, until it now amounts to practically nothing. There was also at the same time a very serious change in the business of this country and Canada. There were certain facts which the directors considered at their meeting of December 28, 1914, which were very encouraging and looked like a substantial change for the better. But within a very few months the reverse began to take place."

He was asked: "You had difficulty in getting your films across into countries that are in war?"

And he replied: "Well, we had more difficulty in getting orders. Formerly we would send a small positive print abroad of each production. That would be shown to the buyers on the other side, not only for European markets, but also for Australia. They would order on samples and on a certain day they would cable to ship so many positives. That meant that they ordered two or more weeks in advance of the time required. Later on conditions changed to such an extent that the various

buyers would not place their orders more than a few days in advance of the time required for delivery, and we were obliged to ship machinery to the other side and hold our negatives here until we made all the positives we could sell or lease in the American and Canadian markets. Then we shipped the negatives to the other side, and had the positive prints made there, so that we could accept orders up to leaving less than twenty-four hours before the time required for delivery. That was a very serious change. Furthermore, the duty imposed was so great,—the duty requirements put in force by the Canadian government,—that our agent, the man who represents us in all foreign countries, cabled us to suspend all shipments even of positives. By that time the business ceased entirely."

The resolution of rescission was adopted after many hours of discussion of the American and of the foreign market.

No scrip dividend has been paid to a single stockholder, and apparently all the stockholders with the exception of this plaintiff have acquiesced in the action of the directors. If this action can be maintained and the plaintiff can recover the damages he sues for, and other stockholders insist on like payments to them, it will require approximately \$1,000,000,—an amount which probably could only be realized by converting this company's fixed assets into cash and winding up its business. The question presented is one of considerable importance, and has received careful consideration.

This seems to be an attempt on the part of a single stockholder to dictate to a directorate and to compel it, against its will and honest judgment, to pay a dividend to him in cash or stock. The general rule is well established that, when a corporation has a surplus, whether a dividend shall be made rests in the fair and honest discretion of the directors, uncontrollable by the courts. *Williams v. Western U. Teleg. Co.* 93 N. Y. 162; *Gibbons v. Mahon*, 136 U. S. 549, 565, 34 L. ed. 525, 529, 10 Sup. Ct. Rep. 1057 (1890).

There have been numerous attempts to induce courts to interfere with directors in the exercise of their discretion, but they have quite uniformly refused to do so, unless it appeared that the directors had willfully abused their discretion and acted in bad faith and in neglect of duty. It takes a very strong case to induce a court to order directors to declare a dividend. A court has no jurisdiction to do so unless fraud or a breach of trust is involved. 2 Cook, Corp. 7th ed. § 545, p. 1588.

In the case at bar there is nothing to lead us to doubt the perfect honesty and

good faith of this board of directors, and the soundness of their judgment in this matter. But this plaintiff is not in this court asking us to compel the board of directors to declare a dividend. He is here, he asserts, because the board has declared the dividend and announced it, and then recalled its action and rescinded the vote.

In proper cases courts protect minorities, even minorities of one, against the oppression of the majority of stockholders and of boards of directors. It sometimes happens, however, that a minority institute "strike" suits and seek to oppress majorities and to involve the corporation itself in disaster for purposes of their own and for reasons not always revealed. So that there are cases in which courts are compelled to protect minorities against majorities and majorities against minorities.

In this case it does not escape observation that the plaintiff's right to a stock dividend, if he has such a right and can enforce it, would gain him nothing. We say it would gain him nothing, because, while a stock dividend would increase the number of his shares, it proportionately diminishes the value of each of his shares, leaving the aggregate value as it was before. He acquires the ownership of more shares, but he adds nothing to his proportionate ownership of the assets of the corporation. *Green v. Bissell*, 79 Conn. 547, 555, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287 (1907). What he expects through this suit is not the stock, but the cash value of the stock. But the question which this court must pass upon, whatever the consequences in this particular case may be, is whether a board of directors, having declared the dividend in the form already stated, had the power to rescind its action.

We may, however, remark in passing that while it might be very disastrous to the welfare of the defendant, under the circumstances in which it now finds itself, if any large number of its stockholders could come into a court of law as this plaintiff has done and enforce the demand that they receive the value of the stock dividend as declared, yet the corporation might easily have avoided any such situation. For we confess our inability to see how the corporation or its stockholders could in the least degree have been prejudiced if the scrip dividend had been issued as originally voted, and the corporation had then elected to pay it in stock. The property of the corporation would not have been impaired in the slightest extent.

The right to reconsider the declaration of a dividend would seem to depend upon the circumstances under which the divi-

dend was declared, as well as upon the character of the dividend itself.

1. If a board of directors, for example, should declare a dividend, and, before any public announcement of the action has been made, should reconsider the vote and rescind the action, its right to do so, perhaps, could not successfully be challenged.

2. If a board of directors should declare a dividend, when there are, at the time the declaration is made, no profits to divide, and if public announcement of the declaration of the dividend should be made, it may be that the right to reconsider and rescind would not be denied. Until such a dividend is paid, there would seem to be a locus penitentiæ, and the directors might recall their ultra vires act. They would not be under any obligation to consummate an illegal act which is merely in fieri. 2 Thomp. Corp. § 2135.

3. But if a board of directors should declare a cash dividend and make a public announcement of the fact, the courts have held that thereafter the board has no right to reconsider and rescind its action. The reason seems to be that the declaration of the dividend sets apart from the profits of the corporation a sum which is to be paid to the stockholders in proportion to their shares, and that it creates a debt due from the corporation to each shareholder, resulting in the relation of debtor and creditor. A dividend divides the property which belongs to the corporation into that which the corporation retains and that which the corporation agrees to pay to the stockholders, and which it is thereby bound to pay. That which one person is bound to pay to another is a debt. *Lockhart v. Van Alstyne*, 31 Mich. 76, 78, 18 Am. Rep. 156 (1875). Such a dividend cannot be rescinded, because a debtor does not have it within his power to "rescind" his debt. *Beers v. Bridgeport Spring Co.* 42 Conn. 17 (1875); *McLaran v. Crescent Planing Mill Co.* 117 Mo. App. 40, 50, 93 S. W. 819 (1906); *King v. Patterson & H. R. Co.* 29 N. J. L. 82, 87 (1860); *Ford v. Easthampton Rubber Thread Co.* 158 Mass. 84, 20 L.R.A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036 (1893); 2 Cook, Corp. 7th ed. § 541, p. 1580. And sometimes the corporation becomes not merely a debtor, but is a trustee; as where the corporation has not only declared a dividend, but has deposited a fund out of which the dividends are to be paid. *Le Roy v. Globe Ins. Co.* 2 Edw. Ch. 657 (1836); *Van Dyck v. McQuade*, 86 N. Y. 38, 52 (1881). A trust relation, having been established, cannot be terminated at the pleasure of the board of directors by a vote rescinding its former action.

In *Taylor on Corporations*, 5th ed. § 568,

it is said that "the discretion of the corporate management is exhausted in declaring the dividend; thereupon their only function is to pay it to the stockholders."

So in *Machen on Modern Law of Corporations*, vol. 2, § 1358, that writer says: "As a dividend when declared becomes a debt of the company, it follows that a dividend once properly declared cannot be revoked."

Morawetz, in his book on *Private Corporations*, vol. 1, § 445, says that "a dividend properly declared by the directors of a corporation cannot subsequently be revoked; those persons who were shareholders on the books of the company at the time when the dividend was declared have a legal claim against the company for the payment of the amount of the dividend."

And in *Marshall on Corporations*, § 283, it is said: "Since the right of the stockholders of a corporation to a dividend becomes vested as soon as the dividend has been fully declared by the directors, and the corporation becomes their debtor for their respective shares, it follows that neither the same board of directors nor their successors can afterwards reconsider their action and revoke the declaration without the stockholders' consent."

4. A difference seems to exist between a cash dividend and a stock dividend, so that, if a board of directors declare a stock dividend, the authorities appear to recognize the right of the board subsequently to rescind its action at any time prior to the actual issuance of the stock.

The leading case on the subject is that of *Terry v. Eagle Lock Co.* 47 Conn. 141 (1879). It appears in that case that at a meeting of stockholders of the defendant company held on August 5, 1875, it was voted to increase the capital stock 2,000 shares, and that the said increase be out of the surplus earnings of the company. It was at the same time voted that the directors be authorized and directed to cause the stock to be issued to the present stockholders pro rata. On August 18, 1875, a specially called stockholders' meeting was held, and a vote was passed rescinding the vote of August 5th, increasing the capital stock. The plaintiff stockholder, who had not been present at the meeting at which the former vote was rescinded, asked to have his pro rata share of the increase issued to him, or the value thereof paid to him, claiming that by the first vote he had a vested right of which he could not be deprived by the subsequent rescission. The court, in referring to the alternative prayer in the plaintiff's petition asking for a proportionate part of the supposed increase of stock or the cash value of his proportion of

the increase, declared it very clear that the alternative prayer ought not to be granted, as it would in effect be making it a cash dividend,—something "the company never intended. It would withdraw from the working funds of the company that amount which would not have been the result had the stock dividend been carried into effect. It is in effect asking the court to make a dividend instead of enforcing one made by the company." The Connecticut court denied, also, the stockholders' right to compel the company to issue the stock certificates, and it clearly pointed out the difference existing between a cash and a stock dividend. In the course of its opinion the court said:

"There is a difference, however, between a cash and a stock dividend. The former is created by a simple vote of the directors, and the amount thereby becomes severed from the general fund and belongs to the stockholders pro rata. The latter can be initiated only by a vote of the stockholders. That is followed by issuing the stock, and the increase can only be completed legally by filing with the town clerk and with the secretary of the state the certificates required by law. Suppose the vote had been to increase, not from the surplus earnings, but by a sale of the newly created stock. In such a case, it cannot be said that the capital is actually increased until the new stock is subscribed for at least. Until then there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not per se an increase. Nor is it such where the increase contemplated is from the surplus earnings.

"Again, a cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment. Such dividends do not materially affect the value of the stock. A stock dividend is exceptional. It does not add to his ready cash, but it changes the form of his investment by increasing his number of shares, thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same. It is of no special importance whether that value be divided into few or many shares.

"These differences are somewhat material, and serve to show that the petitioner's right, if he has such a right, to an increase of the number of his shares, was at the time a mere nominal right, and one which possessed no appreciable pecuniary value. It is at least doubtful whether a court of equity will in any case aid in enforcing such a right. But however this may be, there are other reasons of a pretty sub-

stantial character why the prayer of the petition should not be granted.

"The petitioner's right, as we have seen, was a mere naked right which he might waive without losing anything, and might enforce, if it could be enforced, without gaining anything. It became a mere question of expediency,—shall the surplus be actually converted into capital, or remain surplus and be used as capital? The corporation chose the latter; and the petitioner, having nothing to gain or lose in either case, acquiesced in that decision."

In *Dock v. Schlichter Jute Cordage Co.* 187 Pa. 370, 379, 31 Atl. 656 (1895), a stock dividend was declared on July 16, 1890, and on March 16, 1891, it was rescinded. The court held that a resolution adopted by the directors of a corporation distributing among the shareholders shares of stock of the company which had been purchased by the company out of its earnings cannot be subsequently rescinded where it is not shown that such distribution would be injurious to the business of the company. It was said that if, upon the declaration of a dividend, the company deposited the moneys to pay the dividends with a banker, and drew its check to the order of each entitled on the fund so deposited, or, in the case of a stock dividend, if the company executed its power of attorney to transfer the shares and these awaited delivery, the stockholder's right would be a vested one which could not be taken from him by a rescinding vote of the directors. Then followed this statement: "It is believed that, when there has been no such appropriation as that above mentioned, a company, by its board of directors, in a proper case and for cause, may rescind a resolution declaring a dividend; as where owing to destruction of a plant by fire immediately following such resolution. If in the business and honest judgment of the board the earnings intended to be distributed should be recalled and used for the restoration of the destroyed property it would be within its power to so deal with them; but, unless some similar thing appear, the declaration of a dividend of earnings is the announcement of an obligation due each shareholder for which proceedings may be had as legal methods indicate, and the burden of manifesting that the debt or obligation is not due after such a declaration is upon the company."

In the above case the court wrote no opinion, but affirmed "on the clear, concise, and convincing report of the master."

In *Billingham v. E. P. Gleason Mfg. Co.* 101 App. Div. 476, 91 N. Y. Supp. 1046, the directors passed a resolution providing for a regular cash dividend and for a scrip

dividend. The scrip certificates were issued, and the court held that they constituted an indebtedness. An action was brought on one of them against the company, and the court held the action maintainable; and in speaking of the certificate the court said: "It was so much set apart and reserved for him as undivided earnings. His share was ascertained and his right to it was fixed. It was a divided share of past earnings, and, as we think, became a severed indebtedness of the company; for nothing is better understood than that a dividend when declared is a debt due absolutely to the stockholders."

In the case at bar the scrip certificates were never issued.

In *Machen on Modern Law of Corporations*, vol. 1, § 601, the law is stated as follows: "Rescission of Stock Dividends.—A stock dividend should also be distinguished from a cash dividend, in that, in the case of cash dividend, the right of the shareholder becomes indefeasible immediately upon the declaration of the dividend, and the company cannot subsequently rescind its action. In the case of a stock dividend, on the other hand, until the formalities required by law as conditions precedent to an increase of capital have been completed, all is in fieri, so that until then the company may revoke the dividend. The reason of this rule applies, however, only where the stock dividend involves an increase of the company's nominal capital, and therefore a dividend payable in shares which had been purchased by the company should be in this respect assimilated to a cash dividend and is irrevocable."

It is undoubtedly true that directors may repeal any previous resolution or rescind any previous action unless repeal or rescission would involve a breach of contract or disturb a vested right. The resolution originally adopted by the directors certainly created no debt. The declaration was not to pay a cash dividend absolutely, for the directors had an option which they reserved as to whether they would or would not pay in cash. The distinguishing and necessary feature of a "debt" is that a fixed and specific amount is owing by a certain and express agreement, and that does not exist under the circumstances we find in this case. The directors did not bind themselves to pay a cash dividend absolutely, and in all events, and if they should ultimately elect to pay in cash, they were left free to determine how much should be in cash and how much should be in stock. And as to the declaration as to the stock dividend, it should be said that the whole matter rested in fieri, and, not having become obligatory, was subject to repeal.

Notwithstanding the fact that the resolution declaring the dividend reserved to the corporation an option to pay in cash or to pay in stock, the plaintiff demands \$27,500, the amount he would be entitled to receive if the dividend were paid in cash. But the law is well settled that where one is bound by covenants to do one of two things, and does neither, then, in an action by the covenantee, the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most beneficial to the covenantee; and the courts of equity have applied the same principle to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust. See *Robinson v. Robinson*, 1 De G. M. & G. 247, 42 Eng. Reprint, 547, 21 L. J. Ch. N. S. 111, 16 Jur. 255.

It would seem that, if the resolution declaring the dividend could be held in law to have created a contractual obligation, then, as an option was reserved, the corporation would have the right to insist that its liability should be restricted to damages for its failure to do that which is least beneficial to the promisee. In this case that would be to restrict its liability to the damages which arose from the failure to issue the stock dividend; and according to the decision in *Terry v. Eagle Lock Co.* 47 Conn. 141 (1879) the right to the stock dividend is a "mere naked right which he might waive without losing anything, and might enforce, if it could be enforced, without gaining anything." At the most, the damage would be nominal. If the defendant had performed, the complainant simply would have had the number of his shares of stock increased, and the value of each share in the same proportion decreased.

The action taken by the directors on December 28, 1914, which declared the scrip dividend and which was subsequently repealed, as already stated, declared a dividend payable on February 1, 1915, in registered scrip certificates containing upon their face an agreement by the company that they should be converted on or before December 31, 1916, at par without interest, wholly or partly in cash, wholly or partly in stock at par, or wholly or partly in such form of interest-bearing obligation as might be deemed by the directors to be for the best interest of the company. This is not a suit in equity to compel specific performance and the issuance of the scrip certificates, but it is an action at law for damages for the failure to perform the agreement and issue the registered scrip certificates payable on February 1, 1915. The L.R.A.1917B.

suit was not brought until October, 1915. Nevertheless the defendant claims that the action was prematurely brought. The basis for this contention is that while the scrip certificates were to be issued on February 1, 1915, the holders of such certificates were not entitled under the express language of the resolution to demand either cash or stock on them from the corporation until December 31, 1916, unless the corporation chose prior to that date to honor them, and that even on the latter date the corporation would have an option to pay in cash or stock as it might deem best. Has the corporation lost its rights to determine whether to pay in cash or stock on that date by its rescission of that contract prior to that time, assuming that a contract existed? We shall not at length review the cases relating to anticipatory breaches of executory contracts. The doctrine concerning anticipatory breaches was announced in *Hochster v. De La Tour*, 2 El. & Bl. 678, 118 Eng. Reprint, 922, 22 L. J. Q. B. N. S. 465, 17 Jur. 972, 1 Week. Rep. 469, where Lord Campbell held that the man who wrongfully renounced a contract into which he had entered could not justly complain if he was immediately sued for a compensation in damages without awaiting the time when the contract was by its terms to be performed. And in *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780 (1900), the cases in England and in this country were reviewed, and the Supreme Court, in an opinion by Chief Justice Fuller, laid down the law in similar terms. But while the law is undoubted now that the doctrine announced in the cases above referred to is applicable to certain classes of contracts, still the courts do not agree that the doctrine is applicable to all classes of contracts. In a recent case in the court of appeals in New York, that court declares that the rule that renunciation of a continuous executory contract by one party before the day of performance gives the other the right to sue at once for damages is usually applied only to contracts of a special character. *Ga Nun v. Palmer*, 202 N. Y. 483, 493, 36 L.R.A. (N.S.) 922, 96 N. E. 99 (1911). And in *Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 19, 78 N. E. 584, 9 Ann. Cas. 661 (1906), the New York court of appeals declared that the doctrine "is not generally applied to contracts for the payment of money at a future time."

We do not, however, pass on this question as to the right to sue for an anticipatory breach, for, in our opinion, there was in this case no contract to be breached.

Decree affirmed.



**Annotation—Power of corporation to rescind declaration of dividend.**

The general question of the right to reconsider a vote in a stockholders' or directors' meeting is discussed in the note to *State ex rel. Springs v. Ellison*, L.R.A.—, —.

The declaration of a cash dividend severs the amount thereof from the corporate funds and makes it the individual property of the stockholders; thenceforth the corporation owes the stockholders a debt;<sup>1</sup> the provision that it is to be paid at such time as directed by the board does not absolve the company from this obligation to the stockholder.<sup>2</sup> Since the declaration of a cash dividend creates a debt, such a dividend declared by the directors of a corporation cannot be rescinded as against nonassenting shareholders, even though the only action taken is the declaration thereof, no fund having been set aside out of which the dividend is to be paid when due,<sup>3</sup> or if it is ordered to be placed pro rata to the credit of the stockholders upon its books, to be paid at such time as may be directed by the board.<sup>4</sup> It is stated that "if the declaration of the dividend is fairly and properly made, out of profits existing at the time it is declared, the relation of debtor and creditor is thereby established between the corporation and the stockholders and a debt is thereby created against the corporation and in favor of the stockholder for the amount of the dividends due on the stock held by him.

... The mere declaration of the dividend, without more, by competent authority, under proper circumstances, creates a debt against the corporation in favor of the stockholder the same as any other general creditor of the concern; where as the setting apart of a fund after or concurrent with the dec-

laration out of which the debt thus created is to be paid passes one step further towards securing the payment of the identical fund to the shareholder, inasmuch as the law treats the setting apart of such fund as payment to the corporation as trustee for the use of the stockholder, on which fund the stockholder has a lien, and to which fund he has rights superior to the general creditor. . . . The doctrine is that by the mere declaration, the dividend becomes immediately thereby separated and segregated from the stock and exists independently of it; that the right thereto becomes at once immediately fixed and absolute in the stockholder, and from thenceforth the right of each individual stockholder is changed by the act of declaration from that of partner and part owner of the corporate property to a status absolutely adverse to every other stockholder and to the corporation itself, in so far as his pro rata proportion to the dividend is concerned. . . . It follows, of course, that a cash dividend properly and fairly declared cannot be revoked by the subsequent action of the corporation, for if, by the declaration of the dividend, the corporation thereby becomes the debtor of the stockholder, it goes without saying that the debtor cannot revoke, recall, or rescind the debt or otherwise absolve itself from its payment by any action on its part against or without the consent of the creditor."<sup>5</sup>

In one case it has been held that a resolution of the board of directors to distribute among its shareholders shares of the corporation's own stock purchased by it out of its earnings cannot be rescinded where nothing in the affairs of the company require such rescission.<sup>6</sup>

<sup>1</sup> *Beers v. Bridgeport Spring Co.* (1875) 42 Conn. 17; *McLaran v. Crescent Planing Mill Co.* (1906) 117 Mo. App. 40, 93 S. W. 819.

<sup>2</sup> *Beers v. Bridgeport Spring Co.* (Conn.) *supra*.

<sup>3</sup> *McLaran v. Crescent Planing Mill Co.* (Mo.) *supra*.

<sup>4</sup> In *Beers v. Bridgeport Spring Co.* (Conn.) *supra*, where the dividend declared by the directors, the amount thereof to be placed pro rata to the credit of each stockholder on the books of the company, and made payable without interest at such time as directed by the board, was reported to a meeting of the stockholders and approved by them by formal vote, and at a subsequent date the directors adopted a resolution that the amount of such dividend

be carried to an account to be known as a surplus fund account, thus in effect rescinding the declaration of the dividend, a non-assenting shareholder was held entitled to equitable relief to compel the corporation to pay over the dividend, the court stating that although no time was fixed for the payment of the dividend, the legal effect of the vote was that the debt was to be paid within a reasonable time.

<sup>5</sup> *McLaran v. Crescent Planing Mill Co.* (Mo.) *supra*.

<sup>6</sup> *Dock v. Schlichter Jute Cordage Co.* (1895) 167 Pa. 370, 31 Atl. 656. It was claimed by the directors in this case that the distribution was made to enable the sale and transfer of the corporate property. The resolution directing the transfer recited that there was in the treasury

If the fact that the dividend has been declared has not been made public, or in any manner communicated to the stockholders, and no fund has been set apart for its payment, it has been held that the declaration of a dividend payable at a future time may be rescinded at a subsequent meeting held before the dividend becomes payable.<sup>7</sup> The court argues: "As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote,—certainly before the passage of the vote had been made public or communicated to the stockholders,—it was within the power of the directors at a meeting subsequent to that at which the vote was passed to rescind it."

And it has been held that the declaration of an interim dividend may be rescinded by the directors where the circumstances of the company make it

advisable to do so. This is true although the money intended for the payment of the dividend had been lodged with the bankers of the company and set aside by them under a special account entitled "interim dividend account."<sup>8</sup>

If, subsequent to the resolution rescinding the declaration of a dividend another resolution is passed declaring another and distinct dividend, in which it is expressly provided that the same is to be in lieu of the former dividend, a stockholder who accepts payment of the latter dividend with knowledge of and in accordance with the terms of the last-mentioned resolution is estopped from claiming payment of the first dividend.<sup>9</sup>

The declaration of a stock dividend may be rescinded; this is true even though it is made from surplus earnings.<sup>10</sup> In discussing the distinction between a cash dividend and a stock dividend one court states that "a cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment. Such dividends do not materially affect the value of the

of the company the shares of stock representing undivided profits, and it was deemed advisable to divide the stock and distribute it among the stockholders. The court states that it may be admitted that the purpose of the resolution was to divide the stock so as to enable a transfer of the property, but this was not inconsistent with the further purpose indicated in the resolution. See citation from this case in *STARRS v. BIOGRAPH Co.* ante, 728.

<sup>7</sup> *Ford v. Easthampton Rubber Thread Co.* (1893) 158 Mass. 84, 20 L.R.A. 65, 35 Am. St. Rep. 462, 32 N. E. 1036.

The court in *McLaran v. Crescent Planing Mill Co.* (Mo.) supra, referring to *Ford v. Easthampton Rubber Thread Co.* (Mass.) supra, states that "the decision of that case can only be sustained upon the theory that the declaration of the dividend did not create a debt to the stockholders, for if a debt was thereby created, it is preposterous to say that such debt can be canceled by the action of the debtor without the consent of the creditor. In fact, we understand the opinion, inasmuch as it is there asserted that 'the passage of the vote did not constitute an actual contract of the corporation with the stockholder' as holding that the declaration of the dividend did not create a debt; and if this be its holding, it stands out boldly, singly, and alone in this country against an unbroken line of cases and overwhelming weight of authority that we are not at liberty to disregard were we so inclined, and we are not."

<sup>8</sup> *Lagunas Nitrate Co. v. Schroeder* (1901) L.R.A. 1917B.

85 L. T. N. S. (Eng.) 22, 17 Times L. R. 625. The rescission of the dividend was acquiesced in by the shareholder. At least, there was no evidence that any of the shareholders objected to it. An interim dividend is not an absolute declaration of dividends, but is a payment on account of the next forthcoming dividend.

<sup>9</sup> *Albany Fertilizer & Farm Improv. Co. v. Arnold* (1897) 103 Ga. 145, 29 S. E. 695. A part of the resolution declaring a subsequent dividend recited the illegality of the former dividend on account of want of funds, and expressly made the payment and acceptance of the last dividend to be in lieu of the former one declared.

<sup>10</sup> *Terry v. Eagle Lock Co.* (1879) 47 Conn. 141. The resolution declaring a stock dividend out of the surplus earnings of the company was made at a stockholders' meeting for a special purpose, and was assented to by the petitioner; the special purpose having failed, the stockholders met, pursuant to a notice, and passed a vote rescinding the declaration of the stock dividends. The petitioner was not present at this meeting and received no actual notice of it. No certificate of the increase was ever filed in the office of the secretary of state or in the office of the town clerk, as required for the completion of an increase in capital stock. A further reason for denying relief in this case was the delay on the part of the petitioner for a considerable time, within which a large amount of stock had changed hands on the basis of the validity of the rescission.

stock. A stock dividend is exceptional. It does not add to his ready cash, but it changes the form of his investment by increasing his number of shares, thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same. It is of no special importance whether that value be divided into few or many shares." 11

And see *STAATS v. BIOGRAPH CO.* ante, 728.

It thus appears that a distinction exists between the right to rescind the declaration of a cash and a stock dividend; in the case of a cash dividend there being no right to rescind the declaration, save in the exceptional cases above mentioned, while in the case of a stock dividend this right is held to exist. This conclusion of the courts seems to be a correct application of the governing principles.

There are, however, some considerations of a practical nature which seem to suggest a reversal of the rule; at least, to the extent of permitting a rescission of the declaration of a cash dividend at any time before it becomes payable. The corporate assets must necessarily be reduced by so much as is paid out in cash dividends. Assuming that the dividends are properly declared out of profits, circumstances may arise subsequent to the declaration that make the payment of so much money as is represented by the dividends inadvisable; while the issuance of a stock dividend would not affect the assets of the corporation. Hence, to deny the right to rescind in the case of a cash dividend and permit rescission in case of a stock dividend is to deny the right to take action in the only case in which it can be beneficial to the corporation.

11 *Terry v. Eagle Lock Co. (Conn.) supra.*

The reason for holding that a stock dividend may be rescinded is well stated in an obiter statement in *McLaran v. Crescent Planing Mill Co.* (1906) 117 Mo. App. 40, 93 S. W. 819, as follows: "That inasmuch as the act of declaring the cash dividend not only creates a debt, but thereupon severs the amount thereof from the mass of the corporate funds and property, and cannot be recalled for the reason the debtor cannot cancel a debt and rehabilitate or re-establish the fruit on the tree, so figuratively referred to in the case supra; whereas the act of declaring a stock dividend does not of itself operate to sever the stock to be thereafter issued from the other corporate property, inasmuch as there is no stock to be severed, and as the new stock cannot be issued until certain precedent conditions and formalities are complied with, such as issuing stock, the filing of certificates with the proper authority, etc."

In an action to enforce the individual

liability of a stockholder a defense set up by him that certain of his shares were issued to him as a stock dividend when there were no profits out of which such a dividend could properly be declared, and subsequently the board of directors rescinded the resolution directing such increase of capital and stock dividends, and that he has been at all times ready and willing to surrender his certificate to the company, was held a good defense, the court stating that the act of rescission operated to annul the previous illegal action of the board and cancel the certificate which had been issued, so that the holder thereof could not be held to any liability upon or by virtue of the shares thus issued to him and afterwards annulled. *Hollingshead v. Woodward* (1885) 35 Hun (N. Y.) 410, disposed of on appeal on another point (1887) 107 N. Y. 96, 13 N. E. 621.

See *Dock v. Schlichter Jute Cordage Co.* (1895) 167 Pa. 370, 31 Atl. 656.

W. A. E.

## KENTUCKY COURT OF APPEALS.

B. LINCOLN TEAGUE, Appt.,  
v.  
COMMONWEALTH OF KENTUCKY.

(172 Ky. 665, 189 S. W. 908.)

### Perjury — acquittal of criminal charge — effect.

1. Acquittal of one charged with crime is no bar to a prosecution for perjury for testimony given by him at the trial.

For other cases, see *Perjury*, in *Dig. 1-52 N. S.*

Note. — For acquittal of crime as bar to a subsequent prosecution of defendant for perjury committed on the former trial, see ANNOTATION following this case, post, 743. L.R.A.1917B.

### Appeal — time for argument in lower court.

2. The appellate court will not interfere with the discretion of the trial court as to the time allowed for argument of a case, unless it plainly appears that its discretion has been abused to the prejudice of the substantial rights of the complaining party.

For other cases, see *Appeal and Error*, VII. i, 6, in *Dig. 1-52 N. S.*

### Criminal law — sentence — law governing.

3. Punishment for crime must be imposed under an indeterminate sentence law in force when it was committed, although it was repealed before the trial.

For other cases, see *Criminal Law*, IV. d, in *Dig. 1-52 N. S.*

(December 12, 1916.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Hopkins County convicting him of false swearing. Reversed.

The facts are stated in the opinion.

Messrs. Gordon & Gordon & Moore, for appellant:

If the defendant was acquitted in the police court and if he swore falsely, this prosecution cannot stand.

Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; Petit v. Com. 22 Ky. L. Rep. 262, 57 S. W. 14.

If the defendant is guilty, he had the right to have the jury fix both the minimum and the maximum punishment, and the instruction which compelled them to fix the maximum term of his punishment is in violation of § 465 of the Kentucky Statutes, and is a highly prejudicial error.

Waters v. Com. 171 Ky. 457, 188 S. W. 490.

Messrs. M. M. Logan, Attorney General, and D. O. Myatt, Assistant Attorney General, for the Commonwealth:

The law in force at the time of the commission of the offense determines the rights of the accused, and the court should instruct the jury under such law.

Albritten v. Com. 172 Ky. 274, 189 S. W. 204.

The rule that permits one to testify falsely in his own behalf and thus procure his acquittal, and then exempts him from prosecution for false swearing, is not only against good reason, but against sound public policy, and against the great weight of authority.

Martin v. Com. 154 Ky. 704, 159 S. W. 542; Allen v. United States, 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 664; People v. Scully, 3 N. Y. Crim. Rep. 244; State v. Williams, 60 Kan. 838, 58 Pac. 476; State v. Beville, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 Ann. Cas. 753; State v. Cary, 159 Ind. 504, 65 N. E. 527; State v. Caywood, 96 Iowa, 372, 65 N. W. 385; State v. Vandemark, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; Dickerson v. State, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448; People v. Albers, 137 Mich. 678, 100 N. W. 908; State v. Smith, 119 Minn. 107, 137 N. W. 295; Mitchell v. State, 103 Am. St. Rep. 29, note g; State v. Sargood, 80 Vt. 415, 130 Am. St. Rep. 995, 68 Atl. 49, 13 Ann. Cas. 387; Wadlington v. Com. 22 Ky. L. Rep. 1108, 60 S. W. 8.

Carroll, J., delivered the opinion of the court:

Lincoln Teague, the appellant, was tried in the police court of Madisonville on the charge of selling beer in violation of the L.R.A.1917B.

Local Option Law, about 8 o'clock at night on October 16th, and found not guilty. On the trial of this prosecution, after being first duly sworn as a witness, Teague, testifying in his own behalf, said that he was not in Madisonville between the hours of 4 o'clock in the afternoon and 11:30 o'clock on the night of that day, and that he did not sell at his place of business in Madisonville the beer he was being prosecuted for selling. Thereafter the grand jury of Hopkins county returned an indictment against Teague, setting out in proper manner and form that on his trial he did "wilfully, knowingly, corruptly, and feloniously swear, depose, and give in evidence that on the day in question, viz., the 16th day of October, 1915, he (Teague) left the city of Madisonville, Hopkins county, Kentucky, about 4 o'clock P. M., and went to the city of Earlington, Hopkins county, Kentucky, and did not return to said city of Madisonville, Hopkins county, Kentucky, until about 11:30 o'clock P. M., when he came from said city of Earlington to said city of Madisonville on the passenger train No. 54, which arrives in said city of Madisonville about 11:30 o'clock P. M., which said statement was wilfully, knowingly, corruptly, and feloniously false and untrue, and the said Teague well knew it was false and untrue when he wilfully, corruptly, knowingly, feloniously, and falsely swore to it, for, in truth and in fact, said Teague did not leave the city of Madisonville, Hopkins county, Kentucky, about 4 o'clock P. M., and go to the city of Earlington, Hopkins county, Kentucky, and remain there and not return to the city of Madisonville until 11:30 o'clock P. M., and then did not come from said city of Earlington to the said city of Madisonville on the passenger train No. 54, which arrives in said city of Madisonville about 11:30 P. M., and the said Teague well knew said statements so sworn to by him as aforesaid were false and untrue."

But it did not charge, and could not truthfully have charged, that Teague was convicted. A general demurrer to the indictment was overruled, and thereafter, on May 3, 1916, Teague was put upon his trial and found guilty. The jury assessed his punishment at confinement for two years in the penitentiary, and from the judgment on his verdict this appeal is prosecuted.

On the trial under the indictment the evidence for the commonwealth was to the effect that at the trial of Teague in the police court he testified, after being sworn as a witness, that he was not in Madisonville between the hours of 4 o'clock in the afternoon and 11:30 on the night of October 16th, and that he did not, about 8 o'clock on the night of that day, sell the beer he was be-

ing prosecuted for selling, and further testified that on the afternoon of that day he left Madisonville about 4 o'clock and went to the city of Earlington, and did not return to Madisonville until 11:30 o'clock that night. There was also evidence sufficient to sustain the verdict of the jury that this testimony of Teague was false, and that, in fact, he was in Madisonville at his place of business about 8 o'clock on that night, and did sell beer in violation of the Local Option Law. On this appeal it is insisted that the demurrer to the indictment should have been sustained, or, if not, that the motion made by counsel for Teague for a peremptory instruction should have been sustained. It is further urged that the court committed prejudicial error in limiting the time for argument allowed his counsel and in instructing the jury.

The argument in support of the proposition that the indictment was fatally defective is rested on the ground that it was indispensable to a good indictment that it should charge that Teague was convicted on the prosecution in the police court; and the argument in support of the contention that the jury should have been instructed to return a verdict of not guilty is based on the proposition that a conviction could not be sustained, as the uncontradicted evidence showed that Teague was acquitted on his trial in the police court.

These two points relied on for reversal involve the same question, and will be treated together. If it is necessary to sustain a prosecution for false swearing that the defendant should have been convicted at the trial during which the alleged false evidence was given, the indictment was fatally defective, and so, if it was indispensable to a conviction that the evidence should show that the accused was convicted, the motion for a directed verdict in his behalf should have been sustained. On the other hand, if a person may be indicted and convicted of the offense of giving false testimony in a prosecution against him, although he may have been acquitted by the jury of the offense charged, the indictment was good, and the evidence sufficient to sustain the conviction.

In *Cooper v. Com.* 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 11 Am. Crim. Rep. 625, 51 S. W. 789, it appears from the opinion that Cooper was indicted in the Rowan circuit court for the offense of adultery committed with one Libbie Purvis, and on the trial under that indictment he was acquitted; that thereafter the grand jury of Rowan county returned an indictment against Cooper, charging that upon his trial for adultery he testified that he had not had carnal, sexual intercourse with Libbie Purvis, which testimony was, as he knew, L.R.A.1917B.

false, and under this indictment he was convicted. In holding that the conviction for giving false testimony could not be sustained because Cooper had been acquitted of the offense with which he was charged on the trial in which the alleged false testimony was given, the court said in the course of the opinion: "Appellant in this case had already been tried and acquitted of the offense of having had carnal, sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the commonwealth, and he cannot again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation. It therefore follows that appellant was entitled to a peremptory instruction to the jury to find him not guilty."

Again, in *Petit v. Com.* 22 Ky. L. Rep. 262, 57 S. W. 14, it appears that Petit, on the trial of a prosecution against him for the offense of carrying concealed, on or about his person, a deadly weapon, testified in his own behalf that he did not have the pistol at the time and place charged in the indictment, and was acquitted by the verdict of the jury. Thereafter he was indicted for giving false evidence in the case in which he was acquitted, and on this indictment he was found guilty. In holding that the indictment for false swearing could not be maintained, the court said: "The question here presented is identical with the case of *Cooper v. Com.* *supra*, and it is admitted by the attorney general that, unless the *Cooper Case* be overruled, a reversal should be had. To that opinion we adhere."

It will thus be seen that if the ruling in the *Cooper Case* and the *Petit Case* is adhered to, the indictment against Teague was not good, and the motion for a directed verdict in his behalf should have been sustained, and accordingly the judgment appealed from should be reversed on these grounds. On this appeal we have carefully examined the reasoning upon which the decision in the *Cooper Case* was rested, and have reached the conclusion that that case, as well as the *Petit Case* which merely followed it, should be overruled. An investigation of this question discloses that, with the exception of the *Cooper* and *Petit Cases*, and the case of *United States v. Butler* (D. C.) 38 Fed. 498, in which a like ruling was made, the authorities are uniform that the acquittal in a prosecution against a defendant will not bar a subsequent prosecution against him for giving false testimony in the case in which he was acquitted.

The circuit court of appeals of the United States for the fourth circuit had before it in *Allen v. United States*, 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 664,

this identical question, and that court, after a review of the authorities, refused to follow the Federal case of *United States v. Butler*, or the two cases from this court, and held that, although the defendant had been acquitted at the trial at which the alleged false testimony was given, this did not bar a prosecution for giving false evidence on that trial. To the same effect are *State v. Vandemark*, 77 Conn. 201, 58 Atl. 715, 1 Ann. Cas. 161; *Hutcherson v. State*, 33 Tex. Crim. Rep. 67, 24 S. W. 908; *State v. Beville*, 79 Kan. 524, 131 Am. St. Rep. 345, 100 Pac. 476, 17 Ann. Cas. 753; *State v. Cary*, 150 Ind. 504, 65 N. E. 527; *State v. Caywood*, 96 Iowa, 372, 65 N. W. 385; *People v. Albers*, 137 Mich. 679, 100 N. W. 908; *State v. Smith*, 119 Minn. 107, 137 N. W. 295; *State v. Sargood*, 80 Vt. 415, 130 Am. St. Rep. 995, 68 Atl. 49, 13 Ann. Cas. 367.

But aside from the great weight of authority opposed to the ruling in the *Cooper*, *Petit*, and *Butler* Cases, it seems to us that the reasoning on which these cases were rested is unsound, as well as unsafe. The efficient, as well as the correct, administration of the criminal law, demands that the defendant in a prosecution for false swearing of perjury should not be allowed to plead in bar of the prosecution the judgment of acquittal in the case in which the alleged false testimony was given. It will be observed that the decision in the *Cooper* Case, as well as the *Butler* Case, was put upon the ground that the judgment of acquittal in the prosecution was an adjudication that the defendant was not guilty of the offense charged, and hence it followed that he could not, in a subsequent prosecution, be punished for giving the evidence upon which his acquittal was secured. In other words, the judgment of acquittal was held to be *res judicata*. If this were so, it would seem to logically follow that a judgment of conviction in the prosecution in which the alleged false evidence was given would likewise be conclusive evidence of the guilt of the accused in a prosecution for false swearing in testifying that he was not guilty of the offense for which he was found guilty. But in neither the *Cooper* nor the *Butler* Cases was the court willing to carry the principle announced to its logical conclusion and give a judgment of conviction the same effect as a judgment of acquittal would have. And this itself sufficiently demonstrates the unsoundness of the view taken in these cases. The effect of the ruling in the *Cooper* and *Butler* Cases is that the defendant, in a prosecution against him, may practise a fraud upon the court and the jury, and secure his acquittal by means of this fraud perpetrated by and

through the medium of his false evidence, and yet this fraud will be sanctioned to such an extent as to make the judgment of acquittal conclusive evidence of his innocence in swearing that he was not guilty of the offense charged, although in truth and in fact he might have been proven guilty beyond a reasonable doubt and convicted, if all the facts in the case had been truthfully put before the court and jury. The rule announced in the *Cooper* and *Butler* Cases would, in effect, make a judgment of acquittal in a criminal case obtained by fraud conclusive, and beyond the power of the court to reinvestigate. But the rule everywhere prevails that a judgment obtained by fraud is not conclusive, and the means by which it was secured may be reinvestigated and a different result reached even in a collateral attack on the fraudulent judgment, when the wrong cannot be corrected by appeal; and in a criminal case, a judgment of acquittal, although obtained by fraud, cannot be reopened on an appeal. When the defendant is put upon his trial and acquitted, that is an end of the matter, and so if the defendant, in a prosecution against him, could, by giving false testimony, secure a judgment of acquittal when, if the truth had been known, there would have been a judgment of conviction, it would necessarily follow that the defendant could commit two crimes against the commonwealth, one the offense with which he was charged in the prosecution in which he gave false evidence, and the other the crime of false swearing, and go free of punishment for each.

It needs no citation of authority or elaborate argument to show that no rule of court-made law or practice that would permit conditions like this to prevail should be tolerated in a jurisdiction where punishment is supposed to follow the wilful violation of a statute. But we are not without authority on this subject, because a like question was presented in *Carrington v. Com.* 78 Ky. 83. In that case, as appears from the opinion, *Carrington*, under what are now §§ 1073 and 1076 of the Kentucky Statutes, under an indictment found against him in the circuit court, was tried in the county court, and when it was afterwards sought to try him in the circuit court, he attempted to plead in bar the judgment of the county court. But the circuit court rejected this plea upon the ground that the proceedings in the county court were fraudulent, and in sustaining the circuit court this court said: "The circuit court properly refused to permit its jurisdiction to be ousted, and to allow the prisoner, by a device so transparent, to choose the tribunal in which he would be tried. A judgment of acquittal thus pro-

cured was not a bar, and was properly disregarded. It is to be treated as if the prisoner had procured himself to be accused, arrested, and tried, and then attempted to plead the judgment thus obtained in bar; for, although he had been regularly indicted, he procured a trial in the quarterly court by a fraud upon the statute giving that court jurisdiction."

To the same effect are *Reddy v. Com.* 97 Ky. 784, 31 S. W. 730, and *McDermott v. Com.* 30 Ky. L. Rep. 1227, 100 S. W. 830.

In *Freeman on Judgments*, § 318, it is also said: "The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction under an indictment for any offense is a bar to any subsequent indictment substantially like the former. But in criminal, as in civil actions, it is essential that the judgment be on the merits, and not tainted with fraud. Thus going into a favorable court, and submitting to a conviction, in order to escape a severe penalty, is no bar to a bona fide prosecution."

It is fundamental in the policy of the law that judicial proceedings and judgment shall be fair and free from fraud, and litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and punished if they do not. If, however, a party accused of crime could secure immunity from prosecution for false swearing or perjury by securing his acquittal through these means, the law would be offering a reward for false swearing by affording the person guilty of its protection instead of inflicting punishment. Many persons accused of committing offenses against the law, and especially persons of low character, who are most commonly the offenders, would feel entirely free to give false evidence in their own behalf, and take the chance of thereby securing an acquittal, if they knew that an acquittal would bar a prosecution against them for giving the false evidence, and that if they were convicted the conviction would not be conclusive evidence that they were guilty of false swearing. The reason and the common sense of the thing are opposed to a rule that would make it possible for a guilty party to escape punishment when he had secured his acquittal of the offense charged by false testimony.

It may be suggested that if a person who told the truth in a prosecution against him was acquitted, a sufficient number of his enemies might be able to procure his indictment and conviction by giving evidence that his testimony was, in fact, false, and therefore the innocent defendant might be convicted of false swearing. It is, of course, L.R.A.1917B.

possible that a situation like this might arise, but it is not probable, and the possibility of wrong is too remote to have any controlling influence on the principle at stake.

It further appears that on the trial of this case the lower court limited the argument of counsel for the defendant to thirty minutes, and it is pressed on our attention that, although the judgment of conviction may be reversed for other reasons, we should, for the guidance of the trial judge on another trial, if there be one, indicate that a longer time should be allowed for the argument of the case than was permitted on this trial.

It is at once apparent that the time that should be allowed for the argument of cases cannot be regulated by a rule fixing the time that should be allowed in any particular case, because every case presents different facts and circumstances, and so, although we have in some cases held that the time allowed for argument was not sufficient, and in other cases held that it was, we have adopted the practice of leaving it to the trial judge to regulate, in the exercise of a sound discretion, the time for argument in each case, and it is only when it plainly appears that this discretion has been abused to the prejudice of the substantial rights of the defendant that his refusal to allow a longer time will be deemed reversible error. Thus it was said in *Combs v. Com.* 97 Ky. 24, 29 S. W. 734: "What length of time the ends of justice and rights of an accused party require should be allowed for argument to the jury on a criminal trial must, from necessity, be generally left to the sound discretion of the trial court; otherwise an undue portion of the time of a court might be needlessly consumed in the trial of one cause, to detriment of other business and rights of other parties."

In somewhat different form in *Stout v. Com.* 148 Ky. 199, 146 S. W. 407, the same idea was expressed as follows: "We have ruled in a number of cases that the time that shall be allowed for argument is a matter in the discretion of the trial judge, and that unless it affirmatively appears that this discretion has been abused to the prejudice of the accused, it will not amount to reversible error. *Combs v. Com.* supra; *Harris v. Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044; *Scott v. Com.* 148 Ky. 80, 146 S. W. 406. The trial court should, of course, allow counsel for the accused in every case reasonable time and opportunity to present the reasons why there should be an acquittal, but it is obvious that the time that should be allowed depends upon the facts and circumstances of each particular case. It is not to be altogether regulated by the number of witnesses that are introduced,

as a very complicated state of facts might be presented by the testimony of a single witness. It is rather to be controlled by the simplicity of the facts and circumstances surrounding the transaction."

We may, however, say that, taking into consideration the gravity of the offense, the number of witnesses who testified in the case in behalf of the commonwealth and the defendant, one hour would not be more than reasonable time to allow for the argument of the case.

The crime charged in the indictment was committed in October, 1915, at a time when what is known as the "Indeterminate Sentence Law," found in § 1136 of the Kentucky Statutes, was in effect. Under that statute the jury had the right, if they found the defendant guilty, to fix an indeterminate sentence not less than the minimum time nor greater than the maximum time of imprisonment prescribed by law for the punishment of the offender, so that, under the statute which prescribes that the punishment for false swearing shall be confinement for not less than one nor more than five years, the jury might have returned a verdict finding the defendant guilty and fixing his pun-

ishment at not less than one nor more than five years' confinement in the state penitentiary. Before the trial was had, however, the Indeterminate Sentence Law was repealed by an act of 1916 that may be found in the Acts of 1916, p. 430, and the trial court, being of the opinion that the provisions of the 1916 act should control, instructed the jury that, if they believed the defendant was guilty, they should fix his punishment at confinement in the penitentiary for not less than one nor more than five years; and the jury found the defendant guilty, and fixed his punishment at confinement in the penitentiary for two years.

It was held in *Albritten v. Com.* 172 Ky. 274, 189 S. W. 204, a case presenting this precise question, that a defendant must be punished under the law in force at the time the offense was committed, and not under the law in force at the time of the trial. This general statement, however, is to be considered as controlled by § 465 of the Kentucky Statutes. Therefore the court in this case should have instructed the jury under the Indeterminate Sentence Law.

For the error in the instructions, the judgment must be reversed.

### **Annotation—Acquittal of crime as bar to a subsequent prosecution of defendant for perjury committed on the former trial.**

Earlier cases considering the question under annotation will be found in the note to *Allen v. United States*, 39 L.R.A. (N.S.) 385.

TEAGUE v. COM. ante, 738, it will be observed expressly overrules *Cooper v. Com.* and *Petit v. Com.*, cited in the earlier note, and puts itself in line with the great weight of authority in holding that, although one has been acquitted at the trial at which false testimony was given, the acquittal does not bar the prosecution of such person for giving false evidence on that trial.

Since the earlier note it has been held in *McDaniel v. State* (1915) 13 Ala. App. 318, 69 So. 351, writ of certiorari denied in (1915) 193 Ala. 678, 69 So. 1018, that one, although acquitted of the charge of burglary, may be convicted of the crime of perjury in having falsely testified at the trial of the burglary charge, that at the time of his arrest he was unarmed. Certainly, the court said, it cannot be said that the jury in the burglary case, by acquitting defendant of the charge of burglary, adjudicated not only the truth of his statement that he was not guilty, but also the truth of his statement that at the time of his arrest he did not have a

pistol, and did not place his hand upon the pistol, etc.,—falsity in making which statement is the charge here made against defendant, and not falsity in making the former statement; that is, the statement of his innocence of crime.

So, also, in *Miles v. State* (1914) 73 Tex. Crim. Rep. 493, 165 S. W. 567, it was held that one acquitted of the charge of assault with intent to murder may be tried and convicted for perjury in having falsely sworn on that trial that he did not shoot the person alleged to have been shot. As to the contention that there was a second trial for the same offense, the court said: "The assault to murder was committed on June 13, 1912. The perjury was committed by appellant in a trial had in the district court on September 17, 1912. The Constitution and statute are that no man shall be put in jeopardy twice for the same offense. By no stretch of the imagination can an assault with intent to murder committed on June 13, 1912, be held to be the same offense, or anything akin to it, as perjury committed on September 17, 1912, even though the perjury is committed on the trial of the assault to murder case. Such a doctrine contended for by appellant could not for one moment



be sanctioned by this court as correct. Here it is established without doubt and without question that appellant in the dead hours of the night with his gun, a deadly weapon, crept up to within shooting distance of his intended victim, who was lying upon her bed in her own house, and attempted to assassinate her by shooting her through the body; and soon thereafter stated to four or five separate and distinct witnesses that he had shot and intended to kill her, and he fled and attempted to make his escape. Afterwards he was caught by the officers, duly indicted and tried, and by his perjured testimony secured an acquittal of his dastardly assault to murder and intention to assassinate his victim. Then, to hold that, because he escaped merited punishment for his first crime, he should go scot-free from his crime of perjury, would be monstrous indeed. We deem it unnecessary to further discuss the two offenses to demonstrate that they are not the same, and by no stretch of the imagination could be construed to be the same."

Again, in *Murff v. State* (1914) 76 *Tex. Crim. Rep.* 5, 172 S. W. 238, one acquitted of the charge of rape was held to have been properly tried and con-

victed of perjury for having falsely sworn at the trial of the rape charge that he had not had or attempted to have sexual intercourse with prosecutrix in that trial. If appellant's contention is correct, the court said, then, when an accused is tried for any offense, and he commits perjury on such trial, the mere trial itself would be perfect immunity for any perjury that might be committed on the trial thereof. This the court considered would be offering a high premium to everyone who is charged with crime to testify falsely on his trial so as to secure an acquittal, for, if such contention could be correct, such person could commit perjury and could not be tried for any perjury he might commit on such trial, and accused, the court added, has no more right to commit perjury on any trial where he is tried for an offense and testifies falsely, and then go scot-free, than any other witness.

So, also, in *Hutcherson v. State* (1894) 33 *Tex. Crim. Rep.* 67, 24 S. W. 908, it was held that there was no error in refusing to admit as evidence in a trial for perjury a judgment of acquittal in the trial at which the perjury was alleged to have been committed.

J. H. B.

#### NORTH CAROLINA SUPREME COURT.

JOHN D. HINES

v.

NEW ENGLAND CASUALTY COMPANY,  
Appt.

(— N. C. —, 90 S. E. 131.)

**Insurance — health — hernia — breach of representation.**

1. The existence of hernia does not per se avoid a policy of health insurance because of a breach of representation that insured is in sound condition, but the question whether or not it is sufficient to render the applicant unsound is for the jury; at least where the statute provides that no representations shall prevent a recovery unless materially affecting the risk.

*For other cases, see Insurance, III. c, 2, b, in Dig. 1-52 N. S.*

**Same — confinement to house — walking as part of treatment.**

2. One is not shown not to have been confined to his house or a hospital within the

meaning of a health insurance policy, by the fact that, acting under the directions of his physician, he visited the office of the latter and walked or rode out as part of the treatment prescribed by the physician.

*For other cases, see Insurance, VI. c, 2, in Dig. 1-52 N. S.*

(Brown and Walker, JJ., dissent.)

(October 11, 1916.)

**A**PPEAL by defendant from a judgment of the Superior Court for Franklin County in plaintiff's favor in an action brought to recover the amount alleged to be due on a health insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. William H. Ruffin, for appellant:

The suppression of the fact of plaintiff's disease avoided the policy.

*Gardner v. North State Mt. L. Ins. Co.* 163 N. C. 367, 48 L.R.A.(N.S.) 714, 79 S. E. 806, Ann. Cas. 1915B, 652; *Fishblate*

**Note.**—For hernia as breach of condition or warranty as to health or bodily condition in insurance contract, see annotation following this case, post, 747.

For construction and effect of condition in accident or health policy that assured

must be confined to the house to entitle him to indemnity, see notes to *Breil v. Claus Groth Plattsduischen Vereen*, 23 L.R.A.(N.S.) 359, and *Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes*, 42 L.R.A.(N.S.) 700.

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v. Fidelity & C. Co. 140 N. C. 589, 53 S. E. 354; Alexander v. Metropolitan L. Ins. Co. 150 N. C. 536, 64 S. E. 432; Bryant v. Metropolitan L. Ins. Co. 147 N. C. 181, 60 S. E. 983; Security Life & Annuity Co. v. Forrest, 152 N. C. 621, 68 S. E. 139; Schas v. Equitable L. Ins. Co. 166 N. C. 55, 81 S. E. 1014; Hardy v. Phoenix Mut. L. Ins. Co. 167 N. C. 22, 83 S. E. 5; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 6 L. ed. 934, 6 Sup. Ct. Rep. 837; Vance, Ins. pp. 267-269.

The effect of the hernia in determining the nature of the risk assumed and in fixing the rate of insurance was a matter solely for the insurer, before it entered into the contract at all.

Henderson Lighting & P. Co. v. Maryland Casualty Co. 153 N. C. 275, 30 L.R.A. (N.S.) 1105, 69 S. E. 234; Schas v. Equitable L. Ins. Co. 166 N. C. 55, 81 S. E. 1014; Hardy v. Phoenix Mut. L. Ins. Co. 167 N. C. 22, 83 S. E. 5.

The contract, being clear of ambiguity, should be construed so as to give effect to the intent of both parties.

Bruzas v. Peerless Casualty Co. 111 Me. 308, 89 Atl. 199; Henderson Lighting & P. Co. v. Maryland Casualty Co. 153 N. C. 275, 30 L.R.A. (N.S.) 1105, 69 S. E. 234; Preston v. Aetna Ins. Co. 193 N. Y. 142, 19 L.R.A. (N.S.) 133, 85 N. E. 1006; Dulaney v. Fidelity & C. Co. 106 Md. 17, 66 Atl. 614; Cooper v. Phoenix Acci. & Sick Ben. Asso. 141 Mich. 478, 104 N. W. 734; Dunning v. Massachusetts Mut. Acci. Asso. 99 Me. 390, 59 Atl. 535; Bishop v. United States Casualty Co. 99 App. Div. 530, 91 N. Y. Supp. 176; Schneps v. Fidelity & C. Co. 101 N. Y. Supp. 106; Sawyer v. Masonic Protective Asso. 75 N. H. 276, 73 Atl. 168; Lieberman v. Columbia Nat. L. Ins. Co. 47 Pa. Super. Ct. 276; Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes, 42 L.R.A. (N.S.) 700, note; Breil v. Claus Groth Plattsdutschen Vereen, 23 L.R.A. (N.S.) 359, note; Haksbacher v. Aetna Beneficial Asso. 55 Pa. Super. Ct. 410.

Messrs. W. H. Yarborough, Jr., and Ben T. Holden for appellee.

Clark, Ch. J., delivered the opinion of the court:

This is an action to recover on a health insurance policy which contained promised indemnity for partial disability, confinement to the house accompanied by disability, and confinement in a hospital accompanied by disability. Each of these was at different rates and the claims made under the three classes of indemnity aggregated \$382.14. The defense was that the insured had a disease at the time of application which he did not disclose, and that the defendant was not liable under the indemnity either L.R.A.1917B.

for confinement at the house or confinement in the hospital, for that it was not such as entitled the plaintiff to indemnity therefor, but only to partial indemnity.

The exceptions, seventeen in number, may be grouped under two heads,—those which relate to the refusal of the motion to nonsuit, and those which relate to the construction of the words, “within a house” and “within a hospital.” As to the first exception, the plaintiff had, as it appears, at the time of the application, a slight attack of hernia. He was not asked if he had that disease. If so, his answer in the negative would have vitiated the contract; because the defendant company had a right to make any disease material, and if the plaintiff had answered untruly, this would have been a misrepresentation. The statement in the application on which the defendant relies is the following: “I have never had fits or disorders of the brain. My habits of life are correct and temperate, and I am in sound condition, mentally and physically, except as follows: No exceptions.”

Few people are absolutely exempt from some variation from a perfect condition, and, unless such variation is specifically asked about in the application and denied, it is not matter vitiating the policy, unless the variation was serious enough to affect his “soundness” so that anyone would say who knew the facts, “He is not a sound man.”

The plaintiff testified that he had hernia, but that he did not suffer from it at all. Dr. Perry testified as an expert that he had examined the plaintiff two years later, in August, 1914; that he then made a physical examination of the plaintiff for life insurance; that he examined the indications of hernia, and recommended the plaintiff for insurance in another company as a sound man. He further testified: “I was of the opinion that he was a sound man. . . . I would not think that the hernia would affect Mr. Hines's health to any degree.”

Hernia sometimes is a most serious defect, making the sufferer an unsound man. In other cases it is simply a slight imperfection which would not render him unsound in any respect, according to the testimony in this case. Therefore the court properly submitted to the jury the issue whether the plaintiff's answer, as above set out, was false or not, or whether at the time he made the application he was in the ordinary acceptance of the words “a sound man.” It is not every ailment or indisposition or imperfection that makes one an unsound man. There must be such a condition that there is a material departure from a sound condition. The is-

sue was left fully and fairly to the jury as an issue of fact, and they found with the plaintiff.

The defendant has not contended that the plaintiff's representations were fraudulently made, but insists that the insured should not be the judge of the materiality of such representations; but neither could the defendant be sole judge. The question is not whether the plaintiff had hernia, for this is not denied, but whether it was of such nature as to have rendered him an unsound man at the time of the application. The jury is the only tribunal which can settle the disputed facts, for this is an issue of fact, and not a matter of law. The illness from which the plaintiff suffered subsequently and for which he seeks to recover is an attack of rheumatism which had no connection with, nor was there any evidence to show that it was in any way traceable to, hernia.

Revisal, § 4808, provides that all statements in an application for insurance shall be held merely representations, and not warranties, and that no representations, unless fraudulent or materially affecting a risk, shall prevent a recovery. This matter was properly submitted to the jury, and they found that "the plaintiff was of sound physical condition at the time he signed the application, notwithstanding such hernia, and that his representations at the time he applied for the policy were not false, and were not material to the defendant in determining whether it would issue the policy."

The court instructed the jury that whether he was in sound health or not was a matter for the jury to determine upon the evidence, depending upon whether the extent of the hernia he had was such as to render him unsound or not.

The second proposition involved is whether the plaintiff has brought his case, upon the evidence, within the conditions which entitle him to recover because "confined within a house or within a hospital." The court instructed the jury that the words, "confined in his home," do not mean that he must be actually confined within the four walls of his house, but it means that he was entitled to indemnity while kept in his home on account of sickness and unable to leave for any purpose not connected with his sickness. If, during such illness, he was able to visit friends or his place of business, he would not have been "confined." But if, acting under the directions of the physician, he called at his doctor's office, or the mere fact that he walked out under his directions as a part of the treatment the physician was giving him, this would L.R.A.1917B.

not require the jury to find that he was not confined to his home.

The court also instructed the jury that, within the meaning of this policy, a man would be "confined within a hospital" during such time as he was therein and subject to its rules and regulations, although at times walking or driving in the grounds of the hospital, or even outside the grounds, provided such walking or driving was taken under the rules and regulations of the hospital physician as a part of the treatment; but if during that time the plaintiff was able to leave the hospital, or left it for social purposes, or for business reasons, then he would not have been "confined" within the meaning of the policy.

The court instructed the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that, notwithstanding the hernia, he was not suffering therefrom at the time of the application for the policy, and was, in fact, a sound man at that time, and also that the burden was upon the plaintiff to satisfy the jury that he was confined in his home and in the hospital in the manner already charged, and the burden was upon him to show the length of time; that the burden was upon the defendant to satisfy the jury that from the nature of the hernia it would have prevented it from issuing the policy, if it had been informed thereof.

The charge is very full, and the jury must have understood the matters of fact left to them. We find no error of law committed during the trial.

**Brown, J., dissenting:**

I am of opinion that the motion to nonsuit should have been sustained, because upon the plaintiff's own testimony he is not entitled to recover. The admitted facts are that the plaintiff filed a written application with the defendant for a Plymouth Rock health policy, and in that application he represented that he had not been exposed to any contagious or infectious disease, and that at the time of the application nor for a year past had he had any local or other disease, except as follows: "No exceptions."

It is admitted at the time that the plaintiff filed this application and made this representation that he suffered from a disease or infirmity called "inguinal hernia." It is a matter of common knowledge that hernia is an infirmity and a disease of which the sufferer is bound to have personal knowledge. When he made out the application for the policy of insurance, in answer to the question, he said he had no disease and no infirmity, and the space where he was expected to write the excep-

tion was filled in, "No exceptions." The defendant company had a right to assume from this application that the plaintiff was in every respect sound.

It is proven by the testimony of plaintiff's own experts, as well as the defendant's, that hernia can only be cured by an operation, and that its tendency is to grow worse and impair the health. Medical books declare that hernia consists of a protrusion, generally of the bowels, which has escaped from its natural cavity, and projects through some natural or accidental opening in the walls of the latter, as hernia of the brain, of the bowels, or of the lungs. Hernia of the abdominal viscera is a common disease or infirmity, and is commonly called "rupture." The disease of which the plaintiff suffered is called "inguinal hernia," because it is in the region of the inguen or groin.

I am of opinion that his Honor should have instructed the jury that the disease from which the plaintiff suffered or the infirmity, whichever it is called, was such as would prevent a recovery in this action, for it is manifestly a physical unsoundness. It was error to leave the effect of the disease to the jury to determine. It was substantially permitting the jury to act as medical experts and determine whether the defendant should have made such contract. The effect of the hernia, in determining the nature of the risk assumed, as well as fixing the rate of the insurance, was a matter solely for the judgment of the insurer before it entered into the contract at all. It had the right to have the facts truthfully disclosed, so that its officials could determine whether the risk was one proper to be taken. It was obviously the intent of the defendant in making inquiries to learn the nature and character of any and all diseases and unsoundness that might exist, so as to decide for itself whether the plaintiff was a proper subject for insurance. It is not necessary for the plaintiff to have acted fraudulently; it is only necessary to show that he acted erroneously and stated the fact untruly.

While § 4808 of the Revisal of 1905 of

North Carolina declares that all statements in an application for insurance are mere representations, and not warranties, and that no representation, unless material or fraudulent, shall prevent a recovery, yet a material misrepresentation will avoid a policy if it is calculated to influence the insurer in making the contract. *Gardner v. North State Mut. L. Ins. Co.* 163 N. C. 367, 48 L.R.A. (N.S.) 714, 79 S. E. 806, Ann. Cas. 1915B, 652; *Fishblate v. Fidelity & C. Co.* 140 N. C. 589, 53 S. E. 354.

Every fact which is untruly stated or wrongfully suppressed in an application for insurance must be regarded as material, if it would influence the insurer into making or refusing to make the contract. A false representation avoids the policy when material wholly without reference to its intent, unless otherwise provided by statute. And we have no statute to the contrary. *Fishblate v. Fidelity & C. Co.* supra. If the company was imposed upon (whether fraudulently or not is immaterial) by such representations, and induced to enter into the contract, assuming that both parties acted in the utmost good faith, justice would require that the contract be canceled and the premiums returned. *Alexander v. Metropolitan L. Ins. Co.* 150 N. C. 536, 64 S. E. 432.

Under all the authorities, the suppression of the true facts, whether fraudulently or not, avoids the policy. *Bryant v. Metropolitan L. Ins. Co.* 147 N. C. 181, 60 S. E. 983; *Schas v. Equitable L. Ins. Co.* 166 N. C. 55, 81 S. E. 1014; *Vance, Ins. pp.* 267-269.

We find a case very similar to this in 11 App. Div. 245, 42 N. Y. Supp. 228, *Hanna v. Mutual Life Asso.* quoted in *Kerr on Insurance*, p. 341, in which a warranty against local injury or infirmity is held to be broken if the insured at the time was suffering from a stricture. While hernia is not a serious illness, it is nevertheless a physical infirmity, an unsoundness, and the failure to make it known in the application voids the policy.

Walker, J., concurs in this opinion.

### **Annotation—Insurance: hernia as breach of condition or warranty as to health or bodily condition.**

As to innocent misrepresentation as to health of insured when he has an undiscovered disease see annotation to *Fidelity Mut. Life Asso. v. Jeffords*, 53 L.R.A. 193 and *Supreme Lodge K. L. H. v. Payne*, 15 L.R.A. (N.S.) 1277.

In should be noted that the court in *HINES v. NEW ENGLAND CASUALTY CO.* L.R.A.1917B.

ante, 744, decided that the existence of a hernia did not per se avoid the health policy involved on the ground that it constituted a breach of the representation that the insured was in "sound condition," but held that the question whether he was rendered unsound because of the hernia was for the jury

where it was provided by statute that no representation should prevent a recovery unless it materially affected the risk.

With respect to warranties of good or sound health by applicants for insurance in 14 R. C. L. 1068, the rule is laid down as follows, "A warranty that the insured is in good or sound health is not broken unless the insured has an ailment of a character so well defined as appreciably to affect his health. Only an ordinary and reasonable degree of health is required and this question is generally to be determined by the jury."

The decision in *Collins v. Casualty Co. of America* (1916) — **Mass.** —, L.R.A.1916E, 1203, 112 N. E. 634, is in accord with the conclusion in *HINES v. NEW ENGLAND CASUALTY CO.* In the *Collins* Case where an applicant for accident insurance warranted that he was in sound condition physically when in fact he was predisposed to rupture, and a statute provided that no warranty should be deemed material or defeat or avoid a policy unless the warranty was made with actual intent to deceive or unless the matter made a warranty increased the risk of loss, it was held, there being no evidence that the warranty was made with the intent to deceive, that the only question was whether it was one which increased the risk of loss, and this was held a question for the jury, the burden of proving it being upon the insurer.

There was evidence, not objected to, in this case not only that a predisposition to rupture increased the risk of loss but that accident insurance companies generally did not take a risk in such a case, but it was held that the jury were not bound to believe this testimony, and a verdict for the plaintiff was sustained.

In *Levie v. Metropolitan L. Ins. Co.* (1895) 163 **Mass.** 117, 39 N. E. 792, there was evidence that the insured had suffered from a strangulated hernia which had been reduced only after the calling of two physicians and the application of either, and the court said that it assumed that this experience was an illness which truth required the insured to disclose instead of giving a negative answer to a question in an application for life insurance for full particulars of any illness since childhood, and the names of medical attendants, and that his negative answer was a misrepresentation which would have avoided the policy if it had not been for a statute which provided that no misrepresentation by an insured should defeat a policy unless it was made with actual intent to deceive, or unless L.R.A.1917B.

the matter misrepresented increased the risk of loss; but in view of these provisions the questions whether the insured's misrepresentation was made with intent to deceive, or the matter misrepresented increased the risk of loss were held upon the evidence for the jury, and a finding for the plaintiff was sustained.

It was further held in this case that a question in the application whether the applicant was ruptured and if so whether he wore a well fitting truss related to the time of the answer.

The court in this case stated that conceding that upon the evidence the only reasonable finding was that the applicant had suffered from a strangulated hernia the year before his application, yet there was evidence tending to show that he had recovered from it before the time of his application, that it was not a matter of law that one who has once had hernia is thence forward "ruptured," and that whether the insured's negative answer to the question whether he was ruptured was correct was for the jury.

In *Keen v. Continental Casualty Co.* (1915) — **Iowa**, —, 154 N. W. 409, where the insured stated in his application for accident insurance that he was not then suffering from hernia the lower court instructed the jury that if they found that the insured had hernia at the time of his application they should return a verdict for the defendant. The jury found that the insured was not so afflicted and this finding and also the finding that he was not afflicted with hernia at the time he suffered a hernia through an accident, and that his death was due solely to the accident, were held to be supported by the evidence.

In *Hilts v. United States Casualty Co.* (1913) 176 **Mo. App.** 635, 159 S. W. 771, which was an action on a policy providing for an indemnity, among other things, in case of a surgical operation for hernia, it was held that there was no breach of a warranty by the plaintiff that he was free from any "functional or organic disease, mental or physical disorder, defect" etc., although at the time it was made he might have had a predisposition to hernia, or by reason of exertion the inguinal ring had been weakened, causing hernia to subsequently develop.

The trial court in this case instructed the jury that there might have been premonitory symptoms of, or a predisposition to hernia in plaintiff which had not arrived at a state of being the disease itself, "and that mere premonitory symp-

toms of or a predisposition to hernia in plaintiff should not be regarded as the existence of the disease itself." This instruction was attacked on the ground that a "symptom" of a disease is not a forerunner thereof or a warning of a disease likely to develop in the future but an evidence of a present existing trouble. It was held that it was intended by this instruction to tell the jury that there might have been a predisposition to hernia or such condition existing as would likely result in the development of a hernia, though the latter was not then in existence, and that this was supported by the medical testimony, and that the giving of the instruction was not reversible error.

In *Life Asso. of Scotland v. Foster* (1873) 11 Sc. Sess. Cas. 3d series, 351, 45 Scot. Jur. 240, 4 Bigelow, Life & Acci. Ins. Rep. 520, the applicant believed herself to be in perfect health and stated that she was in good health and not afflicted with any diseases, external or internal, and that her statements were true, and that she had not withheld or concealed any important circumstances, and agreed that such declaration should be the basis of the contract, and that if any untrue averment was made therein the policy should be void, and also stated in the medical examination that she never had had rupture and that in her own opinion she was in perfect health, and declared that her statements "were faithful and true." She had at the time a swelling on her groin which to a medical man might have indicated a rupture, but it gave her no pain or uneasiness, and she attached no importance to it but after the application, because of unusual exertion, it suddenly increased in size and ultimately proved fatal. The court in this case held that while an insurance contract might be so drawn as to make freedom from specified diseases, however latent, a matter of warranty

it was not so in this case, and that if the insured did not know that the rupture existed, and made her answer in good faith, its existence would not prevent a recovery.

And where an applicant for life insurance answers a question in the application as to whether he had ever had certain diseases, including a rupture, in the negative, but qualifies his answer by stating "the above is as near correct as I remember" the right to recover on the policy will not be defeated although the insured had had a rupture, unless he knew or had reason to believe that his answer was untrue. *Ætna L. Ins. Co. v. France* (1877) 94 U. S. 561, 24 L. ed. 287, affirming (1873) Fed. Cas. No. 5,027.

Generally as to effect of qualifying statements on warrants by words of "best of my knowledge and belief" or words of like import see annotation to *Smith v. Prudential Ins. Co.* 43 L.R.A. (N.S.) 431.

Where a life insurance policy provides that if the insured's answers to the questions in the application are untrue or fraudulent or there is any suppression of facts in regard to his health they shall render the policy void the materiality of the statements is removed from the consideration of the court or jury, and in an action in which it is claimed that the policy was avoided because the insured answered a question whether he had ever had a rupture falsely in the negative, the only question which should be submitted to the jury is whether the applicant at the time he made the answer had ever had a rupture, and it is error to also submit to the jury the question whether, if the insured ever had a rupture, it increased the risk and was material to the risk. *Ætna L. Ins. Co. v. France* (1876) 91 U. S. 510, 23 L. ed. 401, reversing (1873) Fed. Cas. No. 5,027. J. T. W.

## NORTH CAROLINA SUPREME COURT.

THOMAS J. JEROME, Appt.,

v.

LESLIE M. SHAW.

(— N. C. —, 90 S. E. 764.)

**Malicious prosecution — service of process in foreign state.**

No action lies for malicious prosecution or wrongful abuse of process in the absence L.R.A.1017B.

of seizure of person or property, although both parties being residents of the same state, the summons was served in a foreign state, when the one seeking the damages was temporarily there.

For other cases, see *Malicious Prosecution*, II. b, in *Dig. 1-52 N. S.*

(November 29, 1916.)

**Note.** — As to bringing civil action in remote district or foreign jurisdiction as ground of action for malicious prosecution, see annotation following this case, post, 752.

**A** PPEAL by plaintiff from an order of the Superior Court for Rowan County sustaining a demurrer to a complaint filed to recover damages for malicious prosecution or for wrongful abuse of process. Affirmed.

The facts are stated in the opinion.

Messrs. A. H. Price and Edward C. Jerome, for appellant:

An action for malicious prosecution or for abuse of process can be maintained without an allegation of an arrest of the person or seizure of property.

Stanford v. A. F. Messick Grocery Co. 143 N. C. 419, 55 S. E. 815; 1 R. C. L. 102; Bank of Tarboro v. Fidelity & Deposit Co. 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; 4 Am. & Eng. Enc. Law, 608; Carpenter v. Hanes, 167 N. C. 555, 83 S. E. 577; Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701; 26 Cyc. 74; Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Wright v. Harris, 160 N. C. 547, 76 S. E. 489; Chatham Estates v. American Nat. Bank, 171 N. C. 579, 88 S. E. 783; Terry v. Davis, 114 N. C. 31, 18 S. E. 943; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Davis v. Gully, 19 N. C. (2 Dev. & B. L.) 360; McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 56 L.R.A. 338, 93 Am. St. Rep. 449, 88 N. W. 497.

Messrs. Brooks, Sapp, & Williams, for appellee:

Plaintiff's action is for the abuse of legal process, and not for malicious prosecution.

19 Am. & Eng. Enc. Law, 2d ed. 650; Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 N. C. 174, 50 S. E. 571, 3 Ann. Cas. 720; Wright v. Harris, 160 N. C. 546, 76 S. E. 489; Kirkham v. Coe, 46 N. C. (1 Jones, L.) 423.

A suit for the malicious prosecution of an action, when there has been no illegal interference with the person or property, cannot be maintained.

Carpenter v. Hanes, 167 N. C. 559, 83 S. E. 577; Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 N. C. 174, 50 S. E. 571, 3 Ann. Cas. 720; Smith v. Michigan Buggy Co. 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569; Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433, 56 N. E. 198; Bonney v. King, 201 Ill. 47, 66 N. E. 377; Abbott v. Thorne, 34 Wash. 692, 65 L.R.A. 827, 101 Am. St. Rep. 1021, 76 Pac. 302; Keithley v. Stevens, 238 Ill. 199, 128 Am. St. Rep. 120, 87 N. E. 375; Chatham Estates v. American Nat. Bank, 171 N. C. 579, 88 S. E. 783.

**Per Curiam:**

The plaintiff brought this action to recover damages for malicious prosecution, or the wrongful abuse of process, as he states L.R.A.1917B.

in his brief. Whatever may be the cause of action, whether the one or the other of those named, we think the court properly sustained the demurrer. The defendant brought suit on a note given by plaintiff, and merely caused a summons to be served on him as he was passing through the state of New Jersey on a train. There was no attachment levied, or other interference with the plaintiff's property, nor was there any process against his person. The issuing and service of the summons were all. The defendant had a legal right to sue in this state, New York, or New Jersey, and to serve a summons there on the plaintiff (in this action) wherever he could be found. The case is within the principle stated in Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Terry v. Davis, 114 N. C. 31, 18 S. E. 943; Carpenter v. Hanes, 167 N. C. 551, 83 S. E. 577. The cases relied on in this court will be found to belong to that class where some other process than a summons has been issued against the property or person of the defendant in the action, as in Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 N. C. 174, 50 S. E. 571, 3 Ann. Cas. 720; a. c. 143 N. C. 54, 55 S. E. 422; Jackson v. American Teleph. & Teleg. Co. 139 N. C. 356, 70 L.R.A. 738, 51 S. E. 1015; Ludwick v. Penny, 158 N. C. 104, 73 S. E. 228; Wright v. Harris, 160 N. C. 542, 76 S. E. 489; Carpenter v. Hanes, supra. In all these cases there was something more done than the issuing and service of a summons. The case of Chatham Estates v. American Nat. Bank, 171 N. C. 579, 88 S. E. 783, upon which the plaintiff relied so much, does not sustain his position. The civil suit, alleged in that case to have been wrongful and which caused injury to the plaintiff, was one to impose a lien upon the defendant's property by a *lis pendens*, of practically the same force and effect as if there had been an attachment levied. There was something done in the former action which was directly injurious to the plaintiff apart from the issuing of the summons, and all that is said in the Chatham Estates Case must be considered with reference to that important fact. There is a very able and exhaustive discussion of the doctrine in Muldoon v. Rickey, 103 Pa. 110, 49 Am. Rep. 117, where the cases are fully discussed. See also Potts v. Imlay, 4 N. J. L. 330, 7 Am. Dec. 603; Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870; McNamee v. Minke, 49 Md. 122; Johnson v. King, 64 Tex. 226; Turner v. Walker, 3 Gill & J. 377, 22 Am. Dec. 329; State, Bitz, Prosecutor, v. Meyer, 40 N. J. L. 252, 29 Am. Rep. 233; Mitchell v. Southwestern R. Co. 75 Ga. 398. The rule is succinctly stated in Wetmore v. Mellinger,

supra, as follows (64 Iowa, 744, 52 Am. Rep. 265, 18 N. W. 871): "We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action,"—citing numerous cases.

And in *Bitz v. Meyer*, supra, the court said (40 N. J. L. 255, 20 Am. Rep. 233): "In *Goslin v. Wilcock*, 2 Wils. K. B. 302, 95 Eng. Reprint, 824, the defendant in the alleged malicious suit was arrested by process out of a court which had no jurisdiction, and on that ground the action for malicious prosecution was maintained; but my research has not found a case where the defendant was not arrested, and no special grievance was laid, in which it has been held that suit will lie, where costs were or could have been awarded to the defendant in the original action. Since the statute (4 James I, chap. 3), which gives costs to a defendant in all actions, in case of a nonsuit or verdict against the plaintiff, and other statutes giving costs in other stages of the case, the English courts have not considered the malicious institution of a civil suit a sufficient basis for an action at law, where no arrest or special grievance is alleged. *Savil v. Roberts*, 1 Salk, 14, 91 Eng. Reprint, 14; *Purton v. Honnor*, 1 Bos. & P. 205, 126 Eng. Reprint, 861. In such cases, the measure of punishment to be inflicted upon a plaintiff who is actuated by malice is the costs given by statute."

What is said by Chief Justice Kirkpatrick in *Potts v. Imlay*, approved in 4 N. J. L. 330, 7 Am. Dec. 603, supra, is applicable to this case: "In the case of *Savil v. Roberts*, in the time of William III., 1 Salk. 15, 91 Eng. Reprint, 14, which seems to be a leading case on this subject, Holt, Ch. J., says: 'A civil action differs very far from an indictment in this respect. In a civil action, the defendant has his costs and the plaintiff is amerced for his false claim. To bring a civil action therefore, though there be no ground, is not actionable, because it is a claim of right in the King's courts to which every subject may resort, and he has found pledges, is amercible for his false claim, and liable to costs. It is not enough to declare that such action was *ex malitia et sine causa*, per quod, he was put to great charges; he must go further; he must show special grievance, as that the prosecutor had no cause of action, or cause of action only to a small sum, and that he had sued out a latitat for a large sum with intent to

imprison him, or do him some special prejudice.' So in Lord Chief Baron Gilbert's report of the case of *Parker v. Langley*, Gilb. L. & Eq. 161, 93 Eng. Reprint, 293, about the close of Queen Anne's reign, where this doctrine is investigated with much ability, Parker, Chief Justice, in giving the opinion of the court, says: 'The applying, in a civil action, to a court of justice for satisfaction or redress, has been so much favored that no action has ever been allowed against a plaintiff for such suit singly and directly on pretense of its being false and malicious. . . . ' I have had occasion to look into this doctrine once before, in the case of *Woodmansie v. Logan*, 2 N. J. L. 93. The opinion then expressed is precisely the same which I now entertain upon looking further into the question, aided, as I have been, by so careful an examination of books, and so able an argument at bar. Upon the whole, upon the strength of these authorities, I think it may be laid down as law that this action cannot be maintained for prosecuting a civil suit in a court of common law having competent jurisdiction by the party himself in interest, unless the defendant has, upon such prosecution been arrested without cause and deprived of his liberty, or made to suffer other special grievance different from, and superadded to, the ordinary expense of a defense. The case before us is for a suit commenced by summons, where there could be no arrest; nor does the state of demand set forth any grievance or damage, other than, or different from, the common expenses of making defense in suits of this kind. That the litigation was protracted as far as the rules of the court would admit; that it was renewed and ultimately discontinued by the party,—does not alter the case. These circumstances are, at most, only evidence that the prosecution was malicious and without probable cause; but this is not enough. There must be special grievance, and that specifically charged in the complaint filed."

In *Johnson v. King*, 64 Tex. 226, the court held that "the institution of a civil action by one in his own right for the purpose of enforcing a claim, whether that claim be real or unfounded, affords no cause of action against the party suing, unless by the abuse of process the person or property of the defendant be seized or in some manner injuriously affected (following *Smith v. Adams*, 27 Tex. 31, and *Haldeman v. Chambers*, 19 Tex. 53). To create a cause of action, there must not only be a loss to the plaintiff, but a loss resulting from the violation of some legal right."

The facts in that case and those in *Carpenter v. Hanes*, 167 N. C. 551, 83 S. E.



577, are very similar. There are cases to the contrary, but some are distinguishable from this case, and the doctrine of others has not been adopted by us.

"Regular and legitimate use of process, though with a bad intention, is not malicious abuse of process." Cooley, Torts, 3d ed. p. 356, \*221.

When a right is being prosecuted in a lawful and proper way, the hidden motive behind it is not taken into account. If there is any loss to the defendant in the suit, it is *damnum absque injuria*. It is alleged in the complaint, and, as against

a demurrer, it must be taken as admitted, that there was a suit on the note by the defendant Leslie M. Shaw in the Federal court at Greensboro, which resulted in a judgment against the defendant in that suit, plaintiff in this. This tends, of course, to repel any suggestion that the debt was not due or that defendant in this case intended to harass the plaintiff by suing for the recovery of a nonexistent debt, but whether so or not, there was nothing illegal in what this defendant did in New Jersey, and the demurrer, therefore, was properly sustained. Affirmed.

**Annotation—Malicious prosecution: bringing civil action in remote district or foreign jurisdiction.**

As to debtor's right of action against his creditor for collecting debt in another jurisdiction, in evasion of exemption laws of their domicil, see notes to *Stewart v. Thomson*, 36 L.R.A. 582, and *Markely v. Murphy*, 47 L.R.A. (N.S.) 689.

There is but little direct authority upon the question whether an action for malicious prosecution may rest upon the institution and prosecution of a civil suit in a remote district or foreign jurisdiction, apart from an attachment of property or arrest of the person, or other special damage.

As appears from *JEROME v. SHAW*, ante, 749; *Carpenter v. Hanes* (1914) 167 N. O. 551, 83 S. E. 577; *Harr v. Ward* (1904) 73 Ark. 437, 84 S. W. 496; *Brown v. McIntyre* (1864) 43 Barb. (N. Y.) 344; and *Savage v. Brewer* (1835) 16 Pick. (Mass.) 453, 28 Am. Dec. 255, in which the alleged malicious actions were instituted in a foreign country or another state, the mere fact that the civil action which is alleged to be the basis of an action for malicious prosecution was brought in a foreign jurisdiction seems to be immaterial, an action for malicious prosecution not being maintainable in such case, as in other cases, unless the defendant in the alleged malicious action was arrested or his property seized, or he suffered some special injury different from and in addition to that necessarily resulting from similar actions.

In *Kramer v. Stock* (1840) 10 Watts (Pa.) 115, which was an action on the case, the cause of action was alleged, in substance as follows: That the plaintiff offered to pay a note of his, held by the defendant, but the latter refused to receive the money and to deliver up the note; that afterwards he maliciously, intending to harass the plaintiff, sued him L.R.A.1917B.

on the note before a justice of the peace, having jurisdiction, whose office was 30 miles from the home of the plaintiff, who resided in a township in which there was a justice with jurisdiction of claims of the amount of the note, and that the plaintiff defended the action, which resulted in a judgment in the defendant's favor. The court held that while the conduct of the defendant was malicious and vexatious, an action would not lie therefor, as he had a right to refuse the tender, and was successful in the suit. As to the grievance alleged of the plaintiff being summoned before a magistrate out of his own township, and at a distance of 30 miles from his residence, the court said that there was nothing contrary to law in that, and that the plaintiff could not recover damages against the defendant for doing a legal act.

And in *Woods v. Finnell* (1878) 13 Bush (Ky.) 628, where the court held good a petition alleging, in substance, that the plaintiff and the defendant were citizens of the same county, that the latter, to annoy the former and subject him to unnecessary expense and trouble, left the county and went to another state, not for the purpose of residing there in good faith, but to enable him to institute an action against the plaintiff in the circuit court of the United States for the district of the plaintiff's state, held in a certain county (not that of the plaintiff's residence); that he maliciously and without probable cause instituted an action in such court which resulted in a judgment against him, and that plaintiff, by reason of the malicious institution of such action and its malicious prosecution, expended large sums of money,—it is stated in the opinion that if the defendant, at the time he left the county and claimed his residence in the other

state, had a cause of action against the plaintiff, or any probable grounds for believing that a cause of action existed, he had the right to select the forum in which to prosecute it, and in such a case his removal from one jurisdiction to another, if for the avowed purpose of bringing the action, was not to be regarded as evidence of a want of probable cause; and that, having a cause of action, or probable cause for bringing it, he had the right to institute proceedings in any court having jurisdiction.

In *Smith v. Michigan Buggy Co.* (1896) 66 Ill. App. 516, it was held that a mere enticement of one into another state in order that process might there be served upon him, where there is detention of neither his person nor property, will not support an action for the malicious prosecution of the action so commenced. This case was affirmed in (1898) 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569, without mention of the foregoing point.

But in *Payne v. Donegan* (1882) 9 Ill.

App. 566, it was held that a cause of action good in substance was set forth in a count in a declaration showing the bringing by the defendants maliciously and without probable cause, and in pursuance of an unlawful conspiracy between them to annoy, harass, and injure the plaintiff, and to obtain and extort money from him by persecution and abuse of legal process, a succession of suits before a justice of the peace, at a great distance from where all the parties resided, and then letting such suits be dismissed by the justice for want of prosecution, thus subjecting the plaintiff to annoyance and expense for which the taxable costs would be no adequate compensation. The court seems to intimate, in passing upon the sufficiency of other counts, that the mere bringing of a civil action against a person before a justice of the peace in a district distant from that of his residence, thus compelling him to go a great distance to defend such suit, would support an action for malicious prosecution. G. V. I.

#### NORTH DAKOTA SUPREME COURT.

ARVID NORDBY, Resp't.,

v.

O. J. SORLIE, Appt.

(— N. D. —, 160 N. W. 70.)

#### Highway — collision — negligence.

1. Plaintiff, riding a motorcycle, met defendant driving an automobile, and collided with the rear wheel of the auto just as it was turning out of plaintiff's half of the roadway. Plaintiff recovered a verdict for \$2,500 for alleged negligence of defendant, who appeals. Held, there is no proof that defendant was negligent.

*For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.*

#### Same — contributory negligence.

2. Conceding that defendant was negligent, it is conclusively established by plaintiff's own testimony and by uncontroverted evidence that plaintiff was guilty of contributory negligence barring his recovery. *For other cases, see Automobiles, II. b, in Dig. 1-52 N. S.*

Headnotes by Goss, J.

**Note.** — For rules of the road governing vehicles proceeding in opposite directions, see note to *Smith v. Barnard*, 41 L.R.A. (N.S.) 322; and as to vehicles proceeding in the same direction, see the note to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A. (N.S.) 337. For other aspects of the law as to rules of the road, consult the Indexes L.R.A.1917B.

#### Appeal — finding against evidence.

3. The finding by the jury that plaintiff was not guilty of contributory negligence is contrary to all the admitted facts and to plaintiff's own proof, and cannot be upheld. A directed verdict of dismissal should have been ordered.

*For other cases, see Appeal and Error, VII. 1, 2, in Dig. 1-52 N. S.*

(November 10, 1916.)

**A** PPEAL by defendant from a judgment of the District Court for Traill County denying a motion for new trial or for judgment in favor of defendant notwithstanding a verdict in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Theodore Kaskor and John Carmody, for appellant:

The owner of an automobile has the same rights as the owners of other vehicles to use a highway, and like them he must use reasonable care and caution for the safety of others. In using such a highway all

to L.R.A. Notes under the title, "Negligence," subtitle, "Rule of the road."

For speed of automobile as negligence, see notes to *Baker v. Close*, 38 L.R.A. (N.S.) 488; *Minor v. Stevens*, 42 L.R.A. (N.S.) 1180; and *Deputy v. Kimball*, 51 L.R.A. (N.S.) 993; and later case, *Schell v. Du Bois*, L.R.A.1917A, 710.

persons are bound to the exercise of reasonable care to prevent accidents.

Huddy, *Automobiles*, 3d ed. pp. 18, 129, 130; *Christy v. Elliott*, 215 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A. (N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369; *McIntyre v. Omer*, 166 Ind. 57, 4 L.R.A. (N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336.

If a pedestrian sees an automobile before it strikes him, or might have seen it, in time to avoid injury by the reasonable use of his senses, there can be no recovery.

*Gerhard v. Ford Motor Co.* 20 L.R.A. (N.S.) 234, note; *Hannigan v. Wright*, 5 Penn. (Del.) 537, 63 Atl. 234; *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778; *Seaman v. Mott*, 127 App. Div. 18, 110 N. Y. Supp. 1040.

No presumption of negligence arises from the fact that the driver of an automobile runs down and injures a pedestrian on the public streets. The mere happening of an injury, with nothing else shown, does not raise a presumption of negligence.

*Millsaps v. Brogdon*, 97 Ark. 469, 32 L.R.A. (N.S.) 1177, 134 S. W. 632; *Lee v. Jones*, 181 Mo. 291, 103 Am. St. Rep. 596, 79 S. W. 927; *Stone v. Forest City Exp. Co.* 105 Me. 237, 74 Atl. 23; *Chester v. Porter*, 47 Ill. 66; *Philpot v. 5th Ave. Coach Co.* 142 App. Div. 811, 128 N. Y. Supp. 35; *Dudley v. Raymond*, 148 App. Div. 886, 123 N. Y. Supp. 17.

The person having the management of the vehicle and the traveler on foot are both required to use reasonable care as the circumstances of the case demand; the exercise of greater care on the part of each being required where there is an increase of danger.

*Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989; *Messer v. Bruening*, 48 L.R.A. (N.S.) 945, and note, 25 N. D. 509, 142 N. W. 158; *Minor v. Stevens*, 42 L.R.A. (N.S.) 1178, note.

A plaintiff whose violation of the law contributed to and was the approximate cause of his injury is not permitted to recover for the injury.

*Newcomb v. Boston Protective Dept.* 146 Mass. 597, 4 Am. St. Rep. 354, 16 N. E. 555; *Babbitt, Motor Vehicles*, ¶ 250; *Wolf v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; *Spofford v. Harlow*, 3 Allen, 176; *Butterfield v. Forrester*, 11 East, 60, 103 L.R.A. 1917B.

*Eng. Reprint*, 926, 10 Revised Rep. 433, 19 Eng. Rul. Cas. 189; *Huddy, Automobiles*, 3d ed. § 79, pp. 101, 102; *Brooks v. Hart*, 14 N. H. 307; *Clay v. Wood*, 5 Esp. 44, 8 Revised Rep. 827; *Thomp Neg.* 2d ed. § 1287; *Decow v. Dexheimer*, — N. J. L. —, 73 Atl. 49; *Parker v. Adams*, 12 Met. 415, 46 Am. Dec. 694; *Loftus v. North Adams*, 160 Mass. 161, 35 N. E. 674; *Cassedy v. Stockbridge*, 21 Vt. 391; *Peoria Bridge Asso. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263; *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377; *Chase v. Tingdale*, 127 Minn. 401, 149 N. W. 645; *Baker v. Close*, 38 L.R.A. (N.S.) 495, note.

The verdict is contrary to the law governing the case as well as against the evidence.

*Benedict v. Lawson*, 5 Ark. 514; *Crocker v. Garland*, 7 Cal. Unrep. 275, 87 Pac. 209.

The evidence is not even sufficiently conflicting to allow the verdict of the jury to stand.

*Malmstad v. McHenry Teleph. Co.* 29 N. D. 21, 149 N. W. 690; *Behling v. Wisconsin Bridge & Iron Co.* 158 Wis. 584, 149 N. W. 484; *Fuller v. Northern P. Elevator Co.* 2 N. D. 220, 50 N. W. 359; *McDonald v. Walter*, 40 N. Y. 551; *Inland & S. Coasting Co. v. Hall*, 124 U. S. 121, 81 L. ed. 369, 8 Sup. Ct. Rep. 397; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Reynolds v. Lambert*, 69 Ill. 495; *Fox River Mfg. Co. v. Reeves*, 68 Ill. 403; *Blake v. McMullen*, 91 Ill. 32; *Reid v. Colby*, 26 Neb. 469, 42 N. W. 485.

Messrs. Charles A. Lyche and Henry Leum for respondent.

Goss, J., delivered the opinion of the court:

Assignments upon refusal to direct a verdict challenge the sufficiency of the evidence to sustain a \$2,500 verdict against defendant as damages from a motorcycle and automobile collision.

Defendant resides at Buxton. On Sunday, July 12, 1914, with his family, he went by automobile 18 miles to Mayville, where a Chautauqua was being held. He left Mayville for home about 6 p. m. Two other autos, driven by Knudson and by Gunderson, left just ahead of Sorlie, running in that order. They met plaintiff coming on his motorcycle, 6 miles out. They were going east and plaintiff west. Less than a mile intervened between the lead machine of Knudson's and Sorlie's automobile. Plaintiff met and passed the autos of Knudson and Gunderson, overtook and passed a team, and then met and collided with Sorlie's machine. Plaintiff broke his leg necessitating its amputation. At the place of the accident, the main traveled

roadway ran to the extreme left and north side of a wide-crowned but somewhat rough highway. From ditch to ditch the driveway was wide enough for three rigs abreast, but the traveled roadway ran well to the north side with ruts worn in by travel to a depth of 1½ inches as estimated by plaintiff's witnesses, to 3¼ inches according to defendant's measurements. Seeing plaintiff coming, defendant endeavored to turn out of the ruts, but succeeded in getting only his front wheels out, while the rear ones remained in them sliding along, but not mounting the rut so as to carry the rear of the machine over to the right, clearing plaintiff's half of the roadway. Seeing Sorlie turning out, plaintiff assumed that the auto would be out of the north track of the roadway, until too late to avoid striking the rear wheel.

Plaintiff assumes (1) that Sorlie was negligent in being upon the left side of the highway (although within the traveled roadway) instead of upon the untraveled right side of the highway; and (2) in not having his machine under control because of alleged high speed at which plaintiff claims Sorlie was traveling. Sorlie asserts that he had a right to be where he was, exactly in the route of ordinary travel, and hence was not negligent; and also that he was not driving at more than 15 miles an hour at the time, and was not negligent in any way, but was doing his utmost to get out of plaintiff's way when plaintiff dashed into his rig. And Sorlie claims that the uncontradicted testimony establishes conclusively that plaintiff caused his injury by his own contributory negligence in failing to slacken his speed or control his motorcycle while attempting to pass defendant at a high and excessive rate of speed.

The first contention that defendant was upon the wrong side of the highway, and that negligence based upon that fact alone can be assumed, is untenable. While the highway to the south might have been traveled had it been necessary to do so, it was not the generally traveled roadway, otherwise the ruts would not have been worn. The remainder of the highway was practically untraveled. As defendant was but traveling where all others drove, he was only doing what all others had done, and therefore could not have been negligent in merely following that roadway instead of a rougher one elsewhere. The very definition of "negligence" imports a departure from the usual conduct of the ordinary prudent individual; and, as Sorlie, in doing what he was and what others generally had done, was not departing from that standard, but instead only following it, the assumption

of negligence assumed by plaintiff at the outset is erroneous and unsound.

Illustrative of this, the brief reads: "The defendant kept to the *left* in violation of the law of the road, and was following the spur next to the same ditch at the time of the collision. The plaintiff was on the right side of the highway, but the defendant was on the *wrong* side."

He has the words "*left*" and "*wrong*" italicized to emphasize their importance. For reasons stated, defendant was not on the "*wrong*" side of the highway, but was where he had a right to be, without any imputation of negligence being drawn from the fact that he was in the traveled roadway upon that portion of the highway. The jury should have been instructed as a matter of law that defendant was not negligent in being in the traveled roadway upon the highway.

And now to examine the other alleged negligence of defendant, and the contributory negligence charged against plaintiff: The two may best be considered jointly under a recitation of all the facts in evidence bearing on them.

Plaintiff had left Hillsboro at 6 or a quarter to 6, at approximately the same time that Sorlie and accompanying autos had left Mayville. During the time intervening before the collision plaintiff had run 16 miles. Sorlie had gone between 5 and 6 miles during the same period. Comparing distances and elapsed time, plaintiff must have traveled nearly three times as fast for that period as Sorlie had traveled. Plaintiff had gone north from Hillsboro through Taft and Cummings, going a mile out of his way and back between the latter place and the highway bearing straight into Mayville, a mile and a half ahead of the place of collision. His undisputed record of achievement of speed and its consequences from the time he left Hillsboro is in evidence. He met or passed half a dozen rigs and automobiles on the trip before the collision, and in every instance the drivers met or overtaken took to the ditch because of the excessive speed at which plaintiff came down upon and passed them. This is undisputed. The nearest plaintiff comes to contradicting it is that he did not notice or observe who he met or where they went.

Plaintiff testifies that he had a drink of whisky at 10 o'clock that forenoon, and that he had been to a beer party a mile out of Hillsboro until just before supper. He admitted having drunk at least four glasses of beer, and might have had five, as a keg of beer was on tap all that afternoon.

The first party Nordby met a mile and

one-half or 2 miles north of Hillsboro on this eventful motorcycle ride was O. A. Hong, who was driving south in an auto. Here the first significant fact appears. Plaintiff approached and passed in the wrong track. Hong testifies: "I swung into the ditch on the east side to get out of his way. He was coming on the west side all along. It was around 6 o'clock, or possibly a few minutes after 6. I am not sure what time, but it was a little late for supper. . . . He was going at a pretty fast speed, did not give me any road, held the track on the west side of the road. I saw it was pretty fast speed, so I drove into the ditch to be sure I would clear him, and he went past me pretty fast."

The uncontroverted proof shows that at this particular point he was not only speeding, but coming on in the wrong track, where he did not belong. Had he collided with Hong, the latter would have been exonerated by plaintiff's contributory negligence.

He next met Holtz and Odegard, the latter driving, and this second machine, quoting Odegard's testimony, "went into the ditch. I had to go as far as I could to the west side of the road to give him the east side; happened to notice him coming, and that he was going rather fast." Holtz, riding with Odegard, says they remarked about plaintiff's speed, and that Odegard said, "Look at that fellow coming!" This statement, clearly admissible, was erroneously stricken out as hearsay. It was a part of the facts of the trip, the res under investigation. That the statement was made strongly evidences the unusual.

Holtz continues:

Well, he come up the road tearing, and Odegard turned out for him of course, in the ditch as far as he could get, and he come along the road just in this shape.

Q. Swinging back and forth?

A. Yes, and he was coming pretty fast, going from one side of the road to the other, as he was coming towards us.

Then plaintiff approached Dr. Knudson's auto, Gunderson's auto, Tolsby's team, and Sorlie's auto, all four rigs strung out behind one another and with Knudson's in the lead. The drivers and the occupants of all these rigs all agree that in every instance plaintiff did not slacken speed, but came down upon them and whizzed by them until he collided with the last car. Knudson noticed plaintiff coming a half mile east before he turned the corner, and had a good opportunity to observe and judge of L.R.A.1917B.

the speed at which plaintiff was approaching him. Knudson had driven cars for nine years, and when asked the question, "From your experience in driving motor vehicles, state to the jury your best judgment as to how fast this man on the motorcycle was coming at the time he passed you?" replied: "Well, it wasn't less than 40 miles an hour. . . ."

Q. Did he slow up any when he approached and passed your car?

A. No, sir.

Q. He went by apparently at the same speed as when he was far ahead of you?

A. Yes.

Mrs. Knudson says: "He came pretty fast. We turned out for him. He came pretty fast. I could hardly see him." And just as he went by she exclaimed: "Oh, my! He goes fast."

Oscar Hanson, riding in the front seat of Dr. Knudson's auto, testifies that his best judgment as to plaintiff's speed when he passed their car was "from 40 to 45 miles an hour."

Q. Did he seem to slow up as he approached your car?

A. No, he kept the same gait.

Q. State what you did as you approached him?

A. The doctor swung his car on the right into the ditch.

Q. Did you notice any exclamation by any one of those in the car as he passed you?

A. Yes, Mrs. Knudson hollered, "Oh, My!"

George Gunderson was driving some distance behind Knudson and ahead of Sorlie and also east of Tolsby's team. He had driven autos for two years.

He says that:

As he passed me I turned out in the ditch, and he went past me pretty fast.

Q. At the time he approached you as you met him, state whether or not he slowed up any.

A. He did not slow up.

Q. Was he using the same speed when he passed you, as far as you could tell, as he used when he was some distance ahead of you?

A. It looked that way.

Q. State whether or not you were off the traveled part of the road as you passed him?

A. Yes, I went off the road entirely.

Q. Did this man on the motorcycle make any attempt to turn out of the road or not?

A. No.

Gunder Ashiem, riding in Gunderson's car, gave similar testimony as to the way plaintiff approached and passed, and states his best estimate of the speed at which plaintiff passed their rig immediately ahead of Sorlie's as "about 60 miles an hour," and that he did not slow up. When asked, "What is the lowest you are positive he was running?" answers: "The lowest was about 40 miles, but I think he went 60. That is my honest opinion."

Carl Vigestrang, also riding in Gunderson's machine, likewise places plaintiff's speed at from "60 to 65 miles an hour," and adds: "When he passed our car, I looked back. I thought possibly he might take a tumble; he went so awful fast."

Plaintiff next overtook and passed Anton Tolsby going toward Mayville and only a short distance ahead of the point of collision. He also got off the road. He says, "I turned right out, right out through the ditch," and that plaintiff in going by him "went pretty fast, and I should judge 35 or 40 miles an hour, just right close to the horses. He kept the road and made no attempt to give me any room or turn out."

Sorlie was asked to describe the circumstances preliminary to the collision, and replies:

Just as the motorcycle got over the rise and as soon as I distinguished what it was, I started to turn out of the rut. I was in the rut, and I got the front wheels out of the rut, but the hind wheels slid in the rut, and I could not get them out, and before they got out he was there and struck the hind end of my machine.

Q. He passed the front of your machine safely?

A. Yes, the front was out, I got that out, and if the rest of the machine had gotten out when the front part came out we would have been out to clear the man easily.

That a few hundred feet ahead was a depression, the lowest part of which was over 8 feet below the level of the road leading to it upon which was Sorlie.

There is a plat in evidence made the next day by Sorlie and another, assisted by one of the defendant's present attorneys, made as a precautionary matter. The main general facts therein stated are not denied by plaintiff. It shows that the roadway in which was the auto was 15 feet upon the highway from the bottom of the so-called north ditch, and that 32 inches from the outside rut over toward the ditch the crowning portion of the highway had lowered only 2 inches from what it was at the edge of the roadway; and 5½ feet, or I.R.A.1917B.

nearly twice as far toward the ditch, it was but 3 inches lower than the traveled roadway. All witnesses except the plaintiff, including plaintiff's own witnesses, agree that there is no sudden drop or depression between the outer rut on the north side and the ditch on that side. And plaintiff testifies only from his impressions made hurriedly in his approach to Sorlie or while trying to pass. The measurements show the ditch to be only 17 inches deep, or a drop of only that much in the 15 feet from the north rut to the edge of the highway. The measurements actually taken tend to establish that plaintiff had ample room to pass without going into the ditch or even getting close to it, had he gotten out of the rut on that side.

Plaintiff testifies that his motorcycle that day "was running, but it wasn't running right. There was something wrong with the cylinders. It kind of bound in the cylinders," that he left Hillsboro "about 6 o'clock, or a little before." He describes his route; was going "at the time of this accident, I think, about 15 or 18 miles an hour."

Q. And can you tell and give the jury an idea about how fast the auto driven by Sorlie was going?

A. No, I hardly can. It seemed it was a good speed. I can't say how fast it was. [That he] was riding along on the right side till I met this fellow Sorlie.

Q. Tell the jury how it happened?

A. Well, just when I met him he was just turning the front wheels a little, I guess.

Q. Do you remember the collision? Do you remember coming together there?

A. Yes, just when we struck, just before the accident, he turned his front wheels out of the rut or tracks where the front wheels were, to the south of the road. [He had no speedometer on his motorcycle.]

Q. I want to ask you just how close to the traveled part of the road, the part of the road used for the wagons, was the north ditch?

A. There was just a few inches.

Q. About how many?

A. Probably a foot or so.

Q. Now, I want to ask you if there was a traveled portion to the south? Was there a road traveled over south?

A. It looks to have been traveled there, but not so much as on the other side.

Q. Where was the road the smoothest on the north track or on the south track?

A. The north track.

Q. When you saw this man on the north side of the road, the same side that you

were on, why didn't you stop your motorcycle?

A. Of course, I expected him to turn out the same as them others did.

Q. Well, after you got nearer to him and saw he wasn't turning out, why didn't you stop your car (meaning motorcycle)?

A. I never had time to stop, and then, of course, he was coming awful fast and struck me like a bullet.

Q. Why didn't you get in the ditch?

A. The ditch was kind of deep on the north side. It was near square up and down, and I probably would kill myself to go out there.

Q. How far was your motorcycle from the ditch, as you were going along?

A. As close to the ditch as I possibly could.

Q. And you couldn't get by the machine?

A. No.

Q. Were you going as fast when you met Sorlie as you were when you met Dr. Knudson?

A. Of course, I see—I thought that—I didn't think he could control his auto, and when I saw that I turned the gasoline off, but it was too late.

Q. Turned it all off?

A. Yes, but it was too late to do anything. Of course, I couldn't do anything to save myself then before the strike.

The foregoing is all in response to his own counsel.

On cross-examination he testifies:

Q. Was there sufficient room there for you to pass if you had turned to the left of Sorlie's machine, as you wanted to?

A. Well, if I turned right away when I passed the second automobile.

Q. What is that?

A. When I passed the second automobile, I probably could; but I expected him to turn the same as everybody does, till it was too late.

As corroborative of plaintiff's statement that he was going at a low speed, he has offered the testimony of Johren, who saw plaintiff from a distance of a quarter of a mile, half a mile from the place of collision, and who says that his "best guess" was that when witness saw plaintiff the latter was making 18 or 20 miles an hour. Dunley, who had repaired the motorcycle some time before, said he had reduced the speed of it somewhat to take a knock out of it, so that it did not go as fast as a new one, but that he could not tell what speed it would develop. And one Lerum also testified that the north rut was 1½ inches or so deep and only about a foot from the ditch L.R.A.1917B.

on that side. This fairly and accurately states the testimony upon which the jury found that Sorlie was negligent, and that his negligence contributed to plaintiff's injury, and that plaintiff was not guilty of contributory negligence.

It is impossible to read the record without coming to the conclusion that the facts were that plaintiff was running at a high rate of speed from Hillsboro to the scene of the accident, and with little regard to his own safety or the safety or rights of others. Without exception, every rig he passed went into the ditch to avoid him. It is significant, also, that everybody he met noticed that Nordby was going "awful fast," and that several of them remarked about it; and that all agree that at no time did he slow up as he approached, but "whizzed" by at full speed. The distance that he had come in the elapsed time is corroborative proof of sustained excessive speed. He does not claim to have turned out or slowed up, not even in meeting Sorlie, except, as he says, "when it was too late;" and that he claims was because of Sorlie's speed, not his own. If plaintiff was insensible to his own speed, it was but natural for him to believe that Sorlie, and not himself, was speeding; but, had he struck any other of the half dozen rigs he passed before colliding with Sorlie, under the proof he would have been guilty of contributory negligence as a matter of law. And that he was making no exception as to Sorlie is proven by his own statement that he expected him to get out of the way "as them others had done." An accident prevented Sorlie from being out of his way. The condition of the road kept him in the way, and plaintiff dashed into his rear wheel. The physical, admitted, and uncontroverted fact that he safely passed the front wheel and the side of the auto and struck the hub of the hind wheel demonstrates that the auto must have been attempting to get out of the rut and must have been standing at considerable of a diverging angle to his roadway. This corroborates Sorlie and is substantiated by plaintiff's own testimony that he saw Sorlie turning the front wheels out of the ruts. Sorlie in this position must have been going slow, or, as he says, he would have been out of the roadway or overturned.

Eliminating, as we must, the fact that Sorlie was on the north side of the road, the proof discloses that he did nothing negligent, neither did he omit to do anything that a reasonably prudent man could have done to avoid the accident. Admitting for the sake of further analysis plaintiff's testimony that Sorlie appeared unable to control his machine and because thereof was

negligent, and that the same contributed to the accident, nevertheless under the undisputed facts and every reasonable inference therefrom, and from plaintiff's own testimony and admissions, plaintiff was guilty of want of control, and therefore guilty of contributory negligence. He says he made no attempt to get out of the rut, and the only reason he gives for it was, "I probably would kill myself to go on there," i. e., to his right and into the ditch, which he says in the same breath "was pretty near square up and down." It can be assumed that the situation in which he had placed himself was a dangerous one, yet the very situation conclusively proves that he had no control over his machine. When he had shut off the gasoline, he was too close to the approaching automobile to avoid collision. It is a self-evident fact that, had he been in control and using the degree of care required of him, he with safety could have either run his machine into the ditch or have alighted therefrom. That he could do neither establishes his negligence when attempting to pass the approaching vehicle. The condition of the road or its ruts does not alter his duty to use care. The statute means what it says, in § 2976L, Comp. Laws 1913, that, "no person shall operate a motor vehicle on the public highways at a rate of speed greater than is reasonable and proper, having regard to the width, conditions and use of the highway at the time and the general and usual rules of the road, or so as to endanger property or the life or limbs of any person."

Plaintiff was bound to regard the width, condition, and use made of this highway at that point, as well as the rules of the road, and could not without negligence on his part rely entirely upon Sorlie's getting out of his track "the same as them other ones had done" all the way from Hillsboro there. He could not expect others to have more regard for his safety than he had himself. It was his duty to have his machine under control when passing.

True, it was Sorlie's duty to use reasonable diligence to obey the rules of the road and clear for the plaintiff the north pathway of the roadway; but the law does not make Sorlie an insurer of his ability to do so, as "the width, condition, and use of the highway at the time" are to be considered with the rules of the road in that respect. To hold otherwise would make him an insurer against the results of unavoidable accident, as well as culpable negligence of the approaching party, and announce a rule of law that would permit an approaching vehicle like plaintiff's to dash ahead at full speed reckless of road

conditions, with the other party an insurer against such recklessness. The duties owing by each driver toward the other are reciprocal, equal, and alike, with no advantage of one over the other, under the law and the rules of the road. It is clear from plaintiff's testimony that he failed to realize that he owed any such reciprocal duty to Sorlie, but instead assumed that the latter must get out of his track in any event and would do so, and that he was excused from exercising any care for his own safety. Plaintiff was bound in law to be in a position to allow Sorlie time to get out of his track, as admittedly he was endeavoring to do. If plaintiff's recovery can be sustained under this proof, it is hard indeed to conceive of such a case where a recovery would not be upheld. When, from out of plaintiff's own mouth, accompanied by the unquestioned and undenied proof of his previous and almost contemporaneous successive acts of culpable negligence establishing his wanton recklessness for the entire trip until he struck Sorlie, and when he might have received the same injury from any of the others had it not been for their exercise of undue care toward him, coupled with the reasonable probability that his conduct was the result of a mind more or less dulled into insensibility of speed or danger from the admitted use of a considerable amount of intoxicants that afternoon, together with as nearly conclusive proof by Sorlie that he did no act upon which negligence could be based as can in ordinary probability usually be established by proof,—when all of this is considered, to affirm this recovery is to close one's eyes to every reasonable probability and established fact, and, because a verdict has been found, announce a precedent that will in practical effect make every automobile driver or owner, at the whim of a careless jury, the absolute and unqualified insurer against, not his own negligence, but that of every vehicle that attempts to pass another in however a negligent manner. It is true that a jury has passed upon the facts, but it is equally true that in doing so it must have closed its eyes to the facts and any and all reasonable inferences from them.

And the paucity of plaintiff's proof as set forth in his own brief well illustrates the extreme to which plaintiff's counsel has been driven in his attempt to uphold this verdict and establish his major premise that all the evidence without contradiction does not favor defendant. He calls attention to what he claims was the fact that "plaintiff had no difficulty in meeting or passing vehicles on the highway, other than the defendant's auto." The reason is



plainly apparent from the proof. Of course he did not, because, under the uncontroverted proof, every vehicle without exception took to the ditch in meeting him or when overtaken by him. He says "his motorcycle was not in condition to develop speed on that day." To find this to be fact would ignore the established fact that plaintiff had gone more than twice as far as Sorlie in the same length of time, as well as also to overlook the testimony of ten witnesses estimating plaintiff's speed immediately preceding the accident (and all of which testimony is undenied by plaintiff himself) variously at from 35 to 65 miles an hour, and corroborated by contemporaneous occurrences and remarks made.

And in the same way plaintiff's statement that he was not riding to exceed 15 or 18 miles an hour on meeting Sorlie is condemned as untrue by the facts surrounding the accident, and that he failed to alight or turn out and thus avoid injury. It was impossible for Sorlie to have been going at an excessive speed from the admitted position of his auto, partly in the ruts and partly out, when plaintiff was approaching, immediately preceding as well as at the time of the collision; also dis-

posing of plaintiff's testimony that defendant was coming "awful fast" and "struck him like a bullet." The comparison was misapplied; plaintiff was the bullet.

Plaintiff lays emphasis upon the proposition that questions of credibility were for the jury, and has attempted to discredit about all of defendant's witnesses by reason of friendship, acquaintance, or association with Sorlie. Of course, credibility was for the jury. But the main and decisive facts are out of the mouth of the plaintiff or stand admitted.

When the motion for a directed verdict of dismissal was made at the close of the case with the entire history of plaintiff's trip that day in evidence and undenied, taken with plaintiff's own testimony, there was no issue for the jury upon whether plaintiff was guilty of contributory negligence. A finding that he was not guilty of contributory negligence cannot be upheld. The case should have been dealt with accordingly. The judgment and order appealed from are ordered reversed, and judgment of dismissal of this action is ordered.

Petition for rehearing denied December, 2, 1916.

#### OREGON SUPREME COURT. (Department No. 2.)

JANE CAPLES, Appt.,  
v.  
W. L. MORGAN, Resp't.

(81 Or. 692, 160 Pac. 1154.)

#### Pleading — amendment — counterclaim to recoupment.

1. An answer setting up a counterclaim in an action for rent may be amended so as to claim mere recoupment against the amount claimed, without any demand for excess judgment, if complainant is not taken by surprise.

*For other cases, see Pleading, I. n, in Dig. 1-52 N. S.*

#### Statute of Limitations — recoupment.

2. One defrauded into taking a lease by false representations may recoup his dam-

ages in an action for rent, although an action to recover for the fraud is barred by the Statute of Limitations.

*For other cases, see Set-Off and Counterclaim, I. b, in Dig. 1-52 N. S.*

#### Fraud — false statement of offer for property.

3. One induced to take a lease at a higher rent than he offered, by a false statement that the higher rate had been offered by a stranger, may recoup the resulting damages in an action against him for rent.

*For other cases, see Set-Off and Counterclaim, I. b, in Dig. 1-52 N. S.*

#### Damages — fraud — excessive rent.

4. The damages to be allowed to one induced to take a lease at a certain rental by false statements that another had offered that sum for the lease are, in case he affirms the lease, the difference between the contract price and the reasonable value of the lease at the time the contract was made, where all evidence as to oral agreements

**Note.** — The question whether fraud may be predicated of misrepresentations as to offers made for property is considered in the notes to *Kohl v. Taylor*, 35 L.R.A.(N.S.) 174, and *Brody v. Foster*, L.R.A.1916F, 782, which cover also the question whether fraud may be predicated of false statements as to the cost, selling, or market price of property.  
L.R.A.1917B.

Generally as to measure of damages for false representations in the sale or exchange of real estate, see notes to *George v. Hesse*, 8 L.R.A.(N.S.) 804, and *Tooker v. Alston*, 16 L.R.A.(N.S.) 818. The measure of damages for fraud in the exchange of property is considered in the note to *Stoke v. Converse*, 38 L.R.A.(N.S.) 465; and see later case, *Epp v. Hinton*, L.R.A.1915A, 675.

for a lesser amount is excluded by the Statute of Frauds.

*For other cases, see Damages, III. f, in Dig. 1-52 N. S.*

(November 21, 1916.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in defendant's favor in an action brought to recover rent alleged to be due upon a five-year lease of certain real property. Reversed.

**Statement by Burnett, J.:**

This is an action to recover sundry monthly instalments of rent alleged to be due upon a five-year lease of real property in Portland, the execution of which and possession thereunder being admitted. That anything is due is denied. Answering affirmatively, the defendant alleged, in substance, that he was the principal stockholder in a firm of architects engaged in the business of building apartment houses and family dwellings; that oral negotiations were entered into between the defendant and the agent of plaintiff for the erection upon the real property of the latter of an apartment house containing 71 rooms, to be leased to the defendant for the term of five years at the rate of \$8 per room per month; that before the negotiations were completed and the lease finally executed the plaintiff's agent falsely represented to the defendant that a third party had offered to take a lease for that term at the rate of \$10 per room per month, in which event, if accepted, the defendant firm would not be allowed to construct the building; that this representation was made for the purpose of inducing the defendant to agree to the larger rental; that relying upon the statement mentioned, and believing it to be true, the defendant agreed to the lease in question at the larger rental, and, as he says, "will be obliged for the remainder of the term of said lease to pay the sum of \$2 per room per month more than he had agreed with said agent to pay for the same, or than said plaintiff was offered for same, or could have then or now receive from any other person therefor, or than same was then or is now worth, and defendant was, has been, and is damaged by reason thereof and thereby in the sum of \$8,520." A demurrer to the further and separate answer on the ground that it did not state facts sufficient to constitute a cause of defense to the complaint or counterclaim against the plaintiff, and that the defendant's cause of action set forth as a counterclaim did not accrue within two years prior to the commencement of this action, nor within two years prior to L.R.A.1917B.

the filing of the counterclaim, was overruled. Every allegation in the new matter of the answer was denied by the reply, except as expressly admitted therein. It admits that the agent was authorized to negotiate for and find a tenant for an apartment house to be erected on the property, and to negotiate for proposals to construct the same, but that he was not authorized to enter into such a lease, nor to conclude the contract for the construction of the building; that the defendant proposed to the agent to take a lease on the building to be erected for five years on the basis of \$8 per room per month, but that the proposal was never accepted. It also admits that the agent represented that the third party had made an offer for a lease running for the same term at \$10 per room per month, and avows that the plaintiff is informed and believes, and therefore alleges, that the offer had, in fact, been made; and, lastly, affirmatively avers the defense of the Statute of Limitations, for that it appears that the alleged fraud was perpetrated April 11, 1910, whereas the answer was not filed until more than two years after that date. A general demurrer to the new matter in the reply was sustained apparently on the ground that the questions involved had been settled by the ruling on the demurrer to the allegations of the answer. During the progress of the trial, over the objection of the plaintiff, the defendant was allowed to amend his answer so as to call it set-off and recoupment instead of counterclaim, and by changing the prayer to the effect that the plaintiff take nothing and defendant be dismissed with his costs and disbursements. The jury found a special verdict to the effect that the statement of the agent that the third party had offered \$10 per month was false, that defendant in taking the lease relied upon that offer, and that but for the offer he would have secured it at a rental of \$575 per month for the whole building; and as a general verdict the jury found for the defendant. From the judgment rendered on this verdict, the plaintiff appeals.

Messrs. Flegel, Reynolds, & Flegel, for appellant:

The two-year Statute of Limitations applies to an action for deceit.

Dalton v. Kelsey, 58 Or. 244, 114 Pac. 464; Cartwright v. Southern P. Co. 206 Fed. 234; Aldrich v. McClaine, 98 Fed. 378; McGaffin v. Cohoes, 74 N. Y. 387, 30 Am. Rep. 307.

The limitation period for an action at law for deceit begins to run when the fraud is consummated, not when it is discovered.

25 Cyc. 1181; Northrop v. Hill, 57 N. Y.

351, 15 Am. Rep. 501; *McKay v. McCarthy*, 146 Iowa, 546, 34 L.R.A. (N.S.) 911, 123 N. W. 755; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320.

The Statute of Limitations applies against counterclaims.

25 Cyc. 1064; *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616; *Bradbury v. Higginson*, 167 Cal. 553, 140 Pac. 254; *Ashbury Park & S. G. R. Co. v. Neptune Twp.* 73 N. J. Eq. 323, 67 Atl. 790; *State Hospital v. Philadelphia County*, 205 Pa. 336, 54 Atl. 1032; *McClure v. Johnson*, 10 Okla. 663, 65 Pac. 104.

Recoupment is an affirmative cross demand. It has been transformed by the Code and has now the same scope as any other counterclaim.

Pom. Code Rem. 4th ed. §§ 609, 612; *Krauss v. Greenfield*, 61 Or. 507, 123 Pac. 392, Ann. Cas. 1914B, 115.

Representations as to cost or value of property or prices offered for it are not material in the absence of relations of confidence, where the other party had equal opportunity to judge of the value.

*Beare v. Wright*, 8 Ann. Cas. 1057, with note, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632; *Cole v. Smith*, 26 Colo. 512, 58 Pac. 1086; *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Noetling v. Wright*, 72 Ill. 390; *Boles v. Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Hemmer v. Cooper*, 8 Allen, 334; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544; *Mackenzie v. Seeberger*, 22 C. C. A. 83, 40 U. S. App. 188, 76 Fed. 108; *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N. E. 88.

A person relying on his own judgment, having full means of knowledge, cannot complain of misrepresentation.

*Wimer v. Smith*, 22 Or. 469, 30 Pac. 416; *Whitney v. Bissell*, 75 Or. 28, L.R.A. 1915D, 257, 146 Pac. 141.

The correct measure of damages for deceit leading to a sale or a lease is the difference between what the property is really worth and what it would have been worth had the representation been true.

*Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *Fargo Gas & Coke Co. v. Fargo Gas & E. Co.* 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; *Page v. Wells*, 37 Mich. 415; *Williams v. McFadden*, 23 Fla. 143, 11 Am. St. Rep. 345, 1 So. 618; *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Drew v. Beall*, 62 Ill. 164; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544.

Another measure of damages is the difference. L.R.A. 1917B.

once between the price paid and the actual value of the property.

4 *Sutherland, Damages*, 3d ed. § 1172; *Robertson v. Frey*, 72 Or. 599, 144 Pac. 128; *Reynolds v. Franklin*, 44 Minn. 30, 20 Am. St. Rep. 540, 46 N. W. 139; *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, 10 Mor. Min. Rep. 124; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, 16 Mor. Min. Rep. 159; *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057.

Mr. M. L. Pipes also for appellant.

Messrs. Bauer & Greene, A. H. McCurtain, and Malarkey, Seabrook, & Dibble, for respondent:

When an action is instituted to enforce a contract, the Statute of Limitations does not bar the defense that the contract was obtained by fraud until the cause of action on the contract itself is barred by the statute. This is true where the defense is pleaded as a recoupment of damages.

*Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1; *Kaup v. Schinostock*, 88 Neb. 95, 129 N. W. 184; *Stewart v. Simon*, 111 Ark. 368, 168 S. W. 1135, Ann. Cas. 1916A, 825; *C. Aultman & Co. v. Torrey*, 55 Minn. 492, 57 N. W. 211; *Secor v. Siver*, 165 Iowa, 673, 146 N. W. 845; *Aultman & T. Co. v. Meade*, 121 Ky. 241, 123 Am. St. Rep. 193, 89 S. W. 137; *Reesborough v. Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033; *Utah Commercial & Sav. Bank v. Fox*, 40 Utah, 205, 120 Pac. 840; *Conner v. Smith*, 88 Ala. 300, 7 So. 150; *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401; *Sehree v. Patterson*, 92 Mo. 451, 5 S. W. 31; *Ware v. Howley*, 68 Iowa, 633, 27 N. W. 789; 25 Cyc. 1063.

The same is true when the fraud is pleaded as a defense to recovery on the fraudulent contract.

*Hall v. O'Connell*, 51 Or. 225, 94 Pac. 564; *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296; *Robinson v. Glass*, 94 Ind. 211; *Wilhite v. Hamrick*, 92 Ind. 594; *Thomas v. Rauer*, 62 Kan. 568, 64 Pac. 80; *Evans v. Duke*, 6 Cal. Unrep. 973, 69 Pac. 688; *Pinkham v. Pinkham*, 61 Neb. 336, 85 N. W. 285; *Cannon v. Baker*, 97 S. C. 116, 81 S. E. 478; *Weakley v. Meriwether*, 156 Ky. 304, 160 S. W. 1054; *State ex rel. American Freehold-Land Mortg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Wood, Limitations*, 2d ed. pp. 723, 724; 25 Cyc. 1063; *Advance Thresher Co. v. Doak*, 36 Okla. 532, 129 Pac. 736.

If a representation be such that, had it not been made, the transaction would not have been entered into or completed, then it is material.

*McAleer v. Horsey*, 35 Md. 439; 20 Cyc.

23; 1 Bigelow, Fr. p. 497; Smith, Fr. § 61, p. 78.

Any false representation which a man of ordinary intelligence and prudence may believe, that induces him to pay more for the same thing than he otherwise would have had to pay, is a material representation.

*Bergeron v. Miles*, 88 Wis. 397, 43 Am. St. Rep. 911, 60 N. W. 783; *Lowe v. Hendrick*, 86 Conn. 481, 85 Atl. 795; *Thorp v. Hough*, 160 Iowa, 694, 142 N. W. 201.

Whether or not a representation is material is a question of fact for the jury.

*Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158, 71 N. E. 347; *Fottler v. Moseley*, 179 Mass. 295, 60 N. E. 788; *Sheriff v. Hull*, 87 Iowa, 174; *Moore v. Cains*, 116 Mass. 396; *Davis v. Davis*, 97 Mich. 419, 56 N. W. 774; *Hawley v. Wicker*, 117 App. Div. 638, 102 N. Y. Supp. 711; *Stauffer v. Hulwick*, 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 951.

A false representation that a third party has made an offer for the thing being bargained for, if it induces the defrauded party to act, to his injury, is a material representation.

*Prescott v. Brown*, 30 Okla. 428, 120 Pac. 991; *Ives v. Carter*, 24 Conn. 392; *Hinchey v. Starrett*, 91 Kan. 181, 137 Pac. 81; *Seaman v. Becar*, 15 Misc. 616, 38 N. Y. Supp. 69; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475; *Peffley v. Noland*, 80 Ind. 164.

*Burnett, J.*, delivered the opinion of the court:

Complaint is made about permitting the amendment of the answer. It is not shown, however, that the plaintiff was taken by surprise or that her rights were prejudiced thereby. She could not have experienced any injury on that account; for whereas the original answer demanded a judgment for the excess of the damages alleged over what should be found due to the plaintiff by the terms of the lease, the change allowed her to escape any judgment for this possible overplus. Neither can the Statute of Limitations be urged against a mere defense of the kind here involved. Our statute stating the time within which actions may be brought refers to instances where the party claiming to have been defrauded institutes proceedings on his own behalf of the recovery of damages. It does not contemplate mere resistance of a claim founded upon a contract into which the defendant has been inveigled by the fraudulent conduct of the other contracting party. The rule is thus stated by Mr. Justice Henshaw in *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910: "It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must

be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three-years' Statute of Limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud."

To like effect are the cases of *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732; *State ex rel. American Freehold-Land Mortg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Advance Thresher Co. v. Doak*, 36 Okla. 532, 120 Pac. 736. The injured party is not bound to presume that his adversary will at all events endeavor to enforce the contract which is corrupted with his own fraud, at least beyond what would be justly his due. A wronged individual may safely rest on a mere defense grounded upon the deceit of the other party so long as the contract itself is liable to be enforced. The taint is inherent in the agreement, and, as a defense, will last as long as the convention it affects.

The most difficult question to be determined is whether or not the false representation that the third party had offered \$10 per month is material and vitiates the contract or is a basis of damage pro tanto. That the representation was false is established by the special verdict of the jury beyond our power to investigate. So far as the precise question thus presented is concerned, it is new in this state. There are many authorities which sustain the position of plaintiff. The argument is stated in *Williams v. McFadden*, 23 Fla. 143, 11 Am. St. Rep. 345, 1 So. 618, as follows: "To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject matter of the contract which will render it void or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact, substantially.

affecting his interests, not as to matters of opinion, judgment, probability, or expectation,"—citing 3 Sutherland, Damages, 484, and Long v. Woodman, 58 Me. 49.

The reasoning seems to be that the representation does not affect or pretend to affect the intrinsic qualities of the property under consideration; that the statement of the offer of the third party is but another way of saying that he has an opinion that the value is so much; that opinions are not material, and may be set down as "trader's talk." A fair statement of the rule relied upon by the plaintiff is found in Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057: "It is apparent that the representation as to what others paid for the stock did not affect its value. It has not been found that there were any fiduciary relations existing between the parties, or that there were any other facts or circumstances giving rise to an implied agreement that the price paid by the vendor or others should be the price to the plaintiff. It is not found or admitted that there was any express contract to that effect. In the absence of special circumstances of that nature, a mere false statement as to the price paid by the vendor or others is not actionable deceit,"—citing many authorities.

Again, in Cole v. Smith, 26 Colo. 506, 58 Pac. 1086, the court, speaking by Mr. Chief Justice Campbell, says: While "a statement by the vendor that property cost him a certain sum of money is not a mere expression of opinion, but a statement of fact which, if relied upon and proved to be false, may be a ground for rescinding a contract entered into upon the faith of it, it is quite uniformly held that a statement by a vendor that he has been offered a certain sum for his property, or that it is of any given value, are not such representations of fact as to be the foundation of an action."

In Dingle v. Trask, 7 Colo. App. 16, 42 Pac. 186, a creditor of a merchant falsely stated to him that another creditor was about to attach the property of the merchant, and so induced the latter to give him a mortgage upon his goods. The court held that this false statement did not constitute ground for an action of deceit looking to the cancellation of the mortgage. In Dillman v. Nadlehofer, 119 Ill. 567, 7 N. E. 88, it was held that a false statement by the defendant that he had been offered \$25,000 for a certain patent furnished no ground for rescission of the contract induced by this statement. In Noetling v. Wright, 72 Ill. 390, the syllabus says: "A purchaser cannot maintain an action against his vendor for false statements in regard to the value of the property purchased, or its good qualities, or the price he has been offered for it."

Like cases are these: Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416; Boles v. Merrill, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; Holbrook v. Connor, 11 Am. Rep. 212, 60 Me. 578; Hemmer v. Cooper, 8 Allen, 334; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544; Mackenzie v. Seeberger, 22 C. C. A. 83, 40 U. S. App. 188, 76 Fed. 108; Brown v. Castles, 11 Cush. 348.

Even upon authorities holding that the simple representation, falsely made, of an offer for the property being sold, will not vitiate the contract, many exceptions have been engrafted in the progress of time. For instance, where the party making the representation has or affects to have superior knowledge as to the value of the property, while the other party is ignorant and relies upon the statement thus made, or where the property is at a distance so great that it is impracticable for the buyer to examine the same, the representation is held to be material, and its falsity will avoid the contract. On the theory that a statement of an offer is but the expression of some other man's opinion, this court has restricted the doctrine in Olston v. Oregon Water Power & R. Co. 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L.R.A.(N.S.) 915, note, where it is held that a statement of an opinion is necessarily based on a fact, or carries with it such an inference that it can be interpreted as a statement of fact, and where it is known to be false, and made with intent to deceive, it may be actionable.

On the other hand, there are many authorities indicating that the trend of judicial thought is toward the doctrine that, where a falsehood is uttered in a manner calculated to and which does swerve the judgment of a reasonably prudent man under all the circumstances, it will work the destruction of the contract or an award of damages in favor of the injured party. If, notwithstanding the deceit, he makes an independent investigation of the matter, and through that method forms his judgment and decision, he must abide by the resultant contract, under the doctrine of Wimer v. Smith, 22 Or. 469, 30 Pac. 416, for thus it is made to appear that he did not rely upon the cozenage of the other party. The case of Strickland v. Graybill, 97 Va. 602, 34 S. E. 475, directly holds the doctrine that a false representation about the offer of another directly affects the value of the property in question. So do Ives v. Carter, 24 Conn. 392, and Seamen v. Becar, 15 Misc. 616, 38 N. Y. Supp. 69. Cases like Prescott v. Brown, 30 Okla. 428, 120 Pac. 991, Stauffer v. Hulwick, 176 Ind. 410, 96

N. E. 154, Ann. Cas. 1914A, 951; Kehl v. Abram, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158, Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788, and Chisum v. Huggins, — Okla. —, 154 Pac. 1146, are all complicated more or less with fiduciary relations existing between the parties, or ignorance of the defrauded party, who relies upon the superior knowledge of the other, or where opportunity to examine the property has been denied to the one who suffers from the fraud. A valuable case with an exhaustive note appended is Kohl v. Taylor, 35 L.R.A. (N.S.) 174, reported also in 62 Wash. 678, 114 Pac. 874.

We think the better argument may be thus stated: The ground for saying that an opinion as to value is negligible is that it is impossible to prove the falsity of a mere matter of judgment about which honest men may reasonably differ. But even this rule has been restricted as above stated. The reason, however, fails when a statement is made of a fact the truth of which may be demonstrated or disproved. In the present instance the third party either made the offer or he did not make it. That fact is capable of proof or refutation. There can be no honest difference of opinion about whether or not he made the offer. Again, the statement of the fact of the offer at the increased price was made for the purpose of inducing the defendant to agree to the higher price. It was intended to operate in that direction, and whether or not it did have that effect is for the jury to determine. If demonstrable falsehood has been used to induce the execution of a contract in a manner calculated in the judgment of a jury to influence the decision of a reasonably prudent man under all the circumstances, it is sufficient to defeat the agreement, at the election of the injured party. Under such conditions the court will not busy itself to determine how much untruth may be injected into a transaction without spoiling it. It is wrong to lie, and a person who has thus set a trap for the other party cannot be heard to complain that the latter should not have walked into the snare. It better comports with common honesty to condemn falsehood as a means of constructing a contract. There was no error in overruling the demurrer to the answer on that ground.

It remains for us to consider to what extent the recoupment urged by the defendant shall be allowed to prevail in this action. This is not an action to rescind the contract. On the contrary, the defendant proceeds in affirmance of the agreement, does not allege a return of the property which he received under the lease, but as originally framed demands an affirmative L.R.A.1917B.

judgment for damages in excess of what remained due on the rent. The amendment whereby he waives such a judgment and uses his claim for damages as a mere defense does not alter the case. Recoupment, as defined by Mr. Justice Moore in *Krausse v. Greenfield*, 61 Or. 502, 507, 123 Pac. 392, 394, Ann. Cas. 1914B, 115, is the keeping back or stopping something which is due. He says: "Under the principles of the common law, 'recoupment' could be invoked when the defendant sustained damages by reason of the plaintiff's nonperformance of his part of the contract sued on, in which case the damages to which the defendant was entitled could be abated from the plaintiff's claim."

The question then is: By what rule shall it be determined how much the defendant is entitled to hold back from the amount due on the rent, conceding, as we must under the verdict, that he was imposed upon by the fraud of plaintiff's agent? The plaintiff requested and the court refused the following instructions to the jury: "If you believe from the evidence that the rental under this lease was a reasonable rental at the time the lease was entered into, taking into consideration the rents then prevailing, you must allow defendant nothing on his counterclaim. If you find for defendant on his counterclaim, you should determine how much less valuable this lease was to defendant than if Phil Gevurtz had made the offer of \$10 per room as represented, and allow such amount to defendant as his damages. In assessing damages, if any are assessed, you are not to take into consideration any decrease in the rental value of the property which has occurred since April 11, 1910, the date of this lease, for plaintiff could not be charged with any loss accruing to defendant by a decline in the rental value."

It appears from the record that the plaintiff offered to prove what was the reasonable rental value of the building at the time the defendant took the lease, but this offer was denied, over the plaintiff's exception. The theory adopted by the court is embodied substantially in this instruction to the jury: "There can be no middle ground in this case on the question of the amount of damages defendant has sustained, if any. If you find the issues in favor of the defendant, then your duty would be to ascertain the amount of credit he was entitled to. In doing this you must find from the evidence one of two possible facts: Either that defendant could and would have secured said lease at a rental of \$575 per month but for said alleged false representation, or, on the other hand, that he could and would not. If you find the fact to be

that defendant would have secured said lease at the monthly rental of \$575 per month but for said representation, defendant has been damaged to the extent of \$135 per month for five years, and your verdict should in such case be for defendant; but if you fail to so find, then plaintiff is entitled to a verdict for the sum of \$6,515.-05."

The sum of \$575 alluded to in this instruction was what the defendant claims was orally agreed upon as the rental of the building per month prior to the execution of the written lease.

As a standard for the measurement of damages the oral negotiations of the parties must be laid out of the case because of the provisions of § 808 L. O. L. It is there stated: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: . . . 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein. . . ."

This enactment, more stringent in its terms than most Statutes of Fraud in other states, not only says that an oral agreement is void, but goes further, and interdicts any evidence of such a convention. For the purposes of this case, therefore, the oral testimony about what was offered for the lease on the one hand and accepted on the other is utterly of no value whatever.

It is stated by Mr. Justice Bean, in *Robertson v. Frey*, 72 Or. 590, 804, 144 Pac. 130: "The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of the loss caused by the fraud of the other party, or damages adequate to the injury which he has sustained. The recovery must be limited to the actual loss. 20 Cyc. 130. There are a great number of cases in which the rule is stated that the measure of damages is the difference between the value of the thing purchased and the price paid; or, in case of exchange, the difference between the value of that with which the injured party was fraudulently induced to part and what he received."

In *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, 16 Mor. Min. Rep. 159, there was before the court a case wherein the plaintiff sought to recover damages which he had suffered by reason of the purchase of stock in a corporation, induced by false and fraudulent representations

made to him by the defendant, Mr. Chief Justice Fuller said: "If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery. Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages."

The matter may be likened to a statement of account between the parties wherein the defendant's gross damages may be set down as the amount of rent which he agreed to pay. With this he must be credited. In reduction of this he must be charged with the reasonable value of that which he received. If the value of what he has received is less than or equal to the amount of gross damages, the verdict should be for the defendant under the present form of the pleading; but, if the value of what he received is greater than his gross damage, the verdict should be for the plaintiff in the amount of the difference. The written lease, affirmed as it is by the defendant, is the contract by which the parties must be bound, subject to abatement in damages by reason of fraud alleged to have been practised on the defendant. To refer to the oral convention said to have been had between the parties as a standard for fixed damages would be to make a new contract for them and to install as a rule governing their conduct what the statute says is utterly void and beyond the pale of testimony. The defendant may have been outwitted in the contest over the price to be paid; but it does not follow that because the plaintiff was at fault we must violate the Statute of Frauds and establish a contract which the parties did not make and which the law says is null and of no effect. In correcting the balance of the scale disturbed by the fraud of the plaintiff, we

must not go as far the other way beyond the reasonable value of the property which he received. The question about the abatement of the rental value must therefore be decided by what is the difference between what the defendant agreed to pay and the reasonable value of what he received as of the date the contract was made. He took his chances about fluctuation in the market value of rents, and a subsequent decline cannot affect the case. If, indeed, the rent

was reasonably worth the stipulated price, or if he has himself recouped his loss, he has no cause of complaint, for damages can be awarded only to one who has been really injured.

For these reasons, the judgment is reversed, and the cause remanded for further proceedings.

Moore, Ch. J., and Bean and Harris, JJ., concur.

## RHODE ISLAND SUPREME COURT.

WILLIAM T. GRINNELL, Appt.,

v.

EDWARD WILKINSON.

(— R. I. —, 98 Atl. 103.)

**Appeal — dismissal of action — question open.**

1. Upon appeal from an order dismissing a petition for compensation under the Workmen's Compensation Act because the injury occurred out of the state, so that the statute did not apply, the question whether or not the decree is against the evidence is not open.

*For other cases, see Appeal and Error, VII. 1, 4, in Dig. 1-52 N. S.*

**Master and servant — workmen's compensation — injury out of state.**

2. A Workmen's Compensation Act will apply to injuries to workmen employed in the state and injured while temporarily out of its limits in the performance of their duties unless there is something in its terms making it inapplicable, and a provision that the injured employee shall at reasonable times during his disability, if requested by his employers, submit himself to examination by a physician authorized to practise under the laws of the state, is not sufficient for that purpose.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(July 6, 1916.)

**A** PPEAL by petitioner from a judgment of the Superior Court for Providence and Bristol Counties, dismissing his petition in a proceeding under the Workmen's

**Note.**—The general subject of Workmen's Compensation Acts is treated in the annotation in L.R.A.1916A, 23. The specific question as to the extraterritorial effect of such acts and conflict of laws in relation thereto is discussed in the annotation following *Kennerson v. Thames Towboat Co.* L.R.A.1916A, 443.

For later cases and annotations consult the L.R.A. Digests and Indexes to Notes for volumes subsequent to L.R.A.1916A, under the title, "Workmen's Compensation." L.R.A.1917B.

Compensation Act to recover compensation for injuries received while in defendant's employ. Reversed.

The facts are stated in the opinion.

Messrs. George A. Breaden and Edward W. Bradford for appellant.

Mr. Ernest P. B. Atwood for appellee.

Parkhurst, J., delivered the opinion of the court:

This is a petition for compensation under Pub. Laws, chap. 831, 1912, commonly known as the "Workmen's Compensation Act." The petitioner alleges and the answer admits that the parties were subject to the provisions of the Workmen's Compensation Act. The petitioner was employed by respondent as a carpenter, and his employment commenced at Providence, in the course whereof he was directed by his employer to go without the state, to New Haven, in the state of Connecticut, to complete work already commenced by him at Providence. While so engaged at New Haven he claimed to have received a splinter in his finger, on the 20th day of May, 1915, and that, as a result of receiving said splinter in the middle finger of his right hand, blood poisoning set in, from which he has never recovered. The petitioner claims that he personally brought the attention of his employer to his injury at the hospital, within a period of thirty days from the occurrence of the accident. The petition was heard before the presiding justice of the superior court at Providence, and denied for the reason, substantially, that the statute does not apply because the injury was received outside this state. The matter is before this court on an appeal duly taken by the petitioner from the decision of the presiding justice.

The question to be decided is whether our statute gives to an employee whose contract of service is within its scope the right to recover compensation for injuries resulting from an accident in the state of Connecticut. The petitioner in his reasons of appeal says that the decree appealed from "is against the evidence and the weight



thereof." But the presiding justice, ruling as above against the petitioner, and dismissing the petition solely on the point of law stated, made no findings of fact upon the evidence adduced before him; this court, therefore, has before it upon this appeal only the question of law involved in the decision above referred to; it has no jurisdiction under the act to try and determine the facts of the case. Petitioner's counsel offered no argument upon this point; the argument on this point on behalf of the respondent by his counsel is disregarded for the reasons stated.

Since acts relating to workmen's compensation are of comparatively recent date in this country, the precise question raised in this case has been presented to the courts of this country in comparatively few instances, and quite recently. The presiding justice, in his rescript dismissing this petition, cites only four cases, viz., *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Hotez v. International Mercantile Marine Co.* 83 Misc. 25, 144 N. Y. Supp. 355, and *Tomalin v. Pearson* [1909] 2 K. B. 61, 78 L. J. K. B. N. S. 863, 25 Times L. R. 477, 100 L. T. 685, 2 B. W. C. C. 1. Of these cases *Johnson v. Nelson* is a Minnesota case decided January 8, 1915, and simply holds, substantially, that the plaintiff was an employee whose contract of service related only to work in Wisconsin and was carried out in that state, where he was injured, and that both he and his employer were subject to the terms of the Workmen's Compensation Act of Wisconsin, and that his right of recovery was governed thereby, but the sole remedy of the plaintiff was under the Wisconsin act, and that he could not recover in Minnesota. This case has no bearing upon the question here under consideration.

The case of *Hotez v. International Mercantile Marine Co.* 83 Misc. 25, 144 N. Y. Supp. 355 (1913), was for a marine tort, where the complaint charged negligence attempted to be imputed to the owner of a vessel through a subordinate officer. The case was in tort for negligence, and it was held that the Workmen's Compensation Act of New York did not cover the case of torts committed without the state, and that the action could not be maintained as a common-law action under the evidence. This case has no application to the case at bar.

The case of *Tomalin v. Pearson*, supra, in the court of appeal for England relates to the English Workmen's Compensation Act, and holds that an employee injured in work done at Malta under contract with a British employer has no right of recovery, un-

der the English act, which by its terms, as interpreted by the English court, covers only injuries received within the territorial limits of the United Kingdom. This construction is based principally upon the fact that there is no express language in the act to cover injuries suffered outside the United Kingdom, except in case of a limited class of seamen; and it appears to be held that this express extension to a limited class of seamen is evidence of an intention on the part of Parliament to limit the effect of the act otherwise as above stated. See also *Hicks v. Maxton*, 124 L. T. Jo. 135, 1 B. W. C. C. 150; *Schwartz v. India Rubber, Gutta Percha & Teleg. Works Co.* [1912] 2 K. B. 299, 81 L. J. K. B. N. S. 780, 106 L. T. N. S. 706, 28 Times L. R. 331, 5 B. W. C. C. 390, where the English act is held not to apply to foreign injuries.

The leading case in this country up to 1913 was *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60, decided September 12, 1913, and it was doubtless upon this authority that the presiding justice relied in his decision, and he is, at first sight, apparently supported thereby. Since that time, however, certain other cases have been decided which, in the opinion of this court, more closely apply to our act and which we shall later discuss. *Gould's Case*, supra, was a petition under the Massachusetts act. The petitioner was a citizen resident of Massachusetts, and made a contract of service with a Massachusetts corporation, and accepted the benefits of the act. "In the course of his employment he received the injury out of which this claim arises, in the state of New York. He was principally employed in Massachusetts, but at times incidentally worked in New York and other states." After discussing certain incidental questions of practice which are not here material, the court proceeds to discuss the construction of the act, and while conceding that the legislature has power, if it sees fit, to give the act such scope as to cover injuries received outside the state, finds no express words giving it such scope, which is deemed to be significant, and then proceeds to examine its provisions in detail to see whether there is any intent to be gathered therefrom to make the act apply to such injuries. At page 484 of 215 Mass. the court says: "A consideration of the act in detail fails to disclose any plain intent to that end. On the contrary, several provisions indicate solely intrastate operation. Part 2, § 19, provides that the employee who has received an injury shall submit himself on request to an examination 'by a physician or surgeon authorized to practise medicine

under the laws of the commonwealth.' It hardly can be inferred from this language that the legislature intended that physicians or surgeons from Massachusetts should journey to the place of injury, or that those authorized to practise under the laws of other states should make the examination. Part 3 of the act, which relates to procedure, and which, as has been pointed out, creates a wholly new method of procedure, deals only with boards and courts within this commonwealth. No provision is made for enforcing rights as to injuries occurring outside the state. Part 3, § 7, as amended by Stat. 1912, chap. 571, § 12, requires that the hearings of the committee on arbitration 'be held in the city or town where the injury occurred.' Obviously, this cannot relate to injuries received outside this commonwealth. Section 11, as amended by Stat. 1912, chap. 571, § 14, provides that in the event of resort to the courts, copies of the papers shall be presented 'to the superior court for the county in which the injury occurred or for the county of Suffolk.' The words 'for the county of Suffolk' may be presumed to be inserted for convenience, as the offices of the Industrial Accident Board are in Suffolk and courts are continually in session in that county, and not in order to make provision for injuries occurring outside the state. Part 3, § 18, requires the employer, within forty-eight hours, not counting Sundays and legal holidays, after the accident resulting in personal injury, to make a report 'in writing to the Industrial Accident Board.' Part 4, § 18, authorizes the directors of the Massachusetts Employees' Insurance Association created by the act, to make and enforce reasonable rules and regulations for the prevention of injuries on the premises of the subscribers, 'and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours.' This section is in furtherance of that part of the purpose of the act as set forth in its title for the prevention of industrial injuries. But it cannot be operative outside of Massachusetts."

From these various provisions of the Massachusetts act the court finds an intent to confine the operation of the act to accidental injuries happening in the state, and that it is not applicable to injuries arising out of the state. On page 488 of 215 Mass. the court says: "If employees and employers from different states carry their domiciliary personal-injury law with them into other jurisdictions, confusion would ensue in the administration of the law, and at least the appearance of inequality among those working under similar conditions. If such a result had been intended by the gen-

eral court, it cannot be doubted that it would have been disclosed in unambiguous words."

These remarks do not seem to be applicable to the case before the court, but seem to be used *arguendo*, in the general discussion of the scope and intent of such acts generally. In this state we have found no difficulty such as that last referred to in the administration of the law; for in the case of *Pendar v. H. & B. American Mach. Co.* 35 R. I. 321, L.R.A.1916A, 428, 37 Atl. 1, 4 N. C. C. A. 600 (1913), a case of an injury which occurred in Massachusetts to a citizen of Rhode Island who was employed in Massachusetts by a corporation which had taken the benefit of the act in that state, we held that "where an accident occurred in a foreign jurisdiction, under whose laws plaintiff waived his right to bring a common-law action to recover by failing to give notice in writing to his employer at the time of the hiring that he claimed his right to bring such action, plaintiff cannot bring in this state an action at common law to recover for the injury."

See also *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620 (1915); *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. Supp. 942; *Schweitzer v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 149 App. Div. 900, 134 N. Y. Supp. 812; *Schweitzer v. Hamburg-American Line*, 78 Misc. 448, 138 N. Y. Supp. 944.

Returning now to the specific provisions of the Massachusetts act above referred to in the quotation from *Gould's Case*, supra, upon which the court principally relies to support its finding that the Massachusetts act was intended to apply solely to injuries received within that state, we find only two of these provisions which are the same in substance as are certain provisions of the act of this state. The first of these is the provision that the employee "shall, after an injury, at reasonable times during the continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practise medicine under the laws of the state," etc. Pub. Laws 1911-12, chap. 831, art. 2, § 21, p. 436.

We do not find that this provision is important in determining the intent of our law, bearing in mind at all times that our law nowhere in terms excludes the consideration of injuries occurring out of the state, but in broad and general terms gives to the employee compensation for "personal injury by accident arising out of and in the course of his employment." Article 2. § 1. The provision for examination by the physician or surgeon is for the benefit and protection of the employer, and the act further

provides: "If such employee refuses to submit himself for any examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited." Article 2, § 21.

The provisions here referred to are general, and apply to any time after the injury, during the pendency of proceedings, and during the operation of the decree, "during the continuance of his disability." It is not impossible for such examination to be made, at the request of the employer, even in another state; it will probably happen in most cases that a resident of this state, injured elsewhere, will come home for treatment and for the prosecution of his remedy under the law, and will be subject to examination here. At all events when the case arises it will be disposed of according to the act; and we do not propose further to discuss this provision until it shall be necessary, except to repeat that, in our opinion, it is not of importance in determining the general intent of the act. See *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94 Atl. 392, *infra*, where there is a similar provision in the law, but no inference of intent to confine the act to injuries arising in the state is drawn.

The next provisions of the Massachusetts act, referred to in *Gould's Case*, *supra*, relate to procedure, requiring that hearing "be held in the city or town where the injury occurred;" that papers shall be presented "to the superior court for the county in which the injury occurred," etc. These provisions, in our opinion, furnish the best ground in support of the decision in *Gould's Case*; there are no such provisions in the Rhode Island act, which provides (article 3, § 16, p. 444): "Sec. 16. Proceedings shall brought either in the county where the accident occurred or in the county where the employer or employee lives or has a usual place of business. The court where any proceeding is brought shall have power to grant a change of venue."

By the general provisions of the act original jurisdiction of these proceedings is vested in the superior court. From the provisions last quoted it will be seen that there is no difficulty about the jurisdiction, and it would almost seem that the general assembly, in making this provision, had taken pains to provide for jurisdiction in cases where the injury occurred out of the state. In our opinion no restriction of the scope of the act is to be found in this regard.

The provision regarding reports of injuries is found in Pub. Laws Jan. 1915, chap. 1268, pp. 261 et seq., and in some respects is similar to the provision of the

Massachusetts act referred to in *Gould's Case*, *supra*. We do not regard it as of the slightest importance in determining the construction and scope of the act as a whole. The other provisions referred to in *Gould's Case* are not found in our act. We do not regard the decision in *Gould's Case* as a precedent which we should follow—partly because of the differences between the act there discussed and our act, as above shown; partly because we do not agree with certain reasoning therein set forth. We prefer the broader view set forth in certain cases hereafter cited from Connecticut, New Jersey, and New York.

The Workmen's Compensation Act of Connecticut (Laws 1913, chap. 138, of Public Acts; see also 2 *Bradbury's Workmen's Compensation*, p. 1144) in its general purpose, scope, and provisions, with minor differences in details, is very similar to the Rhode Island act. The same question here involved arose under the act and was decided in June, 1915, in the case of *Kennerston v. Thames Towboat Co.* 89 Conn. 367, L.R.A. 1916A, 436, 94 Atl. 372. The case was a proceeding for compensation from the defendant, a Connecticut corporation, for the death of an employee, a citizen of Connecticut, who was in the employ of the defendant on a towboat, and whose death occurred by drowning in Raritan Bay, New Jersey, when the tug on which he was employed foundered. After disposing of certain contentions advanced by defendant that the petitioner's claim was cognizable only in the admiralty courts, or under the Federal Employers' Liability Act (Act Congress April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, §§ 8657-8665), and some points of practice, the court in its opinion says (89 Conn. 374): "We come, then, to the next question: whether our Compensation Act provides for compensation for injuries received outside our state, and arising out of and in the course of the employment. The respondent insists that our act has no extraterritorial effect. That is not the precise question to be determined, but, rather, whether our act provides for compensation, arising out of a contract of employment authorized by our act, for injuries suffered without our jurisdiction. If our act authorizes such a contract, recovery may be had; otherwise not. Unless the intention to have a statute operate beyond the limits of a state is clearly expressed or reasonably to be inferred from the language of the act, or from its purpose, subject matter, or history, the presumption is that the statute is intended to have no extraterritorial effect. A like presumption should control the operation of a contract based upon a statutory authority. We find no

clearly expressed intention in our act that the contract authorized should operate without the state. If found in the act, it must be found as an inference reasonably to be inferred from the language of the act, read in the light of its purpose, subject matter, and history. In our search for such an intention it is all important that we do not forget the remedial character of the act, and that we construe its provisions broadly and liberally 'in order to effectuate its purpose.' Powers v. Hotel Bond Co. 89 Conn. 143, 146, 93 Atl. 245. The remedy provided by our Compensation Act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost, in the case of every injury not caused by the wilful and serious misconduct or intoxication of the injured employee, to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the state, and the employee, or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the state, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The state boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally

L.R.A.1917B.

hard will it prove to the employee, since he must pursue his remedy in the state of the accident, or the Federal court applying that state's law, and thus he may be brought under any one of many different Compensation Acts, with whose provisions he cannot hope to be familiar; some acts contractual in character, some compulsory, some optional, and some ex delicto; and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities. It is reasonable to infer that our legislature, inaugurating a new system, based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system and cast a multitude of employers and employees into a maelstrom of trouble, uncertainty, and liability? On the other hand, is it not reasonable to infer that the legislature, having bottomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed to have known that contract and not the place of injury, would govern the recovery. Such a construction of the act would lift insuperable burdens from industry and commerce and workmen, and give to each his course and the ascertained fruits of the contract of his will. Whether the contract shall include injuries in a jurisdiction other than where the contract was made is determined by the expressions or implications of each act. Section 1, pt. A, of our act recites: 'In an action to recover damages for personal injury,' certain defenses shall not be available. Here is no limitation to injuries received within the state. We, through comity, enforce actions for injuries received outside the state when not against our law or public policy. The natural construction of this language makes it include every action wherever it originates. Section 1, pt. B, recites that, when employer and employee have accepted part B, the employer shall not be liable to any action for damages for personal injury sustained by his employee in the course of his employment, but the employer shall pay compensation on account of such injury as provided by the act. Do not the words 'any action' mean what they say? And have we any more right to insert after them 'within the state' than 'within or without the state?' In this section the acceptance of the act is, by its express terms, a renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment, except as specified. It seems to us plain that the rights and claims waived are not merely those

arising in Connecticut, but anywhere. In § 8, pt. B, compensation is required to be paid for 'any injury' which incapacitates for more than two weeks. There is no warrant for construing any injury to consist of one arising within the state. By § 20 every employer who has accepted part B 'shall keep a record of such injuries sustained by his employees in the course of their employment' and 'send each week to the commissioner such report of said injuries as the commission shall require.' It cannot be that the record intended was solely of the injuries happening within the state. Obviously it was intended to embrace all injuries occurring to such employees everywhere; any other construction would do violence to the ordinary meaning of the word used and to the manifest purpose in keeping the record. Similarly the notice of injury of § 21, and the voluntary agreement of § 22, relate to every injury, and not merely those occurring within the state. Under § 29, any employer may enter into a substitute system of compensation with his employees in lieu of the compensation of the act. The legislature had the undoubted power to make the substitute system apply to injuries without as well as those within the state. Is it likely that the legislature intended a substitute system applicable to employees when employed within the state and inapplicable when employed elsewhere? How could the employer engaged in intrastate and interstate employment take advantage of the substitute system? If the agreement of this character had to be confined to the injuries received in the state, neither employer nor employee would [undertake] it. Practically the provision for a substitute system would be . . . nugatory. Certain sections of the act are referred to as indicating that the act has relation exclusively to intrastate injuries. Thus, § 7, which requires the employer to furnish medical and surgical aid, and § 23, which requires the injured employee to submit himself to examination by a reputable physician, are said necessarily to refer to Connecticut practitioners. We see no practical reason why these sections may not refer to the practitioner without the state as well as within it. Unless this limitation be read in the section, the language used does not express the limitation."

The opinion then proceeds to discuss certain questions as to hearings before commissioners and courts, not contained in the Rhode Island act, which are not material here, and proceeds (89 Conn. 379): "In legislative acts inaugurating a new system not infrequently are found contradictory provisions, and it becomes the duty of the court to reconcile them so far as it can. L.R.A.1917B.

It does this, whenever it is possible, in such way as to sustain the act and carry out its purposes. This we believe to be our present duty. In a sense the injury may be said to have been sustained in the place of the contract, and, if appeal is taken, in cases of injury occurring without the state, to the county of the contract, the terms of the act will be reasonably satisfied. The precise question we are considering has been the subject of discussion in two cases,—one under the New Jersey act, a contractual optional act very similar to our own, where the trial court, in *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121, construed the contract under the New Jersey act as we construe these contracts; the other under the Massachusetts act, where the supreme judicial court construed their act as confined to accidents within the state. *Gould's Case*, 215 Mass. 480, 102 N. E. 603, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60. We must accept the construction accorded the Massachusetts act by its supreme judicial court. It may be well, however, to point out that the court does not state that its act is contractual in character. That, as we have indicated, is of final importance in the conclusion we reach concerning our own act. Then, too, under the Massachusetts act, the employee is merely the beneficiary under a contract between the employer and the insured; with us the employer and employee enter into a contract relation. In its reference to and comment upon certain sections of their act, the court says that these must be found within the act from 'unequivocal language,' or 'plain and unmistakable words,' that the act was intended to relate to injuries without the commonwealth. We have adopted a broader rule. We read our act in the light of the purpose, subject matter, and history of the act, to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction. This is our ordinary rule in the interpretation of statutes. The . . . court states that 'the subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs.' And it argues that, if the act had intended employers and employees from different states to carry their domiciliary personal injury law with them into other jurisdictions, it would have expressed its intent in unambiguous words. This argument concerns a proceeding to enforce an *ex delicto* claim, not one for compensation by way of contract. It is also argued that, if an act is given extraterritorial force, similar effect must be given to like laws of other states. If contracts of employment

cover compensation for injuries outside the state, recovery for these will be governed by the usual rules for the construction and enforcement of all contracts. We should give similar effect to contracts of like character to those before us, though made under a compensation act of another jurisdiction, provided they did not conflict with our law or public policy, and the machinery provided for the ascertainment and collection of the compensation could be used in our jurisdiction. Where, as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign jurisdiction. 1 Bradbury, Workmen's Compensation, 1914 ed. p. 52. If it should be necessary to so rule, no hardship would result; the parties in interest would be relegated to the place where they had elected to make their contract, and no questions of conflict of laws could arise. At the base of this question is the character of the compensation. Mr. Bradbury, repudiating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the state. We think his later conclusion sound, and one which will prove beneficial alike to employer and employee."

Also in June, 1915, the supreme court of New Jersey passed upon the question whether the act of that state applies, where the accident occurs in another state, in the case of Rounsaville v. Central R. Co. 87 N. J. L. 371, 94 Atl. 392. In this case the petitioner was employed in New Jersey by the defendant, a New Jersey corporation, as a brakeman on a train which went into Pennsylvania, and was injured in Pennsylvania; his wages were paid in New Jersey; it was held that his contract of service was a New Jersey contract; both parties were subject to the New Jersey act. It was held that the act covered the case, and the petitioner could maintain his proceeding. The New Jersey act is, in its general features and scope, very similar to the Connecticut and Rhode Island acts; the provision requiring the employee to submit to medical examination in the state by a physician authorized to practise medicine in the state is almost the same in essential terms as in the Rhode Island, and differs slightly from the Connecticut, act. See Laws of N. J. 1911, chap. 95, § 17, p. 141. After disposing of certain preliminary questions, and deciding that the liability of the employer under the act was contractual, and discussing a certain previous decision not directly in point, the court said (87 N. J. L. 374): "We are now dealing with the simpler ques-

tion, whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance."

It is notable that these two cases should each have been independently decided by the courts of Connecticut and New Jersey in June, 1915, and have reached the same conclusion upon the same point in the consideration of statutes essentially similar. The latest case which has come to our attention is Post v. Burger, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888 (January, 1916), a New York case, where the same question arose under the Workmen's Compensation Act of New York. The case follows substantially the same line of argument and arrives at the same conclusion as the cases of Kennerson v. Thames Towboat Co. 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372, and Rounsaville v. Central R. Co. supra, both of which it cites with approval. See also Deeny v. Wright & C. Lighterage Co. 36 N. J. L. J. 121; 1 Bradbury, Workmen's Compensation, pp. 50, 52 et seq., cited with approval in the Kennerson Case, supra, 89 Conn. 378, L.R.A.1916A, 436, 94 Atl. 372, and in the Post Case, supra.

We are of the opinion that the reasoning of the cases above cited from New York, New Jersey, and Connecticut is quite applicable to the case at bar; that under the Workmen's Compensation Act of Rhode Island the relation of employer and employee is contractual, and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that, on principle and in reason, and in view of the purpose, scope, and character of the act, it should be construed and held to include injuries arising out of the state as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion. Gould's Case, supra, stands alone so far as any cases have come to our attention, and is only deemed to be authoritative on the particular statute therein considered, which we regard as different from ours in many important respects.

The Superior Court was in error in dismissing the petition in this cause, for the reasons above set forth. The appeal is sustained, the decree of the Superior Court is reversed, and the cause is remanded to the Superior Court for a trial upon its merits.

## ARKANSAS SUPREME COURT.

C. S. FITZPATRICK, Admr., etc., of Henrietta Owens, Deceased, et al., Appts., v.

F. M. OWENS.

(124 Ark. 167, 186 S. W. 832, 187 S. W. 460.)

**Husband and wife — liability of man for killing wife.**

Where married women are, by statute, given the right to sue and be sued and to enjoy in law and equity all rights as though sole, a man wrongfully causing the death of his wife is liable in damages under a statute imposing liability in damages for wrongful death in case the person injured might have maintained an action had death not ensued.

For other cases, see *Husband and Wife*, III, d, in Dig. 1-52 N. S.

(Wood and Hart, JJ., dissent.)

(May 29, 1916.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Phillips County sustaining a demurrer to a complaint and dismissing an action brought to recover damages for the alleged wrongful killing of plaintiffs' intestate. Reversed.

The facts are stated in the opinion.

Messrs. Bevens & Mundt and Hughes & Hughes, for appellants:

Where a married woman enjoys equal and separate legal identity of person, she has a right of action against her husband for a tort committed by him against her resulting in her injury.

Brown v. Brown, 88 Conn. 42, 52 L.R.A. (N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70; Fiedler v. Fiedler, 42 Okla. 124, 52 L.R.A. (N.S.) 189, 140 Pac. 1022.

Messrs. Moore, Vineyard, & Satterfield, Andrews & Burke, and Flink & Dinning, for appellee:

Neither spouse has the right to sue the other for personal torts.

Peters v. Peters, 156 Cal. 32, 23 L.R.A. (N.S.) 699, 103 Pac. 219; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Abbott v.

**Note.** — The question as to the right of wife to sue husband for personal tort, which is apparently regarded in FITZPATRICK v. OWENS as determinative of the liability of a husband for wrongfully causing the death of a wife, is treated in the notes to Strom v. Strom, 6 L.R.A. (N.S.) 191; Thompson v. Thompson, 30 L.R.A. (N.S.) 1153, and Brown v. Brown, 52 L.R.A. (N.S.) 185, and see later cases, Lillienkamp v. Rippetoe, L.R.A. 1916B, 881, and Gilman v. Gilman, L.R.A. 1916B, 907. L.R.A. 1917B.

Abbott, 67 Me. 304, 24 Am. Rep. 27; Strom v. Strom, 98 Minn. 427, 6 L.R.A. (N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; Peters v. Peters, 42 Iowa, 182; Freethy v. Freethy, 42 Barb. 641; Longendyke v. Longendyke, 44 Barb. 367; Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25; Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589; Main v. Main, 46 Ill. App. 106; Nickerson v. Nickerson, 65 Tex. 281; Sykes v. Speer, — Tex. Civ. App. —, 112 S. W. 422; Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382; Thompson v. Thompson, 218 U. S. 611, 52 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921; Lillienkamp v. Rippetoe, 133 Tenn. 57, L.R.A. 1916B, 881, 177 S. W. 628; Mathewson v. Mathewson, 79 Conn. 23, 5 L.R.A. (N.S.) 611, 63 Atl. 285, 6 Ann. Cas. 1027.

McCulloch, Ch. J., delivered the opinion of the court:

According to the allegations of the complaint, plaintiff's intestate, Henrietta Owens, was the wife of the defendant, F. M. Owens, and said parties had, by a decree of the chancery court of Phillips county, Arkansas, been divorced from bed and board, but not from the bonds of matrimony, that, while the said relation subsisted, the defendant made a felonious assault upon said Henrietta Owens and killed her, and that, by reason of said wrongful act of defendant, the estate of said decedent and her next of kin suffered injury which entitled them to recover damages in the large sum named in the complaint. The court sustained a demurrer to the complaint and dismissed the action on the ground that a right of action on the part of either the administrator or next of kin was not set forth. In testing the sufficiency of the complaint, we must, of course, accept as true all the allegations set forth.

The action is based on the statute which provides as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." Kirby's Dig. § 6289.

This court construed that statute, not as a continuation of the right of action which the deceased had in his lifetime, but as arising by the preservation of the cause of

action which was in the deceased, and that, if the latter never had a cause of action, none accrues to his representative or next of kin. *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801.

The question, then, for determination is the one stated by appellant in the brief, whether or not a married woman, under the statute now in force in Arkansas, may maintain against her husband an action to recover damages for tort committed by him. The cause of action, if any exists, arose since the enactment of a statute by the general assembly of 1915 entitled "An Act to Remove the Disabilities of Married Women in the State of Arkansas," and reads as follows: "Section 1. That from and after the passage of this act, every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this state, as though she were a feme sole." Acts 1915, p. 684.

It is difficult to find authority bearing upon the construction of this statute; for there are no statutes in other states in precisely the same language, or enacted under the same circumstances as this statute was passed. The disposition of all the courts in the construction of statutes relating to the rights of married women is to hold tenaciously to the rule that statutes in derogation of the common law must be strictly construed. This court has announced that rule in many cases, and has given it effect in confining within the narrowest possible limits statutes passed by the legislature to emancipate married women from their common-law disabilities. There are many cases cited on the brief construing statutes of this kind, and in most of the decisions the statutes were held not to give a married woman the right to maintain an action against her husband for tort. But, as before stated, none of the statutes are similar to ours, nor were they passed under the same circumstances. One of the leading cases on the subject is that of *Thompson v. Thompson*, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921, where the court decided that the statute of the District of Columbia declaring that married women "shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried," did not confer upon the wife

the right to sue her husband for damages on account of tort committed by him. In reaching that conclusion the court said that "it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention and control of the husband, and to maintain actions separately for the recovery, security, and protection of her property," and to sue separately for torts as freely as if she were not a married woman, but that the statute "was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband." The case was decided by a divided court; there being a dissenting opinion by Mr. Justice Harlan, in which Justices Holmes and Hughes concurred. The statute then under consideration was not as strong in the enlargement of the rights of married women as the one passed in this state, but the opinion of the court undoubtedly shows the tendency of the court, at least at that time, to restrict as far as possible those statutes, and to only follow the legislative will as expressed in the most irresistible language in enlarging the rights of married women.

There are statutes in many states enlarging the rights of married women to contract and to maintain suits both upon contract and for tort the same as that given by law to the husband, and those statutes have uniformly been construed to give no greater rights than the husband had, and therefore the right to maintain an action for tort was not conferred, for the reason that the husband had no such right. *Strom v. Strom*, 98 Minn. 427, 6 L.R.A. (N.S.) 191, 116 Am. St. Rep. 387, 107 N. W. 1047; *Schultz v. Christopher*, 65 Wash. 496, 38 L.R.A. (N.S.) 780, 118 Pac. 629; *Drum v. Drum*, 60 N. J. L. 557, 55 Atl. 86; *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382.

In other states where there are statutes authorizing the wife to contract, either with her husband or with others, and providing that she may sue or be sued alone, the courts have construed those statutes to refer solely to contractual rights, and to provide a remedy merely for the enforcement of those rights. *Peters v. Peters*, 156 Cal. 32, 23 L.R.A. (N.S.) 609, 103 Pac. 219; *Main v. Main*, 46 Ill. App. 106; *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 758, 72 Am. St. Rep. 550, 75 N. W. 287.

In still other states statutes somewhat similar are held merely to give the right to sue upon causes of action which existed at common law, and not to otherwise enlarge the common-law rights of a married woman.



an. *Peters v. Peters*, 42 Iowa, 182; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Freethy v. Freethy*, 42 Barb. 641.

Counsel for appellee rely, with much apparent confidence, on the decision of the supreme court of Tennessee in the case of *Lillienkamp v. Rippetoe*, 133 Tenn. 57, L.R.A.1916B, 881, 179 S. W. 628, but we think that decision has little, if any, bearing on the construction of the statute now before us. In that case the court construed a recent enactment of the Tennessee legislature declaring that married women "are hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effects on the rights of property of the wife is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married," and that "every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married," and the court decided that the statute did not confer the right on the wife to sue the husband for tort. In disposing of the matter the court said: "We must assume that the legislature had in mind in the passage of the act the fundamental doctrine of the unity of husband and wife under the common law, and the correlative duties of husband and wife to each other, and to the well-being of the social order growing out of the marriage relation, and that, if it had been the purpose of the legislature to alter these further than as indicated in the act, that purpose would have been clearly expressed, or would have appeared by necessary implication."

All the statutes of this character do, as stated by the Supreme Court of the United States in *Thompson v. Thompson*, supra, "treat the wife as a feme sole, and to a large extent alter the common-law theory of the unity of husband and wife." The difficulty is that the courts, in their reluctance to change the common-law rules of law and procedure, place too narrow restrictions upon the manifest designs of the law-makers. There are two decisions brought to our attention which hold broadly, under statutes not near so strong as ours in the emancipation of married women from all common law disabilities, that the wife can

sue the husband on account of torts committed by him. *Brown v. Brown*, 88 Conn. 42, 52 L.R.A.(N.S.) 185, 89 Atl. 889, Ann. Cas. 1915D, 70; *Fiedler v. Fiedler*, 42 Okla. 124, 52 L.R.A.(N.S.) 189, 140 Pac. 1022. The Connecticut statute construed in the case above cited merely declared that "all property hereafter acquired by any married woman shall be held by her to her sole and separate use," and that court held that, giving that statute full scope, each party to the marriage retains his or her legal identity and capacity to own property, and each may sue or be sued at law, not only for breach of contract, but may sue each other for a tort. In stating the conclusions of the court it was said: "It is true that courts in some of the states have held that statutes more or less similar to the one here in question give a married woman no right of action against her husband for a tort. They find in the statutes construed no legislative intent to change the legal status of husband and wife as regards the legal identity of the two, but simply an intent to ameliorate the condition of the wife by permitting her to retain and deal with her own property, and to contract with, and sue and be sued, by, others than her husband. These courts generally hold that, unless there is an express provision giving her the right to sue her husband, she has no action against him upon contract or for tort. . . . If the legislative intent in such an enactment is not to change the foundation upon which the status of married persons was based at common law, namely, their legal identity, but its purpose is to empower the wife, while that status exists, to contract and sue in her own name like a feme sole, it might well be held that language bestowing this right could not be so extended as to permit her to contract with her husband or to sue him for a tort, because the statute intends that her identity shall still be merged in that of her husband."

The court then proceeds further to hold that the effect of the statute of that state with respect to the rights of married people was that "the parties retain their legal identity, and their several rights are to be determined in accordance with the status thus established," and that, the wife's separate identity not being lost by her coverture, it necessarily resulted, from the "retention of her legal identity after coverture that she has a right of action against her husband for a tort committed by him against her and resulting in her injury."

In the Oklahoma case referred to the court held that the general statutes there declaring that a woman shall "retain the same legal existence and legal personality after marriage as before marriage, and

shall receive the same protection of all her rights as a woman, which her husband does as a man," gave her the right to sue him for tort.

It is unnecessary for us, in order to sustain the right of action of the plaintiffs in the present case, to go as far as did the Oklahoma case, because that case is in conflict with the decisions in those states which hold that a statute merely enlarging the rights of married women to those of the husband do not give her the right to sue for torts. Our statute must be construed in the light of previous legislation in this state, which had already gone very far towards complete emancipation of a married woman from all the common-law disabilities of coverture. Those statutes provided that married women could own property of any kind, and hold the same in their own right, and convey it as a feme sole; that she could enter into contracts with reference to her separate property, and sue and be sued with reference thereto. The Act of 1873 (Acts 1873, p. 384, § 9) provided that "any married woman may bring and maintain an action in her own name for or on account of her sole and separate estate or property, or for damages against any person or body corporate, for any injury to her person, character or property, the same as if she were sole."

Another statute conferred upon a married woman the power to enter into executory contracts for the sale of her lands (Act March 19, 1895; Kirby's Dig. § 5209). Sparks v. Moore, 66 Ark. 537, 56 S. W. 1064. After this court had decided in Kies v. Young, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669, that the husband was liable for the antenuptial obligations of his wife, the legislature changed that rule, thus indicating the further desire to preserve the separate identity of the wife. Act Feb. 1, 1899; Kirby's Dig. § 5223. These enactments left but little in the way of restrictions upon the rights of married women, but the legislature deemed it proper to provide further legislation to completely emancipate her, and they did so by this statute which declares its purpose in the broadest terms to "remove the disabilities of married women." An analysis of the language of the statute shows that the legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by unmarried women. The words "to sue and be sued," when considered by themselves, merely enlarge the remedies of a married woman, and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and un-

doubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman "to contract and be contracted with," and the words which follow declare in the very broadest terms her right "in law and equity" to "enjoy all rights and be subjected to all the laws of the state as though she were a feme sole." If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights which she would enjoy if she still remained a single woman, and that with respect to those rights she may sue and be sued.

The inquiry arises whether the language of the statute giving her only such rights and remedies as she would enjoy if she were a feme sole necessarily excludes the right to maintain a suit against her husband for the reason that, if she were a feme sole, she would have no husband to sue, and therefore it is not intended to give her any greater right than she would have if she were a feme sole. We scarcely think that the lawmakers had that in mind; for they were dealing entirely with enlarged rights and remedies of a married woman, and it was evidently meant to confer upon her the enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried.

We are convinced, therefore, that this was the intention of the lawmakers, and it would be doing violence to their manifest purpose to further apply the rule of restriction on account of the statute being in derogation of the common law, and to hold that a married woman has no right of action against her husband. We have, as has been so often said by this and other courts, nothing to do with the policy of the law; for that is controlled entirely by the legislative branch of government. It cannot be said that there is any such fixed policy on the subject that the legislature has not the power to change. As to the policy of such a statute the Connecticut court, in the case referred to, said: "The danger that the domestic tranquillity may be disturbed if husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel, as suggested in some of the cases cited in behalf of the defendant, we think is not serious. So long as there remains to the parties domestic tranquillity, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such actions will be impossible. When the purposes of

the marriage relation have wholly failed by reason of the misconduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give them against other persons. Courts are established and maintained to enforce remedies for every wrong, upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another and one slander with another slander, until the public peace is broken and the criminal law invoked against them."

Again it is said against this construction of the statute that it confers a greater right upon the wife than it does upon the husband. That may be true, and still the statute is in accord with previous legislation on the subject which gives the wife greater rights than the husband. It was within the power of the legislature to give the wife new rights without conferring reciprocal rights upon the husband, and that view of it does not militate against the validity of the statute, nor does it prevent that construction being placed upon it.

Upon the whole, we are convinced from the language of this statute and the fact that it was enacted to add something more to the whole sum of the law on that subject that the statute meant to give the wife the right to maintain an action against her husband, either upon contract or for tort.

The conclusion of the Circuit Court was therefore erroneous, and the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

**Hart J.**, dissenting (July 10, 1916):

I do not think the construction placed upon the act under consideration is justified by its language, and it seems to me that the construction is opposed to the trend of our former decision relating to the question. In the case of *Kies v. Young*, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669, the court expressly recognizes the rule in the construction of married women acts to be that, where the legislature does not, by express words or by clear implication, express an intention to repeal the existing law in regard to married women, the presumption is that they intended the rule should remain.

The court said that the common-law unity of husband and wife still exists in this state L.R.A.1917B.

except so far as the legislative purpose to change it has been expressed by statute. The statute under consideration is as follows: "Section 1. That, from and after the passage of this act, every married woman, and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this state, as though she were a feme sole." Acts 1915, p. 684.

Reliance seems to be placed in the decision of the majority in the dissenting opinion of Judge Harlan in *Thompson v. Thompson*, 218 U. S. 611, 54 L. ed. 1180, 30 L.R.A. (N.S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921. A statute governing the District of Columbia was under consideration in that case, and it specially provided that married women might sue for torts committed against them as fully and freely as if they were unmarried; and Judge Harlan's dissent was based upon this special provision of the statute. I think that an examination of his dissenting opinion will lead to the conclusion that, had it not been for this special provision, he would not have dissented from the majority opinion.

The first part of our act, providing that married women shall have all rights to contract and be contracted with, to sue and be sued, I think gives her the right to make contracts with her husband, as well as with third persons, and to sue or be sued by him, as well as others, in regard to such contracts. Before the passage of the act, by the common law, a husband and wife were deemed to be one person, and no suit at law of any character could be maintained by one against the other in this state. Suits between a husband and wife, however, have long been permitted in equity.

It seems to me that the object of the statute was the placing of the husband and wife upon an equal footing in regard to the making of contracts and ascertaining their rights thereunder. Under the common law, the husband did not have the right to sue the wife for a tort. I do not think the language of the present statute indicates a legislative intent, "to make a departure from the common law so radical and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character." See *Peters v. Peters*, 156 Cal. 32, 23 L.R.A. (N.S.) 699, 103 Pac. 219. In the case of *Jackson v. Williams*, 92 Ark. 486, 25 L.R.A. (N.S.) 840, 123 S. W. 751, it was held that a husband was liable for a tort of the wife not committed in his presence, and the ruling was based upon the unity of person in husband and wife. But it is said

that no force can be given to the latter part of the section, unless the construction placed upon the act by the majority opinion is adopted. It can be said, with equal force, that all the language preceding that is useless, if the opinion of the majority is adopted; because if the language of the latter part of the section is broad enough to include suits by the wife against the husband for personal torts, it is certainly broad enough to include suits by her against him on contracts, and it was entirely useless to have embodied the language used in the first part of the section in the statute. It is our duty to give force and effect to every part of the statute, if we can do so without doing violence to its language. I think the first part of the section gives the wife the right to contract and be contracted with by her husband and that the words "sue and be sued" have relation to such contracts, and that the latter part of the section, which provides that "in law and equity shall enjoy all the rights and be subject to the laws of this state as though a feme sole," was intended to remove the rigor of our former rule in regard to making the hus-

band liable for torts of his wife not committed in his presence, and other matters of that kind. I believe, however, it was the intention of the lawmakers to still preserve the legal unity of husband and wife, and that marriage still "acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." In other words, if the legislature had intended such a radical departure from the rule as it now exists as indicated by the majority opinion. It would have said so in plain terms. Many cases might be cited to show that statutes broader than ours have not conferred upon husband and wife the right to sue each other for personal tort.

But my dissent is based upon what I believe to be an adherence to the principles of law heretofore decided by this court. I have no regret that, by judicial construction, the rules of the common law on this subject "have gone to that bourne from which no traveler returns, where they must rest undistinguished by a single tear shed for their departure."

Wood, J., concurs in this dissent.

#### KENTUCKY COURT OF APPEALS.

CITY OF DAYTON, Appt.,  
v.  
TRUSTEES OF SPEERS HOSPITAL.

(165 Ky. 56, 176 S. W. 361.)

#### Tax — hospital — exacting pay for services — effect.

That a charge is made for services rendered by a hospital to help defray its expenses does not render it taxable if it was founded by funds donated for that purpose, and is operated as a public charity.

*For other cases, see Taxes, I. f, 3, in Dig. 1-52 N. 8.*

(May 26, 1915.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Campbell County dismissing its petition filed to procure a sale of the hospital of which defendants were trustees, in satisfaction of taxes assessed against it. Affirmed.

The facts are stated in the opinion.

Mr. Hubbard Schwartz for appellant.

Messrs. Kelly & Regenstein for appellees.

**Note.** — On the question of requiring payment from inmates as affecting right of charitable institution to public aid or exemption from taxation, see annotation following this case, post, 782.  
L.R.A.1917B.

Hurt, J., delivered the opinion of the court:

This is an appeal of the city of Dayton, Kentucky, from a judgment rendered by the Campbell circuit court, in an action by the city against J. O. Jenkins, John L. Phythian, and W. E. Senour, trustees of the Speers Hospital, in which the city sought to procure a decree of sale of the hospital in satisfaction of taxes assessed against it by the officials of the city for the years 1910 and 1911. The defense offered by the appellees was that the hospital was an institution of purely public charity, and the case resulted in a judgment dismissing the petition of appellant. The case was tried upon an agreed statement of facts, which are, in substance, that the taxes for the benefit of the city were regularly levied upon the hospital for the years mentioned, in the first of which years the taxable value of which it was assessed was \$28,000, and the second year \$38,000, and the whole amount sought to be recovered was \$1,100.50, as taxes due from it to the city for the years mentioned. The hospital was founded by funds set apart for that purpose by the will of Elizabeth L. Speers, who died in 1894, and whose will was duly probated October 20, 1894. The item of the will which set apart the funds for the erection and maintenance of the hospital, after providing that the various specific legacies devised in the will to various persons should be paid, and all costs

and expenses incident to the settlement of her estate "conveyed and transferred the entire balance of her estate, real, personal, and mixed, of every kind, wherever situated, to Dr. B. K. Rachford, Dr. C. B. Schoolfield, and William C. Pickering, as trustees, in trust, for the establishment and maintenance of a hospital in the city of Dayton, Campbell county, Kentucky. Said hospital to be erected and maintained, and conducted in such a manner, and upon such plan as, in their judgment, would do the greatest good. Said trustees shall annually report all of their acts and doings to the highest court in said county, having original equitable jurisdiction, and all vacancies in said trustees shall be filled by said court. Said court shall require from said trustees proper bonds, for the performance of their duties, and it may allow them annually, out of the trust funds, a just and fair compensation for their labor, etc."

In pursuance to the trust thus created, the trustees and their successors erected the hospital at a cost of about \$72,000, which left real estate of the value of \$14,200 situated in Ohio, which also passed into the hands of the trustees. The receipts of the hospital, with the rents of the property in Cincinnati, were not sufficient to pay its operating expenses, and its doors were closed, but in 1901 the present trustees were appointed, and they applied to the Campbell circuit court for permission to borrow \$6,000 to pay its debts, and \$2,000 additional with which to make needed repairs. The trustees borrowed the \$8,000 from J. J. Ellerhorst, and thereafter they borrowed from Ellerhorst \$2,250 additional, making \$10,250, to secure which they gave a mortgage for that sum upon the real estate situated in Cincinnati, Ohio; and, while the income from that property did not quite pay the interest on the Ellerhorst mortgage, he accepted same in full satisfaction of it. In 1909 it became necessary to provide a more commodious and convenient building for the nurses at the hospital, and the trustees again applied to the Campbell circuit court and received permission to borrow \$20,000 for that purpose, and to secure it by a mortgage upon the hospital itself. \$16,453.36 of this fund was expended in erecting the necessary additional building, and the remaining \$3,546.64 was put in the treasury of the hospital, and used to pay accumulated debts and the operating expenses of the institution. There was another debt of \$1,000 due one Langendorfer, incurred in building the nurses' addition to the hospital, and Langendorfer had secured his claim by filing a mechanic's lien upon the hospital property, and to satisfy this claim the circuit court authorized the trustees to place another

mortgage upon the property for that sum, which was done in 1912. The average number of patients cared for in the hospital each day in 1910 was thirty-three, of which number nineteen were private patients and fourteen public patients, and the average number of patients cared for in 1911 each day was twenty-seven, of which number fourteen were private patients and thirteen were public patients. In the year 1910 the city of Dayton sent to the hospital and paid for twenty patients, who remained there an aggregate of three hundred fifty-eight days, and in 1911 it sent twenty-one patients to the hospital, who remained an aggregate of four hundred thirty-two days. Private patients are those who enter the hospital and pay from their own resources for their room, board and nursing and pay the physician for professional services rendered them directly. The profit, if any, derived from the care of these private patients, for their rooms, board and nursing, goes into the general fund of the hospital, and is used for maintaining the hospital. Public patients are described as those who come of their own accord, or are sent by the authorities of the cities of Dayton, Bellevue, and Newport, and Campbell county. All public patients are received and treated in the public wards. No patients are kept in the hospital without charge, but some patients who come of their own accord fail to pay their bills. All public patients receive medical attention at the hands of the members of the hospital staff free of charge to them, and one interne is on duty at all times, and his services are also given to the patients. The hospital trustees serve, and have always served, without compensation. When the hospital first began operation, a number of rooms were furnished by charitably inclined persons and organizations, and since that time other rooms have been furnished in a similar manner. The hospital each year receives from various sources charitable contributions in the way of beds, towels, furniture, food supplies, and various necessities, which have been used for the benefit of all the patients in the operation of the hospital. The hospital is located in the central part of Dayton, and has the benefit of the sewerage system of the city of Dayton, and such police and fire protection as is furnished any other building in the city. The hospital pays the same for water, gas, and electric light and power service as is paid by other consumers. Each year during its operation the hospital has received contributions of money, which are used in the operation of the hospital.

The agreed statement of facts further shows that for several years before the

year 1910 the cities of Dayton and Bellevue contributed annually to the hospital the sum of \$1,000, and the city of Newport contributed annually to the support of the hospital \$3,000, and the county of Campbell contributed annually the sum of \$1,000. These contributions were made to the hospital upon condition that the indigent sick of the three cities named and of the county were to be received at the hospital and treated there without charge to them. This plan continued for several years, when it was changed, so that the cities of Dayton, Bellevue, and Newport paid \$1.05 per day for each indigent person sent to the institution by them; but in the year 1913 the city of Newport paid \$3,500 for that year, while the county of Campbell continued to donate \$1,000 per year, as theretofore. The hospital trustees have given to the cities of Dayton and Bellevue notice that after March 1, 1914, the rate to be paid for each patient per day was to be \$1.20. The actual cost per day for caring for each patient has been \$1.28 per day. During the year 1910, in addition to the public patients received from the three cities named and Campbell county, three persons came of their own accord, who remained an aggregate of twenty days, and in 1911 three such patients were treated for an aggregate of thirty-three days.

It was also agreed that the earnings of the hospital for the year ending August 31, 1909, for board, operating, nursing, rents, donations, miscellaneous receipts of all kinds, and discounts earned, amounted to \$18,720.69, while its expenses for the same time for wages, provisions, fuel, water, light, surgical supplies, drugs, house supplies, repairs, interest, insurance, and general expenses amounted to \$17,032.89, which, after deducting \$861.45 for persons treated free of charge, left a balance in favor of the institution of \$826.35. For the year ending August 31, 1910, the receipts of the hospital amounted to \$18,067.03, and deducting the expenses for the same period from it left a net deficit for the same year of \$147.87, and deducting the expenses from the earnings for the year ending August 31, 1911, showed a net gain for the year of \$184.14. A statement of the earnings and expenses for the year ending August 31, 1912, showed a net balance in favor of the institution of \$126.43.

This court, in *Kentucky Female Orphans' School v. Louisville*, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921, and in *Widows' & Orphans' Home v. Com.* 126 Ky. 386, 16 L.R.A. (N.S.) 829, 103 S. W. 354, quoted with approval from the case of *Episcopal Academy v. Philadelphia*, 150 Pa. 565, 25 Atl. 55, wherein it laid down, among others, the two following rules by which to determine

whether an institution was one of purely public charity:

"First. Whatever is done or given gratuitously in relief of the public burdens or for the advancement of public good is a public charity. Where the public is the beneficiary, the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefits resulting from the gift or act go to the public, is a purely public charity: the word 'purely' being equivalent to 'wholly.'"

"Third. An institution founded and endowed as a purely public charity does not lose its character as such, under the tax laws, if it receives a revenue from the recipients of its bounty sufficient to keep it in operation."

In the case of *Gerke v. Purcell*, 25 Ohio St. 229, the Ohio supreme court said: "When the charity is public, the exclusion of all idea of private gain or profit is equivalent, in effect, to the force of 'purely,' as applied to public charity in the Constitution."

And the test of purely public charity is the object for which it was founded. If it was for the general public good, and not for private gain, and was so conducted that the public received all the benefits of it, it is a purely public charity. *Donohugh v. Library Co.* 86 Pa. 306.

By the will of Elizabeth Speers, the funds for the establishment and maintenance of this hospital in the city of Dayton were set apart by her, and the hospital to be erected and maintained was to be conducted in such a manner and upon such a plan as, in the judgment of the trustees, would do the greatest good. No provision is in the will providing that the funds so set apart should ever revert to any private person, or should in any event ever be used for any purpose, except the one designated in the will. The title to the property is vested in trustees who have no personal interest in the property whatever, and in the case of vacancies in the office of trustees the vacancies must be filled by the circuit court of the county. The purpose of the donor was to create a pure charity, and the fund was placed in the service of the public without any view to provide gain for any one. The nursing and medical treatment of the indigent sick, and of those whose pecuniary circumstances are such as will not justify an expenditure of more than a small sum for medical and surgical treatment, and nursing and caring while sick, is, without question, a public charity; if the doors of the institution are open to all persons alike. It is always the duty of the state to provide for its indigent sick.

It does not appear that it was ever intend-

ed that any private gain should result to any person in the operation of the trust created by the donor in setting apart the fund for the erection and maintenance of the hospital. The supervision of its operation was given to the court of the highest equitable jurisdiction in the county, and the power to name the trustees was vested in the same tribunal; thus stamping it with evidences of its public character. In its operation no one has been excluded from its benefits. The county in which it is situated and the near-by cities have used it as an instrumentality to care for their indigent sick, and to procure surgical and medical treatment for them. It is true the county and cities have compensated the institution for the care and treatment of their poor and friendless sick, but in a sum less than the actual cost to the institution for caring for them. One half of the inmates have received the services of the physicians, as well as the nursing and their board, free of any charge to them. While a charge is made against every patient other than the ones who are consigned there by the county or cities, it does not appear that any one has ever been turned away or excluded from its benefits because of poverty or inability to pay for the benefits. Private patients are received, who pay the institution for their rooms, boarding, and nursing, and pay their physicians for their treatment, but the funds received from this source are all devoted to the general expenses of the hospital. A building and grounds and furniture are not adequate to maintain a hospital. The nurses must be paid, fuel and lights, water and food, provided, and some one to superintend and direct the operations of the hospital. The fact that the institution receives a revenue from the recipients of its bounty

sufficient to keep it in operation does not take from it its character as a purely public charity, where it was found and endowed as such, and when all of the receipts go to providing for the purposes for which it was erected and maintained. The municipalities and the county itself in which the institution is located, and whose duty it is to care for the indigent sick of each of them, respectively, have, by its use, been saved the burden of erecting an institution of the kind of their own, or otherwise caring for such sick.

In 6 Cyc. 900, a public charity is defined: To be "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The Speers Hospital has been so conducted and was so endowed and maintained that no private gain has come to anyone, and all of its benefits go to the public.

The cases of *Wathen v. Louisville*, 27 Ky. L. Rep. 635, 85 S. W. 1195, and *Gray Street Infirmary v. Louisville*, 23 Ky. L. Rep. 1274, 55 L.R.A. 270, 65 S. W. 11, relied upon to show that Speers Hospital is not a purely public charity, are not in point; since each of those institutions was founded and conducted with a view to private gain and resulted in private gain to the managers.

It is therefore adjudged that the judgment appealed from be affirmed.

Petition for rehearing denied.

**Annotation—Requiring payment from inmates as affecting right of charitable institution to public aid or exemption from taxation.**

This note contains the decisions upon this subject since the writing of the note in 29 L.R.A.(N.S.) 190.

As to effect of using property of religious, charitable, or educational institution in secular business or for revenue, upon its right to exemption from taxation, see note to *Com. v. Lynchburg Y. M. C. A.* 50 L.R.A.(N.S.) 1197.

As to effect of derivation of income from public property upon its right to exemption from taxation, see note to *Com. v. Richmond*, L.R.A.1915A, 1118.

Practically all of the cases in the earlier note as well as those since decided hold that charitable institutions do not lose their right to public aid or L.R.A.1917B.

exemption from taxation by requiring inmates to pay for the privileges or care received by them therein.

Thus, in *DAYTON v. SPEERS HOSPITAL*, ante, 779, it was held that the fact that a hospital received a revenue from the recipients of its bounty, sufficient to keep it in operation, did not take from it its character as a purely public charity, which made it exempt from taxation, where it was founded and endowed as such, and all of the receipts were used for the purposes for which it was erected and maintained.

In *Denville Twp. v. St. Francis Sanatorium* (1916) — N. J. —, 98 Atl. 254, a sanatorium was held exempt from

taxation under a statutory exemption of all buildings used for charitable, benevolent, or religious purposes, not conducted for profit, although it was partly supported by fees and charges received from beneficiaries, where the entire income therefrom was used for charitable, benevolent, or religious purposes.

A Young Men's Christian Association is not deprived of its statutory exemption from taxation by the requirement of small annual fees from members. *Little v. Newburyport* (1912) 210 **Mass.** 414, 96 N. E. 1032, **Ann. Cas.** 1912D, 425.

Nor by the furnishing of lodgings and meals to members, or to their relatives and visiting friends, or to members of other associations. *Ottawa Y. M. C. A. v. Ottawa* (1913) 29 **Ont. L. Rep.** 574, 15 D. L. R. 718; *Re Ottawa Y. M. C. A.* (1913) 29 **Ont. L. Rep.** 582, 15 D. L. R. 724.

The portion of a Young Men's Christian Association building used for dormitories for its members, for the use of which a fee is charged from which a revenue is acquired which is used in the work of the association, is not subject to taxation under a constitutional provision exempting from taxation real estate belonging to, and actually and exclusively occupied and used by, such association, although another section provides that whenever a building or any part thereof shall be leased or shall be a source of revenue or profit, it shall be liable to taxation, since the dormitories are not leased, and their purpose is not for revenue, but to assist in the purposes of the association. *Com. v. Lynchburg Y. M. C. A.* (1914) 115 **Va.** 745, 50 **L.R.A.(N.S.)** 1197, 80 S. E. 589.

Generally, as to exemption from property taxation of property of Young Men's Christian Association, see note to *Y. M. C. A. v. Parish*, **L.R.A.** 1916D, 275.

A religious order does not lose its right to exemption from taxation as a charitable institution by the boarding of pupils attending a school conducted by it. *Re Ottawa* (1913) 29 **Ont. L. Rep.** 568, 15 D. L. R. 725.

The letting of rooms to persons other than the students of a seminary of learning, in one of the buildings belonging to and used by it for its ordinary purposes, where the whole of the income so derived is used for the purpose of the seminary, does not deprive it of its exemption from taxation under a statute exempting buildings actually used as a **L.R.A.** 1917B.

seminary of learning, maintained for philanthropic, religious, or educational purposes, the whole profits from which are devoted to such purposes only. *Re Sisters of Congregation of Notre Dame*, (1912) — **Ont.** —, 1 D. L. R. 329.

In *Maxcy v. Oshkosh* (1910) 144 **Wis.** 238, 31 **L.R.A.(N.S.)** 787, 128 N. W. 899, 1136, it was held that the fact that a will creating a public charitable trust in the form of a manual training school required the exaction of a tuition fee which, in the judgment of the municipal donee, should be sufficient, together with the income of the trust fund, to properly maintain the school, did not preclude the city from contributing the money of its taxpayers towards the support of the school.

But in *Huntington v. Swedish Baptist Home* (1916) 90 **Conn.** 504, 97 **Atl.** 860, it was held that a home for temporary rest and recreation of overworked persons, and for permanent accommodation of old and infirm members of a denomination, supported by donations and by the payments of inmates, was not entitled to exemption from taxation under a statute exempting buildings used exclusively as infirmaries, or for benevolent or ecclesiastical purposes.

There are many cases other than those involving the right to public aid or exemption from taxation holding that the charitable character of an institution is not destroyed by the fact that payment is required from inmates. Many of these cases are cited in notes dealing with the liability of a charitable institution for personal injuries, which may be found in 7 **L.R.A.(N.S.)** 481; 10 **L.R.A.(N.S.)** 74; 22 **L.R.A.(N.S.)** 486; 32 **L.R.A.(N.S.)** 62; 42 **L.R.A.(N.S.)** 1144; and 52 **L.R.A.(N.S.)** 505.

Other cases where the ultimate question was as to the validity of a charitable bequest may be found in the note to *Buchanan v. Kennard*, 37 **L.R.A.(N.S.)** 993. G. V. L.

#### NEW YORK COURT OF APPEALS.

MARY E. CALKINS, Admr., etc., of  
James H. Calkins, Deceased, Respt.,

v.

JAMES M. HART, Appt.

(— N. Y. —, 113 N. E. 785.)

**Lake — running of division lines.**

The lines of lots bordering on an oval non-navigable lake twice as long as it is broad, with regular shores which belong to



the riparian owners, will be extended from the points where they touch the shore to and at right angles with a line drawn through the thread of the lake on its longest diameter.

*For other cases, see Waters, II. a, in Dig. 1-52 N. S.*

(Willard Bartlett, Ch. J., and Cardozo, J., dissent.)

(October 3, 1916.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Oswego County in plaintiff's favor in an action brought to recover damages for an alleged trespass by defendant in entering upon a certain lake and cutting and removing ice therefrom. Affirmed.

The facts are stated in the opinion.

Mr. Udelle Bartlett, with Mr. Louis O. Rowe, for appellant:

Plaintiff failed to show a good title, and failed to show any facts upon which constructive possession of the triangle in question can be based.

*Hinckel v. Stevens*, 35 App. Div. 5, 54 N. Y. Supp. 457; *Beach v. New York*, 45 How. Pr. 357; *Hubbell v. Rochester*, 8 Cow. 114; *Meiggs v. Hoagland*, 68 App. Div. 182, 74 N. Y. Supp. 234; *Wheeler v. Spinola*, 54 N. Y. 377; *Lane v. Gould*, 10 Barb. 254; *Thompson v. Burhans*, 79 N. Y. 93; *Miller v. Long Island R. Co.* 71 N. Y. 380; *Miller v. Downing*, 54 N. Y. 631; *Pepper v. O'Dowd*, 39 Wis. 538; *Price v. Brown*, 101 N. Y. 669, 5 N. E. 434; *Holland v. Brown*, 140 N. Y. 344, 35 N. E. 577.

All lines should be drawn to the center point of the lake.

*Gouverneur v. National Ice Co.* 134 N. Y. 356, 18 L.R.A. 695, 30 Am. St. Rep. 660, 31 N. E. 865; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; *Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982; *Everson v. Waseca*, 44 Minn. 247, 46 N. W. 405; *Shell v. Matteson*, 81 Minn. 38, 83 N. W. 491; *Security Land & Exploration Co. v. Burns*, 87 Minn. 97, 63 L.R.A. 157, 94 Am. St. Rep. 684, 91 N. W. 304; *Rhodes v. Cissel*, 82 Ark. 367, 101 S. W. 758; *Scheifert v. Briegel*, 90 Minn. 125, 63 L.R.A. 296, 101 Am. St. Rep. 399, 96 N. W. 44; 3 *Farnham, Waters*, § 843; *Pitts-*

*burgh & L. A. Iron Co. v. Lake Superior Iron Co.* 118 Mich. 109, 76 N. W. 395.

Resort to equity should first be had to settle the lines before an action at law is brought.

*Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982; *Gould, Waters*, §§ 162, 163; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *People ex rel. Hunt v. Schermerhorn*, 19 Barb. 540; *Lincoln v. Davis*, 53 Mich. 369, 51 Am. Rep. 116.

Mr. L. W. Baker, for respondent:

The plaintiff is the owner in fee of the land under the water to the center of the lake.

*Wilcox v. Bread*, 92 Hun. 9, 37 N. Y. Supp. 867, affirmed in 157 N. Y. 713, 53 N. E. 1133; *Fulton Light, Heat & P. Co. v. State*, 200 N. Y. 400, 37 L.R.A. (N.S.) 307, 94 N. E. 199; *Mott v. Mott*, 68 N. Y. 246; *Smith v. Bartlett*, 180 N. Y. 360, 73 N. E. 63; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

Plaintiff being in possession of the upland, it was not necessary to prove possession of the lands under the waters of the lake.

*Holland v. Brown*, 140 N. Y. 349, 35 N. E. 577.

**Hogan, J.**, delivered the opinion of the court:

Lot No. 33 in the township of Hannibal, Oswego county, as distinguished on a map of the military township, contained 600 acres. Lying in the westerly side of said lot No. 33, and extending a short distance westerly outside the west line of said lot, is a small body of water, oval in shape, without inlet or outlet, about two thirds of a mile in length and half as broad. About five sixths of the water is upon lot No. 33. In 1850, one Loomis, a surveyor, made a map of lot No. 33 and filed the same in Oswego county clerk's office. The numbers of the subdivisions appearing on an earlier map were changed upon the Loomis map, and conveyances after 1850 were made with reference to the Loomis map. The water of the "Spring or Mud lake," so called, is described as pure, and quantities of moss and ice are annually taken from the same for commercial purposes.

The plaintiff, by deed dated December 28, 1906, obtained title to 94 acres of land in lot No. 33, bounded on the north by lands of Vorce and Barnes and the north line of lot No. 33, on the east by the highway, on the south by the land of Baker, now claimed by defendant, and on the west by the west line of great lot No. 33, according to the map made by Loomis. The land thus conveyed covered the land surrounding the

**Note.**—As to division, in absence of special agreements, of water front, alluvion, and flats between adjoining riparian owners, see annotation following this case, post, 786.

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northerly end of the lake in lot No. 33 and about three quarters the length of the lake on the easterly side thereof. A small portion of the lake, at the southerly end, extended into the lot south of plaintiff's land claimed by defendant, the northerly line of said lot running east about 25 chains from the shore of the lake to the highway. This action was in trespass by reason, as alleged by plaintiff, of an unlawful entry by defendant upon the lake in question and cutting and removal of ice from that portion of the lake directly west of plaintiff's land and north of the boundary of the land claimed by defendant. The trial justice submitted the case to the jury, and instructed them that plaintiff owned the land east of the center of the lake and north of his south line extended, and if the jury found that defendant cut any ice in that portion of the lake, he was a trespasser. The jury found a verdict in favor of plaintiff. The trial justice held that plaintiff could not, under the proofs offered, establish title to all lands under water to the westerly side of lot No. 33, but had established title to the thread of the stream. Defendant claimed the right to establish an interest in the lake and the land under water to the geographical center of the body of water, and asserted that each owner on the lake was entitled to a triangular parcel of land under water, with its apex at such center and the base on the shore line of his property by reason of the oval shape of the lake. Evidence was adduced by defendant to locate such geographical center. The trial justice held that each abutting owner was entitled to the land under water to a line drawn through the longest diameter of the lake, and in that conclusion, affirmed by the appellate division, we concur. Though the body of water in question is oval in shape, an examination of the Loomis map discloses the shore line to be quite regular. By extending the boundary lines of the land of the plaintiff on the south side into the lake to the thread of the stream, and then following northerly the thread of the stream to the head of the lake would result in an allotment to plaintiff of only such portion of the lake as the shore line of his premises discloses would be fair and proportionate. While the divisions by a geographical center, as asserted by defendant, would give to him an unfair proportion of the lake, to the detriment of plaintiff and other riparian owners.

In this state and in most of other jurisdictions where the common-law rule obtains, the rule has been established that, as between adjoining owners on non-navigable streams and rivers, each owner takes title

*ad medium filium aquæ*, in proportion to his line on the margin in front of his upland according to straight lines drawn at right angles between the side lines of his land on the shore and the center line of the stream. The decisions of our courts relating to the ownership of land under water in inland lakes are founded upon the principles of law applicable to rivers. *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 16 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Deuterman v. Gainsborg*, 9 App. Div. 151, 41 N. Y. Supp. 185. As pointed out in the very illuminating opinion written by the trial justice in this case (64 Misc. 149, 118 N. Y. Supp. 1049), the question has arisen in some jurisdictions when the body of water was so irregular that a division of rights therein upon the rule prevailing in this state would seem inequitable; but the facts in this case are clearly distinguishable from the decisions made where such difficult situations were involved. In this state may be found many inland lakes of varying size and shape. It would be well-nigh impossible to lay down a general rule applicable alike to all of them, as each case depends upon its own peculiar circumstances and facts. The case at bar is not out of the ordinary. The body of water under consideration is legally a non-navigable stream, its length is double the width of the same, the shore line practically unbroken by coves or bays, the lot lines bounding the same at right angles with the stream. A line drawn through the center of the stream north and south equitably and proportionately gives to each riparian owner an interest to that line in the water or the land thereunder without undue advantage over his neighbor. Should the present shore line at some future date be extended uniformly into the lake by alluvion, even midway to the thread of the stream, as it is located at the present time, the allotment made by the trial justice in this case would be justified. *People ex rel. Cornwell v. Woodruff*, 30 App. Div. 43, 51 N. Y. Supp. 515, affirmed on opinion below, 157 N. Y. 709, 53 N. E. 1129.

The judgment should be affirmed, with costs.

Chase, Collin, and Cuddeback, JJ., concur.

Willard Bartlett, Ch. J., and Cardozo, J., dissent.

Petition for rehearing denied.

**Annotation—Division, in absence of special agreements, of water front, alluvion, and flats between adjoining riparian owners.**

This note in supplementary to the note in *Northern Pine-Land Co. v. Bigelow*, 21 L.R.A. 776, supplemented by note to *Stuart v. Greanyea*, 25 L.R.A.(N.S.) 257, and contains only the cases decided later.

The question of title to islands is covered in note to *Holman v. Hodges*, 58 L.R.A. 673, supplemented by note to *Wilson v. Watson*, 35 L.R.A.(N.S.) 227.

The scope of this note is limited to cases in which both parties claim by reason of their being riparian owners. Cases in which one party claims the land as a special grant, or by prescriptive right, or by virtue of the peculiar wording of the deeds from a common grantor, do not fairly raise the question of division between riparian owners, and, of course, are not in point. *CALKINS v. HART*, ante, 783, is the only later case in which the question of division was squarely raised and decided. There are, however, a few later cases in which former holdings on the point have been approved, and a few that indicate the position of the court on very closely related questions.

In *Rhodes v. Cissel* (1907) 82 Ark. 367, 101 S. W. 758, it was held that the owners of land fronting upon a non-navigable lake, on the disappearance of the water, are entitled to take to its center; the extent of their respective interests depending upon the frontage. And this case was cited with approval and followed in *Little v. Williams* (1908) 88 Ark. 37, 113 S. W. 340, affirmed in (1913) 231 U. S. 335, 58 L. ed. 256, 34 Sup. Ct. Rep. 68. And the two cases were cited with approval and followed in *Johnson v. Elder* (1909) 92 Ark. 30, 121 S. W. 1066. The cases are again cited with approval in *Barboro v. Boyle* (1915) 119 Ark. 377, 178 S. W. 378, but not followed, for the reason that the lake was found to be navigable. In *Elder v. Johnson* (1915) 119 Ark. 403, 178 S. W. 396, which is a second appeal in the case of *Johnson v. Elder*, already cited, it was held that where land touches the non-navigable lake only at a given point, the owner could take no appreciable interest in the lake if it were divided among the riparian owners in accordance with the rules for the division thereof. It will be noted that, for the most part, these authorities are strongest on that part of the question L.R.A.1917B.

involving the right of the riparian owner to any land at all; and to that extent are not within the scope of this note. In the *Rhodes Case*, however, the question of division was involved to some extent, and the decision is based upon *Scheifert v. Briegel* (1903) 90 Minn. 125, 63 L.R.A. 296, 101 Am. St. Rep. 399, 96 N. W. 44, and *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* (1894) 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681, both of which cases are directly in point, as explained in the note in 25 L.R.A.(N.S.) 262.

In California there is a statute which provides, "except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream;" and the court in *Foss v. Johnstone* (1910) 158 Cal. 119, 110 Pac. 294, applied this statute as giving title to the adjacent landowner to the middle of a non-navigable lake; but the facts were such that it was unnecessary for the court to determine the division line between the proprietors of the upland. The case is, therefore, not strictly in point, and, notwithstanding the statute, the courts will yet be obliged to determine whether the division lines shall run at right angles with the middle line of the lake, or be simply extended to meet it.

One who owns a small portion of the bed of an inland lake, in connection with its bordering uplands, does not have the right to use the whole lake for fishing, boating, etc., in common with the other owners. *Tripp v. Richter* (1913) 158 App. Div. 136, 143 N. Y. Supp. 563. This, of course, merely indicates that the land is not owned in common by the riparian owners, and it indicates no rule for fixing the division line between owners.

And it has been held that owners of land fronting upon a lake that is meandered in the government survey, where they take the land to the center of the lake, take it in severalty. *Brig-*

nall v. Hannah (1916) — N. D. —, 157 N. W. 1042. It will be seen that this is a question that is presupposed before the question of division can arise, and, of course, the note does not purport to be exhaustive of cases of this kind.

In *Providence Forge Fishing & Hunting Club v. Miller Mfg. Co.* (1915) 117 Va. 129, 83 S. E. 1047, the controversy seems to have been between the owners

on opposite sides of an artificial pond. The trial court held that each took to the middle line of the pond; and, as the most of the current was on appellant's side, it was held that no error to his disadvantage had been permitted, and the decree was affirmed. Of course, the facts do not bring this case strictly within the scope of the note. J. W. M.

# OHIO SUPREME COURT.

ERIE RAILROAD COMPANY, Plff. in Err.,  
v.  
ROSE STEINBERG.

(— Ohio St. —, 113 N. E. 814.)

## Carrier — conversion — remedy.

1. Where goods have been delivered to a common carrier for transportation, and the common carrier converts the property to its own use, the shipper may maintain an action for damages for breach of contract of carriage, or may sue for conversion.

*For other cases, see Election of Remedies, I. in Dig. 1-52 N. S.*

## Damages — conversion.

2. In a suit for conversion, where the facts do not authorize the assessment of exemplary damages, the general rule for the measure of damages is the value of the property at the time of the conversion.

*For other cases, see Damages, III. j., in Dig. 1-52 N. S.*

## Same — articles for personal use.

3. This general rule is subject to the exception that, where the property converted by the defendant to its use consists

of articles for personal use, which have been used by the owner, and therefore have little or no market value, the measure of damages is the reasonable value to the owner at the time of conversion.

*For other cases, see Damages, III. j, in Dig. 1-52 N. S.*

## Carrier — rates.

4. Where a public utility has filed a schedule under the provisions of § 614-16, General Code, showing rates, joint rates, rentals, tolls, classification, and charges for services of each and every kind by it rendered or furnished, the rates, rentals, tolls, or charges named in the schedule become the legal rate for the services rendered, and must be charged by it and paid by the shipper or passenger without deviation therefrom.

*For other cases, see Carriers, IV. c, in Dig. 1-52 N. S.*

## Same — sliding scale.

5. Where a sliding scale of charges, based upon the value of the articles transported, is provided in the schedule filed with the Public Utilities Commission of the state, it is the duty of the transporting company to require the shipper to declare the value, and to demand, collect, and receive from him the rate fixed in its schedule filed with the state Commission.

*For other cases, see Carriers, IV. c, in Dig. 1-52 N. S.*

## Headnotes by the COURT.

**Note.**—The refusal of a carrier to deliver goods as a conversion is considered in the note to *O'Donnell v. Canadian P. R. Co.* 50 L.R.A.(N.S.) 1172. For other phases of conversion by carrier, see Indexes to L.R.A. Notes, under the title "Carriers," subtitle "Conversion; refusal to deliver." Various questions in relation to measure of damages for breach of contract or tort by carrier, as well as for conversion generally, are treated in notes cited in the Indexes to L.R.A. Notes, under the title "Damages."

Although *ERIE R. Co. v. STEINBERG*, *infra*, involved an intrastate, and not an interstate, transportation, the court, as shown in the opinion, would have been strongly influenced by the construction placed by the United States Supreme Court upon the Carmack amendment as to the validity of stipulations limiting the amount of liability had it not been for the passage of the Cummins amendment, which was deemed, in a measure, at least, to have L.R.A.1917B.

obviated the effect of that interpretation. The effect of the Carmack amendment, prior to the Cummins amendment, upon state regulations as to stipulations limiting the liability of common carriers for loss or damage to goods, was treated in the notes to *Bernard v. Adams Exp. Co.* 28 L.R.A.(N.S.) 293; *Adams Exp. Co. v. Croninger*, 44 L.R.A.(N.S.) 257; and *Louisville & N. R. Co. v. Miller*, 50 L.R.A.(N.S.) 819; and see also later cases, *Boston & M. R. Co. v. Hooker*, L.R.A.1915B, 450; *Southern Exp. Co. v. Byers*, L.R.A.1917A, 197; and *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, L.R.A.1917A, 265. Because of its probable bearing upon the practical effect of the Cummins amendment, attention is called to the questions considered in the notes to *Harrington v. Wabash R. Co.* 23 L.R.A.(N.S.) 745, and *Ellison v. Adams Exp. Co.* L.R.A.1915A, 502, as to the effect of misrepresentation as to character, quality, or value of goods by shipper, on his right to recover for loss.

**Same — notice to shippers.**

6. Where a copy of such schedule, or so much thereof as the Commission shall deem necessary for the use and information of the public, is printed in plain type and kept on file or posted in such places and in such manner as the Commission may order, shippers and travelers are charged with notice of the tariffs named in this schedule, and must abide thereby, unless the same be found unreasonable by the Public Utilities Commission of the state.

*For other cases, see Carriers, IV. o, in Dig. 1-52 N. 8.*

**Same — relief from liability.**

7. A common carrier cannot relieve itself from the liability imposed by § 8994-1, General Code, by any rule or regulation contained in the schedule filed by it with the state Public Utilities Commission.

*For other cases, see Carriers, II. o, 5, in Dig. 1-52 N. 8.*

(Jones, J., dissents.)

(May 9, 1916.)

**E**RROR to the Court of Appeals for Mahoning County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for alleged unlawful conversion of plaintiff's property. Affirmed.

**Statement by the Court:**

On the 20th day of October, 1913, the plaintiff below, Rose Steinberg, filed her petition in the common pleas court of Mahoning county, Ohio, against the Lake Shore & Michigan Southern Railway Company and the Erie Railroad Company. In her amended petition she averred that on the 11th day of September, 1913, she took passage of Toledo, Ohio, on the Lake Shore & Michigan Southern Railway for Youngstown, Ohio, and traveled over said railway to Cleveland, and was there transferred to a train of the Erie Railroad Company for Youngstown; that at Toledo she checked her trunk, containing certain goods described in the exhibit attached to her petition; that upon arriving at Youngstown plaintiff presented her check to the Erie Railroad Company and said defendant, "being in possession of said property, refused and failed to deliver the same, and unlawfully converted and disposed of said property to its own use."

The Lake Shore & Michigan Southern Railway Company filed a separate answer, admitting it is a common carrier doing business in the state of Ohio, and denying all the other allegations in the petition.

The Erie Railroad Company also filed its separate answer to the amended petition, in which it admitted that it is a common carrier.

of passengers and freight, and denied all the other allegations of the petition. Further answering, this defendant averred that, if any baggage was transported for plaintiff over its line of railway, the same was done under and by virtue of contract with the plaintiff; that, unless a greater value was declared by her, it was not to be liable in excess of \$100 for any loss or destruction thereof. The answer also averred that said agreement was made in accordance with and under and by virtue of and arose from the local, interdivision, and joint tariff of baggage rules and regulations, excess baggage rates, and transfer charges in force and effect at the time complained of in said petition, schedules of which were properly filed with the Interstate Commerce Commission and with the Public Utilities Commission of the state of Ohio; that the defendant was then engaged in interstate commerce; that the rules and regulations on file with the Interstate Commerce Commission and with the Public Utilities Commission of Ohio were applicable to the situation of the plaintiff; and that by reason thereof this defendant is in no event indebted to plaintiff in excess of \$100 for the complete loss of any baggage shipped by her.

On the trial of the case it was admitted that the plaintiff had taken passage at Toledo, Ohio, as pleaded in her petition, and that the baggage reached the Erie Railroad Company's depot at Youngstown, Ohio, and some three days later, through error of the company's agents, was forwarded to New York, placed on a steamer, and taken to Europe.

Upon the admission of these facts the Lake Shore & Michigan Southern Railway Company moved the court to dismiss the case as against it. That motion was sustained without objection on the part of the plaintiff or the defendant the Erie Railroad Company.

The Erie Railroad Company introduced in evidence, over the objection of the plaintiff, certified copies of the schedules filed with the Interstate Commerce Commission and proof that the same were properly posted as required by law. At the close of the evidence, and before argument, the defendant requested the court to charge the jury that "the court says to you as a matter of law that in no event can the plaintiff recover more than the sum of \$100 for loss of baggage."

This request was refused, and the court thereafter instructed the jury that the action was one for conversion, and that it might assume that the property described in the plaintiff's petition was converted by the railroad company to its own use, and further charged as follows: "By consent of counsel there is only one question to be

submitted to this jury, and that is for you to determine what the fair market value, at the time of the conversion, was, of these goods. That is the only question that is submitted to you."

At the request of counsel for plaintiff, the court charged further reference to value as follows: "I say to you it isn't the fair market value, but it is a question of what the goods were reasonably worth to her at the time of the conversion."

Counsel for the defendant made no objection whatever to the statement of the court to the jury that, by consent of counsel, this one issue only was submitted to the jury, nor is it now claimed that this charge was not given by consent of counsel for all parties; the error complained of being the refusal of the court to charge as requested by plaintiff in error. A general exception, however, was taken to the charge as a whole.

The jury returned a verdict against the Erie Railroad Company in favor of the plaintiff for \$285. A motion for new trial was overruled, and judgment entered on the verdict. Error was prosecuted to the court of appeals, which court affirmed the judgment of the common pleas court.

This proceeding in error is prosecuted in this court to reverse the judgment of the common pleas court and the judgment of the court of appeals, affirming the same.

**Messrs. Hine, Kennedy, & Manchester**, for plaintiff in error:

Rates, joint rates, charges for services of each and every kind rendered or furnished by a carrier, as well as all rules and regulations in any manner affecting the same, when filed and posted in accordance with the provisions of the acts regulating commerce, have the force of law, and therefore enter into and become a part of all contracts for transportation.

*Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 528, Ann. Cas. 1915D, 593; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 245, 50 L. ed. 1011, 1013, 26 Sup. Ct. Rep. 628; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Armour Packing Co. v. United States*, 209 U. S. 56, 61, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 652, 656, 57 L. ed. 683, 688, 689, 33 Sup. Ct. Rep. 391; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 495; *Louisville & N. R. Co. v. Magnus Co.* 13 Ohio C. C. N. S. 305; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 337, 28 L. ed. 717, 719, 5 Sup. Ct. Rep. 151; *Pennsylvania Co. v. L.R.A.1917B.*

*O'Connell*, 84 Ohio St. 218, 95 N. E. 773, Ann. Cas. 1912C, 540; *Robbins v. Hennessey*, 86 Ohio St. 181, 99 N. E. 319; 2 Page, Contr. § 1117.

The regulations shown in the joint tariffs of baggage rules and regulations contained in defendant's schedule printed on the baggage check have the force of law, and were entered into by, and became a part of the contract with, plaintiff.

*Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 27, 25 L. ed. 531, 533; *Baltimore & O. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231; *Pennsylvania Co. v. Shearer*, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, 9 Ann. Cas. 15; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 528, Ann. Cas. 1915D, 593; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Cleveland C. C. & St. L. R. Co. v. Blind*, 182 Ind. 398, 105 N. E. 483; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 112, 18 L. ed. 170, 172; *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162.

Upon the ground of estoppel, the limit of liability is \$100, because Mrs. Steinberg is by law chargeable with knowledge of the regulations, and she failed to declare a higher value.

*Bigelow, Estoppel*, p. 459; *Hoeger v. Chicago, M. & St. P. R. Co.* 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; *Fourth Nat. Bank v. Olney*, 63 Mich. 58, 29 N. W. 513; *Ewart, Estoppel*, p. 137; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 651, 652, 656, 57 L. ed. 683, 688, 689, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 670, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 508, 57 L. ed. 314, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 476, 57 L. ed. 600, 603, 33 Sup. Ct. Rep. 267; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 337, 338, 341, 28 L. ed. 717, 719, 720, 721, 5 Sup. Ct. Rep. 151; *Bernard*

v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A. (N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351; *Alair v. Northern P. R. Co.* 53 Minn. 180, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; *Louisville & N. R. Co. v. Magnus Co.* 13 Ohio C. C. N. S. 305.

Messrs. *Livingston, Livingston, & George*, for defendant in error.

*Donahue, J.*, delivered the opinion of the court:

The pleadings and the facts distinguished this case from the case of the *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593. In that case, Mr. Justice Day, in his opinion, said, at page 109 of 233 U. S.: "It is to be borne in mind that the action was tried and decided in the state court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station, but was solely upon the contract of carriage in interstate commerce."

The amended petition in the case under consideration avers that "upon arriving in Youngstown, plaintiff presented her check to the Erie Railroad Company and demanded her property, and was entitled to possession of the same. On said date said defendant, being in possession of said property, refused and failed to deliver the same, and unlawfully converted and disposed of said property to its own use."

The Erie Railroad Company in its answer denied these averments of the amended petition, but, upon the trial of the case, it was admitted that the trunk arrived at the Erie depot in Youngstown, Ohio. It further appears from the undisputed evidence (plaintiff's exhibit A) that on September 14th the trunk was sent by the defendant to New York placed on a steamer, and taken to Europe. Immediately upon the admission being made that the trunk had reached the Erie depot at Youngstown, Ohio, the Lake Shore & Michigan Southern Railway Company moved the court to be dismissed from the case. The court sustained this motion without objection on the part of the plaintiff or the Erie Railroad Company.

The Lake Shore & Michigan Southern Railway Company was the initial company and the company with whom the contract of carriage was made. Under the provisions of § 8994—1, General Code, this company was liable upon its contract of carriage for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which it delivered such property, or over whose line or lines the property passed in transportation to its final destination. The fact that this defendant, upon its own motion, and evidently with the consent of the other par-

ties, was dismissed from the suit, is sufficient to show that this action was not tried and decided in the common pleas court "solely upon the contract of carriage," as was the case of the *Boston & M. R. Co. v. Hooker*, supra. On the contrary, the petition averred a conversion of the property to defendant's use after it reached the Erie depot at Youngstown, Ohio. The recitals in the petition, as to the purchasing of a ticket and checking this baggage at Toledo, Ohio, are pertinent only as showing that the defendant came into the lawful possession of it. The admissions made upon the trial of the case sustain the averments of the amended petition.

It is true that the plaintiff in error pleaded a contract of carriage in its answer to the amended petition. No reply was filed taking issue therewith. It offered in evidence the joint tariff of baggage rules and regulations relating to excess baggage rates, to the introduction of which the plaintiff objected, but the court admitted the same over her objection. The charge of the court, however, practically eliminated this evidence from the consideration of the jury, and instructed the jury that the action was one for conversion, and that it might assume that the property described in the plaintiff's petition was converted by the Erie Railroad Company to its own use. This charge was evidently given in view of the admissions made in the case; for in the next paragraph of the charge the court instructed the jury that, by consent of counsel, there was only one question for its consideration, and that was the value of the goods at the time of the conversion.

Counsel for the railroad company caused to be noted a general exception to the charge of the court, but did not object or except to the statement by the court that, by consent of counsel, the only issue for the consideration of the jury was the value of the property converted to the company's use; nor is any claim made now that counsel for the plaintiff in error did not consent that this single issue of value was the only issue to be submitted to the jury. On the contrary, the only error urged by counsel for plaintiff in error upon the attention of this court is the refusal of the trial court to charge as requested, that "as a matter of law in no event can the plaintiff recover more than the sum of \$100 for loss of baggage."

It clearly appears that this was solely and only an action for conversion after the baggage had reached the Erie depot at Youngstown, Ohio, and that the only serious dispute between the parties was not as to the actual conversion, for that was admitted, but rather as to the amount the plaintiff was entitled to recover for such conversion. Even if counsel for plaintiff in error

had not consented that the sole question to be submitted to the jury was the amount that plaintiff was entitled to recover by reason of such conversion, nevertheless the charge of the court was right; for there was really no disputed question of fact in this case other than the amount the plaintiff was entitled to recover from the defendant.

Under the pleadings and proof the plaintiff was entitled to recover for a conversion of her property. *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 21 L.R.A. 117, 34 Am. St. Rep. 579, 32 N. E. 476; *Robinson v. Austin*, 2 Gray, 564; *Rosenfeld v. Central Vermont R. Co.* 111 App. Div. 371, 97 N. Y. Supp. 905; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608; and *Baldwin v. Cole*, 6 Mod. 212, 87 Eng. Reprint, 964.

In an action for conversion, where the facts will not justify exemplary damages, the measure of damages is ordinarily the value of the goods at the time of conversion. *Baltimore & O. R. Co. v. O'Donnell*, supra.

Some authorities hold that the measure of damages in such cases ordinarily is the value of the goods at the time of conversion, or any higher value they may have had between the time of conversion and the time of trial. That question, however, is not in this case.

The general rule as to the measure of damages is subject to the exception that, where the property is of a strictly personal nature, such as wearing apparel and the like, which would have little or no market value, the measure of damages for conversion of such property is its reasonable value to the owner at the time of conversion; and the court in this case so charged the jury. The request of the plaintiff in error had no application to the issue joined by the pleadings or to the proof in this case, and was therefore properly refused by the trial court. If it were conceded, however, that this action was based solely upon the contract of carriage, nevertheless the request of the defendant was properly refused by the trial court.

It is contended on the part of the plaintiff in error that the regulations shown in joint tariff of baggage rules and regulations contained in the schedules filed by it with the Interstate Commerce Commission and the Public Utilities Commission of Ohio and printed upon the back of the baggage check given to plaintiff when her baggage was checked have the force and effect of law, and entered into and became a part of the contract with the defendant in error in this case, and limit the amount that she is entitled to recover, if she is entitled to recover any sum or amount whatever.

Undoubtedly it is the law of this state that, where a public utility files schedules

under the provisions of § 614—16, General Code, and prints in plain type and keeps on file or posted in such places and in such manner as the Commission may order, a copy of such schedules, or so much thereof as the Commission shall deem necessary for the use and information of the public, shippers and travelers are charged with notice of the tariffs named in these schedules, and must abide thereby, unless the same be found unreasonable by the Public Utilities Commission.

This section also authorizes and requires a public utility to include as part of its schedules "all rules and regulations in any manner affecting the same," but this does not mean that it may write into such schedules so filed with the Public Utilities Commission of the state any rules or regulations that are in direct conflict with the provisions of other statutes of the state. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501. Any rules or regulations purporting to exempt the carrier from any part or all of its liability for loss, damage, or injury to property delivered to it for transportation are in direct conflict with the plain, express, positive, and unequivocal provisions of § 8994—1, General Code. That section provides, among other things, that any common carrier receiving property at a point within the state for transportation to another point within the state shall be liable for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose lines such property may pass. If that were all the provisions of this section, the contention of the plaintiff in error might be answered in the affirmative, but that section further specifically provides that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Notwithstanding the clear and unambiguous provisions of this section of the General Code, it is contended on the part of the plaintiff in error that, by the rules and regulations contained in the schedule filed by it with the Public Utilities Commission of Ohio, it can exempt itself or limit in amount the liability imposed by this section. In support of this contention our attention is directed to the case of *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593, construing the Carmack amendment to the Hepburn Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913 § 8563), regulating interstate commerce.



We recognize the desirability of a uniform construction of the laws of each of the several states of the United States with the construction given by the Supreme Court of the United States to act of Congress covering the same subject-matter, and particularly is this desirable where these laws relate to the transportation of passengers and freight; but § 8994—1, General Code while similar to the Carmack amendment (Comp. Stat. 1913, § 8592), except in that part which relates to the territorial extent of the application of the law, is not, in the opinion of a majority of this court, susceptible of the construction given the Carmack amendment in the case above cited. Nor is it now necessary to a uniform operation of the laws regulating interstate and intrastate commerce for this court to give to § 8994—1, General Code, the same construction that was given the Carmack amendment by the Supreme Court of the United States in the case of the *Boston & M. R. Co. v. Hooker*, supra. That case was decided April 6, 1914. The Congress of the United States, at its next session after that decision was announced, passed the Cummins amendment (Act March 4, 1915, chap. 176, 33 Stat. at L. 1196), amending § 7 of the Hepburn Act which amendment provides among other things, that the common carrier shall be liable for the full actual loss, damage, or injury to such property, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to the value in any receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, and that any such limitation, without respect to the manner or form in which it is sought to be made, shall be unlawful and void; and further, that where the goods are hidden by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to state specifically in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated.

It is evident that this immediate action on the part of Congress was occasioned by the construction given the Carmack amendment by the Supreme Court of the United States in the case of *Boston & M. R. Co. v. Hooker*, supra, but it is in no wise important whether the action of Congress was induced by the belief that it had failed in expressing its true intent and purpose in the Carmack amendment, as construed by the Supreme Court, or that there existed at the time of the adoption of the Cummins amendment a necessity for further legislation on that subject. The fact remains that L.R.A.1917B.

Congress did pass the Cummins amendment, and the construction given to the Carmack amendment by the Supreme Court of the United States in the case just referred to is no longer the law applicable to this subject of interstate commerce. It would also appear that the general assembly of the state of Ohio, when it wrote into § 8994—1, General Code, the language of the Carmack amendment, had in view the desirability of a uniform operation of the laws relating to interstate and intrastate commerce. Should this court now construe § 8994—1 in line with the construction given to the Carmack amendment by the Supreme Court of the United States, it would be necessary for the general assembly of this state, if it desires uniformity of state and interstate commerce laws, to amend that section to conform to the provisions of the Cummins amendment. However, the conclusion this court has reached makes such an amendment unnecessary.

In construing a statute of this state, where no Federal question is involved, this court is not required to adopt a construction given to a similar law of the United States by the Supreme Court of the United States. However, this court would be inclined to follow the judgment of the Supreme Court of the United States, even though no Federal question was involved, unless it clearly appeared that a different conclusion should be reached. In construing a statute it is the duty of the court to give effect to the legislative intent. True, the intent of the legislature is to be determined from the language employed, and when that language clearly expresses the intent of the lawmaking body, it should be given its plain, ordinary meaning; for it is not a question what the lawmaking body intended to enact, but rather the meaning of that which it did enact. Where, however, the meaning is doubtful, the history of legislation on the subject may be considered in connection with the object, purpose, and language of the law in order to arrive at its true meaning. *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574.

The passage by Congress of the Cummins amendment immediately following the decision in the case of the *Boston & M. R. Co. v. Hooker*, supra, would seem to indicate the meaning and intent of Congress when it passed the Carmack amendment, and this Cummins amendment was made necessary by the fact that the language employed in the Carmack amendment, as construed by the court, did not clearly express the intent of the lawmaking body. This later legislation by Congress in this regard is an important aid to this court in arriving at the intention of the legislature of this state when

it enacted into law § 8994—1, General Code; for the intent of the General assembly of Ohio when it passed that section must have been identical with the intent of Congress when it passed the Carmack amendment; otherwise the same language would not have been employed.

Aside from these considerations, however, we are compelled to a different construction of § 8994—1 than the construction given to the Carmack amendment by the Supreme Court of the United States in the case above cited. Mr. Justice Pitney, in his dissenting opinion in that case, calls attention to the fact that there is no previous instance where any court in this country has ever held the recovery to be limited to an arbitrary sum, unrelated to the value of the goods lost, without any previous valuation or agreement assented to by the shipper or passenger, and without any representation of value made by him, and further calls attention to the clear expression of the legislative purpose in the Carmack amendment to enforce the carrier's responsibility for losses of property caused by it, without regard to any rule or regulation exempting it.

Section 614—17, General Code, authorizes a public utility to fix a sliding scale of charges based on the value of the articles to be transported. This is only a fair and reasonable provision to enable the carrier to protect itself against fraud and imposition and to provide a rate or charge proportionate to the responsibilities of the risk assumed. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 112, 18 L. ed. 170, 171. This same section also requires every public utility to conform its schedule of rates to this sliding scale. Such sliding scale of rates automatically attaches to the declared or agreed value, and becomes the lawful rate which the carrier must exact and the rate which the shipper must pay. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

The duty imposed upon the carrier by § 614—18, General Code, to exact, demand, and receive the charge for service rendered, as specified in the schedule, is not a passive, but an active, one. It is not met and discharged by leaving it to the pleasure of the shipper to declare or refuse to declare the value of the goods offered for transportation.

It is not only the right of the carrier to be advised of the full extent of its responsibility, but, in order for it to comply with the provisions of § 614—18, General Code, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value. *New York C. & H. L.R.A.* 1917B.

*R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531, and *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

In view of the positive provisions of § 614—18, an express contract, written or verbal, between the shipper and the transportation company to carry property known by both parties to the contract to be worth \$1,000 for the same rate charged for property worth \$100, upon condition that the shipper will release the transportation company from any loss, damages, or injury to such property in excess of \$100, would not only be in violation of this statute, but against public policy and void, even if § 8994—1, General Code, did not provide in express terms that a common carrier cannot exempt itself by contract from the liability imposed by that statute. Certainly, if an express contract could not be made exempting the carrier from liability for loss or damages to the property transported, or relieve the shipper from paying the legal rate published in the schedules, no implied contract, based upon the theory of constructive or actual notice of rules and regulations contained in the schedules filed, can have that effect. There is a substantial difference, however, between a contract purporting to limit or exempt a common carrier from liability under this statute and a contract or agreement fixing the value of the goods delivered for transportation, where the rates to be charged for the transportation service are fixed in the schedules with reference to the value of the property to be transported.

The authorities would seem to be uniform that, where a shipper declares a less value than the true value of the property delivered for transportation, in order to obtain a lower rate, recovery for loss or damages will be limited to the amount of the valuation named. *Baltimore & O. R. Co. v. Hubbard*, 72 Ohio St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231; *Pennsylvania Co. v. Shearer*, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, 9 Ann. Cas. 15; *Hoeger v. Chicago, M. & St. P. R. Co.* 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 651, 17 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; and *Bernard v. Adams Exp. Co.* 205 Mass. 254, 260, 28 L.R.A. (N. S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

The Cummins amendment, however, expressly prohibits such contract in relation to interstate commerce, where the articles offered for transportation are not hidden from view. Whether the provisions in § 8994—1, General Code, that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed," should be construed as including contracts

relating to value, or only as to contracts relating to liability or nonliability, is a question that does not arise in this case; for it is not contended that the passenger actually declared the value of the baggage delivered for transportation, but rather that the rules and regulations limiting the carrier's liability to \$100, filed with and as a part of the schedule with the Public Utilities Commission, entered into and became a part of the contract of carriage. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 661, 57 L. ed. 683, 688, 32 Sup. Ct. Rep. 391, and *Bernard v. Adams Exp. Co.* 205 Mass. 254, 260, 26 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

The statutes of our state relating to interstate commerce are for the purpose of providing and maintaining a uniform rate to all travelers and shippers. These statutes not only provide means and methods for establishing and maintaining uniform rates, but they also provide means and methods for the protection of carriers from imposition and fraud, and enable them to fix rates proportionate to the responsibility of the service they assume to perform. Neither shippers nor transportation companies can be permitted to defeat the intention and purpose of these statutes by any loose arrangement that will permit a shipper, by his own neglect or refusal to declare value, to secure a lesser rate for the transportation of his goods than the legal rate named in the schedules filed with the Commerce Commission of the state, or that will permit a common carrier by its neglect of duty to exact, demand, and receive this legal rate, and to that end require a valuation to be fixed by the shipper when the goods are offered for transportation, to exempt itself from all or any part of the liability imposed by the statute. If rules and regulations in direct conflict with a statute are permitted to avoid its positive terms and provisions, then the statute might just as well never have been written; if, on the other hand, a shipper is required to fix the value of his property offered for transportation, then he can be required to pay the same rate charged to all other shippers, and the transportation company will receive the full legal rate for the service it performs and the responsibility it assumes.

It was held by the Supreme Court of the United States in the case of *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494, that the duly filed tariff of the carrier must be charged by it and paid by the shipper or passenger without deviation therefrom; that shippers and travelers are charged by the duly filed tariff, and must abide thereby, unless it is

found to be unreasonable by the Interstate Commerce Commission; that neither misquotation of rates nor ignorance is an excuse for charging or paying less or more than the filed rate; and that, notwithstanding a contract for a less rate than the rate named in the tariff filed had been entered into in good faith between the passenger and the carrier's agent, the carrier could recover from the passenger the difference between the legal rate published in the tariff and the rate actually paid by the passenger under the contract for transportation. This case was decided almost a year later than the case of the *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1916D, 593. Under this authority the carrier, had it transported and delivered this baggage to the plaintiff, would be entitled to recover from her the legal rate named in the schedule for baggage of that value, regardless of whether the plaintiff had declared or failed to declare a value when offered for transportation, and regardless of the rules and regulations contained in the schedule filed with the Interstate Commerce Commission; for it would not be contended that these rules and regulations would be more binding upon either party to the transaction than a positive and express contract in relation to the rate to be charged for the service rendered.

It follows, therefore, that if the carrier could recover from the passenger the difference between the rate charged and the legal rate, the passenger should also have the right to claim the protection of the laws regulating the commerce of the state and enacted for the equal protection of both.

Judgment affirmed.

**Nichols, Ch. J., and Johnson, Wanamaker, Newman, and Matthias, JJ., concur.**

**Jones, J., dissenting;**

The decision is supported neither by authority nor by principles of public policy. It is not supported by authority. The statute involved is of Federal origin, is a copy of the Federal act, and has been construed by a Federal court,—the Supreme Court of the United States,—which has diametrically held the converse of the legal principle outlined in the majority opinion; and the majority opinion, in attempting to distinguish this case by the citation of Federal authority in its support, has simply been hoisted upon its own petard. It is not supported by principles of public policy for the reason, often judicially stated and maintained, that the purpose of the public utility laws here involved, state and Fed-

eral, was to provide "unity of transportation and liability," and to avoid the annoyance and confusion resulting from the application of various rules of liability in the several states, especially in the transportation of freight and baggage from one state to another. This purpose is nullified by the majority opinion.

As a premise to a correct conclusion, it must be understood that the public utility laws of this state, including the requirement of filing and publishing the schedules of tariffs, rates, charges, etc., are substantially similar to and almost exact copies of the Federal statutes upon the same subject. These requirements are found in the following sections of our General Code: §§ 510, 614—16, 614—17, 614—18, and 8994—1. Furthermore, § 511, General Code, provides that the schedules prescribed by the Public Service Commission (now Public Utilities Commission) of Ohio, "as far as practicable, shall conform to the forms prescribed by the Interstate Commerce Commission." And the fact may now be emphasized that, conformably to the provisions of that section, § 8994—1, General Code, is an exact copy of the Carmack amendment to the Hepburn Act, with the single exception that its provisions are made to apply only to intrastate transportation. The Carmack amendment is found in § 20 of the act regulating commerce, as amended by § 7 of the act of June 29, 1906 (34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592).

The legal question involved is whether joint rates, tariffs, and charges for services of this character, performed by the carrier, together with the rules and regulations affecting them, when posted and filed in accordance with the Ohio statutes, become a part of the contract of transportation between passenger and carrier, limiting baggage liability, although no notice of such scheduled rates or of their filing and publication has been brought home to the passenger. If the contract of carriage in question related to an interstate shipment of baggage, or if the trunk had been shipped across the state boundary, then it must be conceded that every question arising in this case was fully presented and decided in the case of *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593.

The action at bar was to recover for loss of baggage checked from Toledo, Ohio, to Youngstown, Ohio. The baggage was checked upon a first-class ticket and routed by the Lake Shore & Michigan Southern and Erie Railways to destination. Judgment was recovered in the sum of \$285. During the course of the trial the initial carrier was dismissed in the case.  
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The Erie Railroad Company, in addition to denials, pleaded certain facts in support of its claim that in no event could there be a recovery for a greater sum than \$100. It alleged that its contract of carriage was to the effect that, unless a greater sum was declared by the passenger and charges paid for increased valuation at the time of the delivery to the carrier, the value of the baggage belonging to or checked for an adult passenger should be deemed and agreed not to be in excess of \$100; that if the passenger, at the time of checking the baggage, declared a greater value than \$100, each \$100 in value or fraction thereof above such allowance would be charged for at 10 per cent of the excess baggage rates for the distance carried; that said agreement was made in accordance with and under and by virtue of and arose from the local, inter-division, and joint tariff of baggage rules and regulations, excess baggage rates and transfer charges in force and effect at the various times complained of in said petition, properly filed with the Interstate Commerce Commission, and also duly filed with the Public Utilities Commission of the state of Ohio; that the passenger plaintiff did not declare the baggage to be of any greater value than \$100, or pay any excess charges therefor.

The evidence disclosed that the defendant company had published and filed with the Public Utilities Commission of Ohio, and also with the Interstate Commerce Commission, in accordance with the Ohio and Federal statutes, its schedules relating to rates, fares, charges, rules, and regulations for transporting both passengers and baggage between the points named, that the plaintiff had no actual notice of the regulations limiting liability, and that no declaration as to value was made by the plaintiff at the time she purchased her ticket and checked her baggage, and that no inquiry as to value was made by the baggageman. On the face of the baggage check was the following stipulation: "See conditions on back. Value not stated."

On the reverse side of the baggage check was the following notation:

#### Notice to Passengers.

Baggage consists of passenger's personal wearing apparel, and liability is limited to \$100 (except a greater or less amount is provided in tariffs) on full-fare ticket, unless a greater value is declared by owner at the time of checking and payment is made therefor.

During the course of the trial, and before argument, at the instance of defendant, the

following request was asked to be given to the jury and refused by the court: "The court says to you as a matter of law that in no event can plaintiff recover more than the sum of \$100, for loss of baggage."

Judgment was rendered for the market value of the goods, and the majority of the court of appeals sustained the judgment recovered.

In the case of *Boston & M. R. Co. v. Hooker*, supra, the pertinent propositions of the syllabus that apply here are as follows:

"Knowledge of the shipper that the rate is based on value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Interstate Commerce Commission, and the effect of so filing the schedules makes the published rates binding upon shipper and carrier alike.

"The limitation of liability of carriers for passengers' baggage is covered by the Interstate Commerce Act, and the Carmack amendment to the Hepburn Act applies thereto as well as to liability for shipments of freight.

"A provision in a tariff schedule that the passenger must declare the value of his baggage and pay stated excess charges for excess liability over the stated value to be carried free is a regulation within the meaning of §§ 6 and 22 of the Interstate Commerce Act, and as such is sufficient to give the shipper notice of the limitation."

Many of the decisions cited in the foregoing majority opinion are not germane to this case, since such decisions are based upon the reciprocal liability of passengers and carrier before the adoption of various commerce laws regulating the shipment of freight and baggage, and prior to the decisions of the courts as to the effect of the adoption of such statutes.

If the Ohio statutes conferring powers upon its Public Utilities Commission in fixing the tariffs, rates, and charges, and requiring their publication and filing, are similar to the cognate Federal statutes relating to that subject adopted by Congress, and if the state court adopts the same rule of liability as the Federal court, then of necessity this case must be reversed. It would not be profitable in this opinion to cite the various acts of Congress under which the Supreme Court of the United States in the case of *Boston & M. R. Co. v. Hooker*, supra, determined the duties and liabilities of shipper and carrier. Those sections of the Federal law are referred to and set forth in the opinion in that case. That case discusses as well the effect of preceding Federal decisions relating to the legal effect of such statutes. Following a discriminating review of those decisions L.R.A.1917B.

Mr. Justice Day, on page 113 of 233 U. S. concludes: "It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess traffic rate, and thus secured the liability of the carrier to the full amount of the value of her baggage; or she might, for the purpose of transportation have valued it at \$100, and received free transportation and liability to that extent only; or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

The principles announced in the case of *Boston & M. R. Co. v. Hooker*, supra, were supported and emphasized by Mr. Justice Lurton in the three cases,—*Adams Exp. Co. v. Croninger*, 226 U. S. 491, 506, 57 L. ed. 314, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 648, 654, 57 L. ed. 683, 687, 689, 33 Sup. Ct. Rep. 391; and *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 668, 57 L. ed. 690, 696, 33 Sup. Ct. Rep. 397,—by Mr. Justice Lamar in *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383, and were later approved by the United States Supreme Court in *George N. Pierce Co. v. Wells F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351, and in *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R. 1915C, 300, 35 Sup. Ct. Rep. 494. In the latter case the court permitted the carrier to recover from the shipper an amount exacted which was less than the published rates for interstate transportation, under the provisions of the Federal law governing filed and published rates under the Interstate Commerce Acts.

In construing the Ohio law upon the same subject, I am constrained to follow the rules of construction adopted by the Supreme Court of the United States, not only because of the high character of that court and the convincing application of the rule found in its opinions, but also because of the uniformity required in the application of legal principles to liabilities arising under similar statutes under local and Federal laws. The adoption of the provisions of the Federal law on this subject by the Ohio legislature is evidence that the state desired such uniformity, entailing similar duties and liabilities, and especially is this true

where our state commerce act provides that these schedules, "as far as practicable, shall conform to the forms prescribed by the Interstate Commerce Commission." I am unable to see what principle of substantial justice, equality before the laws, or of public policy should require this court to prescribe a rule of liability to the effect that a shipment of intrastate goods should entitle the shipper to a higher amount of damages than a shipment made over the state boundary. In this state, as elsewhere, a large volume of the transportation business transacted, covering freight and baggage, goes beyond the state border, and the adoption of a different rule of liability by local courts must necessarily result in annoyance and confusion. Thus, a passenger desiring to transport at the same time one piece of baggage within the limits of the state and another without would be confronted with different duties and with different liabilities, if the rule adopted by the majority opinion in this case should be followed. Questions are now arising, and will continue to arise, presenting different rules of transportation liability under state and Federal laws concededly similar, and their application would vary according to the character of the transportation, whether intrastate or interstate. However, upon all interstate shipments the Carmack amendment to the Hepburn Act embraces the Federal policy and supersedes the state legislation or policy upon that subject, and the construction given such Federal laws by the highest court of the land is binding upon state courts. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 506, 57 L. ed. 314, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 668, 57 L. ed. 690, 696, 33 Sup. Ct. Rep. 397; and *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383.

An effort is made in the majority opinion in this case to distinguish it from the case of *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593, above referred to. This effort is predicated upon the theory that a conversion was involved in this case, and that the liability is like that of warehousemen; and it is intimated that, if such a liability had been before the Supreme Court of the United States, the *Hooker* Case would have been decided otherwise. And in the majority opinion a quotation has been embodied from the opinion of Mr. Justice Day in the case of *Boston & M. R. Co. v. Hooker*, supra, as follows: "It is to be borne in mind that the action was tried and decided in the state court was not for negligence of the railroad company

as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station, but was solely upon the contract of carriage in interstate commerce."

It is therefore intimated that the limitation of liability should not be applied to cases involving conversion, and that this principle is inferentially upheld by the statement above quoted, to the effect that a different rule of liability might possibly apply in cases where the duty of warehousemen arose on the part of the carrier.

While these opinions were undergoing preparation the Supreme Court of the United States, in a very recent decision, held that the provisions of the Hepburn and Carmack amendments, and the liability imposed thereby, apply to a railroad company, whether acting as carrier or warehouseman. This principle was decided in the case of *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177. Evidently in that case, which was one of interstate shipment, the same view was taken by this court as is now taken in the majority opinion. That case was taken to the Supreme Court of the United States from the court of appeals of the eighth district of Ohio, as "the supreme court of the state declined to review the judgment." Page 591 supra. While the reasons for so refusing are not given, evidently, as the case was one of great general interest, the refusal to review must have been based upon the same conception of the law which the court now holds. The court of appeals had affirmed the judgment for the full market value of the goods, and refused to apply the principle of limitation of liability found in the Carmack amendment to a case involving the duties of a carrier as warehouseman. On page 591 of 239 U. S., Mr. Justice Pitney, who delivered the dissenting opinion in the case of *Boston & M. R. Co. v. Hooker*, supra, states the principle thus: "The question is whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control also during the ensuing relation of warehouseman."

In referring to the decision of the court of appeals the justice says: "The court [Ohio court] considered that the declaration of value stamped upon the bill of lading and signed by plaintiff's agent carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation."

The learned justice thereupon denies the rule attempted to be invoked by the court

of appeals, and applies the rule of liability limitation, not only to the service of the transportation company as a carrier, but to its services as a warehouseman as well. I might add in this connection that the gravamen of this case was not a violation of duty of the carrier as warehouseman, and that such duty was neither pleaded, proven, nor given in the charge to the jury. The charge of the trial court was very plain, and simply confined the jury to one issue, viz., the market value of the baggage.

No one questions but the case made was one for the conversion by the misdelivery of the baggage shipped. But again an attempt has been made to distinguish it from the Hooker Case, supra, upon the theory that a different rule of liability would ensue in case of such misdelivery. This theory likewise has been annihilated by the Supreme Court of the United States in the case mentioned.

It is conceded that the baggage in question was transported over the initial carrier, the Lake Shore & Michigan Southern Railroad, from Toledo to Cleveland, Ohio. At that point it was transferred to the connecting carrier, the Erie Railroad, for transportation to Youngstown. When the baggage reached Youngstown it was, through mistake or error, misdelivered to a carrier, taken to New York, and thence to Europe. It appears from the record that, upon motion, the initial carrier was dismissed from the case by the trial court, and the case proceeded against the connecting carrier, whose default caused the loss of the baggage. Why the court dismissed the initial carrier from the case is not disclosed, but the action of the trial court in that behalf is clearly erroneous, for the reason that, under the liability imposed by § 8994—1, General Code, the plaintiff below had a right of action against the Lake Shore & Michigan Southern Railroad Company by reason of the default of its connecting carrier. However, the plaintiff had a perfect right to enforce the liability against the Erie Railroad, which had actually caused the loss, for the limitation of liability imposed in favor of the initial carrier inures in favor of the connecting carrier, and as to the latter is co-extensive with the liability imposed by that section of the Code upon the initial carrier. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391, and *Georgia, F. & A. R. Co. v. Blish Mill Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541.

It has been held that the Carmack amendment to the Hepburn Act, making the initial carrier liable, merely provides a cumulative remedy, and does not prevent an action against the succeeding carrier, if the L.R.A.1917B.

latter be at fault, in case of loss of baggage. *Baltimore, C. & A. R. Co. v. William Sperber & Co.* 117 Md. 595, 84 Atl. 72. However, it is insisted in this case that § 8994—1 does not apply where there has been a conversion of the property. This distinction did not occur to either of the members of the court of appeals who decided this case. An inspection of both the majority and minority opinions shows that the judgment was rendered upon the effect and construction of the statute relating to published tariffs and schedules, and the question of conversion did not occur to either of the judges in the court below. It is true that the trial court held that the case presented was one for conversion, and it may be conceded that such is the case. In cases of this character, where there has been a shipment of goods and a misdelivery by error or mistake to a wrong consignee, the authorities generally hold that this is a conversion. If delivery be made to a wrong person, either innocently or induced by fraud, the carrier is responsible, and the wrongful delivery is treated as a conversion. 1 *Moore, Carr.* 2d ed. p. 233.

In the case of *Oskamp v. Southern Exp. Co.* 61 Ohio St. 341, at page 351, 56 N. E. 14, 7 Am. Neg. Rep. 324, *Shauk, J.*, says: "The cases are numerous in which the carrier's liability has been held to be upon contract, and that delivery to the wrong person is a conversion unless such wrong delivery is induced by the consignor."

Section 8994—1, General Code, imposes a limitation of liability upon the common carrier receiving the goods for shipment and issuing a receipt or bill of lading therefor, and also upon the connecting carrier transporting the same. This section of the Code provides that the initial carrier "shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It has already been stated that this section of the General Code is an exact copy of the Carmack amendment, with the sole exception that it makes its provisions applicable to intrastate transportation. The purposes of the section were to provide a rule whereby initial carriers should be liable for the loss, whether caused upon their own or upon any connecting line; to establish the presumptive rule that for transportation throughout the entire route the connecting carriers were acting as agents for initial carriers; to provide

for uniformity of rates and liabilities; and, furthermore, to limit liability for loss and damage to the valuations based on the published rates and schedules. It will be noted that the section of the Code provides for a liability "for any loss, damage, or injury to such property" caused by the initial and connecting carriers over which the shipment was made. The liability imposed by this section of the Code covers any loss, whether caused by the negligence of the carrier or otherwise, and the valuations made are conclusive on the parties to the contract of carriage, in the absence of circumstances showing attempts at rebating or false billing. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 180, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556, and *Boston & M. R. Co. v. Hooker*, supra, 233 U. S. 112, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 528, Ann. Cas. 1915D, 593.

The statute in question, having provided a limitation of liability for any loss occasioned by the contract of transportation, covers a loss of baggage occurring through the fault of the carrier in misdelivering the property, where the rates, tariffs, and schedules have been lawfully published according to other sections of the General Code. It is true that the property may have been converted by a delivery to a wrong consignee, but it is difficult to see why the limitation of liability does not apply in a case where the property has been damaged or destroyed, as in the following cases: *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; *Boston & M. R. Co. v. Hooker*, supra; and *George N. Pierce Co. v. Wells F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351. However, this limitation of liability has been held to be covered by the Carmack amendment in cases where there has been a failure to deliver, as in this case. *Wells F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267, and *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148. In both of these cases the limitation of liability was upheld upon the failure to deliver the property shipped. In the latter case Mr. Justice Lurton, on page 511 of 226 U. S., quoting from a Massachusetts case, uses the following language as applicable to contracts of carriage of this character: "It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or L.R.A.1917B.

limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier."

And in the case of *George N. Pierce Co. v. Wells F. & Co.* supra, on pages 283 and 284 of 236 U. S., Mr. Justice Day uses the following language:

"The case as made, therefore, presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to \$50, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled, in case of loss, to recover the full value of the property."

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum."

In the case of *Great Northern R. Co. v. O'Connor*, supra, on page 516 of 232 U. S., Mr. Justice Lamar closes his opinion with a quotation from the case of *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, as follows: "The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however, it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

In the recent case of *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177, Mr. Justice Pitney, in construing the language found in § 8994—1, General Code, which was taken bodily from the Carmack amendment, holds that "any loss or damage for which any carrier is liable" includes liability both as carrier and warehouseman; and, further, that the term "transportation" in the Hepburn Act includes all services in connection with the receipt and delivery of goods that come within the purview of the commerce act. Section 504, General Code, contains similar provisions covering "any service in connection" with transportation. This construction of the Carmack amendment was also sustained by the Supreme Court of the United States in a more recent decision rendered January 24, 1916, *New*



*York, P. & N. R. Co. v. Peninsula Produce Exch.* 240 U. S. 34, 60 L. ed. 511, L.R.A. 1917A, 193, 36 Sup. Ct. Rep. 230. In that case it was contended that the words "any loss, damage, or injury to such property" did not include a loss resulting from unreasonable delay in shipment, and it was urged by counsel that, while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not cover damages for unreasonable delay. Mr. Justice Hughes, delivering opinion of the court, at page 38 of 240 U. S., said: "We do not think that the language of the amendment has the inadequacy attributed to it. The words 'any loss, damage, or injury to such property' caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge the carrier's duty with respect to any part of the transportation to the agreed destination."

In the case of *Georgia, F. & A. R. Co. v. Blish Mill. Co.* 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541, the action in the state courts was for conversion; but Mr. Justice Hughes, holding that the form of action was immaterial under contracts of shipment under the Federal act, said, at page 197 of 241 U. S.: "The action is in trover, but, as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.'"

Section 8994—1, General Code, therefore having in terms provided for a limitation of liability for loss, damage, or injury to property, caused by any common carrier, a misdelivery of the baggage in question, coming within the purview of that section, amounts to a conversion, and, under the conceded facts in this case, the liability imposed by the state commerce act is limited to the sum of \$100 when the schedule rates, tariffs, fares, charges, rules, and regulations for transporting passengers and baggage have been filed and published, and where there is an express provision, as in this case, limiting the liability to that sum. The *Kirby* and *Maxwell* Cases cited merely support the well-known principle that preferential rates, ignorance, or misquotation of rates cannot be availed of, as a guise or otherwise, to overcome the policy of Congress effected by the adoption of the Carmack amendment as it relates to uniform rates and liabilities. These cases in no wise impinge on the legal principle that, in the absence of a declaration of value, the "rate and corresponding liability" automatically attach, and that, to recover the full L.R.A.1917B.

value of the baggage, the excess rate should have been paid. *Boston & M. R. Co. v. Hooker*, supra, 233 U. S. 113, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593.

The fatal weakness underlying the majority opinion is found in the remarkable apologia excusing the holding there made because of the fact that in the future the Carmack amendment will not apply for the reason that the same was amended by the Cummins amendment, approved March 4, 1915. It is difficult to conceive how the passage of that amendment affects the present case; for this cause of action arose on September 11, 1913, when the misdelivery of the baggage occurred, and the Cummins amendment was not passed until nearly two years later. It may be conceded that the Cummins amendment vitally changes the rule of liability theretofore prevailing under the Carmack amendment, for the former provides that carriers shall be liable "for full actual loss, damage, or injury to such property," caused by the carrier, notwithstanding any limitation of liability or amount of recovery, or representation or agreement as to value, or of any rule or regulation in any tariff filed with the Interstate Commerce Commission; but the passage of the Cummins amendment was in itself proof of the fact that a different liability was intended by the Carmack amendment and was judicially enforced. The irony of the situation may be gathered from the majority opinion where it states: "We recognize the desirability of the uniform construction of the laws of each of the several states of the United States, with the construction given by the Supreme Court of the United States to acts of Congress covering the same subject matter. . . . It would be necessary for the general assembly of this state, if it desires uniformity of state and interstate commerce laws, to amend that section [8994—1] to conform to the provisions of the Cummins amendment."

It is here plainly shown that this court is not now following the construction given by the United States Supreme Court to a similar public utility statute; but the foregoing quotation imports a hope that the future may bring forth a locus penitentie, whence may arise a due regard for uniformity of carrier liability under similar Federal and state laws and a more ethical respect for the decisions of our highest Federal court.

Comment is made in the opinion from which it might be inferred that counsel for the defendant in the trial court made no special objection to the charge of the court that, by agreement of counsel, the only question left for the jury to determine was

the market value of the property. Counsel for the defendant could not do otherwise. After the court had ruled out the sole legal question in the case, to wit, that the recovery, as a matter of law, should be limited to the sum of \$100 for the loss of baggage, there was nothing left for the jury to

determine but the sole question as to what was the actual value of the property. After the defendant had rested his entire case, seeking to limit, under the conceded facts, the damage in the sum of \$100, he had done all that was necessary to safeguard his legal rights.

WASHINGTON SUPREME COURT.  
(Department No. 1.)

STATE OF WASHINGTON EX REL. J. E. WILLIS, Appt.,  
v.

D. W. MONFORT, Auditor of the County of Lewis, Respnt.

(— Wash. —, 159 Pac. 889.)

Judge — eligibility of suspended lawyer.

A lawyer is not, during the time of his suspension from the bar, eligible to the office of judge, under a constitutional provision that no person shall be so eligible unless he shall have been admitted to practise in the courts of record of the state.

*For other cases, see Judges, III. in Dig. 1-52 N. S.*

(September 5, 1916.)

**A**PPEAL by relator from an order of the Superior Court for Lewis County dismissing his petition for a writ of mandamus to compel respondent to print his name upon the ballot as a candidate for the office of superior judge. **Affirmed.**

The facts are stated in the opinion.

Mr. J. E. Willis, for appellant:

Relator, under no moral taint, desires an election to the office of superior judge in order that he may preside. There is no constitutional provision declaring that suspension from practice renders him ineligible.

Re Advisory Opinion, 31 Fla. 1, 18 L.R.A. 594, 12 So. 114; State Bd. of Examiners in Law v. Byrnes, 97 Minn. 534, 105 N. W. 965.

Messrs. C. D. Cunningham and Forney & Ponder, for respondent:

Relator, by his suspension, was temporarily removed and debarred from all his rights as a practising attorney, and he now stands before the court in the same position as if he had never been admitted to the practice of the profession.

Brown v. Woods, 2 Okla. 601, 39 Pac. 473; Danforth v. Egan, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021, 20 Ann. Cas. 418; Jamieson v. Wiggin, 12 S. D. 16, 46 L.R.A. 317, 76 Am. St. Rep. 585, 80 N.

**Note.** — As to eligibility of suspended or disbarred attorney to judicial office, see annotation following this case, post, 803. L.R.A.1917B.

W. 137; State ex rel. Martin v. Poindexter, 43 Wash. 147, 86 Pac. 176; State ex rel. Reynolds v. Howell, 70 Wash. 467, 41 L.R.A. (N.S.) 1119, 126 Pac. 954; Searcy v. Grow, 15 Cal. 118; State ex rel. Chealander v. Carroll, 57 Wash. 202, 106 Pac. 748; State ex rel. Case v. Superior Ct. 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B, 838.

Mount, J., delivered the opinion of the court:

This is an appeal from an order of the lower court dismissing the petition of the relator for a writ of mandamus to compel the auditor of Lewis county to print the name of the relator upon the ballot as a candidate for the nomination of superior judge. It appears from the petition that the relator is a citizen of the United States and of this state and a qualified voter in Lewis county; that he is and was at all times stated in the application duly admitted to practise law in the courts of record of this state; that in the month of July he filed his declaration of candidacy and tendered to the auditor the fees provided by law therefor, but after the filing of such declaration the county auditor notified relator that he would not print relator's name upon the ballot to be used at the primary election in September. The petition also shows that on the 14th day of July, 1916, after a trial in an action wherein the state of Washington, upon the relation of the Lewis County Bar Association, was petitioner and the relator was the respondent, a judgment was entered in that case suspending the relator from the practice of law in this state for a period of one year from the date of that decree. On these facts the lower court was of the opinion that the relator was not eligible to be a candidate for the office of judge of the superior court, and for that reason sustained the demurrer.

This involves the construction of § 17 of article 4 of the Constitution, which reads: "Sec. 17. Eligibility of Judges. No person shall be eligible to the office of judge of the supreme court or judge of a superior court unless he shall have been admitted to practise in the courts of record of this state or of the territory of Washington."

It is insisted by the appellant that this section of the Constitution should be given

a strict construction, as was done in the case of *State ex rel. Reynolds v. Howell*, 70 Wash. 467, 41 L.R.A.(N.S.) 1119, 126 Pac. 954. It is, no doubt, correct to say that a constitutional provision should be given a strict construction, especially where its terms are clear; but the rule is that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. 1 Kent, Com. 462; *Heydenfeldt v. Daney Gold & S. Min. Co.* 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204.

It is argued by the appellant that, because the constitutional provision uses the words, "No person shall be eligible to the office of . . . judge of a superior court unless he shall have been admitted to practise in the courts of record of this state," it means that every person who has heretofore been admitted to practise law in the courts of record of this state is eligible to the office of judge of the superior court no matter what may occur thereafter. We think it would be absurd to say that this provision of the Constitution means that, when a person has been admitted to practise in the courts of record of this state, and subsequently he has been disbarred for cause or his admission vacated, he is still eligible to the office of superior judge by reason of his original status. The construction of this constitutional provision contended for by the appellant leads to that absurdity. When the Constitution was framed and when it was adopted, it was clearly not the intention of the people in adopting it to authorize a person to be elected judge who was not, at the time of his election, entitled to practise as an attorney in the courts of record in the state. This provision of the Constitution, in our opinion, defines a personal status which must continue, and when the status ceases to continue the person is ineligible. We think no other reasonable construction can be placed upon this provision.

No authorities directly in point have been called to our attention. The case of *Brown v. Woods*, 2 Okla. 601, 39 Pac. 473, comes nearer to the point than any other to which we have been referred. That was a case where there was a statute providing "that no person shall be eligible to the office of county attorney who is not duly admitted to practise as an attorney in some court of record in this territory."

A disbarment proceeding had been instituted against the petitioner, Woods, in that case, and he was suspended from practice. Before the trial was had he was elected county attorney, and the court in that case, in passing upon his eligibility to hold the

office, said: "The evident purpose and intention of the legislative act with reference to the eligibility of a person to the office of county attorney was not only that he should possess qualifications to perform the duties of the office of county attorney, but that there should be a judgment and determination of a court that he does possess the moral and mental qualifications of an attorney; that there should be a determination of a court that he is a person of good moral character, and learned and skilled in the legal profession. It requires that he 'shall have been duly admitted to practise,' and then specifies the particular duties that he is required to perform. The statute, it is true, does not say in terms that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intention of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose, and intention of the language used is as much within the act as though it were a part of the language itself."

That reasoning is applicable to this case. We think it is clear that the Constitution meant to say that no person is eligible to the office of judge of the superior court unless he shall have been admitted to practise in the courts of record in this state, which means that he not only shall have been, but that he is, at the time he becomes a candidate or is required to qualify as such judge, entitled to practise in the courts of this state. The fact that the petitioner is suspended rather than disbarred for all time is of no special importance, because under his suspension he is disbarred during that time from practice in the courts and from being eligible to any office or employment by reason of the fact that he had at one time been admitted to practise. When he was suspended from exercising the rights of an attorney at law, that suspension was as effective during the time thereof as a removal.

In view of the conceded fact that the relator is suspended, it follows that he is not eligible to hold office at the time he is required to qualify, and that he is not eligible to become a candidate upon the ticket. *State ex rel. Reynolds v. Howell*, supra. The respondent was therefore justified in refusing to print his name upon the ballot. The judgment appealed from is affirmed.

**Morris**, Ch. J., and **Main**, **Ellis**, and **Fullerton**, JJ., concur.

Petition for rehearing denied.

# Annotation—Eligibility of suspended or disbarred attorney to judicial office.

Generally, as to the extent of restriction of the right of a disbarred or suspended attorney or unlicensed person to transact legal business for another, see *Re Duncan*, 24 L.R.A.(N.S.) 750, and note.

For disbarment or suspension of attorney for misconduct in an official capacity other than his attorneyship itself, see *State v. Peck*, L.R.A.1915A, 663, and note.

STATE EX REL. WILLIS v. MONFORT, ante, 801, appears to be the only case passing directly upon the effect of disbarment of an attorney upon his eligibility to a judicial office.

See, however, *State v. Peck*, supra, which was a disbarment proceeding against an attorney for misconduct in his capacity as probate judge, in which it was argued upon demurrer, and again at the hearing, that disbarment proceedings so far partake of the character of official impeachment that they should not be permitted in the case of a judicial officer, but the court said this objection was not well taken inasmuch as a judge of probate need not be an attorney, and therefore his disbarment would have no effect upon his official status.

And *Re Silkman* (1903) 88 App. Div.

102, 84 N. Y. Supp. 1025, a proceeding instituted for the suspension of an attorney because he engaged in the practice of law while holding the office of surrogate, such practice being in violation of the Constitution of the state and of the oath of office of surrogate, in which the court held that the proceedings would not lie for the reason that the misconduct related to the office of surrogate, and not to that of attorney, and, after pointing out that the Constitution provides that no one shall be eligible to the office of surrogate who is not an attorney and counsellor of state, said: "The disbarment, however, would not operate to remove the incumbent from his office, for that clearly can only be done in the manner prescribed by the Constitution. The absurd, not to say scandalous, result would therefore be exhibited, upon the exercise of this alleged inherent power of a judicial officer disbarred for misconduct as an attorney, yet retaining his official grace and power after he has thus been judicially decreed to be unfit, and at the same time incidentally deprived of an essential constitutional element of eligibility."

R. L. S.

## IOWA SUPREME COURT.

W. T. RAWLEIGH MEDICAL COMPANY  
v.

WILLIAM H. OSBORNE et al., Appts.

(— Iowa, —, 158 N. W. 566.) •

### Pleading — answer — anti-trust law.

1. The defense that a contract for sale of articles for resale violated the anti-trust law is not raised by allegations that the articles were worthless and of no value, that the sale and resale would constitute a fraud on the merchant and persons purchasing from him, and that the pretended sale thereof by plaintiff was a violation of law.

For other cases, see *Pleading*, III. d, in *Dig.* 1-52 N. S.

Note. — As to validity of contract provision seeking to control price at which an article shall be resold, see annotations to (*Grogan v. Chaffee*, 27 L.R.A.(N.S.) 395; *Fisher Flouring Mills Co. v. Swanson*, 51 L.R.A.(N.S.) 522, and *Stewart v. W. J. Rawleigh Medical Co.* L.R.A.1917A, 1276. L.R.A.1917B.

### Monopoly — price regulation — credit — validity.

2. A contract by a wholesaler to furnish a stock of goods to a retailer who is to sell only the goods furnished at agreed prices and within a specified territory does not violate the anti-trust acts if the contract required the supply of an unlimited quantity of goods on credit, to be paid for in instalments measured by an aliquot part of sales made, so that the provisions operated as security for the payment of the purchase price.

For other cases, see *Monopoly and Combinations*, II. b, in *Dig.* 1-52 N. S.

(June 29, 1916.)

APPEAL by defendants from a judgment of the District Court for Buena Vista County sustaining a motion for direction of a verdict in plaintiff's favor in an action brought to recover the contract price of certain goods sold and delivered by plaintiff under a written contract with defendants. Affirmed.

Statement by Evans, Ch. J.:

Action to recover the contract price of goods sold and delivered under a written contract. The answer was a general denial, with an admission, however, of the execution of the contract and of the receipt of the goods thereunder. The defendants also pleaded that the goods in question were purchased by the defendants for the purpose of resale to others, that such goods were worthless, and that their sale to the defendants was a fraud, and that their sale by the defendants to others would be a fraud. On the trial the defendants admitted the receipt of the goods as pleaded in the petition, and admitted the contract price thereof. The defendants offered no testimony in support of the affirmative defense of failure of consideration. At the close of the trial each party moved for a directed verdict. The motion of the plaintiff was sustained. From the judgment entered for the plaintiff, the defendants have appealed.

Messrs. Baillie & Edson, for appellants:

A contract between a manufacturer and a retail dealer fixing the retail price at which the goods are to be sold in a restricted and exclusive territory, wherein the retailer is to handle the manufacturer's goods exclusively, is a contract in violation of law, is in restraint of trade and free competition, tends to create a monopoly, and is void.

Willson v. Morae, 117 Iowa, 584, 91 N. W. 823; Reeves v. Decorah Farmer's Co-op. Soc. 160 Iowa, 194, 44 L.R.A.(N.S.) 1104, 140 N. W. 844; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; United States v. Kellogg Toasted Corn Flake Co. 222 Fed. 725, Ann. Cas. 1916A, 78; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; W. H. Hill Co. v. Gray & Worcester, 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; United States v. E. C. Knight Co. 156 U. S. 16, 39 L. ed. 330, 15 Sup. Ct. Rep. 249; Addyston Pipe & Steel Co. v. United States, 175 U. S. 244, 44 L. ed. 148, 20 Sup. Ct. Rep. 96; Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936; White Dental Mfg. Co. v. Hurtsberg, — Tex. Civ. App. —, 51 S. W. 355. L.R.A.1917B.

The contract being void and prohibited under the statute, and at common law, and by the laws of the United States, no recovery against the defendant Osborne can be predicated thereon.

Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. 236 U. S. 165-176, 59 L. ed. 520-526, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118; Hanauer v. Doane, 12 Wall. 342-349, 20 L. ed. 439-441; McMullen v. Hoffman, 174 U. S. 639-669, 43 L. ed. 1117-1128, 19 Sup. Ct. Rep. 839; Coppel v. Hall, 7 Wall. 542, 558, 19 L. ed. 244, 248; Harrison County v. Ogden, 133 Iowa, 677, 108 N. W. 451; Marienthal, L. & Co. v. Shafer, 6 Iowa, 223; McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; Toovey v. Ayhart, 136 Iowa, 694, 114 N. W. 181; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; Pike v. King, 16 Iowa, 49; Knowlton v. Congress & E. Spring Co. 57 N. Y. 518; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; Detroit Salt Co. v. National Salt Co. 134 Mich. 103, 96 N. W. 1; Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 395.

The contract being void and against public policy, the law will leave the parties where the court found them.

McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130; Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 Am. St. Rep. 206, 4 N. W. 870.

The parties being in pari delicto, neither party can have a recovery against the other.

Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 Am. St. Rep. 206, 4 N. W. 870; Spaulding v. Bank of Muskingum, 12 Ohio, 544; Stover v. Flower, 120 Iowa, 514, 94 N. W. 1100.

Messrs. Faville & Whitney, for appellee:

The alleged contract between the plaintiff and the defendants, providing for the selling to the latter, and delivery to carrier by the former, of goods for shipment to the latter to points in Iowa, is interstate commerce, which Congress has the exclusive power to regulate, and its validity must be determined under the laws of the United States and the common law as interpreted in the Federal courts.

Gibbons v. Ogden, 9 Wheat. 207, 6 L. ed.

73; Walling v. Michigan, 116 U. S. 446-461, 29 L. ed. 691-696, 6 Sup. Ct. Rep. 454; Wabash St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 285, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; International Text Book Co. v. Pigg, 217 U. S. 103, 54 L. ed. 683, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 228, 44 L. ed. 136, 142, 20 Sup. Ct. Rep. 96; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Western U. Tele. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Caldwell v. North Carolina, 187 U. S. 625, 47 L. ed. 338, 23 Sup. Ct. Rep. 229; Stockard v. Morgan, 185 U. S. 31, 45 L. ed. 792, 22 Sup. Ct. Rep. 576; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; Norfolk & W. R. Co. v. Com. 88 Va. 103, 13 L.R.A. 110, 29 Am. St. Rep. 705, 13 S. E. 340; Albertype Co. v. Gust Feist Co. 102 Tex. 219, 114 S. W. 791; McCall Co. v. J. D. Stiff Dry Goods Co. — Tex. Civ. App. —, 142 S. W. 659; Dr. Koch Vegetable Tea Co. v. Malone, — Tex. Civ. App. —, 163 S. W. 662; Stein Double Cushion Tire Co. v. Wm. T. Fulton Co. — Tex. Civ. App. —, 159 S. W. 1014; Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. 55 Tex. Civ. App. 553, 120 S. W. 532; Moroney Hardware Co. v. Goodwin Pottery Co. — Tex. Civ. App. —, 120 S. W. 1088; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Barnhard Bros. & Spindler v. Morrison, — Tex. L.R.A.1917B.

Civ. App. —, 87 S. W. 376; United States v. Tucker, 188 Fed. 741; Reed v. Walker, 2 Tex. Civ. App. 92, 21 S. W. 687; Hynes v. Briggs, 41 Fed. 468; United States v. Swift & Co. 122 Fed. 529; Standard Fashion Co. v. Cummings, 187 Mich. 196, L.R.A. 1916F, 329, 153 N. W. 814.

The contract is not invalid as being in restraint of trade, but it is a fair, reasonable, and proper contract for the protection of the vendor in credit sales of its own product.

Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Ripy v. Art Wall Paper Mills, 41 Okla. 20, 51 L.R.A.(N.S.) 33, 136 Pac. 1080; Andrews v. New Orleans Brewing Asso. 74 Miss. 362, 60 Am. St. Rep. 509, 20 So. 837; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144; J. D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 S. E. 701; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; Gulf Ref. Co. v. Brown-Lloyd Co. — Tex. Civ. App. —, 167 S. W. 162; Alsworth v. Reppert, — Tex. Civ. App. —, 167 S. W. 1098; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842.

One cannot refuse to pay for goods purchased for resale, because the contract under which they were furnished to him sought to establish a monopoly by forbidding sale of rival goods and fixing the price at which they should be sold.

McCall Co. v. Hughes, 102 Miss. 375, 42 L.R.A.(N.S.) 63, 59 So. 794; Manchester & L. R. Co. v. Concord R. Corp. 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383; Andrews v. New Orleans Brewing Co. 74 Miss. 362, 60 Am. St. Rep. 509, 20 So. 837; International Harvester Co. v. Eaton Circuit Judge (International Harvester Co. v. Smith) 163 Mich. 55, 80 L.R.A.(N.S.) 580, 127 N. W. 695, Ann. Cas. 1912A, 1022; Osgood v. Bauder, 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887; Central New York Teleph. & Tele. Co. v. Averill, 199 N. Y. 128, 32 L.R.A.(N.S.) 494, 139 Am. St. Rep. 878, 92 N. E. 211; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Hanauer v. Gray, 25 Ark. 350, 99 Am. Dec. 226; King v. King, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179,

184, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208; *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 6 C. C. A. 290, 125 Fed. 454; *Wassermann v. Sloss*, 117 Cal. 425, 38 L.R.A. 176, 59 Am. St. Rep. 209, 49 Pac. 566; *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Packard v. Byrd*, 73 S. C. 1, 6 L.R.A.(N.S.) 547, 51 S. E. 678.

Evans, Ch. J., delivered the opinion of the court:

The plaintiff set forth in his petition a copy of the contract sued on. Its execution was admitted by the defendant. As already indicated, the defendant pleaded a want of failure of consideration, but offered no evidence in support of such defense. The general contention now made by the defendant is that the contract sued on was illegal and void, as being contrary to public policy and contrary to the Federal statute known as the Anti-Trust Law, and contrary to those statutes of the state of Iowa which deal with restraints of trade. It is urged by the appellee that this contention and argument are not justified by the pleadings in the case. Such was also the view adopted by the trial court. The question therefore lies at the threshold of the case, and must receive our first consideration.

The contract between the plaintiff and the principal defendant, William H. Osborne, as set up in the petition, was as follows:

#### Exhibit A—Contract.

Whereas, Wm. H. Osborne, of Emmetsburg, Iowa, desires to purchase of the W. T. Rawleigh Medical Company, of Freeport, Illinois, on credit and at wholesale prices to sell again to consumers, medicines, extracts, spices, soaps, toilet articles, perfumes, stock and poultry preparations, and other goods manufactured and put up by it, paying his account for such goods in instalments as hereafter provided:

Therefore he hereby agrees to sell no other goods than those sold him by this company, to sell all such goods at regular retail prices to be indicated by it, and to have no other business or employment.

He further agrees to pay said company for all goods purchased under this contract the current wholesale prices of such goods by remitting in cash each week to said company an amount equal to at least one half of the receipts from his business until his account is balanced, and for that purpose, L.R.A.1917B.

as evidence of good faith, he shall submit to said company weekly reports of his business: Provided, however, if he pays his account in full on or before the tenth day of each month, he is to be allowed a discount of three per cent (3 per cent) from current wholesale prices. Upon termination of this contract from any cause or by either party, he further agrees to settle in cash within a reasonable time the balance due said company on account.

Unless prevented by strikes, fires, accidents, or causes beyond control, said company agrees to fill and deliver on board cars at place of shipment his reasonable orders, provided his account is in satisfactory condition, and to charge all goods shipped him under this contract to his account at current wholesale prices; also to notify him promptly of any change in wholesale or retail prices.

Said company further agrees to furnish him free of charge on board cars at place of shipment a reasonable amount of first-class advertising matter, report and order blanks, and printed return envelopes, for his use in conducting his business; also to give him free of charge, after he has begun work, instructions and advice, through letters, bulletins, and booklets, as to the best methods of selling its products to customers.

This contract is subject to acceptance at the home office of the company, and is to continue in force only so long as his account and the amount of his purchases are satisfactory to said company: Provided, however, that said Wm. H. Osborne or his guarantors may be released from this contract at any time by payment in cash the balance due said company on account.

Dated at Freeport, Illinois, November 17, 1909. The W. T. Rawleigh Medical Company, by W. T. Rawleigh, President. Wm. H. Osborne. [Salesman sign here in ink or indelible pencil.] [Seal.]

On the back of the said contract appeared the following memoranda:

"1588

Contract with

Name, Wm. H. Osborne.

Received, Nov. 22, 1909.

Inv. CMR. Nov. 22, 1909.

Approved by Karf.

Accepted Dec. 2nd, 1909.

Price list and copy mailed Dec. 2, 1909.

Territory selected.

State, Iowa.

County, Dickinson.

Selection recorded."

Manifestly the foregoing contract does not on its face disclose any illegality. On the trial, however, the defendant introduced certain testimony consisting of certain letters and written instructions issued subsequently to the contract. Upon these the defendant's contention is largely predicated, the theory being that they were a part of the contract, and that they indicated the construction of the contract which was put upon it by the plaintiff. These exhibits were received by the court over the objections of the plaintiff that they were irrelevant to any issue made by the pleadings, and were so received subject to a motion to strike. We have to consider, therefore, whether this evidence was relevant to any issue tendered by the defendant's answer.

For the plaintiff it is contended that the question of the illegality of the contract was not made in the answer at all, except on the ground of a failure of consideration. On the other hand, the defendant contends that he pleaded the illegality of the contract in his amendment to his answer. The amendment so relied on by the defendant was as follows, in full: "Further answering, the defendants state that the drugs and nostrums, goods and merchandise for which the plaintiff seeks to charge the defendants, including liniments, antipain oil, Golden cough syrup, cough balsam, Ru-Moxol cod liver oil, extract, tonic laxative, application and gall remedy, female tonic, balm vitus, extracts and flavors, pain expeller, toilet articles, spices, pills, salves, healing powder, dips and disinfectants, louse killers, condition powders, and stock foods, were and are worthless and of no value, and wholly useless for the purpose for which the plaintiff offered them for sale and sold them to the defendant Osborne; that they were offered for sale to the defendant Osborne by the plaintiff with the intention on the part of the plaintiff and the said defendant to sell them to others; that such sale and the sale thereof to others would constitute a fraud upon the defendants and to the person purchasing the same; that the said goods and merchandise contained no curative or valuable qualities, and the pretended sale thereof by the plaintiff to the defendant Osborne was a violation of law, and by reason of the foregoing the defendant has been damaged in a sum equal and in excess to the claim made by the plaintiff in this suit. Wherefore the defendants pray the plaintiff's cause of action may be dismissed

L.R.A.1917B.

and the defendants have judgment for costs."

We think it quite clear that this amendment furnished no basis for the introduction of the evidence in question nor for the contention in argument now urged by the defendant.

The case presented therefore is one where no illegality appears upon the face of the contract sued on, and none appeared in the evidence introduced on behalf of the plaintiff. If we assume, therefore, that the evidence thus introduced by the defendant tended to show the illegality and voidability of the contract as a violation of law, it was clearly incumbent upon the defendant to plead such illegality as a basis for such evidence.

Indeed, if we were to ignore the question of pleading and were to give full consideration to the evidence of the defendant, we are not favorably impressed with the legal merits of the argument of illegality. The emphasis of this argument is laid upon the fact that the defendant agreed to sell the goods at retail prices to be indicated by the plaintiff, and that the territory of the defendant was to be limited to Dickinson county, and that the defendant was to devote his time and attention exclusively to the sale of the plaintiff's goods. The argument is that, inasmuch as the plaintiff had sold the goods to the defendant, it had no further lawful interest in fixing the retail price or the territory where resale should be made. Without going into the greater depths of this question, it is enough for the purpose of this case to note that the plaintiff was undertaking to sell to the defendant an unlimited quantity of goods, and it was extending credit therefor; that the amount of the respective instalments to be paid was to be measured in each case by an aliquot part of the sales made during the previous period. The provisions thus emphasized fairly tended to operate as security for the payment of the purchase price. The final clause in the contract provided in express terms "that said W. H. Osborne or his guarantors may be released from this contract at any time by payment in cash of the balance due said company on account."

We reach the conclusion, therefore, that the trial court properly held that there was no basis in the pleadings for the present contention of illegality.

The judgment below must therefore be affirmed.



## KENTUCKY COURT OF APPEALS.

H. M. BOSWORTH, Auditor, Appt.,  
v.  
STATE UNIVERSITY et al.

(166 Ky. 436, 179 S. W. 403.)

**Statute — title — appropriation for carrying into effect.**

1. A title, An act for preventing the manufacture and sale of adulterated foods and providing penalties for violation thereof, does not cover provisions for a specified aggregate annual amount for the expenses of carrying the statute into effect by securing analyses of foods and the prosecution of offenders.

*For other cases, see Statutes, I. c, 2, in Dig. 1-52 N. S.*

**Same — invalidity in part — effect.**

2. The invalidity, because not specified in the title, of the provisions of a statute to prevent the manufacture and sale of impure foods and providing penalties for violation thereof, which make an appropriation for carrying it into effect, does not nullify the remainder of the act.

*For other cases, see Statutes, I. c, 2, b, in Dig. 1-52 N. S.*

(October 27, 1915.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Franklin County granting a writ of mandamus to compel him to pay to petitioners a certain amount alleged to be due for food and drugs analyses. Reversed.

The facts are stated in the opinion.

Messrs. James Garnett, Attorney General, and Overton S. Hogan, Assistant Attorney General, for appellant:

The act under which petitioners make the demand is unconstitutional.

*Thompson v. Com.* 159 Ky. 8, 166 S. W. 623; *Burton v. Monticello & B. Turnp. Co.* 162 Ky. 787, 173 S. W. 144; *Ragland v. Anderson*, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865; *Marbury v. Madison*, 1 Cranch, 149, 2 L. ed. 64; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 467; *McCreary v. Speer*, 156 Ky. 783, 162 S. W. 99; *Penitentiary Comrs. v. Spencer*, 159 Ky. 255, 166 S. W. 1017.

The experimental station has no authority to use this money as it proposes to use it, and the construction placed upon § 11 of the act, by the lower court, is erroneous.

Mr. J. R. Bush for appellees.

**Note.** — As to necessity and sufficiency of reference in title of statute to appropriations to put its purpose into effect, see annotation following this case, post, 812. L.R.A.1917B.

Settle, J., delivered the opinion of the court:

The appellee State University, suing for the benefit of the Kentucky Agricultural Experiment Station, and the latter in its own behalf, by petition filed in the Franklin circuit court against the appellant, H. M. Bosworth, auditor of public accounts of Kentucky, prayed that that officer be required by writ of mandamus to issue his warrant on the treasurer of the state for the payment to appellees of \$8,460.56, the amount alleged to be due the Agricultural Experiment Station for 1,435 analyses of food and drug products at \$7.50 each, made by it under § 1905a, Kentucky Statutes, during the year 1914. The entire claim presented for the 1,435 analyses in question was \$10,762.50, but, as \$2,301.94 of the amount had been paid by the treasurer upon a warrant from the auditor, there remained unpaid the \$8,460.56 mentioned, which the auditor refused to pay. It is alleged in the petition that it is the purpose of appellees to expend this \$8,460.56 in constructing and equipping, on the State University grounds at Lexington, Kentucky, a cold storage plant and abattoir for the use of the Experiment Station, and that they had, in fact, contracted to have the work done at that price.

The auditor filed a general demurrer to the petition upon the grounds (1) that the act under which the analyses were made by the Agricultural Experiment Station, or so much thereof as authorized the work and attempted to make an appropriation thereof, is unconstitutional, and therefore void; (2) that, if constitutional, the act does not authorize the use of the money claimed by appellees for the constructing or equipping of a cold storage plant or abattoir upon the university grounds or elsewhere. The circuit court overruled the demurrer, to which appellant excepted. He thereupon filed an answer, which, in addition to attacking the constitutionality of the act and denying the right of appellees to expend the amount in controversy in constructing a cold storage plant and abattoir, denied the necessity for such plant or abattoir, and also denied the authority of appellees to construct it at all at the expense of the state, or that they had contracted to have the work done at the price of \$8,460.56, or any other sum. The affirmative matter of the answer was controverted of record.

After the taking of depositions and submission of the case, the circuit court adjudged the appellees entitled to the relief prayed and granted the mandamus. The auditor complains of that judgment; hence this appeal.

Neither the demurrer nor answer makes

any question as to the number of analyses made by the Agricultural Experiment Station, as to the correctness of the analyses or the competency of the persons by whom they were made. The paramount question to be determined is the one first presented by the demurrer and answer; viz., Is the act under which the amount in suit is claimed from the state, or so much thereof as seems to authorize the payment of the claim, constitutional? The act was passed by the general assembly in 1908 (see Acts 1908, p. 10), and is contained in chapter 53a, § 1905a, Kentucky Statutes Carroll's Ed. 1915. It is entitled, "An Act for Preventing the Manufacture and Sale of Adulterated or Misbranded Foods, Drugs, Medicines, and Liquors, and Providing Penalties for Violations Thereof."

The one section of the act, 1905a, contains fourteen subsections.

Subsection 8 makes it the duty of the director of the Kentucky Agricultural Experiment Station, or, under his direction, the head of the division of food inspection of the station, to make or cause to be made examinations of samples of food and drugs manufactured or on sale in this state at such time and place and to such extent as he may determine.

Subsection 9 requires him to make report as to adulterated or misbranded foods or drugs to certain officers named therein, for the prosecution of the person or persons guilty thereof.

Subsection 10 requires that he make an annual report to the governor upon adulterated food or drug products, and for the submission of such annual reports to the general assembly at its regular sessions, and, in addition, for the issue from time to time of bulletins giving the results of such inspections and analyses as are made by him.

Subsection 11, which is the one here particularly involved, provides:

"Said Experiment Station shall receive seven dollars and fifty cents (\$7.50) for the analysis or examination of any sample of food or drug taken or submitted in accordance with this act, and expenses for procuring samples of food and drugs and in making inspections into the condition of and wholesomeness and purity of the food produced, manufactured or sold in food factories, grocery stores, bakeries, slaughtering houses, dairies, milk depots or creameries, and all other places where foods are produced, prepared, stored, kept or offered for sale; for studying the problems connected with the production, preparation and sale of foods; for expert witnesses attending grand juries and courts; clerk hire and all other expenses necessary for carrying out the provisions of this act: Provided, the total ex-

pense from all sources shall not exceed in any one year thirty thousand dollars (\$30,000).

"The board of control of said Experiment Station shall furnish to the auditor of public accounts an itemized statement of the expenditures of money under this act. The expenditures reported to the auditor shall be paid by the commonwealth to the treasurer of the Experiment Station upon the written request of the board of control of the said Experiment Station, and the auditor for the payment of the same is directed to draw his warrant upon the treasurer as in all other claims against the commonwealth."

It is insisted for appellant that subsection 11 of the act violates § 51 of the Constitution of the state, which provides: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title. . . ."

In the numerous decisions of this court interpreting § 51, Constitution, and applying its provisions, the following general rules appear to have been announced: First. The general manner in which the subject of an act is to be accomplished need not be expressed in the title (*Collins v. Henderson*, 11 Bush, 75; *Com. v. Bailey*, 81 Ky. 395); Second. Stating the subject matter of the act, with unnecessary detail in the title, does not render the act unconstitutional (*Allen v. Hall*, 14 Bush, 85); Third. If all the provisions of an act relating to the same subject are naturally connected, and are not foreign to the subject expressed in the title, it is sufficient (*Burnside v. Lincoln County Ct.* 86 Ky. 423, 6 S. W. 276; *Johnson v. Fulton*, 121 Ky. 594, 89 S. W. 672; *Diamond v. Com.* 124 Ky. 418, 99 S. W. 232; *McGlone v. Womack*, 129 Ky. 274, 17 L.R.A. (N.S.) 855, 111 S. W. 688; *Mark v. Bloom*, 141 Ky. 474, 133 S. W. 203; *Com. v. Starr*, 160 Ky. 260, 169 S. W. 743); Fourth. The title cannot be used to extend or restrain the provisions in the body of the act. It must be fairly expressive of the context in the body of the act, and is to be read in connection with it in determining the meaning of the act (*Com. v. Cain*, 14 Bush, 525; *Com. v. Barney*, 115 Ky. 475, 74 S. W. 181; *Joyce v. Woods*, 78 Ky. 386; *Wiemer v. Sinking Fund Comrs.* 124 Ky. 377, 99 S. W. 242; *Thompson v. Com.* 159 Ky. 8, 166 S. W. 623).

The meaning and object of § 51, Constitution, is thus well stated in *Thompson v. Com.* supra; "The purpose of the constitutional provision was to enable persons reading the title of an act to get a general idea of what the act treated of or contained, and it has come to be a recognized legislative practice for members and others interested

in legislation to read the title of acts and gather therefrom in a general way, at least, the subject matter of the act, and under the authority of this constitutional provision members of the legislature, as well as the public interested in legislation, have the right to rely on the title as indicating the subject matter of the act, and to assume that the act contains no legislation that is not embraced in a general way by the subject expressed in the title."

It is not to be overlooked that § 46, Constitution, declares that "Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each house."

And § 230 provides: "No money shall be drawn from the state treasury, except in pursuance of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published annually."

Manifestly, the \$30,000 mentioned in subsection 11 of the act under consideration is an appropriation, in the meaning of §§ 46 and 230, Constitution, *supra*. The \$7.50 allowed by the section as compensation for each analysis that may be made is only a means or scale by which it is to be ascertained when the limit of the annual appropriation of \$30,000 is reached. Therefore the provision as to compensation for analyses does not constitute a system of fees, but merely establishes a scale by which the \$30,000 is graded. The compensation for analyses and other expenses, for the payment of which the act provides, cannot in any one year exceed the \$30,000 appropriation for such year. It is patent from the evidence appearing in the record that the authorities in charge of the Experiment Station have always treated the \$30,000 as an appropriation, and, further, that they have, ever since the act in question became effective, each year, drawn the entire \$30,000 from the state treasury.

We now come to the consideration of the main question: Does the act conform to the requirements of § 51, Constitution? Comparison of the contents of the body of the act with its title will demonstrate that, in so far as the provisions of subsection 11 are concerned, it does not do so. In other words, all of the provisions of the act, except those contained in subsection 11, are embraced and covered by the title, because they each and all relate to and are naturally and directly connected with the subject expressed in the title; that is, they define what shall constitute an adulteration or misbranding of foods and chemicals, provide the means of detecting and preventing same, designate the offenses that may be commit-

ted under the act, and prescribe the penalties therefor. Subsection 11, however, attempts to bring into the act and make a part thereof various provisions which are foreign to the subject expressed in the title. These provisions relate to the making of compensation to the Experiment Station for analyses or examinations of samples of food or drugs, paying the expenses attending the procuring of such samples, the cost of clerk hire, attending grand juries and trials in prosecutions of offenders against the law, and, finally, providing an annual appropriation of \$30,000 for defraying all such items of cost and expense.

The phraseology of the title, "An Act for Preventing the Manufacture and Sale of Adulterated or Misbranded Foods, Drugs, Medicines, and Liquors, and Providing Penalties for Violations Thereof," does not even suggest to the average mind that the body of the act provides for the expenditure of the money of the Commonwealth required by the eleventh subsection, or an intimation that such subsection provides for an annual appropriation of \$30,000. Being utterly silent as to the expenditures required and the appropriation made by this subsection, the title of the act, when introduced and put upon its passage in the legislature, could have conveyed to the mind of the average legislator no other meaning or information than that its only object was to make it an offense for any person to manufacture or sell adulterated or misbranded foods, drugs, medicines, or liquors, and prescribe the penalties therefor. The ostensible object of the act, being the protection of the public, made it so attractive to the members of the general assembly, and the necessity for its passage so apparent, that the mere reading of its title was well calculated to induce them to give it their support, without taking time to examine the body of the act and thereby obtain an understanding of its numerous provisions; whereas, if the title of the act had given any intimation that it contained an appropriation of \$30,000 to be paid by the state annually for an indefinite number of years, it would at least have been understandingly considered and voted on. But the title gave no intimation of the appropriation that lay concealed as far down in the body of the act as its eleventh subsection, to reach which ten other subsections, dealing with totally different matters, must first be read. Being thus preceded and hedged about by other provisions that appear to be germane to the subject expressed in the title, the appropriation contained in subsection 11, which is not even remotely referred to in the title or necessarily connected with the subject therein expressed, was so disguised as to render its

presence in the body of the act well-nigh undiscoverable without a reading of the entire act.

The situation here presented is one that § 51 of the Constitution was intended to prevent, and which could have been prevented by the addition to the title of the act of another sentence, indicating that the act contains an appropriation of \$30,000 per annum to meet the expenses of carrying out its provisions. There can be no doubt that the act in question relates to two subjects; viz., (1) The preventing of the manufacture and sale of adulterated or misbranded foods, drugs, medicines, and liquors, and providing penalties for so doing; (2) an appropriation from the revenues of the state of \$30,000 per annum. It is equally free from doubt that only the first of these subjects is expressed in the title of the act, as the Constitution provides. It may also be remarked that the first subject to which the act relates appertains to the criminal or penal laws, and the second alone to an appropriation of the state's money.

As § 46, Constitution, provides that any act or resolution for the appropriation of money or the creation of debt shall not become a law unless on its final passage it has received the votes of a majority of all the members elected to each house, it would not be wide of the mark to say that adherence to the requirements of § 51, Constitution, is of the utmost importance, in order that the members of the general assembly may be fully informed in voting upon an act carrying an appropriation, and the taxpayers of the state advised, after its passage, as to the meaning of its provisions.

In *Ragland v. Anderson*, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865, we said: "It is for the courts to measure the acts of the general assembly by the standard of the Constitution, and if they are clearly and unequivocally in contravention of its terms, it becomes the duty of the judiciary to so declare. Of course, if the question as to whether or not the legislation is inimical to the Constitution be doubtful, it will always be decided in favor of the constitutionality of the law. But where the matter is plain that the Constitution has been violated, then the courts cannot escape the duty of so declaring whenever the matter is brought to their attention. And no matter how distasteful it may be for the judiciary to review the acts of a co-ordinate branch of the government, their duty under their oath of office is imperative." *Varhey v. Justice*, 86 Ky. 506, 6 S. W. 457; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

In *McCreary v. Speer*, 156 Ky. 783, 162 S. W. 99, we also said: "It is true our Con-

stitution contains no provision to the effect that all its provisions are mandatory; but we deem this immaterial for the reason that this court had held before the adoption of the present Constitution that all the provisions of a Constitution are mandatory; and the Constitution must be presumed to have been adopted with this understanding of its meaning. Since the adoption of the Constitution the court has steadily maintained the same rule." *Penitentiary Comrs. v. Spencer*, 159 Ky. 255, 166 S. W. 1017.

In *Burton v. Monticello & B. Turnp. Co.* 162 Ky. 787, 173 S. W. 144, we further said: "In *Hyser v. Com.* 116 Ky. 410, 76 S. W. 174, it was said: 'This court has repeatedly announced, in effect, that no provision of a statute directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of § 51 of the Constitution.' This broad, liberal rule was approved in the early leading case of *Phillips v. Cincinnati & C. Bridge Co.* 2 Met. (Ky.) 219, and again in *Collins v. Henderson*, 11 Bush, 74; *Hoke v. Com.* 79 Ky. 567; *Com. v. Bailey*, 81 Ky. 395; *Burnside v. Lincoln County Ct.* 86 Ky. 423, 6 S. W. 276; *Conley v. Com.* 98 Ky. 125, 32 S. W. 285; and *Eastern Kentucky Coal Lands Corp. v. Com.* 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138. In recognizing this rule, however, this court, in *Thompson v. Com.* 159 Ky. 12, 166 S. W. 624, further said: 'But in no instance has this rule been extended so as to legalize legislation that departs so radically from the title of the act as do the sections here under consideration. Here the title of the act limited the scope of the legislation to the appropriation of money for the benefit of the houses of reform, and this limitation in the title reasonably and naturally conveyed the meaning that the body of the act was confined to the appropriation of money, and no other subject.'"

It is our conclusion that so much of the act under consideration as is included in subsection 11 of § 1905a is violative of § 51 of the Constitution, and therefore void. This conclusion does not, however, render invalid the remaining subsections of the act, which seem to be germane to the subject expressed in the title, as it is manifest that subsection 11 can be eliminated from the act without to any extent affecting the subject matter of the germane parts: the rule in such case being as stated in *Wiemer v. Sinking Fund Comrs.* 124 Ky. 377, 99 S. W. 242: "When a subject foreign to the title is introduced into the body of an act, if it is so separate and distinct from the remainder of the subject matter of the legislation that it may be omitted without affect-

ing the otherwise valid portions, then the unconstitutional part will be omitted and the remainder allowed to stand." *Jones v. Thompson*, 12 Bush, 394; *Fuqua v. Mullen*, 13 Bush, 467; *Thompson v. Com.* 159 Ky. 8, 166 S. W. 623; *Burton v. Monticello & B. Turnp. Co.* 162 Ky. 787, 173 S. W. 144.

The conclusion we have reached renders unnecessary the decision of the other question urged in the brief of appellant's counsel; and as the salutary object of the act cannot fully be carried out without the appropriation made invalid by the elimination of subsection 11 thereof, it is assumed that

the general assembly will at its approaching session so amend the act as to make the needed appropriation, and at the same time allow its application to the erection of the cold storage plant and abattoir desired by appellee.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the lower court to sustain the demurrer to the petition and dismiss the action.

Petition for rehearing denied.

### **Annotation—Necessity and sufficiency of reference in title of statute to appropriations to put its purpose into effect.**

As to validity of statute or ordinance authorizing a levying of taxes, incurring of indebtedness, or the appropriation of money for two or more purposes, see note to *Knoxville v. Gass*, 14 L.R.A. (N.S.) 519.

There is no fixed, well-defined rule by which the title of every act can be tested for compliance with the constitutional requirement that the "subject" or "object" of an act must be expressed in its title. It is, of course, unquestioned that the purpose of such constitutional provisions is to prevent deception of the public and of members of the legislature by means of provisions in bills of which the title gives no intimation. In other words, the requirement is that the title must give notice of the particular subject or object to be legislated upon in a manner that clearly invites all persons interested in any provisions contained in the body of the act to examine the same. It is also a generally accepted rule or principle that a title fairly expressing the subject generally covers provisions for all proper means and instrumentalities necessary to the accomplishment or enforcement of the expressed purpose, or, as it has been expressed, "the title . . . may cover any matters having congruity and proper connection with it" (36 Cyc. 1028).

But applying these broad rules or principles to the question of the necessity and sufficiency of a reference in the title of a statute to appropriations to put its purposes into effect, it would seem that, generally speaking, an appropriation, a necessity for which is suggested by the title of an act, if it has congruity and proper connection with the subject or object stated therein, need not be specifically expressed in the title, but that if such an appropriation is not

expressed in the title, and is neither suggested by it nor is germane or cognate to the object stated, such as, for instance, an appropriation for fees and expenses for examinations, etc., not reasonably to be anticipated as provided for in an act having such a title, the subject is not sufficiently stated, and the act, or so much thereof as violates the constitutional provision, is void. In fact, most, if not all, of the few decisions upon this question, are in effect an application of this general test.

Thus, it was held in the recent and well-reasoned case of *BOSWORTH v. STATE UNIVERSITY*, ante, 808, that the title, "An Act for Preventing the Manufacture and Sale of Adulterated or Misbranded Foods, Drugs, Medicines, and Liquors, and Providing Penalties" therefore, did not suggest or even intimate to the average mind that the body of the act contained provisions making an appropriation for compensating the making of analyses and other expenses, and therefore that such provisions were void because the subject thereof was not "expressed in the title," as required by the Constitution.

So, in *Ritchie v. People* (1893) 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, it was held that an appropriation for the salaries of factory inspectors was a subject not expressed in the title, "An Act to Regulate the Manufacture of Clothing, Wearing Apparel, and Other Articles in This State, and to Provide for the Appointment of State Inspectors to Enforce the Same, and to Make an Appropriation Therefor," and was void under a constitutional declaration that, if a subject shall be embraced in an act which is not expressed in the title, the act shall be void as to so much thereof as is not expressed. In this case

it was further held that the expression, "make an appropriation therefor," did not necessarily imply that the contemplated appropriations were for salaries, but might have been for the payment of expenses.

And in *White v. Burgin* (1896) 113 Ala. 170, 21 So. 832, it was held that the title, "To Regulate the Management of State and County Convicts," was not sufficiently broad and comprehensive to embrace provisions relative to the payment by the state of certain costs incurred in the prosecution, trial, and conviction of convicts, it being said that such provisions were obviously foreign to the "management" of convicts.

And in *Clark v. Wallace County* (1895) 54 Kan. 634, 39 Pac. 225, it was held that the title, "An Act to Protect Fruit Trees, Hedge Plants, and Fences," did not clearly express the subject of appropriations for paying bounties for gopher scalps, and that provisions in the body of the act making provision for the payment of such bounties rendered the act void, it being said that the title did not suggest such subject matter, and no other provisions had been made for the protection of fruit trees, etc.

And in *Pratt v. Browne* (1902) 135 Cal. 649, 67 Pac. 1082, it was held that the subject of a county court reporter's salary was neither expressed in nor germane to the title of an act creating a "uniform system of county government."

And in the Michigan case of *Ryerson v. Utley* (1868) 16 Mich. 269, it was held that the title, "An Act Providing for the Preservation of the Muskegon River Improvement and for Other Purposes," did not cover a provision in the body of the act appropriating a sum of money to pay for the improvement, within the meaning of the constitutional requirement that the object of a law shall be expressed in its title, the court saying that "the only object mentioned in the title to this act is the preservation of the Muskegon river improvement, for which purpose the act authorizes tolls to be levied and expended;" that the payment for the improvement was in no way connected with this object; that "the title to the act would apprise neither the legislature nor the public that it covered provisions under which a large sum was to be collected and disbursed to pay for the original construction of the work;" and that "the words, 'other purposes,' in the title, can have no force whatever under the constitutional provision which has been quoted." It was also said that "it is very likely that the title to this act

might have been made sufficiently comprehensive to embrace all the purposes of the act; the objection is that it was not made so;" and that the reading of the title in question at once induces the conclusion that the various provisions of the act relate only to the preservation of the improvement, and that the act itself must therefore be confined to that object.

And there are a few cases which illustrate the phase of the rule converse to that applied in the preceding cases; that is, cases in which the titles have been held sufficient to cover provisions making appropriations to carry the purposes of the acts into effect. Thus, in *People ex rel. Moloney v. Kirk* (1896) 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830, the title, "An Act to Enable Park Commissioners Having Control of Any Boulevard or Driveway Bordering upon Any Public Waters of This State to Extend the Same," was held sufficiently broad to cover appropriations in the act for defraying the cost of the improvement, such provisions being declared to be germane to the real purpose or general object of the law as expressed in the title, and to be sufficiently indicated therein to satisfy the constitutional provision that every act shall embrace but one subject, which shall be expressed in its title. So, in *McCaslin v. State* (1873) 44 Ind. 151, it was held that the title, "An Act to Establish a House of Refuge for the Correction and Reformation of Juvenile Offenders," was broad and comprehensive enough to cover provisions making appropriations for carrying the announced purpose into effect, and therefore that such provisions did not violate the constitutional requirement that the subject matter of an act be expressed in its title. And in *Callvert v. Winsor* (1901) 26 Wash. 368, 67 Pac. 91, the title, "An Act Providing for the Establishment, Location, Maintenance, and Support of the University of Washington," was held to express a subject which included appropriations for carrying out the expressed purpose, the court quoting with approval from an earlier Washington case as follows: "It is permissible to insert those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object which is expressed, or are naturally suggested by or connected with that object."

In a few jurisdictions statutes have been enacted which relate to the question of the necessity and sufficiency of reference in the title of an act to appro-

priations to put the purpose of the statute into effect, but none of the adjudications which construe such statutes seem to have involved this phase of the question. As illustrative of statutes of this character, see *Banks v. State* (1905) 124 Ga. 15, 2 L.R.A. (N.S.) 1007, 52 S. E. 74, which construed and applied Ga. Civ. Code, § 5771, which provided that "pro-

visions germane to the general subject matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words, 'and for other purposes.'" G. J. C.

### ILLINOIS SUPREME COURT.

CALUMET & CHICAGO CANAL & DOCK  
COMPANY et al.

v.

ALLEN CONKLING.

ABEL DAVIS, Trustee in Bankruptcy, etc.,  
of Allen Conkling, Plff. in Certiorari.

(273 Ill. 318, 112 N. E. 982.)

#### Corporation — power to lend money.

1. Express power to lend money is not conferred upon a corporation organized to construct a canal and dock, warehouses, and piers, by a provision that it may possess real and personal estate and employ the same in such manner as it may determine. *For other cases, see Corporations, IV. d, 1, in Dig. 1-52 N. S.*

#### Same — implied power.

2. A loan made by a corporation organized to construct a canal and docks, shipyards, and warehouses, in connection with a sale of land not needed in the business for which it was chartered, is not incidental to the exercise of an express power, so as to be within its implied powers.

*For other cases, see Corporations, IV. a, in Dig. 1-52 N. S.*

#### Estoppel — to set up ultra vires of corporation.

3. One borrowing money from a corporation which it has no power to lend is not estopped to set up the ultra vires of the transaction for the purpose of defeating an attempt to enforce repayment of the loan. *For other cases, see Corporations, IV. d, 2, in Dig. 1-52 N. S.*

(Carter, Craig, and Duncan, JJ., dissent.)

(February 16, 1916.)

**C**ERTIORARI to the Appellate Court, First District, Branch B, to review a judgment affirming a decree of the Circuit Court for Cook County in complainant's favor in an action brought to foreclose two trust deeds given by defendant upon certain property. Reversed.

The facts are stated in the opinion.

**Note.** — For estoppel against raising the defense of ultra vires in actions brought by private corporation, see annotation following this case, post, 821.  
L.R.A.1917B.

Messrs. Jesse Lowenhaupt and Oscar M. Wolf, for plaintiff in certiorari:

A corporation has only such express powers as are granted to it by the charter or the act of incorporation, with such implied or incidental powers as are necessary to carry the express powers into effect.

3 *Thomp. Corp.* 2d ed. §§ 2106, 2107; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 59, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 21 N. E. 794; *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; 1 *Clark & M. Priv. Corp.* § 123, p. 365.

All powers not expressly specified in a corporate charter are presumed to be excluded, and all doubts are resolved against the corporation.

*American Loan & T. Co. v. Minnesota & N. W. R. Co.* 157 Ill. 641, 42 N. E. 153; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 142, 64 L.R.A. 366, 51 N. E. 664; *Pond v. Royal League*, 127 Ill. App. 476; *Bank of Montreal v. Waite*, 105 Ill. App. 373; *Bailey v. Farmers' Nat. Bank*, 97 Ill. App. 66; *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 21 N. E. 794; 3 *Thomp. Corp.* 2d ed. § 2106; 1 *Clark & M. Priv. Corp.* § 124, p. 368.

The power to loan money, unlike the power to borrow money, is not one of the ordinary or usual powers of a corporation. If a corporation has the power to loan money, it must be by express grant, or because the power is reasonably necessary to carry into effect some of the express powers.

3 *Thomp. Corp.* 2d ed. § 2180; *Leigh v. American Brake-Beam Co.* 205 Ill. 147, 68 N. E. 713; *Frye v. Bank of Illinois*, 10 Ill. 332; 3 *Cook, Corp.* 7th ed. § 690.

Even assuming that the sale of block 139 to Conkling was a perfectly legitimate exercise of corporate power on the part of the

dock company, the loan to Conkling was an entirely independent transaction, and was not the exercise of a reasonable or necessary incidental power.

*Ibid.*; First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. 887; People ex rel. Healy v. Illinois C. R. Co. 233 Ill. 378, 16 L.R.A. (N.S.) 604, 122 Am. St. Rep. 181, 84 N. E. 368, 13 Ann. Cas. 285; Alton Mfg. Co. v. Garrett Biblical Inst. 243 Ill. 298, 90 N. E. 704; Chambers v. Falkner, 65 Ala. 448; Grand Lodge v. Waddill, 36 Ala. 313; New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; People ex rel. Moloney v. Pullman's Palace Car Co. 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664; Fritze v. Equitable Bldg. & L. Soc. 186 Ill. 183, 57 N. E. 873; United States Brewing Co. v. Dolese & S. Co. 259 Ill. 274, 47 L.R.A. (N.S.) 898, 102 N. E. 753; Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990; Kelley, M. & Co. v. O'Brien Varnish Co. 90 Ill. App. 287.

No action can be brought upon an ultra vires contract.

National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; United States Brewing Co. v. Dolese & S. Co. 259 Ill. 274, 47 L.R.A. (N.S.) 898, 102 N. E. 753; Leigh v. American Brake-Beam Co. 205 Ill. 147, 68 N. E. 713; Stacy v. Glen Elynn Hotel & Springs Co. 223 Ill. 546, 8 L.R.A. (N.S.) 966, 79 N. E. 133; Alexander v. Bankers' Union, 187 Ill. App. 469; Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; Free Home Bldg. L. & Homestead Asso. v. Edwards, 223 Ill. 126, 79 N. E. 64; Fridley v. Bowen, 87 Ill. 151; Penn v. Bornman, 102 Ill. 523; Chambers v. Falkner, 65 Ala. 448; Grand Lodge v. Waddill, 36 Ala. 313; Westinghouse Mach. Co. v. Wilkinson, 79 Ala. 314; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Fritze v. Equitable Bldg. & L. Soc. 186 Ill. 183, 57 N. E. 873.

The failure of the dock company to construct or operate the improvements specified in the act of incorporation is no warrant for now construing that act as conferring upon the corporation the power to sell land.

People ex rel. Moloney v. Pullman's Palace Car Co. 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664; First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. 887; People ex rel. Healy v. Illinois C. R. Co. 233 Ill. 378, 16 L.R.A. (N.S.) 604, 122 Am. St. Rep. 181, L.R.A. 1917B.

84 N. E. 368, 13 Am. Cas. 285; 3 Thomp. Corp. 2d ed. §§ 2113-2115.

The exercise of a particular power by a corporation may be entirely proper under certain circumstances and absolutely ultra vires under other circumstances.

National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; Converse v. Emerson, T. & Co. 242 Ill. 619, 90 N. E. 269; Free Home Bldg. L. & Homestead Asso. v. Edwards, 223 Ill. 126, 79 N. E. 64; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; North Ave. Bldg. & L. Asso. v. Huber, 270 Ill. 75, 110 N. E. 312.

If the trust deed here in question is an ultra vires contract, it is unenforceable, and it is immaterial whether or not the dock company was, in the language of counsel for the dock company, "engaging in the loading business."

National Hoe Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; Converse v. Emerson, L. & Co. 242 Ill. 619, 90 N. E. 269; Free Home Bldg. L. & Homestead Asso. v. Edwards, 223 Ill. 126, 79 N. E. 64; North Ave. Bldg. & L. Asso. v. Huber, 270 Ill. 75, 110 N. E. 312; Kelley, M. & Co. v. O'Brien Varnish Co. 90 Ill. App. 287; Chicago Pneumatic Tool Co. v. H. W. Jones Mfg. Co. 91 Ill. App. 547; Myers v. Equitable Bldg. & L. Soc. 92 Ill. App. 27.

In any event, if the trust deed was ultra vires in the true sense of the term, it cannot be made valid under any doctrine of estoppel or ratification.

National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; Converse v. Emerson, L. & Co. 242 Ill. 619, 90 N. E. 269; Free Home Bldg. L. & Homestead Asso. v. Edwards, 223 Ill. 126, 79 N. E. 64; Kelley, M. & Co. v. O'Brien Varnish Co. 90 Ill. App. 287; Chicago Pneumatic Tool Co. v. H. W. Jones Mfg. Co. 91 Ill. App. 547; Myers v. Equitable Bldg. & L. Soc. 92 Ill. App. 27.

Messrs. Bentley, Burling, & Swan for defendants in certiorari.

Farmer, Ch. J., delivered the opinion of the court:

This case comes to this court by writ of certiorari to review a judgment of the appellate court for the first district, affirming a decree of the circuit court foreclosing trust deeds at the suit of the Calumet & Chicago Canal & Dock Company and Murry



Nelson, Jr., trustee, given by Allen Conkling upon property which will for convenience be referred to as blocks 138 and 139 in the Calumet & Chicago Canal & Dock Company's subdivision in South Chicago. The first of the trust deeds was given by Conkling January 22, 1909, upon both blocks, to secure the payment of his notes for \$50,000, made payable to himself, and by him indorsed and delivered to the dock company. At the time the first trust deed was given there was a street or avenue between the two blocks, which had been dedicated to the public by the dock company. It was afterwards vacated, and the dock company conveyed it to Conkling. The second trust deed was given June 19, 1911, upon this strip of land, to secure the same indebtedness, and subject to all the terms, conditions, and covenants contained in the trust deed of January 22, 1909. Before the bill for foreclosure was filed Allen Conkling was adjudged a bankrupt, and Abel Davis, plaintiff in error, was appointed trustee in bankruptcy of his estate. He was made a defendant to the bill to foreclose. Plaintiff in error answered the bill, setting out in full the act of 1869 incorporating the dock company, and alleged that for many years prior to the giving of the notes and trust deeds Conkling was the owner of block 138, and that, if he was indebted to the dock company at the time he gave the first trust deed, it was on account of a loan made him by said company; that said corporation had no power or authority to loan money and accept trust deeds as security, and that making the loan and accepting the trust deeds was ultra vires and beyond its corporate powers and authority, and that the trust deeds created no lien upon the property superior to the title of the plaintiff in error.

The facts with reference to the transaction between the dock company and Conkling are that prior to January 22, 1909, Conkling was the owner of block 138, which was mortgaged to secure a loan of \$30,000. He applied to Murry Nelson, president of the dock company, for a loan on the property. Nelson testified he first told Conkling's agent, who was trying to secure the loan, that his company was not in the business of making loans, and advised him to go to other parties. Nelson testified Conkling's agent came back later and said Conkling would like to buy some property, and inquired if Nelson's company would make a loan if he bought additional property. These negotiations finally resulted in the dock company selling Conkling block 139 for \$15,000, loaning him \$35,000 cash, and taking his notes for \$50,000, secured by trust deed on blocks 139 and 138, which

latter block Conkling already owned. None of the purchase price of block 139 was paid by Conkling, but it was included in the \$50,000 for which the notes and trust deed were given.

After issues were joined in the circuit court, the cause was referred to a master in chancery to take the testimony and report his conclusions. The master reported that the notes and trust deed were given as part of a transaction by which the dock company sold Conkling block 139 for \$15,000, and as an inducement for such purchase the dock company gave him credit for the whole purchase price (\$15,000) and in addition loaned him \$35,000 out of the surplus funds of the dock company; that the dock company had the power, under its charter, to sell block 139 and to loan Conkling \$35,000, as incidental to such sale, and that the notes and trust deeds were valid legal obligations of Conkling. The chancellor overruled exceptions of Abel Davis, trustee in bankruptcy, and entered a decree in accordance with the finding and report of the master. Davis sued out a writ of error from the appellate court for the first district to review the decree. That court affirmed the decree of the circuit court, and the case is brought to this court for review upon a writ of certiorari.

The Calumet & Chicago Canal & Dock Company was created a corporation by special act of the legislature in 1869. The object of its creation, as stated in § 5 of the act, was to construct a canal from some point on the Calumet river to the south branch of the Chicago river or the Illinois and Michigan Canal, as the corporation might determine, and to construct, use, operate, employ, and maintain docks, slips, basins, shipyards, dockyards, dry docks, warehouses, and piers which the corporation might deem necessary and proper. The corporation was given the right to condemn land for its corporate purposes, and to intersect any road, highway, or railroad with its canal. It was given perpetual succession and the usual corporate powers to contract and be contracted with, sue and be sued, etc., and to "purchase, possess, and occupy real and personal estate, and may sell, lease, and employ the same in such manner as it shall determine, . . . and have and exercise all powers necessary as a corporation to carry out the objects of this act." The capital stock was \$500,000, to be divided into shares of \$100 each. The corporation has never constructed a canal, but appears to have acquired considerable land, or land of considerable value, as the president testified its assets were worth about \$3,000,000. He further

testified it had no other source of income than the sale of real estate.

While part of the dock company's brief and argument is devoted to the proposition that the power given it to acquire and possess real and personal estate, and sell, lease, and employ the same, etc., is an express authority to loan its money, its principal reliance to sustain the transaction of making the loan is that it was authorized by the implied powers of the corporation. The dock company insists that, in view of the powers expressly granted to it, its charter should be construed to imply the power to loan money, when the loaning is incidental to the exercise of some express power, or where the corporation has surplus funds not required for use in its business. We think it entirely clear that there is no basis for any claim that the power to loan money was expressly given by the act creating the corporation. The power to "employ" its real and personal estate in such manner as it might determine was given for the purpose of enabling the corporation to carry out the object of its creation. While it was expressly authorized to purchase, possess, and occupy real and personal estate in the exercise of its legitimate corporate purposes and powers, and "employ" the same in such manner as it might determine, this power only conferred authority to acquire property for the purpose, and employ it in carrying out the objects, for which the corporation was created. Having no express authority to loan money, if it possessed any such authority it must be found in its implied powers. The rule is that corporations can only exercise such powers as are conferred in express terms or by necessary implication. The implied powers are presumed to exist in order that such bodies may be able to carry out the express powers granted and to accomplish the purpose of the corporation's creation. An implied or incidental power must be directly or immediately appropriate to the execution of the powers expressly granted, and not one that has a slight or remote relation to it. *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798, and cases there cited. The enumeration of powers expressly granted implies the exclusion of all others not fairly incidental. A power which the law will imply must be one in a sense necessary or needful and suitable to accomplish the object for which the express powers were granted. *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. Whatever incidental powers are reasonably necessary to enable the corporation to perform its corporate functions are implied from the powers ex-

pressly granted. *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990. These general rules are so well settled that further discussion of them or citation of authorities is not required.

The principal question for determination is whether the loan was made as an incidental to the exercise of an express power granted. There is no dispute about the facts as hereinbefore briefly stated. It is contended the loan of \$35,000 was made for the purpose of effecting the sale of block 139, that the corporation had express power to sell real estate, and that the loan was incidental to the sale, and therefore was an incident to the exercise of an express power and authorized under the implied powers. The express power given by § 1 of the statute creating the corporation to purchase and sell real estate did not confer authority to deal in real estate by buying and selling it. The only real estate the corporation was authorized to acquire was such as was reasonably necessary to enable it to carry out the objects of its creation, which were the construction and operation of a canal, shipyards, docks, warehouses, etc. It is contrary to the public policy of this state to permit a corporation to own land not reasonably necessary to enable it to transact its business, and if it acquires land not necessary for that purpose it is required to dispose of it. We do not doubt the power of the dock company to sell its land, for it had never exercised its corporate franchises and therefore had no use for the land. But this sale was not made pursuant to an express power for the purpose of carrying out the objects for which the corporation was created, but rather as a step toward liquidating and winding up the corporation's affairs. If the sale was not made to enable the dock company to carry out the objects of its creation, then the loan cannot be considered as made incidental to the exercise of an express power. "A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interests and chartered objects cannot be justified by implication of law, but are *ultra vires*." *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664.

We regard it as well settled that implied powers exist only for the purpose of enabling a corporation to accomplish the purpose of its existence, and cannot be invoked to authorize acts only remotely connected with the specific purposes for which the corporation was created. *National Home Bldg.*

& L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. 887; Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; Rockhold v. Canton Masonic Mut. Benev. Soc. 129 Ill. 440, 21 N. E. 794; People ex rel. Healy v. Illinois C. R. Co. 233 Ill. 378, 16 L.R.A. (N.S.) 604, 122 Am. St. Rep. 181, 84 N. E. 368, 13 Ann. Cas. 285; United States Brewing Co. v. Dolese & S. Co. 259 Ill. 274, 47 L.R.A. (N.S.) 898, 102 N. E. 753; North Ave. Bldg. & L. Asso. v. Huber, 270 Ill. 75, 110 N. E. 312; Central Transp. Co. v. Pullman's Palace Car Co. supra. The purpose for which the dock company was created was not to sell land, and although the act expressly authorizes it to do so, its powers in that respect were not enlarged above what they would have been if the power had not been expressly granted. No authority was or could have been given it to buy and sell land for other than corporate objects and purposes. However desirable the corporation may have been to sell block 139, and however advantageous it may have been to the stockholders to loan \$35,000 as an inducement to Konkling to buy \$15,000 worth of real estate, the corporation could not lawfully make a loan in order to effect the sale.

We regard National Home Bldg. & L. Asso. v. Home Sav. Bank, supra, as directly in point. In that case the building association bought a lot on which it held a mortgage, which it had the right to do. At the same time and included in the same deed it bought another lot in which it had no interest. The court held the power to purchase property upon which the association had a mortgage, for its own protection, did not authorize it to buy another lot, and that if it could not purchase the lot on which it had a mortgage without buying the other lot it was not authorized to buy at all. So here the corporation, being in process of liquidation and the land not being required for the purpose of enabling it to carry out the objects and purposes of its creation, could lawfully sell it. Such sale, and under such circumstances, however, was not made to aid the corporation in carrying out and accomplishing the objects for which it was organized. Coupling an unlawful act with a lawful one cannot be given the effect of making the unlawful act an authorized and valid act. The corporation had no power, express or implied, to make the loan, and, as said in the case last above cited, if it could not have sold block 139 unless it made the loan, then it should not have made the sale. Conceding that under some circumstances a corporation may law-

fully make temporary loans of its surplus funds, this could only be done as a measure for the promotion of the success and prosperity of the company in carrying out its corporate purposes. This court has sustained acts of corporations which, though not expressly authorized, were held to be legitimate efforts to promote the corporate business and the continued existence of the corporation for the accomplishment of the objects of its creation. Kraft v. West Side Brewery Co. 219 Ill. 205, 76 N. E. 372; Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543. In the case here under consideration the loan was not made in an effort to promote the corporate objects and purposes, or to extend the legitimate business or perpetuate the existence of the corporation. Considered as a loan of surplus funds, as contended by the dock company, made for the purpose of effecting a sale of block 139, it was, under the authorities herein cited, ultra vires the corporation and void, and to the extent the trust deeds were given to secure the loan of \$35,000 they are void and unenforceable.

Contracts made by a corporation which are beyond the scope of its powers are unlawful and void, and cannot be enforced, and in such cases the doctrine of estoppel cannot be applied on the ground that the party against whom it is sought to enforce the contract, having received the benefits of it, cannot be heard to interpose the defense of ultra vires. "The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. That case was quoted with approval in National Home Bldg. & L. Asso. v. Home Sav. Bank, supra, where it was also said: "No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner."

That case was followed and approved in North Ave. Bldg. & L. Asso. v. Huber, 270 Ill. 75, 110 N. E. 312.

The distinction between cases where the corporation's act was beyond its powers and where the act was within its powers, but was improperly exercised, has perhaps not always been clearly recognized or pointed out, and for this reason there may appear to be some confusion in a few cases. The distinction was clearly stated in Lurton v.

Jacksonville Loan & Bldg. Asso. 187 Ill. 141, 58 N. E. 218, in the following language: "The powers of a corporation are limited and delegated, and where a contract is *ultra vires* in the proper sense, as not being within the powers conferred upon the corporation by the legislature or within the object of its creation, the contract is void [citing authorities]; but where the contract is one which the corporation has power to make and is within the scope of its franchise, neither party to the contract who has had the benefit of it can set up as a defense that legal formalities were not complied with, or that the power was improperly exercised."

The correct rule is announced in the cases last above cited as well as in many other cases and in text-books. Conkling is not himself interposing the defense of *ultra vires*, but that defense is being made by the trustee in bankruptcy for the benefit of all Conkling's creditors. Whether a different rule should apply under these circumstances need not be determined, for in our view of the law Conkling would not have been estopped from making that defense himself.

Our conclusion from a consideration of the authorities is that as to the loan of \$35,000 the transaction was void and the trust deeds unenforceable. They were valid liens prior to the claim of the plaintiff in error, as security for \$15,000, the purchase price for block 139, and subject to foreclosure, and all the property embraced therein is subject to sale for nonpayment of said sum according to the terms, provisions, and covenants of said trust deeds.

The decree of the Circuit Court and the judgment of the Appellate Court are reversed, and the cause remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion.

**Carter, J., dissenting:**

I do not concur in the conclusion of this opinion, nor in the reasoning upon which it is based. In my judgment the entire loan may fairly be held as incident to the sale of the real estate in question. The opinion holds the trust deed valid to the extent of \$15,000. I fail to see how, then, it can be held that the balance of the loan is entirely void. Does it not necessarily follow from holding a part of the loan valid that the loaning of the balance can only be held to have been an act in excess of power, and valid on collateral attack, and not an act wholly beyond and outside the scope of the corporate power of the company? *Rector v. Hartford Deposit Co.* 190 Ill. 380, 60 N. E. 528; *People ex rel. Healy v. Shedd*, 241 L.R.A.1917B.

Ill. 155, 80 N. E. 332; *Golconda Northern R. Co. v. Gulf Lines Connecting R. Co.* 265 Ill. 194, 106 N. E. 818, Ann. Cas. 1916A, 833. If it be assumed that the power of the corporation to sell land is not the main essential power of the corporation, but only a subsidiary one, under the reasoning of this court in former decisions this loan may be held to come within the powers incidental to the main or essential purpose of the corporation.

It does not seem to me that the loan was *ultra vires*, but rather that it was a legitimate investment of surplus funds of the corporation in an interest-bearing security and within the implied powers of the corporation. The opinion concedes that circumstances may arise when any corporation may lawfully make temporary loans of its surplus funds. This, of course, means whether the corporation be a going concern or in the process of liquidation. Situations may often arise where a corporation will require months, and sometimes even years, to liquidate, and when it cannot wisely or safely distribute its funds to the proper parties as rapidly as they are paid in. What is meant in the opinion by a temporary loan? Does it mean one for thirty, sixty, or ninety days, or may it be for six months or longer? Then, too, what kind of security shall be taken? Must each case be determined by its own special facts? Before any corporation is safe in making such a loan, must it be submitted to a court for decision? If a temporary loan can be made under any circumstances, is that not an admission that the corporation is acting within its implied powers in making such loan? How can the doctrine laid down in the opinion be reconciled with the conclusion in this case that the loan of \$15,000 is valid? Of course, no one can contend that a corporation such as this, under its charter, is authorized to engage exclusively, or even largely, in the business of loaning money. Can a temporary loan be made by taking as security municipal or other negotiable bonds? Most of such securities are usually for a long term of years, but are readily negotiable. If such a loan can be made, why may not a loan be made by investing in a mortgage on real estate? It may well be urged that a mortgage on real estate is a safer investment than many negotiable bonds, and ordinarily, as to large investments, just as negotiable. "This power to loan may reasonably be implied in the case of corporations which, from the nature of their business, must necessarily keep on hand a large fund available for future contingencies. Such corporations ought to have the implied power to loan such surplus funds on security that may be readily con-

verted into cash." 3 *Thomp. Corp.* 2d ed. § 2181. It cannot be that a corporation has the implied power to make a loan only to assist in carrying on an active business. A corporation, while liquidating, must necessarily exercise its implied powers the same as when it is a going concern. The fair test as to the power of a corporation to make a loan should be, not whether the act under discussion will directly promote the original corporate enterprise, but whether such act is reasonably connected with and adapted to promote some lawful corporate action which the corporation is proposing to take. The activities of a corporation in liquidating its property after the corporate enterprise has been abandoned certainly are not different, in principle, from its activities in endeavoring to carry out the original corporate purpose, and the implied powers must be the same in either case.

But, even if it be held that the loan was *ultra vires*, the decision of the court in this case is contrary to the general rule that the defense of *ultra vires* will not be allowed to accomplish an injustice. This court said in *Kadish v. Garden City Equitable Loan Bldg. Asso.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236: "The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."

In *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478, 488, it was said (p. 16): "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it."

In *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 76, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496, 499, in referring to an illegal contract, the court said (p. 76): "The illegality of the contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such case the party receiving may be made to refund to the person from whom it has received the property for the unauthorized L.R.A.1917B.

purpose, the value of that which it has actually received."

In this same opinion, commenting on another decision, it is stated on the same page: "The court, while assuming that the statute, by clear implication, forbade the bank from making a loan on real estate, refused to restrain the bank from enforcing the deed of trust."

The recent authorities, in most jurisdictions if not all, hold that the theoretical notion that the corporation has exceeded its powers or violated some shadowy principle of public policy has largely been abandoned. In such cases the decisions are placed on the more solid ground of damage either suffered or threatened.

"The more modern as well as the correct rule is that in all such cases the corporation may recover unless the statute says that it shall not. It has been expressly held that, where the contract was neither immoral nor against public policy, and no penalty was attached, the corporation could recover on the security though the loan was in violation of the charter." 3 *Thomp. Corp.* 2d ed. §§ 2182, 2119.

Land-holding contrary to law always has been recognized in this state as against public policy, yet this court in *Walker v. Taylor*, 252 Ill. 424, 96 N. E. 1055, held that, where the parties had organized an Iowa corporation to deal in Illinois land, the court would not forfeit their rights to the land, but created an equitable claim in their favor against such land.

From a reading of the decisions on the question of *ultra vires* it is quite apparent that the question as to whether a corporation has by its acts exceeded its powers is often a close one and difficult to decide. This court has not heretofore decided any case that would absolutely control on the facts here. Conkling, in this case, had a past-due mortgage on his plant. He had to extend it or his business would be closed. The dock company in good faith lent him the money with which to take up the mortgage, and he received the full benefit of the loan. Under such circumstances he certainly could not repudiate this obligation. Under all well-settled principles of law, why should Conkling's assignees or creditors have any greater rights in equity than he would have had? It is a rule of universal application that courts of equity will never affirmatively enforce either a penalty or a forfeiture. 2 *Story, Eq. Jur.* 13th ed. § 1319; 16 *Cyc.* 80; *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 957. By this decision the dock company, in a court of equity, is being

deprived of its property and of any remedy to recover the same. In effect a forfeiture is being enforced. By reason and the great weight of authority, it seems to me the canal and dock company should be permitted to realize on the security it holds for the amount of its loan. To do so is not to uphold an unlawful contract, but rather to enforce the implied contract of Conkling to make compensation for the money, which

neither he nor his creditors, in justice, have the right to retain.

Craig and Duncan, JJ., also dissent.

First petition for rehearing denied April 13, 1916.

Second petition for rehearing denied June 9, 1916.

### **Annotation—Estoppel against raising the defense of ultra vires in actions brought by private corporation.**

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*1. Scope of monograph.*

In the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737, the question how far the defendant in an action brought upon an ultra vires contract of a private corporation is estopped to plead its invalidity was discussed with reference to cases in which the party sued is the corporation. In the present monograph it is proposed to supplement the former discussion by a review of the cases which bear upon this question, in so far as it is concerned with actions in which the corporation is the complainant.

*I. Introductory.**2. Distinctive considerations applicable to cases in which the action is brought by the corporation.*

In so far as the right of action upon an executed ultra vires contract is regarded as a matter which depends merely upon the technical quality of the contract, the reasons for admitting or excluding the operation of the principle of estoppel are, it is manifest, precisely the same whether we have to do with cases in which the corporation is the defendant, or with cases in which it is the moving party. In this point of view the only question which a court is called upon to determine is whether it is prepared to indorse the theory that a prohibited contract may in effect be validated as a result of what has been done in pursuance of it subsequently to its formation. A full discussion of this phase of the remedial rights of the party who has performed the contract on his side will be found in §§ 13-18 of the monograph referred to in § 1, *supra*, where all the relevant decisions and dicta are reviewed. In this place it will be sufficient to observe that, if the fact of the contract's having been prohibited is treated as the conclusive criterion of those rights in L.R.A.1917B.

cases where the corporation is the plaintiff, it clearly should not be allowed to recover on the ground urged in an early New York case, viz., that, if the loan in question was "illegal and unauthorized, it must be considered the act of the agents or officers of the company, and not of the company itself; and that they, therefore, ought to be allowed to recover back their property thus improperly disposed of." The court said: "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter or incurring any other penalty, if this principle could be established."<sup>1</sup>

If, however, the range of the discussion is extended so as to embrace the various secondary considerations which have been adverted to as reasons for and against allowing the maintenance of an action upon the contract, it is clear that the elements which determine whether such an action should be allowed are in some important respects dissimilar, according as the corporation is the defendant or the plaintiff. As pointed out in § 66 of the monograph referred to in § 1, *supra*, above, two of the most serious objections to the doctrine of estoppel in the general form in which it has been enunciated and applied in favor of parties suing corporations are (1) that it does not adequately safeguard the interests of innocent shareholders, and (2) that it may and frequently does operate to the disadvantage of persons other than the plaintiffs who have had dealings with corporations in regard to matters within the scope of their powers. The force of both of these objections lies in the fact that, if an ultra vires contract which has been performed by the plaintiff is treated as being enforceable upon the same footing as an authorized contract, those descriptions of persons who are chiefly concerned in the conservation of the financial resources of corporations will suffer prejudice in an appreciable number of instances. In the view of those who emphasize these objections, the possibility that this result may follow is a circum-

<sup>1</sup> *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* (1831) 7 Wend. (N. Y.) 31.

stance which demonstrates that the rule which affirms the enforceability of the contract cannot be sound. On the other hand, it is clear that, in respect of actions by corporations, these objections possess little if any weight. Indeed, it would seem that the conditions under which injury will be sustained by stockholders and creditors from allowing a corporation to enforce an ultra vires contract which it has performed occur so rarely that the risk of such injury may warrantably be treated as a negligible factor, when the correctness of general principles is under discussion.

Having regard to these contrasted aspects of the doctrine of ultra vires, there would seem to be adequate reasons for placing in a separate category the cases which deal with the remedial rights of the corporation as moving party. It is plain that even a court which is convinced that the purely logical reasons for refusing to allow a prohibited contract to be virtually validated by the operation of the principle of estoppel are unanswerable might well deem itself justified in taking, with respect to such cases, the position that the defense of invalidity should be excluded, because the exclusion not only does not operate to the prejudice of the two descriptions of persons whose interests are assumed to be promoted by the application of the doctrine of ultra vires, but is, generally speaking, necessary for the purpose of safeguarding those interests.<sup>2</sup> It is true that the materiality of this consideration as a reason for segregating the cases in which the corporation is the moving party has not been explicitly referred to by any of the courts. But the propriety of the classification which it suggests is also indicated by the nature and consequences of a theory which has frequently been recognized by the courts; viz., that only the state can raise the question of ultra vires. As this theory has been applied

far more frequently in cases involving actions brought by corporations than in those in which corporations were defendants, and cases of the former class may be said to constitute the most, if not the only, appropriate field for its operation (see § 7, *infra*), it may be regarded as an additional ground for separating the two classes of cases. Still another ground for the separation is indicated by the following statement: "A corporation, like an individual, when sued on a contract, may set up as a defense its want of power or capacity to make such [i. e., ultra vires] contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor is a defense personal to the party who is under it, and cannot be taken advantage of by another."<sup>3</sup> That this passage does not embody a correct statement of the law in so far as it assumes that the distinction predicated is recognized by all the courts is shown by the English, Federal, and Alabama cases cited in §§ 15, 16, and 19, *infra*. But for the purposes of the present discussion, the importance of the analogy to which it draws attention is manifest.

**3. Estoppel not predicable from the mere circumstance of the defendant's having contracted with the corporation.**

The doctrine that, "by contracting with a corporation, the party contracting estops himself from disputing the power of the corporation to make such contract," has been explicitly repudiated.<sup>1</sup> The correctness of the position thus taken is indisputable, for it is the only one which can be reconciled with the universally accepted theory that no action can be maintained upon an ultra vires contract so long as it remains executory.<sup>2</sup>

The analogous doctrine which prevails,

<sup>2</sup> In this connection the following remarks in *Wald v. Wheelon* (1914) 27 N. D. 624, 147 N. W. 402, with regard to the restricted powers of a bank, may be quoted: "This limitation is for the protection and to promote the safety of the stockholders, depositors, and other customers, but especially of depositors and customers. *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 531. Recognition of this is probably one of the most potent reasons given by courts for holding that a bank may recover on an executed contract made in violation of the prohibition. They reason that the legislative intent was to protect the depositors, and that to deny recovery when L.R.A.1917B.

the other party has the bank's money would not only promote injustice, but would defeat the object sought to be accomplished. On the other hand, where to permit a recovery would defeat the end sought to be attained, the contract will not be enforced, and if not enforceable, damages for its breach cannot be recovered."

<sup>3</sup> *Oregonian R. Co. v. Oregon R. & Nav. Co.* (1884) 10 Sawy. 464, 22 Fed. 245.

<sup>1</sup> *Wilks v. Georgia P. R. Co.* (1885) 79 Ala. 180. See also *Long v. Georgia P. R. Co.* (1890) 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

<sup>2</sup> The ruling to the opposite effect in *Standard Sewing Mach. Co. v. Frame*



with respect to actions against corporations is referred to in § 1 of the monograph referred to in § 1, *supra*.

**3a. Estoppel as predicated from defendant's knowledge of conditions.**

In a few cases the inability of the defendant to resist an action brought by a corporation was predicated upon the ground that he was chargeable with knowledge of the extent of the corporate powers when he entered into the contract. The conception which was explicitly relied upon in two of these cases was that the defendant, having assented to the transaction, was estopped from contesting its validity.<sup>1</sup> In the other cases that conception was not in terms adverted to, but may be regarded as having been the ultimate ratio decidendi.<sup>2</sup> With regard to such rulings it is sufficient to point out that, if the mere fact of assenting to the formation of ultra vires contracts were conceded to produce an estoppel against alleging its invalidity, the well-settled theory as to the nonenforceability of such contracts while they remain executory on both sides would be entirely overthrown. Some specific rulings adverse to the theory propounded are cited in the opening section of the monograph appended to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737.

**4. Applicability of estoppel doctrine in cases where relief against the contract is sought.**

One class of cases in which the corporation is technically the moving party,

viz., those in which it is seeking to be relieved from the obligations of a contract which the other party has performed wholly or in part, is discussed in the monograph appended to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737, for the reason that the essential question which they involve is whether that performance estops the corporation from repudiating a contract of which it has received the benefits.

On the other hand, the actual point presented in a case in which the plaintiff in an action brought against a corporation seeks relief on the ground that the contract is ultra vires obviously is whether the defendant can hold him liable. Such a case, therefore, really belongs to the same category as those discussed in the present monograph, and consequently his right to the relief asked may sometimes depend upon whether the principle of an estoppel, as predicated from an acceptance of the benefits of the contract, prevails in the jurisdiction in which the action is brought.<sup>1</sup> But, irrespective of the position taken with regard to that doctrine, it is clear that such relief may properly be denied on equitable grounds of general application.<sup>2</sup>

**5. Right of action considered with reference to the element of mutuality.**

It has been observed in a leading New York case that "the only justification for such a plea [i. e., of ultra vires] by an individual sued upon a contract with a corporation is that the obligation is not

(1900) 2 Penn. (Del.) 430, 49 Atl. 188, a nisi prius case, is clearly erroneous. See § 26, *infra*.

<sup>1</sup> Provident Loan & Bldg. Asso. v. Carter (1900) 107 Wis. 383, 83 N. W. 655 (suit to foreclose mortgage given by member of building and loan association to secure loan), following Leahy v. National Bldg. & L. Asso. (1898) 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

<sup>2</sup> In *Voris v. Star City Bldg. & L. Asso.* (1898) 20 Ind. App. 631, 50 N. E. 779, the court referred to the rule that "one who deals with a corporation is presumed to know the powers and limitations of its authority, and hence is estopped to plead its want of authority." The authority cited is 2 Beach on Private Corporations, p. 703, § 424, and several cases, the irrelevancy of which as precedents will, it is apprehended, be granted by anyone who examines them. There seems to have been some confusion in the mind of the court between ultra vires contracts and those belonging to the first of the two classes discussed in the next section. L.R.A.1917B.

In *Huguenot Mills v. Jempson* (1903) 68 S. C. 363, 102 Am. St. Rep. 673, 47 S. E. 687 (purchase of land), the court said: "The defendants are charged with knowledge that the plaintiff could not enter into a legal partnership, . . . and that in the contract to purchase they were dealing with the plaintiff and Rountree as joint owners of the property, who as such had a right to sell it. For this reason, they cannot now dispute the validity of the contract of purchase or the liabilities which fell upon them when they repudiated it."

<sup>1</sup> In *Eckman v. Chicago, B. & Q. R. Co.* (1897) 169 Ill. 312, 38 L.R.A. 750, 48 N. E. 496, where the action was brought by a servant to recover for personal injuries, the defense that he had accepted the benefits of a contract with its relief department was sustained against his contention that the contract was ultra vires. It should be noted that this decision was rendered before the rejection of the doctrine of estoppel in Illinois. See § 30, *infra*.

<sup>2</sup> In *Wilson v. Torchon Lace & Mercantile Co.* (1912) 167 Mo. App. 305, 149 S.

mutual, as the other party, the corporation, would not be bound by it."<sup>1</sup> But this is manifestly an erroneous statement. The ground upon which the plea is allowed by the courts which hold it to be effective is simply that an ultra vires contract, being, *ex hypothesi*, the subject of a prohibition, express or implied, comes within the scope of the general rule of law which declares that a contract made in violation of a statute cannot be the basis of an action. It is somewhat singular that this aspect of the matter should have been overlooked by the court, especially as this rule was applied in several of the earlier cases in New York. See § 44, *infra*. The English case cited is certainly not in point, because the invalidity of the contract there under discussion was predicated not on the ground of its being ultra vires, but simply on the ground of its being unsealed.<sup>2</sup>

**6. Applicability of doctrine of estoppel in actions brought by municipal corporations.**

In § 48 of the monograph appended to Creditors' Claims & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737, it was stated that the authorities are not harmonious with respect to the ques-

W. 1156, the decision that the plaintiff could not compel the corporation to carry out an ultra vires contract for the redemption of its own stock, by repaying to him what he had paid for the stock, was based on these reasons: "Counsel seem to argue that this is to be treated as an action for money had and received. While that form of action to a certain extent ingrafts equitable principles upon actions at law, it surely cannot be used to evade the application of settled equitable principles. Looking at the equities of this case, this plaintiff received a large number of shares of stock as dividends pertaining to this stock; he also received a large sum of money by way of dividend on the stock. He retains all this, making no offer of refund of the money received or to return the dividend stock, thirty-three and one third shares. On the contrary, he has placed the latter out of his power to return by having sold and transferred it to an outside party. So that, as far as the equities of the case are concerned, plaintiff does not come into court with clean hands."

See also *Mott v. United States Trust Co.* (1855) 19 Barb. (N. Y.) 568, the effect of which is stated in § 44, note 9, *infra*.

<sup>1</sup> *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 70, 20 Am. Rep. 504. This statement has been cited with approval in *Bowman Dairy Co. v. Mooney* (1890) 41 Mo. App. 665, where it was somewhat expanded in the following terms: "When an indi-

tion whether municipal corporations can be estopped from raising the defense of ultra vires. The applicability of the doctrine of estoppel in actions brought by such corporations has not been much considered; and as the subject lies beyond the scope of the present monograph, it will be sufficient to cite a case in which the doctrine was assumed to be controlling in one of the jurisdictions in which it has been adopted in regard to private corporations.<sup>1</sup>

**II. Doctrine of estoppel considered with relation to the theory as to the exclusive right of the state to raise the question of invalidity.**

**7. Generally.**

The cases in which the ground assigned for holding corporations to be entitled to recover upon contracts which they had performed on their side was that the question of ultra vires could be raised by the state only are so intimately connected with those in which the ratio decidendi was that such performance created an estoppel against interposing the defense of ultra vires, that an examination of the authorities with the view of showing the manner in which the two classes of cases are interrelated will

vidual is sued upon a contract by a corporation, he is permitted to make the defense of ultra vires upon the theory that, at the time of its violation by him, there was no legal obligation on the part of the corporation to comply with its part of the contract. In other words, there is a want of mutuality in the contract. . . . When such a contract has been fully performed by the corporation, the mutuality of the obligation becomes an immaterial question for the reason that the defendant can have no occasion to seek its enforcement."

For similar language, see *Lauder v. Peoria Agri. & Trotting Soc.* (1897) 71 Ill. App. 475.

<sup>2</sup> *Fishmonger's Co. v. Robertson* (1843) 5 Mann. & G. 131, 134 Eng. Reprint, 510, 6 Scott. N. R. 56, 12 L. J. C. P. N. S. 185.

<sup>1</sup> *New York v. Sonneborn* (1889) 113 N. Y. 423, 21 N. E. 121. The court said: "If the lease were evil in itself, and so void as against public policy, or if it had been declared illegal or void by statute, as the contract was in *Pratt v. Eaton* (1879) 18 Hun (N. Y.) 293, reversed in (1880) 79 N. Y. 449, a different question would have arisen. It is simply one of capacity or power, and the rule I have referred to is applicable to an action brought by a municipal as well as another corporation. The party benefited by its exercise cannot be heard to deny its existence."

be advisable for the purpose of the present monograph.

While the theory as to the exclusive right of the state to interfere has been invoked in cases in which the corporation was the defendant (see § 5 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), the most appropriate, perhaps the only appropriate, field for its operation would seem to be the class of cases discussed in the present monograph. So far as regards the former class of cases, the hypothesis that the interest of shareholders and creditors will not be injuriously affected by an allowance of the claim based on the ultra vires contract cannot warrantably be entertained as one *juris et de jure*. Consequently, where it is a question of framing a general rule with regard to the nature and extent of the remedies which may be pursued against the corporation, these interests are elements of which account must be taken, if the possibility of injustice is to be adequately guarded against. In the latter class of cases, on the other hand, it would seem to be a perfectly legitimate assumption that these interests will suffer no prejudice if the action is prosecuted to judgment, for the outcome will be the recovery of a stipulated advantage to which, apart from the effect of the invalidity of the contract, it is undeniably entitled. Under the circumstances involved in such

cases, therefore, the state is the only *outside* party having a tangible right to object to the enforcement of the contract, and may, if it wishes, waive that right.<sup>1</sup>

From the authorities cited in two next sections it is apparent that, in cases involving the remedial rights of the corporation as moving party, the theory as to the exclusive right of the state to object to the ultra vires character of the contract has been applied by courts which reject the principle of estoppel as well as by those which approve it. Hence, so far as regards the jurisdictional areas within which the theory and the principle have been adopted, there is no such general correspondence traceable in this respect as is indicated by the fact that in cases involving actions against corporations their operation is virtually coextensive. See § 5 of the monograph, appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

#### 8. *Exclusive right of state affirmed with reference to ultra vires contracts.*

The right of the corporation to maintain an action upon an ultra vires contract which it has performed on its side has frequently been treated as a consequence of an assumed theory that the question of invalidity is one which can be raised only by the state.<sup>1</sup> This is the theory underlying the numerous deci-

<sup>1</sup> For the purposes of the present discussion it is obviously unnecessary, and indeed out of place, to consider the rare cases in which stockholders (and perhaps creditors) might have reason to complain of the prosecution of an action on the ground of the issues being uncertain and the outlays being too large to incur under the circumstances.

<sup>1</sup> *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188 (loan on mortgage); *Mutual L. Ins. Co. v. Wilcox* (1878) 8 Biss. 203, Fed. Cas. No. 9980 (loan); *Union Water Co. v. Murphy's Flat Plumbing Co.* (1863) 22 Cal. 620, 3 Mor. Min. Rep. 487 (mortgage); *Bay City Bldg. & L. Asso. v. Broad* (1902) 136 Cal. 625, 69 Pac. 225 (loan); *Barrow v. Bank of Louisiana* (1847) 2 La. Ann. 453 (loan on mortgage); *Southern Lumber Co. v. Holt* (1911) 129 La. 273, 55 So. 986 (assignment of cause of action); *Little v. O'Brien* (1812) 9 Mass. 423 (action on notes given by shareholders for the price of their shares); *Chester Glass Co. v. Dewey* (1819) 16 Mass. 94, 8 Am. Dec. 128 (action for price of articles sold at store kept by company); *Slater Woollen Co. v. Lamb* (1887) 143 Mass. 420, 9 N. E. 823 (similar facts); *Chaffee v. Middlesex R. Co.* (1888) 146 Mass. 224, 16 N. E. 34 (action for certificate of stock of another company); *Grand Gulf Bank v. Archer* (1847) L.R.A.1917B.

8 *Smedes & M. (Miss.)* 151 (excessive rate of interest reserved); *Haynes v. Covington* (1850) 13 *Smedes & M. (Miss.)* 408 (loan); *Littlewort v. Davis* (1874) 50 *Miss.* 403 (loan); *Hinds County v. Natchez, J. & C. R. Co.* (1904) 85 *Miss.* 599, 107 *Am. St. Rep.* 305, 38 *So.* 189 (sale of franchises by railway company); *Union Nat. Bank v. Touzalin Improv. Co.* (1901) 1 *Neb.* (unof.) 116, 95 *N. W.* 489 (purchase of stock in another corporation); *Silver Lake Bank v. North* (1820) 4 *Johns. Ch. (N. Y.)* 370 (as to the precise significance of the remarks of Chancellor Kent in this case, see review of New York cases in § 44, *infra*); *Bank of State v. Hammond* (1845) 1 *Rich. L. (S. C.)* 281 (bond secured by guaranty was taken by bank authorized only to make a loan on such an instrument, when secured by mortgage); *Wroten v. Armat* (1879) 31 *Gratt. (Va.)* 228; *John V. Farwell Co. v. Wolf* (John V. Farwell Co. v. Josephson) (1897) 96 *Wis.* 10, 37 *L.R.A.* 138, 65 *Am. St. Rep.* 22, 70 *N. W.* 289, 71 *N. W.* 109 (action by corporation as assignee of claims for damages); *Security Nat. Bank v. St. Croix Power Co.* (1903) 117 *Wis.* 211, 94 *N. W.* 74 (foreclosure of mechanics' lien for construction work performed by a bank).

The restricted form in which this doctrine has been enunciated in Illinois, Missouri,

sions to the effect that the power of a corporation to take and hold the title to property cannot be raised in an action brought by it with respect to the property.<sup>2</sup> Such decisions illustrate one of the branches of a still broader rule, under which the validity of the title to

property, in so far as it depends upon the extent of the corporate powers, is treated as an element to be excluded from the controversy, irrespective of whether the corporation is the plaintiff or the defendant.<sup>3</sup> The authorities are not agreed as to the applicability of this rule in

and Mississippi is discussed in the sections in which the decision in those states are reviewed. See subtitle V., *infra*.

In *State ex rel. Hadley v. Bankers Trust Co.* (1911) 157 Mo. App. 557, 138 S. W. 669, it was laid down as follows: "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void, but only voidable, not wrong *per se* or against public policy and good morals, but wrong merely because the act is not within the scope of the powers conferred by law on the corporation."

<sup>2</sup> For cases in which this rule was recognized with respect to real property, see *Cowell v. Colorado Springs Co.* (1879) 100 U. S. 55, 25 L. ed. 547; *Jones v. Habersham* (1882) 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; *Seymour v. Slide & Spur Gold Mines* (1884) 153 U. S. 523, 38 L. ed. 807, 14 Sup. Ct. Rep. 847; *Brown v. Schieier* (1904) 194 U. S. 13, 48 L. ed. 857, 24 Sup. Ct. Rep. 558, affirming (1902) 55 C. C. A. 475, 118 Fed. 981, which affirmed (1901) 112 Fed. 577; *Farmers' Loan & T. Co. v. Green Bay & Min. R. Co.* (1882) 11 Biss. 334, 12 Fed. 773; *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* (1898) 119 Ala. 105, 24 So. 114; *Rachels v. Stecher Cooperae Works* (1910) 95 Ark. 6, 128 S. W. 348; *Natoma Water & Min. Co. v. Clarkin* (1860) 14 Cal. 544; *Alexander v. Tolleston Club* (1884) 110 Ill. 73; *Springer v. Chicago Real Estate Loan & T. Co.* (1902) 102 Ill. App. 294, affirmed in (1903) 202 Ill. 17, 66 N. E. 850; *Mosher v. Rogers* (1879) 3 Ill. App. 577; *Warner v. De Witt County Nat. Bank* (1879) 4 Ill. App. 305; *Chicago, B. & Q. R. Co. v. Lewis* (1880) 53 Iowa, 101, 4 N. W. 842; *Franklin v. Twogood* (1865) 18 Iowa, 515; *State Security Bank v. Hoskins* (1906) 130 Iowa, 340, 8 L.R.A.(N.S.) 376, 106 N. W. 764; *Delta Duck Co. v. Barrios* (1914) 135 La. 357, 65 So. 489; *Delta Duck Co. v. Buras* (1914) 135 La. 364, 65 So. 491; *First Nat. Bank v. Shewalter* (1911) 153 Mo. App. 635, 134 S. W. 42; *Missouri Valley Land Co. v. Bushnell* (1881) 11 Neb. 192, 8 N. W. 389; *Cross v. Seaboard Air Line R. Co.* (1916) — N. C. —, 90 S. E. 14; *Goundie v. Northampton Water Co.* (1847) 7 Pa. 233; *Advance Thresher Co. v. Rockafellow* (1903) 16 S. D. 462, 93 N. W. 652; *Russell v. Texas & P. R. Co.* (1887) 68 Tex. 646, 5 S. W. 686; *House of Mercy v. Davidson* (1897) 90 Tex. 529, 39 S. W. 924; *Lechenger v. Merchants' Nat. Bank* (1906) — Tex. Civ. App. —, 96 S. W. 638; *Knowles v. Northern Texas Traction Co.* (1909) — Tex. Civ. App. —, 121 S. W. 232; *Rutland & B. R. Co. v. Proctor* (1856) 29 Vt. 93; *Fayette Land L.R.A.* 1917B.

*Co. v. Louisville & N. R. Co.* 93 Va. 274, 24 S. E. 1016; *Hall & P. Furniture Co. v. Wilbur* (1892) 4 Wash. 644, 30 Pac. 665; *John V. Farwell Co. v. Wolf* (John V. Farwell Co. v. Josephson) (1897) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109; *Hubbard v. Haley* (1897) 96 Wis. 578, 71 N. W. 1036; *Illinois Steel Co. v. Warras* (1909) 141 Wis. 119, 123 N. W. 656.

For cases involving personal property, see *Peru Plow & Implement Co. v. Harker* (1906) 75 C. C. A. 475, 144 Fed. 674; *Southern Lumber Co. v. Holt* (1911) 129 La. 273, 55 So. 986; *Wade v. American Colonization Soc.* (1846) 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324; *St. Louis Stoneware Co. v. Partridge* (1880) 8 Mo. App. 580; *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (1908) 48 Tex. Civ. App. 555, 107 S. W. 609; *Farmers' & M. Bank v. Detroit & M. R. Co.* (1863) 17 Wis. 373.

For a case in which a different doctrine was applied, see *Thweatt v. Bank of Hopkinsville* (1883) 81 Ky. 1.

<sup>3</sup> "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188.

"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers." *Kerfoot v. Farmers' & M. Bank* (1910) 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14, affirming *Hall v. Farmers' & M. Bank* (1898) 145 Mo. 418, 46 S. W. 1000 (suit to set aside conveyance of land to national bank).

See also *Runyan v. Coster* (1840) 14 Pet. (U. S.) 122, 10 L. ed. 382; *Smith v. Sheeley* (1870) 12 Wall. 358, 20 L. ed. 430; *American & F. Christian Union v. Yount* (1879) 101 U. S. 352, 25 L. ed. 888; *Chattanooga, R. & C. R. Co. v. Evans* (1895) 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *Rogers v. Nashville, C. & St. L. R. Co.* (1898) 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299; *Long v. Georgia P. R. Co.* (1890) 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; *Hough v. Cook County Land Co.* (1874) 73 Ill. 23, 24 Am. Rep. 230; *Baker v. Neff* (1880) 73 Ind. 68; *Cooney v. A. Booth Packing Co.* (1897) 169 Ill. 370, 48 N. E. 406; *De Witt County Nat. Bank v. Mickel-*

respect of suits for specific performance.<sup>4</sup>

*9. — other contracts of an analogous character.*

The doctrine discussed in the preceding sections is in harmony with the rules in two other classes of cases which have been enunciated with respect to the right of corporations to sue upon contracts which involve descriptions of invalidity different from, but analogous to, that which is predicated on the ground of ultra vires.

berry (1910) 244 Ill. 77, 135 Am. St. Rep. 304, 91 N. E. 86; Hossack v. Ottawa Development Asso. (1910) 244 Ill. 274, 91 N. E. 439; *Lauder v. Peoria Agri. & Trotting Soc.* (1897) 71 Ill. App. 475; *Henderson v. Virden Coal Co.* (1897) 78 Ill. App. 437; *Hayward v. Davidson* (1872) 41 Ind. 214; *Miller v. Flemingsburg & F. S. Turnp. Co.* (1900) 109 Ky. 475, 59 S. W. 512; *Barrow v. Bank of Louisiana* (1847) 2 La. Ann. 453; *Hagerstown Mfg. Min. & Land Improv. Co. v. Keedy* (1900) 91 Md. 430, 46 Atl. 965; *Hubbard v. Worcester Art. Museum* (1907) 194 Mass. 280, 9 L.R.A.(N.S.) 689, 80 N. E. 490, 10 Ann. Cas. 1025 (petition by heirs to file information in the nature of a quo warranto); *Evangelical Baptist Benev. & Missionary Soc. v. Boston* (1910) 204 Mass. 28, 90 N. E. 572 (appeal from refusal of assessor to abate tax assessed to petitioner); *Butterworth v. Kritzer Mill Co.* (1897) 115 Mich. 1, 72 N. W. 990; *Baker v. Northwestern Guaranty Loan Co.* (1886) 36 Minn. 185, 30 N. W. 464; *Chambers v. St. Louis* (1860) 29 Mo. 576; *Land v. Coffman* (1872) 50 Mo. 243; *Shewalter v. Pirner* (1874) 55 Mo. 218; *Connecticut Mut. L. Ins. Co. v. Smith* (1893) 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; *Hall v. Farmers' & M. Bank* (1898) 145 Mo. 418, 46 S. W. 1000; *Ancell v. Southern Illinois & M. Bridge Co.* (1909) 223 Mo. 209, 122 S. W. 709; *Watts v. Gantt* (1894) 42 Neb. 869, 61 N. W. 104; *Northeastern Teleph. & Teleg. Co. v. Hepburn* (1907) 72 N. J. Eq. 7, 65 Atl. 747, reversed in (1907) 73 N. J. Eq. 657, 69 Atl. 249; *Moskowitz v. Hornberger* (1897) 20 Misc. 558, 46 N. Y. Supp. 462; *Mallett v. Simpson* (1886) 94 N. C. 37, 55 Am. Rep. 594; *Leazure v. Hillegas* (1821) 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.* (1847) 7 Pa. 233; *Barrow v. Nashville & C. Turnp. Co.* (1848) 9 Humph. (Tenn.) 304; *Taylor v. Davidson* (1909) — Tex. Civ. App. —, 120 S. W. 1018; *Mansfield v. Neff* (1913) 43 Utah, 258, 134 Pac. 1160; *Wroten v. Armat* (1879) 31 Gratt. (Va.) 228; *Litchfield v. Preston* (1900) 98 Va. 530, 37 S. E. 6; *Milton v. Crawford* (1911) 65 Wash. 145, 118 Pac. 32; 2 *Thomp. Corp.* 2d ed. § 2807; *Cook, Corp.* § 694; *Machen, Corp.* §§ 1050, 1054.

<sup>4</sup>In *Kohlruess v. Zachery* (1913) 139 Ga. 625, 46 L.R.A.(N.S.) 72, 77 S. E. 812, it L.R.A.1917B.

*(a) Contracts made with corporations not legally organized.*

The right of a de facto corporation to enforce a contract has been affirmed on two distinct grounds; viz., (1) that the regularity of its organization could not be attacked except in a direct proceeding by the state;<sup>1</sup> and (2) that "one who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized."<sup>2</sup> The principle of an estoppel has, in respect of this class of cases, been adopted by several of the

was laid down: "The courts will not aid the corporation to compel specific performance of a contract for the purchase of land which it has no power under its charter to acquire and own. . . . The distinction between the two classes of cases is that the courts will not interfere with a contract that is executed, but will refuse to aid a corporation in enforcing a contract for the purchase of land that is merely executory."

The same doctrine was recognized in *Land v. Coffman* (1872) 50 Mo. 243, and *Heiskell v. Chickasaw Lodge* (1889) 87 Tenn. 668, 4 L.R.A. 699, 11 S. W. 825.

On the other hand, in *Bank of Poitiaux* (1825) 3 Rand. (Va.) 136, 15 Am. Dec. 706, a suit for the specific performance of a contract to sell land was sustained.

In *Coleridge Creamery Co. v. Jenkins* (1902) 66 Neb. 129, 92 N. W. 123, a suit for the specific performance of a similar contract was held to be maintainable; but the decision was put upon the special ground that, as the improvements made upon the property by the purchasing corporation had been carried out with the active assistance of the vendor, a gross fraud would result if he were permitted to question the power of the vendee to take and hold the land.

<sup>1</sup>*Marion Sav. Bank v. Dunkin* (1875) 54 Ala. 471; *Hughes v. Bank of Somerset* (1824) 5 Litt. (Ky.) 45; *Hackensack Water Co. v. De Kay* (1883; Err. & App.) 36 N. J. Eq. 548; *Spahr v. Farmers' Bank* (1880) 94 Pa. 429; *Johnston v. Elizabeth Bldg. & L. Asso.* (1883) 104 Pa. 394; *Monongahela Bridge Co. v. Pittsburgh & B. Trac. Co.* (1900) 196 Pa. 25, 79 Am. St. Rep. 685, 46 Atl. 99.

For a case in which it was held that the validity of the organization of a foreign corporation could not be attacked collaterally, see *Bishop v. American Preservers' Co.* (1894) 51 Ill. App. 417, reversed in (1895) 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765, but not on this point.

<sup>2</sup>*Close v. Glenwood Cemetery* (1882) 107 U. S. 466, 27 L. ed. 408. See also *Chubb v. Upton* (1877) 95 U. S. 665, 24 L. ed. 523; *Cowell v. Colorado Springs Co.* (1879) 100 U. S. 61, 25 L. ed. 550; *Andes v. Ely* (1894) 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954; *Oregonian R. Co. v. Oregon R. & Nav. Co.* (1884) 10 Sawy. 464, 22 Fed. 245;

courts which have ordinarily rejected it with relation to ultra vires contracts.<sup>3</sup> It

clearly cannot be invoked where the incorporation was not authorized by any

Snider's Sons Co. v. Troy (1890) 91 Ala. 224, 11 L.R.A. 515, 24 Am. St. Rep. 887, 8 So. 658; Fresno Canal & Irrig. Co. v. Warner (1887) 72 Cal. 379, 14 Pac. 37; Yancy v. Morton (1892) 94 Cal. 558, 20 Pac. 1111; Bank of Shasta v. Boyd (1893) 99 Cal. 604, 34 Pac. 337; Raphael Weill & Co. v. Crittenden (1903) 130 Cal. 489, 73 Pac. 238; Francis v. Western Screen Co. (1913) 22 Cal. App. 32, 133 Pac. 327; Imboden v. Etowah & B. B. Hose Min. Co. (1883) 70 Ga. 86; Washburn v. Rossch (1883) 13 Ill. App. 268; McBroom v. Lebanon (1869) 31 Ind. 268; Ray v. Indianapolis Ins. Co. (1872) 39 Ind. 290; Pancoast v. Travelers' Ins. Co. (1887) 79 Ind. 172; Smelser v. Wayne & U. Straight Line Turnp. Co. (1882) 82 Ind. 417; Hasselman v. United States Mortg. Co. (1884) 97 Ind. 365; Franklin v. Two-good (1865) 18 Iowa, 515; Pape v. Capitol Bank (1878) 20 Kan. 440, 27 Am. Rep. 183; Jones v. Bank of Tennessee (1847) 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540; Henderson & N. R. Co. v. Leavell (1855) 16 B. Mon. (Ky.) 363; Yellow Chief Coal Co. v. Johnson (1915) 166 Ky. 663, 179 S. W. 599; Teutonia Nat. Bank v. Wagner (1881) 33 La. Ann. 792; Latiolais v. Citizens' Bank (1881) 33 La. Ann. 1444; Swartwout v. Michigan Air Line R. Co. (1872) 24 Mich. 394; Wilcox v. Toledo & A. A. R. Co. (1880) 43 Mich. 584, 5 N. W. 1003; Estey Mfg. Co. v. Runnels (1884) 55 Mich. 130, 20 N. W. 823; French v. Donohue (1882) 29 Minn. 111, 12 N. W. 354; East Norway Lake N. E. Lutheran Church v. Froislie (1887) 37 Minn. 447, 35 N. W. 260; Columbia Electric Co. v. Dixon (1891) 46 Minn. 463, 49 N. W. 244; Atlantic & P. R. Co. v. St. Louis (1877) 66 Mo. 228; Studebaker Bros. Mfg. Co. v. Montgomery (1881) 74 Mo. 101; St. Louis Gaslight Co. v. St. Louis (1884) 84 Mo. 202; Father Matthew Soc. v. Fitz Williams (1884) 84 Mo. 406; Broadwell v. Merritt (1885) 87 Mo. 95; Bradley v. Reppell (1895) 133 Mo. 545, 54 Am. St. Rep. 685, 32 S. W. 645, 34 S. W. 841; West Missouri Land Co. v. Kansas City Suburban Belt R. Co. (1900) 161 Mo. 595, 61 S. W. 847; Omaha Cattle Loan Co. v. Shelly (1911) 39 Neb. 502, 131 N. W. 926; Congregational Soc. v. Perry (1833) 6 N. H. 164, 25 Am. Dec. 455; Campbell v. Perth Amboy Shipbuilding & Engineering Co. (1905) 70 N. J. Eq. 57, 62 Atl. 319, affirmed in (1906) 71 N. J. Eq. 302, 71 Atl. 1133; Belvidere Water Co. v. Belvidere (1911) — N. J. —, 92 Atl. 365; Dutchess Cotton Manufactory v. Davis (1817) 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Palmer v. Lawrence (1849) 3 Sandf. (N. Y.) 161, affirmed in (1851) 5 N. Y. 389; Methodist Episcopal Union Church v. Pickett (1859) 19 N. Y. 484; Commercial Bank v. Pfeiffer (1888) 103 N. Y. 242, 15 N. E. 311; White v. Coventry (1859) 29 Barb. (N. Y.) 305; White v. Ross (1860) 4 Abb. App. Dec. L.R.A.1917B.

(N. Y.) 589, 15 Abb. Pr. 66; Montgomery v. Whitbeck (1903) 12 N. D. 385, 96 N. W. 327; Lucas v. Greenville Bldg. & Sav. Asso. (1872) 22 Ohio St. 339; Centre & Turnp. Road Co. v. M'Conaby (1827) 16 Serg. & R. (Pa.) 140; Cochran v. Arnold (1868) 58 Pa. 399; Union Bank & T. Co. v. Wright (1900) — Tenn. —, 55 L.R.A. 469, 58 S. W. 755; Whitney v. Robinson (1881) 53 Wis. 309, 10 N. W. 512; Williams v. Stevens Point Lumber Co. (1888) 72 Wis. 487, 40 N. W. 154; Gilman v. Druse (1901) 111 Wis. 400, 87 N. W. 557; Peyton v. Minong Lumber & Lath Co. (1912) 149 Wis. 66, 135 N. W. 518; Bigelow, Estoppel, 6th ed. p. 499; Clark & M. Priv. Corp. §§ 83 et seq.

The doctrine affirmed in the above cited cases has been embodied in Ky. Stat. § 566. See Johnson v. Mason Lodge I. O. O. F. (1889) 106 Ky. 838, 61 S. W. 620; Yellow Chief Coal Co. v. Johnson (1915) 166 Ky. 663, 179 S. W. 599 (organization not completed until after the contract was made).

For cases in which the doctrine has been affirmed in actions against shareholders of the corporation itself, see Columbia Electric Co. v. Dixon (1891) 46 Minn. 463, 49 N. W. 244; Phoenix Warehousing Co. v. Badger (1876) 67 N. Y. 294; Trumbull County Mut. F. Ins. Co. v. Horner (1848) 17 Ohio, 407.

In Brown v. Scottish-American Mortg. Co. (1884) 110 Ill. 235, the court said, arguing: "In this class of cases, while it is usually said the party is estopped to deny the existence of the corporation, the courts really proceed upon a rule of evidence rather than upon the strict doctrine of estoppel." Having regard to the weight of authority in favor of the admissibility of the principle of estoppel in this connection, it is apparent that the court was not warranted in making this statement.

For a case of estoppel by covenant, see Ragan v. McElroy (1899) 98 Mo. 349, 11 S. W. 735, where the court used the following language: "The grantor 'having by his deed declared the grantee therein to be a corporation, received from it, as such, the purchase money for the land, bound himself and his heirs thereby forever to defend the title to the premises to such corporation, its successor and assigns, and in pursuance thereof delivered possession of the premises to the grantee, the grantor and his heirs are forever estopped from denying the corporate existence of the grantee as against those who have acquired possession and title under that deed.'" See also Franklin v. Twogood (1865) 18 Iowa, 516.

<sup>3</sup> See Federal cases cited at the beginning of the preceding note, and also Douglas County v. Bolles (1876) 94 U. S. 104, 24 L. ed. 46; Rannels v. Rowe (1906) 74 C. C. A. 376, 145 Fed. 296; Marion Sav. Bank v. Dunkin (1875) 54 Ala. 471; Lehman v. Warner (1878) 61 Ala. 461 (expressly distinguishing cases involving contracts in ex-

existing statute, or was expressly prohibited.<sup>4</sup> In some cases in which it has been applied, the fact of the defendant's having enjoyed the benefits of the contract is explicitly referred to as one of the circumstances upon which the right of recovery was predicated.<sup>5</sup> The introduction of this element serves to create a link between cases of the type now under discussion and those relating to contracts which are ultra vires in the proper sense of the expression.<sup>6</sup> But it is clear that the two descriptions of cases belong to essentially different categories.<sup>7</sup> In this point of view it seems reasonably certain that certain statements in which the estoppel predicated from the fact of the defendant's having entered into the contract is referred to as operating in respect of the question of corporate power as well as of corporate existence are inaccurate.<sup>8</sup> Such an extension of the doctrine would bring it into conflict with the general rule accepted in all juris-

dictions, that an ultra vires contract cannot be enforced as long as it remains executory on both sides. The only apparent way to escape from the dilemma thus indicated is to assume that the expression "power" in the statements alluded to connotes merely the ostensible authority which is conferred upon the de facto corporation by the charter under which it professes to be doing business.

*(b) Contracts made with foreign corporations which have failed to comply with the statutable prerequisites to doing business in the state where the action is brought.*

The enforceability of contracts of this type has been dealt with in earlier volumes of the Lawyers' Reports Annotated.<sup>9</sup> For the purpose of "showing the nature and extent of the analogy" between the principles with reference to which this question has been considered and those with which we are concerned

cess of corporate powers); Central Agri. & Mechanical Asso. v. Alabama Gold L. Ins. Co. (1881) 70 Ala. 120; Sherwood v. Alvis (1887) 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; Worcester Medical Inst. v. Harding (1853) 11 Cush. (Mass.) 285; Dooley v. Wolcott (1862) 4 Allen (Mass.) 406.

<sup>4</sup> Imperial Bldg. Co. v. Chicago Open Bd. of Trade (1909) 238 Ill. 100, 87 N. E. 167.

<sup>5</sup> "A person who has contracted with an association assuming to be incorporated and acting in a corporate capacity cannot, after having received the benefit of the contract, set up as a defense to an action brought upon it by the company, that the latter was never legally incorporated, or that it had no authority to enter into the contract in a corporate capacity." Commercial Bank v. Pfeiffer (1888) 108 N. Y. 254, 16 N. E. 311. See also Helena v. Turner (1880) 36 Ark. 577 (occupation under lease); Lincoln Park Chapter, No. 177, R. A. M. v. Swatek (1903) 204 Ill. 228, 68 N. E. 429 (receipt of dividends by stockholder).

<sup>6</sup> In the New York case cited in the last note it was observed after the passage quoted: "The case of Whitney Arms Co. v. Barlow (1875) 63 N. Y. 63, 20 Am. Rep. 504 (see § 44, *infra*) goes far to sustain the principle upon which this rule is predicated." But, having regard to the numerous authorities that were exactly in point, the reference to this imperfect precedent seems to have been somewhat superfluous. The same remark applies to the reliance placed upon this element in Camden & A. R. Co. v. May's Landing & E. H. City R. Co. (1886) 48 N. J. L. 530, 7 Atl. 523.

<sup>7</sup> In New York State Loan & T. Co. v. Helmer (1879) 77 N. Y. 64, it was stated that the remarks in the opinion of the court in Palmer v. Lawrence (1849) 3 L.R.A.1917B.

Sandf. (N. Y.) 161, "as to the right of a debtor who has contracted with a corporation de facto to dispute its organization, can have no application . . . to a case where the illegal act of the corporation is a ground of defense, and not the illegality of its organization."

The difference between the objections of a want of power in the corporation, and of a defect in its organization, was also recognized in *Montgomery v. Whitbeck* (1903) 12 N. D. 385, 96 N. W. 327. See also the cases cited in note 3, *supra*, which were decided on the assumption that there is such a difference.

<sup>8</sup> See, for example, *Massey v. Citizens' Bldg. & Sav. Asso.* (1879) 22 Kan. 624 (in syllabus of court); *Harris v. Independence Gas. Co.* (1907) 76 Kan. 750, 13 L.R.A. (N.S.) 1171, 92 Pac. 1123, quoting the following passage of Judge Thompson's monograph on "Corporation," in 10 Cyc. p. 248: "A person contracting with an ostensible corporation to do an act which is not prohibited by law becomes estopped, in an action by the corporation to enforce the contract, either to deny the existence of the corporation or its power to enter into such a contract."

<sup>9</sup> For a general discussion of the question whether noncompliance by a foreign corporation with the prescribed conditions precedent to its right to do business within the state will invalidate a corporate contract so as to prevent its enforcement by the corporation, see *State v. American Book Co.* 1 L.R.A.(N.S.) 1041, and the note appended thereto.

As to the effect produced by the imposition of a penalty for failing to comply with the conditions precedent, see the notes to *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.* 4 L.R.A.(N.S.) 688, and *Fruin-Colnon Contracting Co. v.*

in the present monograph, the following brief statement will suffice:

The right to recover upon contracts of this description has been affirmed on several different grounds; viz., (1) that the legislature did not intend that a nonobservance of the provisions of the enactment in question should render the contract void;<sup>10</sup> (2) that the enforceability of the contract is a necessary consequence of an essential distinction assumed to be predicable in cases of this class "between an entire absence of authority in the organic law itself, and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case, there is a want of power to act; in the other, only an abuse of power conferred;"<sup>11</sup> (3) that the power of the corporation to carry on business in the

state could be questioned only by the state itself;<sup>12</sup> (4) that the fact of the defendant's having contracted with the corporation estopped him from disputing its right to do business in the state;<sup>13</sup> (5) that the enjoyment of the benefits of the contract created an estoppel against alleging its invalidity.<sup>13a</sup> But there is also a considerable body of authority for the doctrine that no action can be maintained by the defaulting corporation.<sup>14</sup> The rationale of this doctrine is that the corporation has no power to do business in another state except by its consent, and that the condition precedent to obtaining that consent has never been performed. Consequently, "the power to make the contract was never in the corporation. So far as it was concerned the act was ultra vires."<sup>15</sup> In some of the cases in which this position has been taken, it

Chatterson, 40 L.R.A.(N.S.) 857. For a later case reported in this series, see *Oliver Co. v. Louisville Realty Co.* (1913) 156 Ky. 628, 51 L.R.A.(N.S.) 293, 161 S. W. 570, Ann. Cas. 1915C, 565.

<sup>10</sup> *Clark v. Middleton* (1853) 19 Mo. 53; *Dearborn Foundry Co. v. Augustine* (1892) 5 Wash. 67, 31 Pac. 327.

<sup>11</sup> *Sherwood v. Alvis* (1887) 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307 (mortgage executed to security company.) The court said: "In what we have said, we have no wish to question or weaken our former decisions holding that contracts by or with corporations, which are outside of their corporate powers, cannot be enforced. We are unwilling, however, to extend that principle, and make it embrace a case like the present." The provision here under review was an expressly prohibitive clause of the state Constitution.

<sup>12</sup> *Grant v. Henry Clay Coal Co.* (1876) 80 Pa. 209 (action for price of coal).

<sup>13</sup> *Newburg Petroleum Co. v. Weare* (1875) 27 Ohio St. 343; *La France Fire Engine Co. v. Mt. Vernon* (1894) 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; *Rathbone, S. & Co. v. Frost* (1894) 9 Wash. 162, 37 Pac. 298.

In this point of view cases of the class under discussion fall within the scope of the general rule of law that "in ordinary cases it is not allowed an individual to escape his obligation by showing the incapacity of the other party to the contract to act as he had assumed to act." *Bigelow, Estoppel*, § 464, quoted in *Johnson v. Mason Lodge, I. O. O. F.* (1899) 106 Ky. 846, 51 S. W. 620.

<sup>13a</sup> *Washburn Mill Co. v. Bartlett* (1893) 3 N. D. 138, 54 N. W. 544; *Roane v. Union Pacific L. Ins. Co.* (1913) 67 Or. 264, 135 Pac. 892; *Holmes Co. v. Barnard* (1884) 15 W. N. C. (Pa.) 110; *Kilgore v. Smith* (1888) 122 Pa. 48, 15 Atl. 698.

<sup>14</sup> *Cincinnati Mut. Health Assur. Co. v. L.R.A.* 1917B.

*Rosenthal* (1870) 55 Ill. 90, 8 Am. Rep. 628 (contract of insurance); *Rising Sun Ins. Co. v. Slaughter* (1863) 20 Ind. 520 (insurance contract); *Yellow Chief Coal Co. v. Johnson* (1915) 166 Ky. 663, 179 S. W. 599 (construction contract); *Oliver Co. v. Louisville Realty Co.* (1915) 156 Ky. 628, 51 L.R.A.(N.S.) 293, 161 S. W. 570, Ann. Cas. 1915C, 565; *Williams v. Cheney* (1855) 3 Gray (Mass.) 222 (promissory note given for the premium of insurance); *Roche v. Ladd* (1861) 1 Allen (Mass.) 441 (note given for premium upon a policy of insurance); *National Mut. F. Ins. Co. v. Pursell* (1865) 10 Allen (Mass.) 232 (contract of insurance); *First Nat. Bank v. Coughorn* (1899) — Tenn. —, 52 S. W. 1112 (note held void even in the hands of an innocent purchaser); *Etna Ins. Co. v. Harvey* (1861) 11 Wis. 395 (note given for a premium of insurance); and the cases cited in the following note.

In *Jones v. Smith* (1855) 3 Gray (Mass.) 500, Metcalf, J., said: "It was essential to the validity of the contract of insurance which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of this commonwealth."

<sup>15</sup> *Deady, J.*, in *Re Comstock* (1874) 3 Sawy. 218, Fed. Cas. No. 3078 (claim against bankrupt estate), distinguished the class of cases reviewed under the preceding section.

In *Semple v. Bank of British Columbia* (1878) 5 Sawy. 88, Fed. Cas. No. 12,659, the same learned judge said: "The defendant, as to this state or any transaction therein, is neither a corporation de jure nor de facto. It has never acquired the right to exist here, or even attempted it. Whatever it may be in the place of its creation, here, at least, it is a mere nullity, a nonentity. The question of mere irregularities in its organization does not arise. For there is not the slightest ground for



has been explicitly laid down that the claim of the corporation cannot be enforced by the aid of the principle of estoppel.<sup>18</sup>

General principles and legal analogies seem to be in favor of the theory that statutes which specify the conditions under which a foreign corporation may do business operate so that such a corporation remains without contractual capacity until those conditions have been complied with. If that theory is adopted, these consequences would seem to follow: (1) That each and every contract which it makes before the prescribed conditions have been satisfied is locally ultra vires, even though it is acting within the scope of the powers conferred upon it by the state in which it was organized; and (2) that the right of the corporation to sue upon a contract which it has performed on its own side is predicable or not predicable, according as a domestic corporation is or is not held to be entitled, under similar circumstances, to sue upon an unauthorized contract.

**III. Doctrine that the defendant in an action brought by a corporation cannot be estopped from pleading ultra vires.**

**10. Generally.**

The nature and rationale of the doctrine which declares that the principle

claiming that it has ever, regularly or otherwise, become clothed with the form or power of a corporation in this state, or attempted to do so. Indeed, it was expressly prohibited from existing or exercising its corporate functions in Oregon, except upon the condition precedent that it shall first comply with the law of the state in the appointment of a resident agent. As well say that any fortuitous assemblage or association of persons not having in any way attempted or intended to become a corporation under the laws of this state might nevertheless, by simply calling themselves such and acting as such, become one de facto."

<sup>18</sup>In *Re Comstock* (Fed.) supra, Deady, J., remarked "the doctrine of estoppel in pais has never been carried so far as to prevent a party from showing that a corporation, even if it be one de jure, had not the power to do a particular thing, or that it was done in violation of a statute." This remark was repeated by the same judge in *Semple v. Bank of British Columbia* (1878) 5 Sawy. 93, Fed. Cas. No. 12,659. But this statement was plainly inaccurate in view of the not inconsiderable number of cases in which, even before the date when it was made, the principle of es-

toppel cannot be invoked for the purpose of obtaining the enforcement of an ultra vires contract have been fully explained under their general aspects in the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737. The remarks there made are equally applicable, mutatis mutandis, to cases in which the corporation is the moving party.

It would seem that a recent Illinois case might have been referred to a broad doctrine of the following tenor: Where a corporation is suing as assignee of a contract which, prior to the assignment, was completely performed by the assignor, the fact that the defendant has received, and is retaining, the benefits of such performance, will not estop him from relying on the plea of ultra vires, if it appears that the corporation could not, without exceeding its powers, have made a similar contract with him. But the decision was rested upon a ground which had relation merely to the special circumstances involved.<sup>1</sup>

It has been argued that, if corporations are allowed to enforce ultra vires contracts, the result will be that they, "no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them

toppel had been applied with relation to ultra vires contracts.

The question whether the defendant was estopped to set up the illegality of the transaction was left undecided in *Bank of British Columbia v. Page* (1877) 6 Or. 431.

<sup>1</sup>*North Ave. Bldg. & L. Asso. v. Huber* (1915) 270 Ill. 75, 110 N. E. 312. There the plaintiff was organized under a statute which provided that its funds should be lent only to its members, and that no loan should be made in excess of the amount of stock held by the borrowing member. The defendant, who was not one of its members, borrowed money from one Kemper, and executed a note and trust deed as securities. These were purchased by the association, and, upon the default of the defendant, suit was brought for the foreclosure of the mortgage. The court, relying upon the general principle laid down in *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619 (see § 80 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), held that the suit was not maintainable. "Considering the loan as having been made by Kemper to the Hubers, the association

which the legislature have withheld." But the consideration thus adverted to with a somewhat rhetorical emphasis seems to lose most of its force when it is weighed against the interests of stockholders and creditors. If it were carried to its logical conclusions, the obvious consequence would be that a doctrine designed for the protection of shareholders and creditors would frequently operate in such a manner as to inflict the most serious injury upon them. There is, of course, another answer to the argument; viz., that, unless the executive authorities are remiss to an extent which cannot warrantably be assumed, the authority of the state will always be executed for the purpose of preventing any serious abuse of corporate powers.<sup>3</sup> So far as the courts are concerned, the

interposition of the government should, it is apprehended, be treated as a certainty,—especially when the right of action is being considered with reference to a violation of the law which, as a result of judicial proceedings, has become a matter of public record.

### 11. Illustrative cases.

The cases in which the doctrine of estoppel has been explicitly rejected, and those which are upon the facts antagonistic to it, are tabulated below with reference to the particular classes of contracts which were under review. For further information regarding these cases the practitioner is referred to the review of the decisions in each jurisdiction. See subtitle V., *infra*.<sup>1</sup>

had no more authority to purchase it than it would have had to make it in the first instance. The power of the association in loaning its money was expressly limited by the statute to making loans to its members only, and this excluded the power to purchase notes of persons not members of the association. The attempted purchase of the note and trust deed was therefore unauthorized and ultra vires." The special contention put forward by counsel for the plaintiff, viz., "that the loan was made by Kemper, and that by the purchase of it from him the equitable title to it passed to the association, that the legal title remained in Kemper in trust for the use and benefit of the association, and said association had a right to have the trust deed foreclosed by Kemper as such trustee, and for its use,"—was rejected.

<sup>2</sup> *Montgomery v. Montgomery & W. Pl. Road Co.* (1857) 31 Ala. 76.

<sup>3</sup> *Bond v. Terrell Cotton & Woolen Mfg. Co.* (1891) 82 Tex. 309, 18 S. W. 691, where the statement in the Alabama case was criticized from this point of view.

#### 1 Issue of stock.

*Clark v. Turner* (1884) 73 Ga. 1 (stock issued beyond amount authorized); *Simpson v. Greenfield Bldg. & Sav. Asso.* (1882) 38 Ohio St. 349 (loan on shares held by borrower in contravention of expressly prohibitory provision limiting the number to be issued to one person).

#### Guaranty of certain dividend on stock.

*Memphis Grain Elevator Co. v. Memphis & C. R. Co.* (1885) 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52 (guaranty given to induce another company to take stock).

#### Conveyance of real property.

*Wilks v. Georgia P. R. Co.* (1885) 79 Ala. 180 (suit for specific performance of contract to convey interests in land which the plaintiff was not authorized to acquire). See also *Hillsdale College v. Rideout* (1890) 82 Mich. 94, 46 N. W. 373, the actual L.R.A.1917B.

purport of which is discussed in § 38a, *infra*.

#### Grant of privilege with respect to real property.

*Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co.* (1876) 29 Ohio St. 341.

#### Purchase of stock of another corporation.

*Valley R. Co. v. Lake Erie Iron Co.* (1888) 46 Ohio St. 44, 1 L.R.A. 412, 18 N. E. 488 (provision infringed was expressly prohibitory, but contract was explicitly designated as "ultra vires"); *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

#### Purchase of choses in action.

*Salmon River Min. & Smelting Co. v. Dunn* (1882) 2 Idaho, 26, 3 Pac. 911 (a case of somewhat doubtful import; see § 29, *infra*).

#### Purchase of other kinds of personal property.

*Ehrman v. Union Cent. L. Ins. Co.* (1880) 35 Ohio St. 324 (purchase of assets of another corporation; see further in review of Ohio decisions, § 46, *infra*).

#### Lending of money on the security of a mortgage.

*Waddill v. Alabama & T. River R. Co.* (1859) 35 Ala. 323; *Chambers v. Falkner* (1880) 65 Ala. 448; *Free Home Bldg. Loan & Homestead Asso. v. Edwards* (1906) 223 Ill. 128, 79 N. E. 64; *North Ave. Bldg. & L. Asso. v. Huber* (1915) 270 Ill. 75, 110 N. E. 312 (for the special point involved in this case, see § 10, note 1, *supra*); *CALUMET & C. CANAL & DOCK Co. v. CONKLING*, ante, 814; *Fowler v. Scully* (1872) 72 Pa. 456. See also *Elder v. First Nat. Bank* (1873) 12 Kan. 238, the actual scope of which is stated in the review of the Kansas cases in § 33, *infra*. In *Thompson on Corporations*, 1st ed. vol. 4, § 5712, we find the following characteristically vigor-

**IV. Doctrine that the defendant in an action brought by a corporation may be estopped from pleading ultra vires.**

**12. Generally.**

An examination of the cases reviewed in subtitle V., *infra*, shows that the doctrine under which a person who has received the benefits of an ultra vires

ous expression of opinion: "These decisions which upheld the rascally borrower in keeping the money which he had borrowed from the corporation, on the ground that the corporation had no power to lend it,—the very reason why he ought to be compelled to restore it,—form strange blots upon the pages of American jurisprudence." It would seem that the *severa indignatio* which prompted this criticism must have diverted the learned author's attention from the fact that the cases criticized (*viz.*, those cited above and in the following paragraph) merely decided that no action was maintainable upon the contract itself, and that the courts did not deny the right of the borrower to maintain an action in disaffirmance of the contract.

**Lending of money on other kinds of security.**

Grand Lodge v. Waddill (1860) 36 Ala. 313; Mercantile Trust Co. v. Kastor (1916) 273 Ill. 332, 112 N. E. 988; Farmington Sav. Bank v. Fall (1880) 71 Me. 49 (as to the precise purport of this decision, see review of Maine cases in § 36, *infra*); New York Firemen Ins. Co. v. Ely (1824) 2 Cow. (N. Y.) 678 (loan not made on any of the kinds of security prescribed); Life & F. Ins. Co. v. Mechanic F. Ins. Co. (1831) 7 Wend. (N. Y.) 31; Bank of Cadiz v. Slemmons (1877) 34 Ohio St. 142, 32 Am. Rep. 364 (no estoppel against setting up illegality of loan so far as the excessive interest reserved was concerned).

**Execution of bonds, notes, etc.**

Smith v. Alabama L. Ins. & T. Co. (1843) 4 Ala. 558; Montgomery v. Montgomery & W. Pl. Road Co. (1857) 31 Ala. 76; Swift v. Beers (1846) 3 Denio (N. Y.) 70 (post note issued by bank in violation of expressly prohibitory provision); Niagara County Bank v. Baker (1864) 15 Ohio St. 69 (usurious instrument expressly declared by the regulating statute to be "void").

**Discounting of negotiable instruments.**

Orr v. Lacey (1846) 2 Dougl. (Mich.) 230 (rate of interest expressly prohibited was charged); New York Firemen Ins. Co. v. Ely (1825) 5 Conn. 560, 13 Am. Dec. 100 (no power to discount); Seneca County Bank v. Lamb (1858) 26 Barb. (N. Y.) 595 (note discounted at rate exceeding that authorized); Bank of Salina v. Alvord (1865) 31 N. Y. 473 (rate of interest expressly prohibited was charged); Bank of Chillicothe v. Swayne (1838) 8 Ohio, 257, 32 Am. Dec. 707 (rate of interest expressly

contract is estopped from raising the defense of invalidity in an action brought upon the contract by the corporation is accepted in all the jurisdictions in which the corresponding doctrine is applied for the purpose of imposing liability upon the corporation. It is clear, in fact, that the former doctrine is the necessary complement of the latter. General

prohibited was charged); Vanatta v. State Bank (1858) 9 Ohio St. 27 (note discounted was one of which the negotiability had not been restricted by special indorsement).

In the following cases it was held that no action could be maintained on a promissory note discounted in violation of an expressly prohibitory clause of the New York Restraining Act: Utica Ins. Co. v. Scott (1821) 19 Johns. (N. Y.) 1, reversed in (1826) 8 Cow. 709; New York Firemen Ins. Co. v. Sturges (1824) 2 Cow. (N. Y.) 664; Utica Ins. Co. v. Kip (1827) 8 Cow. (N. Y.) 20; Beach v. Fulton Bank (1829) 3 Wend. (N. Y.) 573, affirming (1829) 1 Paige, 429; Fulton Bank v. Benedict (1829) 1 Hall (N. Y.) 480; Utica Ins. Co. v. Bloodgood (1830) 4 Wend. (N. Y.) 652; Pennington v. Townsend (1831) 7 Wend. (N. Y.) 276; Green v. Seymour (1846) 3 Sandf. Ch. (N. Y.) 285. The foregoing decisions were all anterior to the adoption of the doctrine of estoppel in New York, and were rendered during a period when, so far as appears from the reports, expressly prohibited contracts, no less than those which were prohibited merely by implication, were regarded as belonging to the ultra vires category. See § 44, *infra*. For similar rulings made with regard to the same statute since the doctrine of estoppel was introduced and held to be operative merely in respect of impliedly prohibited contracts, see Pratt v. Short (1880) 79 N. Y. 437, 35 Am. Rep. 531, affirming (1877) 53 How. Pr. 506, and Pratt v. Eaton (1882) 79 N. Y. 449, reversing (1879) 18 Hun, 293.

**Purchase of negotiable instruments.**

Straus v. Eagle Ins. Co. (1855) 5 Ohio St. 59. See also the case cited under the head of "Agency," *infra*.

**Hiring of ships.**

Harriman v. First Bryan Baptist Church (1879) 63 Ga. 186, 36 Am. Rep. 117.

**Contract as to boomage of logs.**

Bangor Boom Corp. v. Whitney (1848) 29 Me. 123 (as to precise purport of this decision, see review of Maine cases in § 36, *infra*).

**Agency.**

In Westinghouse Mach. Co. v. Wilkinson (1885) 79 Ala. 312, the court thus stated its conclusions: "The power to manufacture and repair machinery, coupled with a prohibition against the creation of debts except in a mode particularly specified, does not confer by implication the power to act as agent in making sales of machinery

statements regarding the applicability of the principle of estoppel, irrespective of whether the action is brought by or against the corporation, are not uncommon in the reports.<sup>1</sup>

### 13. Illustrative cases.

The cases which either proceed explicitly upon the doctrine of estoppel, or are deemed to be in harmony with it,

manufactured by others, and of taking and indorsing notes executed for the purchase money."

### Performance of services.

Rutland & B. R. Co. v. Proctor (1856) 29 Vt. 93 (a case of somewhat dubious scope and purport; see review of Vermont cases in § 54, *infra*).

### Guaranty and similar contracts for the benefit of third persons.

Fulton Bank v. Benedict (1829) 1 Hall (N. Y.) 480 (company purchasing note with knowledge that it was given for accommodation not entitled to maintain an action upon it); Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co. (1858) 7 Wis. 59 (note that this case illustrates the earlier not the later, doctrine in Wisconsin; for the precise scope of the decision, see review in § 55, *infra*).

<sup>1</sup> See, for example Whitney Arms Co. v. Barlow (1875) 63 N. Y. 70, 20 Am. Rep. 504; Alexandria, A. & F. S. R. Co. v. Johnson (1897) 58 Kan. 175, 183, 48 Pac. 847; Bond v. Terrell Cotton & Woolen Mfg. Co. (1891) 82 Tex. 309, 18 S. W. 691.

### 1 Issue of stock.

Meholin v. Carlson (1910) 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755 (action on note given for purchase price); Keystone L. Ins. Co. v. Von Schlemmer (1906) 122 La. 280, 47 So. 606 (action on subscription for stock).

### Conveyance of real property.

Lauder v. Peoria Agri. & Trotting Soc. (1897) 71 Ill. App. 475 (action for price of land).

### Other contracts with regard to real property.

Shelby v. Chicago & E. I. R. Co. (1892) 143 Ill. 365, 32 N. E. 438, affirming (1892) 42 Ill. App. 339 (defendant agreed to maintain dams on river running through land sold to railway company); Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co. (1876) 29 Ohio St. 341 (use of property in which the plaintiff had an easement; see review of Ohio cases in § 46, *infra*).

### Sale of corporate business.

Bowers v. Ocean Acci. & Guarantee Corp. (1906) 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed in (1907) 187 N. Y. 561, 80 N. E. 1105 (plaintiff, as receiver of guaranty corporation which had transferred its assets to the defendant under a contract L.R.A.1917B.

are tabulated below under heads indicative of the various descriptions of contracts which were involved.<sup>1</sup>

### V. Review of cases decided in each jurisdiction.

#### 14. Introductory.

The historical review of the cases discussed in this subtitle is designed to

embracing a stipulation providing that it should be paid a commission on every premium which accrued in respect of each policy then in force, was held to be entitled to enforce this stipulation).

### Sales of other personal property.

Raphael Weill & Co. v. Crittenden (1903) 139 Cal. 488, 73 Pac. 238; Francis v. Western Screen Co. (1913) 22 Cal. App. 32, 133 Pac. 327; Standard Sewing Mach. Co. v. Frame (1900) 2 Penn. (Del.) 430, 48 Atl. 188 ("lease and sale" contract); Cleveland Paper Co. v. Courier Co. (1887) 67 Mich. 158, 34 N. W. 556; Whitney Arms Co. v. Barlow (1875) 63 N. Y. 62, 20 Am. Rep. 504; Booth Bros. v. Baird (1903) 83 App. Div. 495, 82 N. Y. Supp. 432; Bowers v. Ocean Acci. & Guarantee Corp. (1906) 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed in (1907) 187 N. Y. 561, 80 N. E. 1105 (action to recover consideration stipulated to be paid for the sale of the good will of a company's business).

### Lease of real property.

Starin v. Edson (1889) 112 N. Y. 206, 19 N. E. 670, cited in Coit v. Grand Rapids (1898) 115 Mich. 493, 73 N. W. 811; Bath Gaslight Co. v. Claffy (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390 (lease of property and franchises of quasi public corporation).

### Leases of personal property.

White River, L. & W. R. Co. v. Star Ranch & Land Co. (1905) 77 Ark. 128, 91 S. W. 14.

### Purchase of stock of another corporation.

Nebraska Shirt Co. v. Horton (1903) 3 Neb. (Unof.) 888, 93 N. W. 225.

### Purchase of other personal property.

Neilsville Bank v. Tuthill (1886) 4 Dak. 295, 30 N. W. 154 (promissory note); Voris v. Star City Bldg. & L. Asso. (1898) 20 Ind. App. 643, 50 N. E. 779 (school warrants).

In Black v. First Nat. Bank (1903) 96 Md. 399, 54 Atl. 88, the contract by which the plaintiff bank acquired the note on which the action was brought was held to be a discount, and therefore not *ultra vires*; but the court said that, even if the transaction had been a sale, and consequently *ultra vires*, the recovery could have been had. It should be observed that the Maryland decisions are extremely conflicting. See review in § 86 of the monograph appended to Creditors' Claim & Adjustment

show the position which the various courts have taken with respect to the doctrine of estoppel during the period within which their reported decisions have been rendered. The cases cited include not only those in which the doctrine has been explicitly approved or disapproved, but also those in which it was not referred to in terms, but which, having regard to the facts involved, are either consistent or inconsistent with it. The summaries would, it is obvious, be seriously defective if the cases belonging to the latter category were omitted. The decisions in some of the American states are extremely conflicting, but it

may be stated that, wherever a distinct change of views has occurred, it has nearly always been in the direction of an acceptance of the doctrine. The recent Illinois cases constitute a notable exception to this rule.

The summaries contained in the following sections should, of course, be read in connection with the corresponding ones in the monograph relating to actions against corporations.

#### 15. England.

So far as regards contracts which are ultra vires in the strict sense of the term, that is to say, contracts which cannot be

Co. v. Northwestern Loan & T. Co. L.R.A. 1917A, 737.

#### Lending of money on mortgage.

Leon v. Citizens' Bldg. & L. Asso. (1912) 14 Ariz. 294, 127 Pac. 721, Ann. Cas. 1914D, 1151; Grangers' Business Asso. v. Clark (1885) 67 Cal. 634, 8 Pac. 445; Camp v. Land (1898) 122 Cal. 167, 54 Pac. 839; Bay City Bldg. & L. Asso. v. Broad (1902) 136 Cal. 525, 69 Pac. 225; Huter v. Union Trust Co. (1899) 153 Ind. 204, 54 N. E. 755; Benton County Sav. Bank v. Boddicker (1898) 105 Iowa, 567, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632; Fifth Nat. Bank v. Pierce (1898) 117 Mich. 376, 75 N. W. 1058; Third Ave. Sav. Bank v. Dimock (1873) 24 N. J. Eq. 26 (a case of doubtful purport; see review of New Jersey cases in § 43, infra); Washington L. Ins. Co. v. Clason (1900) 162 N. Y. 309, 56 N. E. 755, affirming (1897) 16 App. Div. 434, 45 N. Y. Supp. 27.

In Provident Loan & Bldg. Asso. v. Carter (1900) 107 Wis. 383, 83 N. W. 655, an estoppel was predicated specially upon the fact that the defendant, a member of the corporation, had assented to the unauthorized transaction with full knowledge of its character. See also Leahy v. National Bldg. & L. Asso. (1898) 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

In Noah v. German-American Bldg. Asso. (1903) 31 Ind. App. 504, 68 N. E. 615, the following statement in Thompson on Corporations, 1st ed. vol. 5, § 6040, was quoted with approval: "The doctrine now is that the corporation thus making the loan in good faith may recover upon or enforce the security, and that the borrower will be estopped by his act of receiving the loan and keeping the money, from setting up that the corporation had no power to make it."

#### Lending of money on other kind of security.

Meholin v. Carlson (1910) 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755 (shares of corporation itself were accepted as collateral security); Poock v. Lafayette Bldg. Asso. (1890) 71 Ind. 357 (action on note); Farmers' Nat. Bank v. Robinson (1898) 59 Kan. 777, 53 Pac. 762 (loan on security of L.R.A.1917B.

money to be received under contract for erection of government building); Johnson v. Mason Lodge, I. O. O. F. (1899) 106 Ky. 838, 51 S. W. 620 (action on note); Central Bldg. & L. Asso. v. Lampson (1895) 60 Minn. 422, 62 N. W. 544 (action on note); Rome Sav. Bank v. Kramer (1884) 32 Hun (N. Y.) 270, affirmed in (1886) 102 N. Y. 331, 6 N. E. 682 (action on note); Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co. (1892) 63 Hun, 629, 44 N. Y. S. R. 379, 17 N. Y. Supp. 826, affirmed in (1893) 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378 (but question of estoppel was not alluded to) (pledge of stock of another corporation); Bond v. Terrell Cotton & Woolen Mfg. Co. (1891) 82 Tex. 309, 18 S. W. 691 (action on note); Smith v. White (1893) — Tex. Civ. App. —, 25 S. W. 809 (action on note); Head v. Cleburne Bldg. & L. Asso. (1893) — Tex. Civ. App. —, 25 S. W. 810 (action on note); Logan v. Texas Bldg. & L. Asso. (1894) 8 Tex. Civ. App. 490, 28 S. W. 141 (action on note); Farmers' Bank v. Burchard (1860) 33 Vt. 346 (action on note; as to precise scope of this case, see review of Vermont cases in § 54, infra).

#### Lending of money without security.

Steam Nav. Co. v. Weed (1863) 17 Barb. (N. Y.) 378.

#### Discounting of negotiable instrument.

Allen v. Freedman's Sav. & T. Co. (1874) 14 Fla. 428; United German Bank v. Katz (1881) 57 Md. 141; Commercial Bank v. Nolan (1843) 7 How. (Miss.) 508 (a case of somewhat doubtful import; see review of Mississippi cases in § 40, infra); Allen v. First Nat. Bank (1872) 23 Ohio St. 97 (a case of which the precise rationale is somewhat doubtful; see review of Ohio cases in § 46, infra); Mutual Trust Co. v. Stern (1912) 235 Pa. 202, 83 Atl. 614; Smith v. White (1893) — Tex. Civ. App. —, 25 S. W. 809; Keys v. Cleburne Bldg. & L. Asso. (1893) — Tex. Civ. App. —, 25 S. W. 809; Head v. Cleburne Bldg. & L. Asso. (1893) — Tex. Civ. App. —, 25 S. W. 810.

In Atlantic State Bank v. Savery (1880)

entered into under any circumstances whatever, the question whether the principle of estoppel may operate so as to preclude the defendant in an action brought by the corporation from raising the plea of invalidity has, it seems, never been discussed by the English courts. But, having regard to the definite views which, in dealing with actions against corporations, they have expressed concerning the absolutely void quality of such contracts (see §§ 15 and 16 of the monograph appended to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737), there can be doubt that this question will be answered in the negative whenever it is presented. In one case, however, we find an explicit statement which could not have been made if the judge from whom it

proceeded had not assumed that the circumstance of the defendant's having received the benefits of the contract did not create any estoppel.<sup>1</sup>

The decisions involving contracts which were ultra vires in the secondary sense, that they were void, unless confirmed by a prescribed proportion of the shareholders, are apparently inconsistent. In one case where it was sought to charge the allottees of shares issued in pursuance of an amalgamation agreement with the liability of contributories in winding-up proceedings, the court apparently assumed that the transaction was as absolutely void as if it had been ultra vires in the strict sense of the term,—a position which necessarily required the conclusion that the principle

82 N. Y. 291, where the note sued upon had been purchased by the plaintiff bank at a greater discount than lawful interest, this fact was held not to invalidate its title. But the court also said: "The transaction out of which the cause of action became the property of the plaintiff was not forbidden. It was not improper in itself, and if it was not within the exact letter of the law from which the plaintiff derived its existence, the fault is one which should give no advantage to the defendants."

#### **Indorsement of negotiable instrument.**

Homestead Bank v. Wood (1892; C. P.) 1 Misc. 146, 20 N. Y. Supp. 640, reversing (1891) 18 N. Y. Supp. 718.

#### **Insurance of life or property.**

Bankers' Mut. Casualty Co. v. First Nat. Bank (1906) 131 Iowa, 456, 108 N. W. 1046 (action on note given for premium); Rochester Ins. Co. v. Martin (1868) 13 Minn. 59, Gil. 54 (action on note given for premium).

#### **Agency.**

Hall Mfg. Co. v. American R. Supply Co. (1882) 48 Mich. 331, 12 N. W. 205; Johnson v. Mason Lodge, I. O. O. F. (1899) 106 Ky. 838, 51 S. W. 620.

#### **Partnership.**

Cameron v. First Nat. Bank (1896) — Tex. Civ. App. —, 34 S. W. 178, affirming (1893) 4 Tex. Civ. App. 309, 23 S. W. 334 (see review of Texas cases in § 52, infra).

#### **Contract made with reference to the conduct of an unauthorized business.**

Louis Bletz & Co. v. Bank of Kentucky (1900) 21 Ky. L. Rep. 1554, 55 S. W. 697 (see review of Kentucky cases in § 34, infra).

#### **Contracts for construction work.**

Homestead Bank v. Wood (1892) 1 Misc. 145, 20 N. Y. Supp. 640. L.R.A.1917B.

#### **Contract conferring exclusive right to sell an article.**

Hall Mfg. Co. v. American R. Supply Co. (1882) 48 Mich. 331, 12 N. W. 205.

#### **Stipulation reserving royalties.**

Newburg Petroleum Co. v. Weare (1875) 27 Ohio St. 343 (for further information about this case, see review of Ohio decisions in § 46, infra).

#### **Contracts to assist in the construction of railroad.**

Chicago & A. R. Co. v. Derkes (1885) 103 Ind. 520, 3 N. E. 239 (contract to purchase and pay for plaintiff's right of way).

#### **Guaranty and similar contracts.**

Dunbar v. Cazort & M. Co. (1910) 96 Ark. 308, 131 S. W. 698 (suretyship); Alexandria, A. & Ft. S. R. Co. v. Johnson (1897) 58 Kan. 175, 48 Pac. 847 (guaranty); St. Louis Drug Co. v. Robinson (1888) 10 Mo. App. 588 (indorsement of note for accommodation of maker); H. Koehler & Co. v. Reinheimer (1898) 26 App. Div. 1, 49 N. Y. Supp. 755.

<sup>1</sup>In *The Royal Bank of India's Case* (1869; C. A.) L. R. 4 Ch. (Eng.) 252, while it was held that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been ultra vires, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time. Sir C. J. Selwyn, L. J., said (p. 261): "If it could have been shown that it was an act absolutely prohibited by their memorandum or articles of association, then, no doubt, a different question would have arisen; the act would have been ultra vires and incapable of confirmation or ratification." This remark was one of the authorities relied upon in *California Nat. Bank v. Kennedy* (1896) 167 U. S. 362, 369, 42 L. ed. 198, 201, 17 Sup. Ct. Rep. 831.

of estoppel could not be invoked.<sup>2</sup> But other cases proceed upon the theory that an estoppel may be created against alleging the invalidity of a transaction of this character.<sup>3</sup>

In a case where the trustees of a friendly society were held by the court of appeal to be entitled to prove against

the estate of a joint maker of a note given for money borrowed from the society by one of the other makers, the decision proceeded upon the ground that the transaction was not illegal, but merely unauthorized on the part of the directors.<sup>4</sup> That the theory entertained concerning the nature of the transaction

<sup>2</sup> *Stace's Case* (1869) L. R. 4 Ch. (Eng.) 682, 21 L. T. N. S. 182, 17 Week. Rep. 751. There the corporation was empowered by its articles of association to amalgamate with another if the transaction was confirmed by a certain majority of the stockholders at an extraordinary meeting. The amalgamation, in pursuance of which fully paid-up shares had been allotted to Stace and Worth, had never been so confirmed. It was sought to hold them liable on the ground that they had attended several meetings of the amalgamated company, and acted as directors of it, and in that capacity signed policies. But this contention did not prevail, because "these acts were done in conformity with and in pursuance of the void transactions." *Clinch v. Financial Corp.* (1868) L. R. 4 Ch. (Eng.) 117, 38 L. J. Ch. N. S. 1, 19 L. T. N. S. 334, 17 Week. Rep. 84, was distinguished on the ground that it involved an independent agreement.

In *Klenck v. East India Co.* (1888) 16 Sc. Sess. Cas. 4th series, 277, 26 Scot. L. R. 261, an allottee was held to be entitled to have his name deleted from the register.

<sup>3</sup> In *Bank of Hindustan v. Alison* (1870) L. R. 6 C. P. (Eng.) 54, affirmed by the Exchequer Chamber (see p. 222), where the issue of shares in pursuance of an amalgamation agreement was invalid as being in violation of a clause in the articles of association which declared that no additional shares could be issued except by consent of an extraordinary meeting, it was held that, upon the facts before the court, the defendant had not estopped himself by his conduct from denying that he was a shareholder. Bovill, Ch. J., said: "Looking, however, to all the circumstances, it is clear to my mind that all that was done, or omitted to be done, on either side, was the result of mere mistake. There was no misleading of the plaintiffs by the defendant into a belief of the existence of a state of facts which did not exist. Both parties were equally mistaken in supposing that a complete and legal amalgamation had taken place. If either party induced a belief in the mind of the other that the two banks had been properly amalgamated, it was the plaintiffs rather than the defendant. The plaintiffs appear to have acted on their own view of the law and the facts, and not upon any representation or conduct of the defendants." Two earlier cases were distinguished by the learned judge. In *Hull Flax & Cotton Mill Co. v. Wellesley* (1860) 6 Hurlst. & N. (Eng.) 38, 30 L. J. Exch. N. S. 5, where a company authorized to issue, with consent of a general meeting L.R.A.1917B.

of the shareholders, additional shares of £100 each, allotted to the defendant a portion of an issue of £50 shares, the court held that the defendant was estopped from denying that he was a shareholder,—first, because he had executed the deed of settlement, which authorized the creation of the shares, and, secondly, because he had for five years constantly received a dividend on the shares which he held. Under these circumstances, having bound himself by his execution of the deed, and having accepted a benefit, it was properly held that he had estopped himself from denying that he was a holder of valid shares. In *Re New Zealand Bkg. Corp.* (1868) L. R. 3 Ch. (Eng.) 131, 18 L. T. N. S. 2, 16 Week. Rep. 381, the directors of a company made an unauthorized issue of additional shares beyond their capital. They afterwards called general meetings at which resolutions were passed to increase the capital. Held, that the issue of the additional shares, although originally ultra vires, was confirmed by the resolutions, and that the allottees of those shares were bound by the resolutions, and were rightly placed on the list of contributories in the winding-up of the company. For other phases of the case of the Bank of Hindustan, see *Imperial Bank v. Bank of Hindustan* (1868) L. R. 6 Eq. (Eng.) 91, 16 Week. Rep. 1107 (where a decree was pronounced by which the attempted amalgamation was set aside); and *Campbell's Case* (1873) 9 Ch. (Eng.) 1, 42 L. J. Ch. N. S. 771, 29 L. T. N. S. 519, 22 Week. Rep. 113.

<sup>4</sup> *Re Coltman* (1881; C. A.) L. R. 19 Ch. Div. (Eng.) 64. Brett, L. J., said: "The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defense to an action that the person who lent him the money, and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money, I will pay you that money back on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take."

was that it was invalid merely as being beyond the powers of the trustees of the society, and not as being beyond the powers of the society itself, is apparent from the language used both by Jessel, M. R., and Brett, L. J. The latter explicitly distinguished the case under review from one in which the House of Lords had "decided that if the directors of a company assume to make a contract on the part of a company which neither the directors nor the company have authority to make, that contract cannot be enforced against the company; and, moreover, that it is so void from the beginning that it cannot be ratified by the company so as to make them liable."<sup>5</sup> The learned judge emphasized the fact that it had not been there held "that if money had been lent by directors without authority, the money could not have been recovered, or that the borrowers could have set up the defense that those who lent them the money had no authority to do so." Under the circumstances, it was obviously open to argument whether the statutory provision which defined the powers of the trustees with respect to the lending of the society's funds ought not to have been regarded as one which, in spite of its being in terms applicable only to the trustees, was really intended to specify the limits of the powers of the society itself. If the provision had been construed in this sense, it is clear from the English decisions as a whole that the circumstance of the borrower's having received the benefit of the transaction would not have estopped him, the other joint obligor, from raising the plea of ultra vires. But Jessel, M. R., said that he could not "find anything in the act which would prevent

all the members from effectually authorizing a loan on such security, though a mere majority could not do so."

In another case the actual point determined was that "in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is [not] an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal."<sup>6</sup> This decision and the reasoning upon which it was based are referred to here because the writer wishes to point out that, in spite of the fact that it is obviously not an appropriate precedent with regard to the consequences of the performance of an ultra vires contract, it has sometimes been cited as such by American courts.<sup>7</sup>

#### 16. Federal decisions generally.

The very few authorities that bear upon the subject indicate that, in one point of view, there is an essential similarity between the general doctrine adopted by the Supreme Court of the United States with regard to the right of a corporation to sue upon an ultra vires contract of which the other party has received the benefit, and the doctrine which it has enunciated (see next section) with special reference to the provisions of the statute which defines the powers of national banks. That is to say, the invalidity is considered to be a matter which concerns the government solely, and which cannot be set up as a defense to an action brought by the corporation itself.<sup>1</sup> In the footnote several cases are

<sup>5</sup> *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 2 Eng. Rul. Cas. 304. See § 16 of monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A. 1917A, 737.*

<sup>6</sup> *Fishmongers' Co. v. Robertson* (1843) 5 Mann. & G. 131, 134 Eng. Reprint, 510. Tindal, Ch. J., delivering the judgment of the court, said: "The defendants, having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is therefore not nudum pactum; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which have already been voluntarily performed; and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability L.R.A.1917B.

to sue the corporation, which suit they can never want to sustain. It may possibly be the case that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract and insist that their undertaking amounted to a nudum pactum only. But after the adoption of the contract by the corporation by performance on their part, upon general principles of reason the right to set up this defense appears altogether to fail."

<sup>7</sup> The extract in the preceding note is quoted in *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504. See § 5, supra.

<sup>1</sup> In *Jones v. New York Guaranty & Indemnity Co.* (1879) 101 U. S. 622, 25 L. ed. 1030, where the validity of a mortgage



cited in which this doctrine was recognized by the inferior Federal courts.<sup>3</sup>

Since the result of treating this doctrine as the controlling factor in any given case is to render it unnecessary and superfluous to consider whether the

which had been taken by the guaranty company from a company which subsequently became insolvent was attacked by the unsecured creditors of the latter company, the court laid it down that, "if the [mortgage] here in question be ultra vires, no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly." The authorities cited were *Silver Lake Bank v. North* (1816) 4 Johns. Ch. (N. Y.) 370, and *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188.

That the doctrine thus stated was held by the court at the time when it decided the earlier case of *Fleckner v. Bank of United States* (1823) 8 Wheat. (U. S.) 338, 5 L. ed. 631, may perhaps be inferred from its remark that, even if the plaintiff bank had violated a certain provision of its charter by the particular transaction under review, yet "the act has not pronounced that such a violation makes the transaction or contract ipso facto void; but has punished it by a specific penalty of treble the value. It would therefore remain to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself could, on this account, be avoided by a party to the original contract, who was not a party to the subsequent transfer."

<sup>3</sup>In *Mutual L. Ins. Co. v. Wilcox* (1878) 8 Biss. 203, Fed. Cas. No. 9,980, an action against the guarantor of a note given by the maker for a loan received from a life insurance company was held to be maintainable. After referring to some of the earlier New York cases which were relied upon by the defendant, Blodgett, J., continued thus: "I think the settled rule now is that the question of how this company shall invest its funds is a question between itself and the sovereignty that created it, and not a question between the borrowers and the company; in other words, that it does not lie in the mouth of this defendant to charge that this security is void. The money was advanced upon the faith of this security. But whether the company had the power to take this security or not is a question the defendant has no right to raise. . . . Any other rule than this would make the policy holders and parties interested in the funds of this company entirely remediless. Suppose that the directors of this corporation, induced by the larger rate of interest which is usually proffered in the western states, or outside of New York, had, instead of loaning their money upon New York state security, seem fit to invest largely in securities in the state of Illinois, would the

defendant is estopped from raising the defense of ultra vires for the reason that he has accepted the benefits of the transaction, it is not surprising that, so far as regards the cases in which a corporation was the moving party, that question

stockholders have to lose it all simply because their directors had violated the charter? It would seem to me a very harsh rule to say that the parties interested in this fund should be the losers simply from this violation of the company's charter,—a question simply between the sovereignty and the corporation itself."

In *Farmers' Loan & T. Co. v. Green Bay & M. R. Co.* (1882) 11 Biss. 334, 12 Fed. 773, where an action for damages to land was held to be maintainable, Harlan, J., rejected the contention of counsel that the manufacturing and boom companies in question "could not lawfully acquire land for the purpose of maintaining and cultivating cranberry vines, and the court, having ruled in the *Kelly Case* [not officially reported; see Fed. Cas. No. 2,492] that the law would not aid the corporation to acquire land, the title to which it could not lawfully take and hold, must now, to be consistent, rule that petitioning corporations, having, as is claimed, acquired title to land for purposes foreign to the object of their creation, cannot recover damages for injuries to such land arising from the negligence of the receiver and his agents engaged in the operation of the railroad." The learned judge summed up his opinion in its statement: "If injury is done to real estate conveyed to and held by a corporation, the party by whose negligence such injury is caused cannot be heard to say, in a collateral proceeding, and by way of defense to a suit for damages, that the corporation was not permitted by its charter to acquire title to the property, or that it had acquired it for purposes unauthorized by law. In considering this question the court has not deemed it necessary to determine whether these manufacturing and boom corporations exceeded their authority in acquiring title to cranberry marsh lands valuable only or chiefly for the cultivation of cranberry vines." Two of the authorities cited were decisions of the Supreme Court regarding national banks.

In *Maxwell v. Akin* (1898) 89 Fed. 178, where an action brought by a receiver to collect certain subscriptions to the stock of the Portland Guaranty Company was held to be maintainable, the court argued thus: "These stockholders are estopped to deny liability. They have assumed, through their organization, the authority to do what has been done. The corporation is in fact the stockholders acting together as an association. If, as individuals, they had guaranteed the notes of another, and by that means had induced third persons to invest their money in such obligations, an attempt to escape the lia-

should have been very seldom alluded to.<sup>3</sup>

*17. Federal decisions with regard to national banks.*

In some of the provisions of the congressional statutes by which the powers of national banks are defined (Act of June 3, 1864; U. S. Rev. Stat. §§ 5136, et seq., Comp. Stat. 1913, §§ 9661, et seq.) the prohibition against engaging in certain transactions is express; in others it is a matter of implication. But the doctrine now established with respect to both kinds of provisions is that the defendant in an action brought by a national bank upon a contract is not entitled to avail himself of the defense that it is void as constituting a violation of the act, the theory being that such a violation is a matter of which only the Federal authorities can take advantage. In other words, it is held that, "where the

provisions of the National Banking Act prohibit certain acts by banks or their officers, without imposing any penalty of forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties."<sup>1</sup> The leading case with regard to this doctrine is one in which the Supreme Court dissolved an injunction which had been granted by a Missouri judge to restrain the sale of real property under a trust deed which had been assigned to a bank as a security for a loan made at the time of the assignment. The injunction had been granted upon the ground that, as the transaction was a loan on real estate security, it contravened the implied prohibition of the clause of the statute which authorizes the loan of money on personal security (§ 5136). But the Supreme Court took the position that, even if it should be

bility thus assumed would not be thought of. There is no reason in morals or law why their obligations assumed through corporate action should not be equally binding. If they have assumed unwarranted corporate power, it is the state that is injured. It is not for them to take advantage of their own wrong to escape the obligations for which they incorporated themselves, and which they formally assumed, and in consideration of which the holders of these notes and bonds invested their money. . . . It is only where the party repudiating the contract pays for what it has had, and returns the property taken under the invalid agreement, that the other party will be refused relief. . . . The power possessed by the board of directors to levy and collect assessments is vested in the receiver, who may act when the board fails or refuses, as in this case, to do so. The demurrer is overruled."

In *Gorrell v. Home L. Ins. Co.* (1894) 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371, the plea of ultra vires was held, on demurrer, to be bad in an action brought upon a note discounted by a life insurance company.

See also *St. Avit v. Kettle River Co.* (1914) 133 C. C. A. 76, 216 Fed. 872, where ultra vires was held not to be available as a defense to an action brought by a municipality to cancel certain bills for construction work performed by the claimant.

In *Wallerstein v. Ervin* (1901) 50 C. C. A. 129, 112 Fed. 124, affirming (1901) 109 Fed. 135, the question presented for decision was whether Ervin, Page, & Company, which had, in pursuance of an ultra vires agreement, become a partner in a firm whose liabilities were being determined in bankruptcy proceedings, was entitled, as against other creditors, to enforce a claim for money lent to the firm. The grounds upon which this question was

answered in the negative were thus stated: "These transactions were, at the time of the adjudication of bankruptcy, fully executed, and the appellant could not avoid the legal consequences of what it had already completely done by showing that in so doing it had overstepped the bounds of its lawful authority. The trustee in bankruptcy did not seek to enforce an ultra vires contract, nor to compel the performance of any of its provisions. He simply insisted that a status which had been created by what had actually occurred should not, at the instance of a party to its creation, and to the prejudice of innocent third parties, be utterly ignored, and we think that in sustaining this insistence the court below was clearly right." From this passage it is clear that the applicability of the principle of estoppel as between the lending and borrowing corporations was not involved. But the court cited, amongst the precedents relied upon, two Pennsylvania cases which proceeded upon that principle.

<sup>2</sup> In *Oregon R. & Nav. Co. v. Oregonian R. Co.* (1888) 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409, reversing (1885) 10 Sawy. 472, 23 Fed. 232, it was held that the partial performance of an ultra vires lease did not create any estoppel against alleging its ultra vires character as a defense to an action for rent accruing subsequently to the repudiation of the contract. This decision was followed in *Oregon R. & Nav. Co. v. Oregonian R. Co.* (1889) 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. Rep. 1072, reversing (1886) 27 Fed. 277.

<sup>1</sup> *Thompson v. St. Nicholas Nat. Bank* (1892) 146 U. S. 240, 36 L. ed. 956, 15 Sup. Ct. Rep. 66. For a discussion of this case (in which the bank was the defendant), see § 70 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

conceded that there was such a contra-vention, the consequence insisted upon did not necessarily follow. It was observed that the statute did not declare such a security void, but was silent upon the subject; that, if Congress so meant, it would have been easy to say so; and that it was hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision.<sup>3</sup> After citing several cases in which a disregard of statutory prohibitions had been held not to vitiate the contracts of parties, but only to authorize actions by the government against them, the court summed up its conclusions as follows: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the

punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."<sup>3</sup> The application of the doctrine thus expounded manifestly rendered it unnecessary to refer to the juristic effect of the circumstance that the defendant had enjoyed the benefits of the contract. But this circumstance was adverted to as an additional ground for holding the action to be maintainable, for the reason that it raised an estoppel against the interposition of the plea of ultra vires.<sup>4</sup> In this point of view the decision must be regarded as one which committed the court to an adoption of the principle of estoppel, and in fact it has not unfrequently been cited as a precedent for that principle.<sup>5</sup>

In the numerous cases, some anterior and others subsequent to the leading one, the former of the two grounds upon which it was based has usually been

<sup>3</sup> Union Nat. Bank v. Matthews (1878) 98 U. S. 621, 25 L. ed. 188, reversing *Matthews v. Skinker* (1876) 62 Mo. 329, 21 Am. Rep. 425. Miller, J., dissented on the ground that the statute operated so as to render the transaction "void."

<sup>4</sup> In *Logan County Nat. Bank v. Townsend* (1890) 139 U. S. 67, 76, 35 L. ed. 107, 11 Sup. Ct. Rep. 496, Mr. Justice Harlan, speaking of this case, said: "The decision went upon these grounds: that the bank parted with its money in good faith; that the question as to the violation of its charter, by taking title to real estate for purposes unauthorized by law, could be raised only by the government in a direct proceeding for that purpose; and that it was not open to the [original] plaintiff in that suit, who had contracted with the bank, to raise any such question in order to defeat the collection of the amount loaned."

"It is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank, for a debt coincidentally contracted, do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government for exceeding its powers." *Schuyler Nat. Bank v. Gadsden* (1903) 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129.

"Although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void, and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without au-

thority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings by the government for exercising powers not conferred by law." *Kerfoot v. Farmers' & M. Bank* (1910) 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. Rep. 14.

In *Ripley v. Harris* (1872) 3 Biss. 199, Fed. Cas. No. 11,853 (decided a few years before the *Matthews* Case), the actual ruling was that, when the point that a security is invalid as having been taken in violation of the statute is not made in the pleadings, it will not be acted upon by the court, although disclosed by the proofs. Here the court apparently assumed the contract to be void.

<sup>4</sup> The court quoted the following statement in *Sedgwick on Statutory & Constitutional Law*, 2d ed. p. 73: "Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

<sup>5</sup> See, for example, *First Nat. Bank v. Gillilan* (1880) 72 Mo. 77; *Buffalo v. Balcom* (1892) 134 N. Y. 532, 32 N. E. 7; *Mutual Trust Co. v. Stern* (1912) 235 Pa. 202, 83 Atl. 614; *Texas Western R. Co. v. Gentry* (1888) 69 Tex. 625, 8 S. W. 98; *Logan v. Texas Bldg. & L. Asso.* (1894) 8 Tex. Civ. App. 490, 28 S. W. 141.

specified as the ratio decidendi. But in none of them has the propriety of applying the principle of estoppel been questioned.<sup>6</sup>

**Loans not made on "personal security" (§ 5136, Comp. Stat. 1913, § 9661).**

For cases in which money lent on the security of real estate was held to be recoverable, see *National Bank v. Whitney* (1880) 103 U. S. 99, 26 L. ed. 443; *Swope v. Leflingwell* (1881) 105 U. S. 3, 26 L. ed. 939; *Fortier v. New Orleans Nat. Bank* (1884) 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; *Lyons v. Lyons Nat. Bank* (1881) 19 Blatchf. 279, 8 Fed. 369.

**Purchasing and holding up real estate for purposes not specified by the statute (§ 5137, Comp. Stat. 1913, § 9674).**

That the power of a national bank to purchase and hold real estate could not be questioned by a private party was held in *Reynolds v. First Nat. Bank* (1884) 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Brown v. Schleier* (1902) 118 Fed. 981, 55 C. C. A. 475 (rent held to be recoverable under a lease alleged to be ultra vires a bank, because it undertook to erect on the demised premises a building which it did not contemplate using "for its immediate accommodation in the transaction of its business," but did intend to rent in part to third parties).

In *Kansas Valley Nat. Bank v. Rowell* (1873) 2 Dill. 371, Fed. Cas. No. 7,611, the effect of a ruling in a foreclosure suit brought by a bank was merely that the mortgage, being valid only in so far as it seemed a debt previously due, could not be reformed in respect of the future advances stipulated for.

**Interest received in excess of the rate authorized (§§ 5197, 5198, Comp. Stat. 1913, §§ 9758, 9759).**

In *Farmers' & M. Nat. Bank v. Dearing* (1875) 91 U. S. 29, 23 L. ed. 196, reversing (1875) 50 N. Y. 659, the precise point determined was that the only effect of accepting a higher rate of interest than that authorized by § 5198 was the forfeiture of the entire interest. The doctrine was applied in *Danforth v. National State Bank* (1891) 17 L.R.A. 622, 1 C. C. A. 62, 3 U. S. App. 7, 48 Fed. 271; *First Nat. Bank v. Garlinghouse* (1872) 22 Ohio St. 492, 10 Am. Rep. 751; *Bank of Cadiz v. Slemmons* (1877) 34 Ohio St. 142, 32 Am. Rep. 364.

For a case in which an action was brought to recover the penalty imposed by § 5198 upon a bank which reserves an excessive rate of interest, see *National Bank v. Johnson* (1881) 104 U. S. 271, 26 L. ed. 742.

**Loans in excess of authorized amount (§ 5200, Comp. Stat. 1913, § 9761).**

In *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1877) 96 U. S. 640, 24 L.R.A.1917B.

The objections to which the doctrine explained in the preceding subsection is open are these: (1) that it is in conflict with elementary rule of law that

L. ed. 648, 1 Mor. Min. Rep. 432, the court said: "We do not think that public policy requires, or that Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him." Having regard to the ratio decidendi, as shown in the above statement, it is clearly improper to rely on the case as a precedent for the principle of estoppel, as, for example, in *Atlantic State Bank v. Savery* (1880) 82 N. Y. 291.

In *Stewart v. National Union Bank* (1869) 2 Abb. (U. S.) 424, Fed. Cas. No. 13,435, where a creditors' bill was dismissed as to the defendant bank, Giles, J., remarked that certain loans made by the three banks in question, although they were in excess of the amount allowed by the act, were not void, and that if the banks were then in court seeking to recover the same, he would have great difficulty in permitting the borrowers, or anyone claiming through them, to set up the defense of ultra vires. The learned judge did not state the grounds upon which this opinion was based, and he may or may not have had in mind the doctrine afterwards propounded by the Supreme Court. The principle upon which the decision was actually based was "that, where the contracts are executed, even if the court would not have enforced them, the court will leave the parties where it finds them, giving aid or relief to neither."

The two cases above cited are in harmony with *Shoemaker v. National Bank* (1869) 2 Abb. (U. S.) 416, Fed. Cas. No. 12,801; *Mutual L. Ins. Co. v. Wilcox* (1878) 8 Biss. 203, Fed. Cas. No. 9,980; *Wyman v. Citizens' Nat. Bank* (1887) 29 Fed. 734; *The Seattle* (1909) 95 C. C. A. 480, 170 Fed. 284.

**Loans made "on the security of the share" of the bank itself (§ 5201, Comp. Stat. 1913, § 9762).**

In *First Nat. Bank v. Stewart* (1882) 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778, an action brought to recover the proceeds of shares which had been sold by the bank at the expiration of the time fixed for repayment of the loan for which they had been deposited as collateral security was held not to be maintainable for reasons thus stated: "While this section in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all,

no action can be maintained upon a contract which the legislature has prohibited either expressly or by implication;<sup>7</sup> (2) that it cannot be reconciled with the general theory subsequently propounded by the Supreme Court with regard to the absolutely void quality of ultra vires contracts;<sup>8</sup> and (3) that the decisions based upon it are essentially

inconsistent with the cases in which the court, proceeding upon that theory, has held that a national bank cannot be held liable on a contract which violates the provisions of the regulating statute, even though the complainant has performed it on his side.<sup>9</sup>

The antinomy indicated by the second and third of these objections may per-

be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves." It is apparent, therefore, that the question whether the section of the statute which was under review should be construed on the same footing as the others was not explicitly determined, so far as contracts not fully executed on both sides were concerned. But doubtless this question will be answered in the affirmative whenever it is presented. The decision itself was followed in *First Nat. Bank v. Lanz* (1913) 120 C. C. A. 271, 202 Fed. 117.

#### **Purchase of its own shares by bank (§ 5201).**

In *Lantry v. Wallace* (1901) 182 U. S. 536, 45 L. ed. 1218, 21 Sup. Ct. Rep. 878, affirming (1899) 38 C. C. A. 510, 97 Fed. 865, where the receiver of a national bank brought suit to enforce the individual liability of the defendant as a stockholder, defendant contended that the purchase of the stock from the previous holders was not simply voidable, but was absolutely void; and that, consequently, the sale to him of such stock was void. But the court was of the opinion that, "when the violation of the statute has occurred, it is not a matter of which a shareholder can complain in order that he may be relieved from the liability attaching to him as a shareholder, and which the receiver seeks to enforce under the orders of the Comptroller."

In the above case no reference was made to *Burrows v. Niblack* (1898) 28 C. C. A. 130, 53 U. S. App. 712, 84 Fed. 111, where the decision, holding the receiver of a national bank to be entitled to maintain an action to recover back the money paid for shares of the bank's own stock which it had bought from the defendant, proceeded upon an apparently different theory concerning the juristic quality of a purchase of stock. The court argued thus: "The principal objections urged are (1) that the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) that the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and (3) that a tender back of the shares of stock purchased was essential to the right of recovery of the price paid. L.R.A.1917B.

The first objection is based upon that line of decisions of which illustrations are found in *Union Nat. Bank v. Matthews* (1879) 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney* (1880) 103 U. S. 99, 26 L. ed. 443; and *Thompson v. St. Nicholas Nat. Bank* (1892) 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; but the present case, as we think, is governed rather by the principles declared in *McCormick v. Market Nat. Bank* (1897) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 831, and *California Nat. Bank v. Kennedy* (1897) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, where the line of cases mentioned is distinguished. The transaction here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but, as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction pro tanto of the corporate stock. . . . The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were indorsed in blank, and delivered to the president of the bank, the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock."

#### **Increase of capital stock (§ 5205, Comp. Stat. 1913, § 9767).**

*Scott v. Deweese* (1900) 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585 (defendant held liable, as shareholder, to creditors of bank).

<sup>7</sup>In *Penn v. Bornman* (1882) 102 Ill. 523, it was remarked that the Supreme Court of the United States had "reached a conclusion which was believed to be in direct conflict with the most approved text-books, and to be opposed to an almost unbroken current of judicial decisions in this country and England."

<sup>8</sup>See especially the exposition of principles in the opinion delivered by Gray, J., in the leading case of *Central Transp. Co. v. Pullman's Palace Car Co.* (1891) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. Some extracts from this opinion are quoted in §§ 24 and 68 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 749.

<sup>9</sup>See § 70 of the monograph referred to in note 8, supra.

haps be accounted for by the fact that the doctrine under discussion was enunciated during a period when, as is shown in another place,<sup>10</sup> the Supreme Court was exhibiting a strong tendency to adopt the principle that a corporation against which an action is brought upon a contract of which it has received the benefits is estopped from alleging its invalidity as a defense. But the serious difficulties created by the apparent antagonism between the two groups of the decisions of the court are not removed by this historical explanation.

### 18. State and Federal decisions col- lated.

Some of the decisions of state courts anterior to the leading case in which the Federal Supreme Court defined its position<sup>1</sup> are irreconcilable with the doc-

trine there laid down;<sup>2</sup> others are in harmony with it.<sup>3</sup> With the decisions belonging to the latter of these categories may be classed a few in which, although they were decided subsequently to the leading case, it was not referred to.<sup>4</sup> Such decisions, whether consistent with or repugnant to the rulings of the Federal Supreme Court are, it is obvious, merely indicative of the nature of the general views which in the particular jurisdictions prevailed with respect to the right of a corporation to maintain an action on an ultra vires contract of which the defendant has received the benefits.

So far as regards the cases determined with reference to the rulings of the Federal Supreme Court, the larger part of them proceed upon the broad ground that, as the construction and ef-

<sup>10</sup> See § 68 of the monograph referred to in note 8, supra.

<sup>1</sup> See note 1 to the preceding section.

<sup>2</sup> In *Fowler v. Scully* (1872) 72 Pa. 456, 13 Am. Rep. 699, a mortgage of real estate was held to be nonenforceable on the broad ground that it was void, as being in contravention of the regulating statute (§ 5137, Comp. Stat. 1913, § 9674). This ruling was followed with respect to the same provision in *Woods v. People's Nat. Bank* (1876) 83 Pa. 57.

In *Fridley v. Bowen* (1877) 87 Ill. 151, it was held that a mortgage taken by a national bank to secure a present loan was void, as being by implication prohibited by § 5137 of the act. This ruling was explicitly disapproved in *Penn v. Bornman* (1882) 102 Ill. 523.

In *Conklin v. Second Nat. Bank* (1871) 45 N. Y. 655, the ratio decidendi was that no lien could be acquired on stock which the bank had taken as security for a loan in contravention of § 35 of the act (U. S. Rev. Stat. § 5201, Comp. Stat. 1913, § 9762).

In *Crocker v. Whitney* (1877) 71 N. Y. 161, a mortgage was held to be nonenforceable, because it was not given to secure a pre-existing indebtedness, and was therefore in violation of § 28 of the act (U. S. Rev. Stat. § 5137). The court followed *Fowler v. Scully* (Pa.) supra, and applied the general rule of law that contracts prohibited by the legislature are void. This decision was reversed in (1880) 103 U. S. 99, 26 L. ed. 443.

In *First Nat. Bank v. Pierson* (1877) 24 Minn. 140, 31 Am. Rep. 341, an action on a note of which the bank was the transferee was held not to be maintainable, because it had been purchased, not discounted. This decision was overruled in *Merchants' Nat. Bank v. Hanson* (1884) 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849.

<sup>3</sup> In *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1872) 1 Colo. 531, it was held, on demurrer to a plea, that an action

was maintainable to recover a loan exceeding the authorized amount (§ 5200, Comp. Stat. 1913, § 9761). On a later appeal of this case, it was laid down that Congress did "not intend that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him." (1873) 2 Colo. 248. This judgment was affirmed by the Federal Supreme Court (1877) 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432. See note 6 to preceding section.

In *Allen v. First Nat. Bank* (1872) 23 Ohio St. 97, the ratio decidendi was an assumed distinction between ultra vires and illegal acts. See § 46, infra.

In *O'Hare v. Second Nat. Bank* (1874) 77 Pa. 96, the fact that the maker of the note sued upon was indebted to the bank in excess of one tenth of its capital was held not to be a good defense, for the reason that this limitation (§ 5200) was merely "intended as a general rule for conducting the business of the bank," and that it was evidently not the intention of Congress to declare the securities taken by the bank to be illegal. This decision was followed with regard to the same provision in *Bly v. Second Nat. Bank* (1875) 79 Pa. 453 (where the opinion of the trial judge was adopted by the supreme court); and *Stephens v. Monongahela Nat. Bank* (1878) 88 Pa. 167, 32 Am. Rep. 438.

<sup>4</sup> In *National Pemberton Bank v. Porter* (1878) 125 Mass. 333, 28 Am. Rep. 237, and *Atlas Nat. Bank v. Savery* (1879) 127 Mass. 75, where the fact that the statute had been violated by the purchase of the notes sued upon was held not to be a bar to recovery, the doctrine invoked was essentially different from that which is embodied in the Federal cases. See § 38, infra.

In *Farmers' Nat. Bank v. Robinson* (1898) 59 Kan. 777, 63 Pac. 762, where the transaction under review violated U. S. Rev.

fect of the National Bank Act are essentially Federal questions, the decisions of that court concerning those questions are absolutely and in every respect controlling in state courts.<sup>5</sup> This, it may be assumed, was the principle taken for granted in all the cases in which the state courts have avowedly followed the decisions of the Supreme Court.<sup>6</sup>

Stat. § 3477, Comp. Stat. 1913, § 6383, prohibiting the assignment of claims, the specified ratio decidendi was the defendant's receipt of the benefits of the contract.

In *Union Nat. Bank v. Hunt* (1879) 7 Mo. App. 42, the court, referring to the provision which prohibits a national bank from lending money on the security of its own shares, observed that, even if the act was intended to prohibit the bank from holding its own stock as collateral security for the price of stock which it had previously purchased to prevent loss upon a debt, and afterwards sold, this "would not make the contract of sale void, or prevent the bank from recovering upon the note. An abuse of its corporate powers might be a reason for punishing the bank, but would be no sufficient reason for not enforcing this contract in the interest of the creditors of the bank." The failure of the court to cite *Union Nat. Bank v. Matthews* is possibly due to the fact that it had not yet been reported. But this explanation will not account for the omission of the supreme court to advert to that case in its affirming judgment, delivered three years afterwards. See 76 No. 439, where the opinion of the court of appeals was adopted in toto.

In *Wroten v. Armat* (1879) 31 Gratt. (Va.) 228, which involved the question whether a deed of trust executed to a national bank was entitled to priority over a deed of trust executed to another party, the court, without referring to the leading case of *Union Nat. Bank v. Matthews*, which had been decided during the preceding year, laid it down that, even though the act of Congress had plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or had made it penal to do so, it did not follow that the deed or mortgage in such case would be void, and that the borrower would be entitled to have the money loaned and at the same time to hold on to the property which he stipulated to give or to pledge for its security.

<sup>5</sup>In *Penn v. Bornman* (1882) 102 Ill. 523, the "paramount authority" of those decisions was conceded in general terms. See also *Voltz v. National Bank* (1895) 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69, where this expression of opinion was approved.

In *Merchants' Nat. Bank v. Hanson* (1884) 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849, the court overruled *First Nat. Bank v. Pierson* (1877) 24 Minn. 140, 31 Am. Rep. 341, as being inconsistent with the Federal decisions of a later date. As to L.R.A.1917B.

A qualified rule of the following tenor has also been propounded: "This court would unquestionably be bound to follow the holding of the Supreme Court of the United States as to the powers of national banks,—this is strictly a Federal question. But, on the other hand, upon the question of the effect or application of such holding as a defense in

the present judicial position in Minnesota, however, see note 7, *infra*.

"State courts must yield to the decisions of the Supreme Court of the United States, construing the powers of national banks under the National Banking Act." *First Nat. Bank v. American Nat. Bank* (1903) 173 Mo. 153, 72 S. W. 1059.

In *Graham v. National Bank* (1880) 32 N. J. Eq. 804, the court based its decision on a judgment of the Federal Supreme Court which had "authoritatively determined the validity of mortgages like the one in controversy."

<sup>6</sup>In the following cases the right of action was affirmed, except where it is otherwise stated. They are classified under the same heads as those tabulated in note 6 to the preceding section.

#### **Loans not made on personal security (§ 5136, Comp. Stat. 1913, § 9661).**

For cases in which money lent on the security of real estate was held to be recoverable, see *Warner v. De Witt Co. Nat. Bank* (1879) 4 Ill. App. 305; *First Nat. Bank v. Elmore* (1879) 52 Iowa, 541, 3 N. W. 547; *State Nat. Bank v. Flathers* (1893) 45 La. Ann. 75, 40 Am. St. Rep. 216, 12 So. 243; *Dresser v. Traders' Nat. Bank* (1895) 165 Mass. 120, 42 N. E. 567; *Fifth Nat. Bank v. Pierce* (1898) 117 Mich. 376, 75 N. W. 1058; *George v. Somerville* (1899) 153 Mo. 7, 54 S. W. 491; *First Nat. Bank v. Grosshans* (1901) 61 Neb. 575, 85 N. W. 542; *Graham v. National Bank* (1880; Err. & App.) 32 N. J. Eq. 804; *Slade v. Squier* (1909) 133 App. Div. 666, 118 N. Y. Supp. 278; *Oldham v. First Nat. Bank* (1881) 85 N. C. 240; *First Nat. Bank v. Messner* (1913) 25 N. D. 263, 141 N. W. 999 (doctrine applied in action in which it was sought to hold a bank cashier personally liable for releasing for less than its face value a debt owed to the bank); *Winton v. Little* (1880) 94 Pa. 64.

For a case in which money lent on the security of personal property was held to be recoverable, see *Smith v. First Nat. Bank* (1895) 45 Neb. 444, 63 N. W. 796.

#### **Purchase of bills, notes, etc., out of the ordinary course of banking business (§ 5136, Comp. Stat. 1913, § 9661).**

*Prescott Nat. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909; *Merchants' Nat. Bank v. Hanson* (1884) 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849, overruling *First Nat. Bank v. Pierson* (1877) 24 Minn. 140, 31 Am. Rep. 341, which had been decided before the leading Federal cases; *First*

a given case properly brought in the state court, this court may properly follow its own decisions, even when differing from the decisions of the Federal courts. Such questions are not Federal questions."<sup>7</sup> The distinction thus taken is certainly a very fine one, to say the least. It would appear to be somewhat anomalous to assert that certain precedents may be controlling with regard to the main question of the nature and extent of corporate powers, and at the same time not controlling with regard to the availability of a defense, the efficacy of which must, in the final analysis, de-

pend upon the manner in which that question is answered.

In the case cited in the footnote, the authority of the Federal decisions reviewed in this section was fully recognized, but they were not followed for the reason that, in the opinion of the court, the rights of the parties to the premises were determinable with reference to certain other Federal decisions.<sup>8</sup>

It is well settled, that, in dealing with statutory provisions regarding state banks, which are similar to those of the National Bank Act, state courts are not bound to follow the Federal decisions re-

Nat. Bank v. Gillilan (1880) 72 Mo. 77; First Nat. Bank v. Smith (1895) 8 S. D. 7, 65 N. W. 437.

**Purchasing and holding of real estate for purposes not specified by the statute (§ 5137, Comp. Stat. 1913, § 9674).**

Hennessey v. St. Paul (1893) 54 Minn. 219, 55 N. W. 1123 (certificate of tax sale purchased by bank was held to be a valid lien on the land); Minneapolis Threshing Mach. Co. v. Jones (1905) 95 Minn. 127, 103 N. W. 1017; Thornton v. National Exch. Bank (1879) 71 Mo. 221; Buchanan v. Saunders County Nat. Bank (1903) 4 Neb. (Unof.) 410, 94 N. W. 631 (statute alleged to be contravened by the bank's having taken an assignment of a foreclosure decree as a speculation); Farmers Deposit Nat. Bank v. Western Pennsylvania Fuel Co. (1906) 215 Pa. 115, 114 Am. St. Rep. 949, 64 Atl. 374 (rent held to be recoverable under lease alleged to be ultra vires the bank, because it undertook to erect on the demised premises a building which it did not contemplate using for its immediate accommodation in the transaction of its business).

**Interest reserved in excess of the rate authorized (§§ 5197, 5198, Comp. Stat. 1913, §§ 9758, 9759).**

In Union Nat. Bank v. Louisville, N. A. & C. R. Co. (1893) 145 Ill. 208, 34 N. E. 135, the court, without referring at all to the Federal decisions, held that no action could be maintained on the contract. But this ruling is inconsistent with the more recent Voltz Case cited below.

**Loans in excess of authorized amount (§ 5200, Comp. Stat. 1913, § 9761).**

Voltz v. National Bank (1895) 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69, affirming (1895) 57 Ill. App. 360; Mills County Nat. Bank (1887) 72 Iowa, 15, 2 Am. St. Rep. 228, 33 N. W. 341; Maryland Trust Co. v. National Mechanics Bank (1906) 102 Md. 608, 63 Atl. 70; Coreoran v. Batchelder (1888) 147 Mass. 541, 18 N. E. 420; Smith v. First Nat. Bank (1895) 45 Neb. 444, 63 N. W. 796; Portland Nat. Bank v. Scott (1891) 20 Or. 421, 26 Pac. 276. L.R.A.1917B.

**Loans made "on the security of the shares" of the bank (§ 5201, Comp. Stat. 1913, § 9762).**

Walden Nat. Bank v. Birch (1891) 130 N. Y. 221, 14 L.R.A. 211, 29 N. E. 127 (action to recover from sureties of cashier the value of share converted by him); Chapin v. Merchants' Nat. Bank (1888; Sup. Ct.) 14 N. Y. S. R. 272.

**Transactions in respect of which the statute is silent.**

In National Bank v. Burr (1882) 27 Hun (N. Y.) 109 (for earlier appeal, see (1878) 15 Hun, 51), the plaintiff bank had received a note with the view of having it discounted by another bank, and unlawfully charged for its indorsement a commission of 5 per cent per annum. After the instrument had been so discounted, it came again into the plaintiff's possession. Held, that the unlawful agreement did not affect the title of the bank to the note, and that an action was maintainable thereon. The court said: "The government granting the charter must interfere for acts of a bank in excess of its powers. The laws relating to state and national banks are the same."

<sup>7</sup> Security Nat. Bank v. St. Croix Power Co. (1903) 117 Wis. 217, 94 N. W. 74. This statement was quoted in Hunt v. Hauser Malting Co. (1903) 90 Minn. 282, 96 N. W. 85, where, however, its apparent inconsistency with what was said in the earlier Minnesota case, Merchants' Nat. Bank v. Hanson (1884) 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849, was not adverted to.

<sup>8</sup> Buffalo German Ins. Co. v. Third Nat. Bank (1900) 162 N. Y. 163, 48 L.R.A. 107, 56 N. E. 521. There the action held to be maintainable was brought to obtain a judgment directing the defendant to transfer upon its books to the plaintiff 450 shares of its capital stock, which stood in the name of one Levi, who had, some years previously, pledged them with the plaintiff to secure the payment of his promissory notes for moneys loaned. The defendant claimed a lien upon the stock by force of a statement printed upon the face of the certificates to the effect that "no transfer of the stock of this association shall be made without the consent of the board of direc-



lating to that act.<sup>9</sup> But it is conceded that those decisions possess a strongly persuasive authority.<sup>10</sup> Having regard to a familiar principle of statutory construction, it would seem that the reasons

for deferring to them are well nigh conclusive, when it appears that the state act was intentionally modeled upon the Federal one. They have even been followed in cases involving the remedial

tors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends." The essential question involved was, therefore, whether the lien so reserved by the bank was valid as against the pledgeor and third parties. The grounds upon which it was considered that this question should be answered in the negative were thus stated: "The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the Supreme Federal Court, and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the National Banking Act is not, in the absence of any declaration to that effect, void, or incapable of enforcement. . . . Hence, it was deemed to follow that, in the present case, the bank's claim to be entitled to an equitable lien, though against a purchaser for value and in good faith of its shares in the market, must be allowed, and any offense against the Banking Act involved must be left to governmental cognizance. I believe this conclusion to be fallacious, and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases in their facts and in the principle underlying their decision, and the earlier cases which construed the National Banking Acts and declared the doctrine that loans by banking association to their stockholders do not give a lien to the bank upon their stock. *First Nat. Bank v. Lanier* (1870) 11 Wall. (U. S.) 369, 20 L. ed. 172; *Bullard v. National Eagle Bank* (1873) 18 Wall. (U. S.) 594, 21 L. ed. 925. I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession, and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge, in order to raise L.R.A.1917B.

a privilege against third persons. *Casey v. Cavaroc* (1878) 96 U. S. 467, 24 L. ed. 779; *Wilson v. Little* (1849) 2 N. Y. 443, 51 Am. Dec. 307. . . . If the case had been one where the bank, not regarding the prohibition of the Banking Act, had taken from Levi his certificates of stock as collateral security for the payment of any indebtedness which he had incurred, or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or anyone claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Union Nat. Bank v. Matthews* (1879) 98 U. S. 621, 25 L. ed. 188, or *First Nat. Bank v. Stewart* (1882) 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778. If the bank had violated the law, it laid itself open to proceedings on the part of the government, and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors. There is no conflict between the *Lanier* and *Bullard* Cases and the *Matthews* Case and the *Whitney* Case (1880) 103 U. S. 99, 26 L. ed. 443. Each class is distinct, and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed and to avoid it would be to deplete the assets of the bank to the amount represented by the contract; it is quite another thing where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute, which provides that it shall not have such a lien or take such a security." In *Nicollet Nat. Bank v. City Bank* (1887) 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577, the *Lanier* and *Bullard* Cases were followed in a case involving the effect of a state enactment corresponding to § 5201 of the Federal act.

<sup>9</sup> *Penn. v. Bornman* (1882) 102 Ill. 523; *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85.

<sup>10</sup> In *Nelson v. Leiter* (1901) 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851, affirming (1901) 93 Ill. App. 176, a provision virtually identical with the section of the National Bank Act which defines the permissible amount of debt that may be contracted by a national bank was construed in the same manner as that section. But in this instance the propriety of following the Federal decisions was indicated by the circumstance that the state legislature had, by adopting the words of the congressional act, signified its intention that the decisions concerning it should also be adopted as controlling.

rights of corporations organized for purposes other than that of banking.<sup>11</sup> But it seems to be open to question whether it is justifiable to treat them as precedents in a case of this description, unless the court to which it is presented is one of those which accept the principle of estoppel.

#### 19. Alabama.

In an early case which turned upon the meaning of a clause in the charter of the plaintiff bank to the effect that it should "not be lawful" for it to discount a bill of exchange for a larger sum than that specified, it was held that an action would lie on the instrument itself. But the ratio decidendi was that this provision should be construed as being merely directory, and consequently did not operate so as to render the contract void; that is to say, the rule prescribed in this instance by the legislature was regarded as being outside the category of those "which cannot be transcended, and the observance of which is essential to the validity of the contracts" of a corporation.<sup>1</sup> Having regard to the facts involved, and to the special ground

assigned for the conclusion arrived at, this case may reasonably be regarded as indicating that at the date when it was decided the court was of opinion that, as a general rule, a contract which a corporation was forbidden to enter into was void in such a sense that no action could be maintained upon it even though its benefits had been received by the defendant. That the same doctrine would have been applied also with respect to a contract which was invalid as being merely not authorized may apparently be inferred from the consideration that the case belongs to a period during which it had not yet been suggested in any jurisdiction that the remedial rights in respect of expressly prohibited and of unauthorized transactions were different. See § 15 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

Some later cases proceeded upon the broad ground that ultra vires contracts are not enforceable, no allusion being made to the circumstance that the other parties had, as a matter of fact, received the benefits of the contracts in question.<sup>2</sup>

<sup>11</sup> *Chaffee v. Middlesex R. Co.* (1888) 146 *Mass.* 224, 16 N. E. 34 (payment of railroad bonds in hands of insurance company cannot be resisted by the railroad company on the ground that the insurance company was not authorized to invest its money in such securities); *Butterworth v. Kritzer Mill. Co.* (1897) 115 *Mich.* 1, 72 N. W. 990; *Washington L. Ins. Co. v. Clason* (1900) 162 N. Y. 305, 56 N. E. 755.

In *Bond v. Terrell Cotton & Woolen Mfg. Co.* (1891) 82 *Tex.* 309, 18 S. W. 691, the court observed: "It appears to be the settled rule and doctrine of our highest tribunal that the benefited party to a contract executed by a corporation shall be held estopped from resisting the demand of a corporation founded upon such contract, even though by the statutory charter of the corporation it is by clear implication forbidden to enter into the contract. *National Bank v. Whitney* (1880) 103 U. S. 99, 26 L. ed. 443; *Swope v. Leffingwell* (1882) 105 U. S. 3, 26 L. ed. 939; *Reynolds v. First Nat. Bank* (1884) 112 U. S. 405, 28 L. ed. 733, 5 *Sup. Ct. Rep.* 213. We therefore agree with the court below that the appellants, having received the benefit of the loan, are in no position to question its validity." This, it is submitted, is a manifestly unwarrantable generalization from the decisions of the Supreme Court. It is only in cases relating to national banks that that tribunal has applied the doctrine here referred to; though it unquestionably showed at one time a tendency to adopt the principle of estoppel in respect of actions against corporations (see § 68 of the mono-

graph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

#### Alabama.

<sup>1</sup> *Bates v. Bank of Alabama* (1841) 2 *Ala.* 451.

<sup>2</sup> In *Smith v. Alabama L. Ins. & T. Co.* (1843) 4 *Ala.* 558, a suit brought to foreclose a mortgage taken to secure a bond executed by the defendant and delivered to the plaintiff in exchange for its own bond was held not to be maintainable, for the reason that the corporate bond was ultra vires. The court reasoned thus: "The company had no power to lend its obligations to pay money in future. The contract, therefore, made by it with the plaintiff in error, whether it be considered a loan of the bonds of the company or an exchange of credits, is void, and the security taken for the performance of this illegal contract, being necessarily void also, cannot be the foundation of any proceeding in a court of justice."

In *Grand Lodge v. Waddill* (1860) 36 *Ala.* 313, where it was held that no action could be maintained on a note given for an ultra vires loan, the court said: "Contracts of corporations which they have no power to make are void, and courts of justice will not enforce them. So, also, promissory notes and other instruments given to secure the performance of the contract are void. No action to enforce the contract, whatever form the pleader's skill may give it, can be maintained." The court cited several of the earlier New York cases. See § 44, *infra*.

In one of these the court took occasion to repudiate the theory that "by contracting with a corporation the party contracting estops himself from disputing the power of the corporation to make the contract."<sup>3</sup>

The doctrine that no estoppel against pleading *ultra vires* can be predicated from the circumstance of the adverse party's having enjoyed the benefits of the contract was first explicitly enunciated in a case involving the remedial rights of a municipal corporation,<sup>4</sup> and was afterward recognized with reference to actions brought by a private corporation.<sup>5</sup>

In this state, therefore, "it is thoroughly well-settled law that a party to an *ultra vires* executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself."<sup>6</sup>

In *Westinghouse Mach. Co. v. Wilkinson* (1885) 79 Ala. 312, it was held that no action would lie on a note which the Montgomery Iron Works Company had, in pursuance of an *ultra vires* contract of agency, taken for the price of certain articles and subsequently indorsed to its principal, the plaintiff.

In *Waddill v. Alabama & T. River R. Co.* (1859) 35 Ala. 323, an action on a bill of exchange drawn by Waddill for accommodation of a Masonic institute, and negotiated by it to the plaintiff railroad company, it was held that, as the company "had no authority to lend its money or to employ its funds in the purchase of a bill of exchange as an independent business transaction," it necessarily followed that the president of the railroad had, as such, no authority to make a loan of such funds, and that, if Waddill, "at his own instance, had the use and benefit of funds belonging to the railroad company in the payment of a debt for which he was bound, the law, at the instance of the railroad, will imply a promise on his part to repay the money." A decision based on this ground is evidently not a direct authority for the doctrine recognized in the above cases; but it is one of the precedents relied upon in the second one cited.

<sup>3</sup> *Wilks v. Georgia P. R. Co.* (1885) 79 Ala. 180, where a suit for the specific performance of a contract by which the defendant Wilks agreed to convey to one Colquit and certain persons named Gordon, their associates and successors, the title to all the coal and iron upon the land L.R.A.1917B.

## 20. Arizona.

It was recently laid down in an action to foreclose a trust deed, that defendants, "having enjoyed the full benefit of the contract, having received and used the money borrowed, cannot be permitted now to repudiate its burden by a collateral attack for the want of power in the corporation. Public policy is promoted by the maintenance of the obligation of contracts, and after the contract has been fully executed, and the appellants have enjoyed its full benefits, it would be most inequitable and unjust to permit them to resist the payment of the money borrowed upon the plea of *ultra vires*."<sup>1</sup>

## 21. Arkansas.

The doctrine established in this state is that a person who has contracted with a corporation and received the benefit of the transaction cannot, in an action brought upon the contract, raise the defense that it was *ultra vires*.<sup>1</sup>

## 22. California.

In one case the ground upon which the action was held not to be maintainable

in question, if a railway should be constructed within a specified period, was held not to be maintainable.

<sup>4</sup> *Montgomery v. Montgomery & W. Pl. Road Co.* (1857) 31 Ala. 76.

<sup>5</sup> *Marion Sav. Bank v. Dunkin* (1875) 54 Ala. 471 (arguendo, in a case where the actual point decided was that the defendant was not entitled to raise the question whether the plaintiff had been duly organized; see § 9 (a), supra); *Chambers v. Falkner* (1880) 65 Ala. 448 (no action maintainable on promissory note or mortgage securing it, plaintiff having no power to lend money).

See also *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353, where the doctrine of the above cases was affirmed arguendo.

<sup>6</sup> *Long v. Georgia P. R. Co.* (1890) 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; 1 Keener, Contr. 766 (bill to cancel deed).

## Arizona.

<sup>1</sup> *Leon v. Citizens' Bldg. & L. Asso.* (1912) 14 Ark. 294, 127 Pac. 721, Ann. Cas. 1914D, 1151.

## Arkansas.

<sup>1</sup> *White River, L. & W. R. Co. v. Star Ranch & Land Co.* (1905) 77 Ark. 128, 91 S. W. 14 (suit on bond given to secure performance of contract).

In *Dunbar v. Cazort-McGehee Co.* (1910) 96 Ark. 308, 131 S. W. 698, a suit brought to foreclose a mortgage executed by the defendant in an action then pending, to secure the plaintiff company when it became surety on a supersedeas bond, was held to

was simply that the contract sued upon was one which neither the corporation nor the other party had power to enter into.<sup>1</sup> The remedial rights of the plaintiff were not discussed with reference to the facts that the contract had been executed on its side, and that the defendant had accepted the benefits of it. But in several subsequent cases these facts have been treated as creating an estoppel against pleading *ultra vires*.<sup>2</sup>

The ratio decidendi in one instance was that the question of *ultra vires* was one which only the state was entitled to raise.<sup>3</sup>

### 23. Colorado.

In one case it was held that, in an action of assumpsit for money lent by a national bank, a special plea averring that the loan exceeded the authorized amount was held to be demurrable, on the ground that the question of *ultra vires* was one which concerned only the Federal authorities.<sup>1</sup>

### 24. Connecticut.

In an early case where the right of the plaintiff corporation to recover on a promissory note which it had discounted was denied, the decision was based partly upon the ground that an implied prohibition against the exercise of the power of making loans by the discount of

be maintainable on grounds thus stated: "The principal contention of the appellant is that the corporation exceeded its charter powers in becoming surety, and that the contract of suretyship, and the mortgage as well, is void. At least two reasons may be stated, without searching for others, why this contention is unsound, or at least why the infirmity of the contract cannot be pleaded. In the first place, Mrs. Sharp, one of the parties, received the benefit of the contract, and she and appellant, who derived his rights to the mortgaged property from her, are estopped from setting up the invalidity of the contract. In the second place, appellee has fully performed the contract on its part by paying the amount of the liability thereunder; therefore it is an executed contract on one side, and neither Mrs. Sharp nor her grantee, who succeeded to her rights, can set up the fact that the execution of the contract was beyond the power of the corporation." The court was clearly mistaken in treating these two circumstances as being substantially distinct grounds for excluding the defense of *ultra vires*. The performance of the contract and the receipt of the benefits thereof are, in the nature of the case, correlative and complementary conditions, and whether one circumstance or the other is predicated as the ground of an estoppel depends simply upon whether the results of

negotiable instruments must be inferred from the grant of other specific powers, and partly on the ground that the exercise of that power was expressly prohibited by a clause in the plaintiff's charter under which it was forbidden to engage in banking transactions.<sup>1</sup> The question whether the remedial rights of the plaintiff were enlarged by the circumstance that the defendant had enjoyed the benefits of the transaction was not adverted to. In fact, the case was decided before the significance of that element had been considered by any of the courts. Nor has the subject been discussed in any later case. But, as the court, after some fluctuations of opinions, seems to have now adopted definitely the doctrine that, in an action brought against a corporation by a party who has performed the contract on his side, the defense of *ultra vires* is not admissible, it is probable that a similar doctrine would now be applied with respect to a case in which the corporation is the claimant. See § 76 of note to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737.

### 25. Dakota.

In a case in which a banking corporation was held to be entitled to recover on a note which it had purchased, even

the transaction are considered with reference to the corporation or the other party.

### California.

<sup>1</sup> San Diego Water Co. v. San Diego (1881) 59 Cal. 517 (claim in respect of water furnished to a municipality for certain purposes).

<sup>2</sup> Grangers' Business Asso. v. Clark (1885) 67 Cal. 634, 8 Pac. 445 (mortgage); Camp v. Land (1898) 122 Cal. 167, 54 Pac. 839 (mortgage); Bay City Bldg. & L. Asso. v. Broad (1902) 136 Cal. 525, 89 Pac. 225 (mortgage); Francis v. Western Screen Co. (1913) 22 Cal. App. 32, 133 Pac. 327.

<sup>3</sup> Union Water Co. v. Murphy's Flat Fluming Co. (1863) 22 Cal. 620, 3 Mor. Min. Rep. 487 (suit to foreclose mortgage).

### Colorado.

<sup>1</sup> Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1873) 2 Colo. 248. On the second appeal of the case (1874) 2 Colo. 565, the discussion turned on the extent of the authority of the defendant company's agent. The decision of the Federal Supreme Court, to which the case was ultimately carried, proceeded on the ground explained in § 13, note 2, *supra*.

### Connecticut.

<sup>1</sup> New York Firemen Ins. Co. v. Ely (1825) 5 Conn. 560, 13 Am. Dec. 100.

though the act of purchase might have been ultra vires, the territorial court proceeded upon the doctrine that the plea of ultra vires could not be interposed in such a case, unless the legislature had expressly declared the act to be void.<sup>1</sup>

#### 26. Delaware.

In a nisi prius case tried before three judges, the jury was instructed that "the defendant, having contracted with the [plaintiff] company, was estopped from denying that it was not authorized by its charter to make the contract."<sup>1</sup> This statement, if taken literally, is manifestly erroneous, as being inconsistent with the axiomatic doctrine that no action can be maintained upon an ultra vires contract as long as it remains executory. See § 3, *supra*. But it is not improbable that the words are merely an inaccurate expression of the rule that a person who has received the benefits of an ultra vires contract with a corporation is precluded from raising the defense of ultra vires in an action brought by it.

#### 27. Florida.

In two somewhat early cases in which it was held that an action might be maintained upon an ultra vires contract, the defendants had in point of fact received the benefits accruing from it, but the grounds assigned for the decision were, that such a contract is not to be deemed void unless it is so declared by the legislature; that to allow the plea of ultra vires to prevail would enable the defendant to perpetrate a fraud; and that the question whether a corporation has exceeded its powers is one which only the government can raise.<sup>1</sup> But, as the principle of estoppel has recently been affirmed with respect to actions against corporations (see § 77 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), its applicability to actions by corporations would doubtless be recognized at the present day.

#### Dakota.

<sup>1</sup> *Neilville Bank v. Tuthill* (1886) 4 Dak. 295, 30 N. W. 154.

#### Delaware.

<sup>1</sup> *Standard Sewing Mach. Co. v. Frame* (1899) 2 Penn. (Del.) 430, 48 Atl. 188 (replevin for chattel delivered under lease and sale contract).

#### Florida.

<sup>1</sup> *Southern L. Ins. & T. Co. v. Lanier* (1853) 5 Fla. 110, 58 Am. Dec. 448 (suit to foreclose mortgage given for stock issued to defendant); *Allen v. Freeman's Sav. & L.R.A.*1917B.

#### 28. Georgia.

In one case where an action was held to be maintainable by a bank upon the promissory note of a third person which had been transferred to the bank in discharge of the holder's debt, the maker was held to be "estopped from setting up the provisions of the plaintiff's charter" for the purpose of escaping liability.<sup>1</sup> But a perusal of the opinion shows that the estoppel referred to was not that which is predicated upon the general ground of a receipt of benefits. In fact, the decision was rendered before the latter description of estoppel had been discussed in any of the American states. The actual ground upon which the court proceeded is indicated by the remark of the court that "the regulations in the charter as to discounts were merely directory."

In a later case it was held that a church which had, in excess of its corporate powers, hired from the defendant a steamer for an excursion, could not maintain an action for the damages resulting from a breach of the contract, but was merely entitled to recover the amount paid in respect of the hire.<sup>2</sup> Having regard to the facts, this decision is by implication an authority against the principle of estoppel, but the plaintiff's remedial rights were not discussed in this point of view.

The same remark applies to a still later case in which the right of the assignee of the property of a corporation, to recover a subscription to stock issued in excess of the authorized amount, was denied on the ground that the issue was ultra vires and void.<sup>3</sup>

#### 29. Idaho.

In one case it was held that no facts sufficient to constitute a cause of action were stated by a complaint which averred in substance that the plaintiff, a mining and smelting company, was the assignee of a claim for money due the assignor in respect of the building of a

*T. Co.* (1874) 14 Fla. 418 (action to recover the amount of drafts drawn by the defendants on themselves).

#### Georgia.

<sup>1</sup> *Bond v. Central Bank* (1847) 2 Ga. 92.  
<sup>2</sup> *Harriman v. First Bryan Baptist Church* (1879) 63 Ga. 186, 36 Am. Rep. 117.

<sup>3</sup> *Clark v. Turner* (1884) 73 Ga. 1. The corporation in question was one organized under the laws of Alabama, a state in which the principle of estoppel is rejected (see § 19, *supra*); but there is nothing in the report to show that this circumstance influenced the court in its decision.

bridge for the defendant, and that the defendant had taken and was holding possession of the bridge.<sup>1</sup> The ratio decidendi was simply that the purchasing of choses in action was entirely foreign to the business of the plaintiff. The fact that the defendant was enjoying the benefits of the contract was apparently not called to the attention of the court. Or possibly it was taken for granted that an estoppel could not be predicated upon such an element. Having regard to the circumstances in evidence, the decision, if it had been rendered by a court which had avowedly adopted the doctrine that this element is one which creates an estoppel, would obviously constitute a precedent for the theory that the position of a corporation which acquires by an ultra vires purchase a right to sue upon a contract which a third person has executed is essentially different from the position of a corporation which is seeking to enforce a contract which has been executed by itself.

In a more recent case it has been explicitly laid down that "a party who has had the benefit of an agreement will not be permitted to question its validity."<sup>2</sup> In this case the contract under review was one which had been expressly prohibited.

### 30. *Illinois.*

In one case decided during the period

#### **Idaho.**

<sup>1</sup> *Salmon River Min. & Smelting Co. v. Dunn* (1882) 2 Idaho, 26, 3 Pac. 911.

<sup>2</sup> *Meholin v. Carlson* (1910) 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755 (suit brought by the receiver of a bank to foreclose an ultra vires pledge of the company's shares which it had issued to the defendant).

#### **Illinois.**

<sup>1</sup> *Shelby v. Chicago & E. I. R. Co.* (1892) 143 Ill. 385, 32 N. E. 438, affirming (1891) 42 Ill. App. 339, where the plaintiff railway company, which had purchased an island in a river and established thereon a resort for excursionists, was granted an injunction to restrain the breach of a contract to maintain dams so as to keep a pond above fit for boating purposes.

<sup>2</sup> *Lauder v. Peoria Agri. & Trotting Soc.* (1897) 71 Ill. App. 475 (assumpsit maintainable for price of land conveyed by corporation in excess of its powers).

In *Voltz v. National Bank* (1895) 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69, affirming (1895) 57 Ill. App. 360, where the non-availability of the defense of ultra vires was affirmed on the authority of the decisions of the Federal Supreme Court (see note 7, *infra*), it was intimated that, if the effect of a state enactment had been L.R.A.1917B.

when the principle of estoppel was still being applied in actions against corporations (see § 80 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), the ground upon which an injunction restraining the violation of a contract was granted to a corporation was that the defendants "will not be permitted to retain the consideration and at the same time repudiate the contract upon which they received it."<sup>1</sup> This decision shows that the court proceeded upon the assumption that the same doctrine was controlling whether a corporation was the plaintiff or the defendant. In a later case the principle of estoppel was recognized by the court of appeals.<sup>2</sup>

As explained in the monograph referred to above, the theory that an ultra vires contract of which the corporation has received the benefits may be enforced on the ground of an estoppel was repudiated by the statements in some of the opinions of the Supreme Court toward the close of the nineteenth century. This change of views is reflected in *CALUMET & C. CANAL & DOCK CO. v. CONKLING*, and other recent cases which fall within the scope of the present note.<sup>3</sup> of those cases the court, advertent to "the rule that one dealing with a corporation is not estopped to deny its legal

involved, the rule that no right of action can spring out of an illegal contract would have been applied. This expression of opinion seems to be irreconcilable to the ruling in note 1, *supra*; but it is, of course, in harmony with the theory adopted in the cases cited in notes 3, 4, *infra*.

<sup>3</sup> In *Lurton v. Jacksonville Loan & Bldg. Assn.* (1900) 87 Ill. App. 395, affirmed in (1900) 187 Ill. 141, 58 N. E. 218 (loan secured by mortgage), the ground upon which the action was held by the court of appeals to be maintainable was that the defense of ultra vires was not available after the contract had been performed by the plaintiff corporation. The position thus taken was in accord with the doctrine applied by the supreme court up to the year in which the decision was rendered. (See note referred to in the preceding paragraph.) In its affirming judgment that court, viewing the case with reference to its altered doctrine, declared that, if the contract had been actually ultra vires, no action could have been maintained on it; but the action was held to be maintainable on the ground that the invalidity relied upon as a defense arose from a merely formal defect.

In *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121, where the corporation was the defend-

existence on the ground that there was no law authorizing it," remarked: "It is analogous to ultra vires acts and contracts of the corporation wholly beyond and outside the general scope of its corporate powers and entirely foreign to

the objects and purposes of its creation. Such contracts are held void as against public policy, and incapable of being validated and enforced by having acted under them."<sup>4</sup>

In some cases the ratio decidendi was

ant, the law was there laid down in general terms: "When the contract is beyond the power conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws."

In *Mercantile Trust Co. v. Kastor* (1916) 273 Ill. 332, 112 N. E. 988, where the contract in question was construed as being one of loan, and as such beyond the powers of the lending corporation, the contention that it was enforceable on the ground that the borrower and guarantor were estopped from pleading ultra vires was rejected. The court expressed the opinion that "the cases in which the doctrine of estoppel has been recognized have been where the act complained of was within the general scope of the corporate powers, but there has been some irregularity in their exercise." But it is submitted that the earlier and later Illinois cases cannot be reconciled on the footing thus suggested. See § 80 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737*.

In *Free Home Bldg. L. & Homestead Asso. v. Edwards* (1906) 223 Ill. 126, 79 N. E. 64, it was held that the plaintiff could not maintain an action upon a contract under which it had lent money at a usurious rate of interest, without a compliance with the provision of the statute by which it was empowered to charge such a rate to its members, if they should pass a by-law authorizing it. The court said: "The board of directors had no more power under the statute to adopt such method of making loans than the attorney and secretary of the association would have had, and to hold that because the board of directors adopted and pursued that method for a number of years, during which time appellees negotiated a loan and paid the premiums and interest thereon, would legalize the transaction, would be to nullify the statute. The association is in no better position than it would have been if there had been no statute providing a method of making such loans. The authorities are clear that where a corporation has no power to contract, performance on either side will not give the unlawful contract validity. *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619." As the contract involved in the case thus cited was a merely unauthorized one, it is evident that, so far as the operation of the principle of estoppel is concerned, the court recognized no distinction between contracts which are ultra vires as not being within the scope of the corporate

powers enumerated, and contracts which are ultra vires as being the subject of an express prohibition. (For the authorities which illustrate this point of view, see § 15 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737*.) But the fact that, in jurisdictions in which that principle has been adopted, it has never been treated as applicable to expressly prohibited contracts, was also adverted to. (See § 44 of same monograph.)

As to the effect of the decision in *North Ave. Bldg. & L. Asso. v. Huber* (1915) 270 Ill. 75, 110 N. E. 312, see § 10, supra.

The court of appeals has in two instances strangely ignored the decisions which reflect the altered doctrine of the supreme court. In *Western Cottage Piano & Organ Co. v. Burrows* (1912) 168 Ill. App. 120, the right to recover in an action on a note given for certain stock was put upon the ground that, after the defendants "have had the benefit of this transaction, and have become the owners of the stock for which this money was paid, they should be estopped from denying their liability to pay back the money of which they have had the benefit." So far as the language of the opinion shows, the right of the corporation to sue on the contract itself, and not merely to obtain relief independently thereof, was asserted. In *Desplaines Safety Deposit Co. v. Bour* (1915) 192 Ill. App. 569, it was held (according to the reporter's syllabus, no opinion being published) that, in an action by a corporation to recover the rent of premises leased by it, the defense of an abuse of power on the part of the plaintiff in making the lease was not available.

In *McCoy v. World's Columbian Exposition* (1900) 87 Ill. App. 605, affirmed in (1900) 186 Ill. 356, 78 Am. St. Rep. 288, 57 N. C. 1043, the decision proceeded upon the ground that the question of ultra vires could not be raised by a third person.

<sup>4</sup> *Imperial Bldg. Co. v. Chicago Open Bd. of Trade* (1908) 238 Ill. 100, 87 N. C. 167, relying upon *National Home Bldg. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, and *Best Brewing Co. v. Klassen* (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, in both of which it was the corporation which raised the plea of ultra vires.

For cases decided during this later period, in which it was laid down that no recovery could be had upon the contract itself, but relief independent of the contract was granted, see *Leigh v. American Brake-Bench Co.* (1903) 205 Ill. 147, 68 N. E. 713, affirming (1903) 107 Ill. App.

the doctrine that "the plea of ultra vires may be successfully interposed in a collateral proceeding where the corporation is alleged to have performed an act which it was not, under any circumstances, authorized to perform; but that where the act is one which at most is but a mere abuse or excessive use of a general power conferred upon the corporation by its charter, such plea cannot be successfully interposed, because the question of ultra vires can in such cases be raised only in a direct proceeding by the state to oust the corporation of its usurped powers."<sup>5</sup> The doctrine thus invoked was possibly relied upon because the principle of estoppel, which would obviously have been applicable under the given circumstances, had been repudiated. But the court was manifestly wrong in assuming it to be a universally accepted doctrine that the operation of the rule as to the exclusive right of the state to raise the question of ultra vires is confined to the latter of the two classes of transactions which are distinguished. In nearly all, if not all, the other cases in which it has been recognized, the rule has been treated as being one of general application. (See § 8, *supra*.) It is difficult to avoid the suspicion that, in predicating this distinction, the court may have been misled by the analogy of the theory (pro-

pounded both in Illinois itself and in other jurisdictions), that the principle of estoppel is not applicable to transactions belonging to the former class of transactions.<sup>6</sup>

In one case where the plea of ultra vires was held not to be available in an action brought to enforce a claim arising from a guaranty given by a national bank, the decision was explicitly founded on the doctrine of the Federal Supreme Court with regard to the unauthorized contracts of such corporations. See § 17, *supra*.<sup>7</sup>

### 81. Indiana.

In § 81 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737*, it has been shown that the decisions and dicta of the supreme court of this state, while they are not altogether consistent, betoken on the whole an acceptance of the doctrine that the plea of ultra vires cannot be interposed in an action brought against a corporation upon a contract of which it has received the benefits. In all the cases relating to actions brought by a corporation, the position has been taken that the fact of the defendant's having received the benefits of the contract in question estops him from alleging its invalidity.<sup>1</sup>

444 (contract to take the money of a manufacturing company and lend it for use in various enterprises); *United States Brewing Co. v. Dolese & S. Co.* (1913) 259 Ill. 274, 47 L.R.A.(N.S.) 898, 102 N. E. 753, reversing (1912) 174 Ill. App. 394 (contract to accept, for use as boarding house, a building which the plaintiff undertook to erect).

<sup>5</sup> *Rector v. Hartford Deposit Co.* (1901) 190 Ill. 380, 60 N. E. 528, affirming (1900) 92 Ill. App. 175 (action for rent of room in building, the erection of which constituted an abuse of the plaintiff's power to hold real estate). The doctrine thus enunciated was relied upon in *Daniels v. Belvidere Cemetery Asso.* (1901) 96 Ill. App. 387, affirmed in (1901) 193 Ill. 181, 61 N. E. 1031, where, however, the court did not refer to the doctrine stated in the text (purchase of mortgage, for foreclosure of which the suit was brought, violated the power of plaintiff in respect of the amount of personalty which it could acquire); *Western Teleph. Mfg. Co. v. Foley* (1909) 160 Ill. App. 343 (purchase of note for purposes of speculation or accommodation); *Commercial Co. v. Sturges* (1914) 186 Ill. App. 573 (action for rent).

<sup>6</sup> See § 43 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737*. L.R.A.1917B.

<sup>7</sup> *Voltz v. National Bank* (1895) 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69, affirming (1895) 57 Ill. App. 360.

### Indiana.

<sup>1</sup> *Poock v. Lafayette Bldg. Asso.* (1880) 71 Ind. 357 (action on promissory note given for a loan); *Voris v. Star City Bldg. & L. Asso.* (1898) 20 Ind. App. 630, 50 N. E. 779 (person who negotiated a sale of school warrants which inured to his sole benefit was held, in an action against him on his guaranty of warrants, to be estopped from denying the power of the vendee, a building and loan association, to purchase the warrants); *Noah v. German-American Bldg. Asso.* (1903) 31 Ind. App. 504, 68 N. E. 615 (loan on mortgage security).

In *Huter v. Union Trust Co.* (1898) — Ind. —, 51 N. E. 1071, the Union Trust Company was the receiver of the Mutual Life Insurance Company, and Huter, a person to whom the company had, in excess of its powers, lent money on the building and loan plan, filed his petition asking that a bond and mortgage for \$600, given by him to the insurance company, be found paid and be ordered canceled. The court said: "In the case at bar the intervener is not refusing to pay his debt. He insists only that the money paid by him to this insurance company shall be applied on his



## 32. Iowa.

In one case where the fact that the amount of a loan made by a national bank exceeded the statutory limit was held not to be a good defense to a suit brought to foreclose the mortgage which secured the loan, the court simply followed the Federal rulings discussed in § 17, *supra*.<sup>1</sup> This decision, therefore, affords no definite information as to the views of the court concerning the general question whether an estoppel against pleading *ultra vires* can be predicated from the fact that the party sued by the corporation has received the benefits of the contract. Subsequently it was laid down in Iowa with reference to a bank organized under an Iowa statute, that "the general rule applicable to loans of this character [i. e., in excess of amount authorized] is that they are not void, the prohibition of the statute being intended as a rule for the government of the bank."<sup>2</sup> It may be conjectured that the reason why the principle of estoppel was not invoked in this case was that, in the view of the court, that principle was not applicable with respect to a contract

debt. He is not repudiating, but seeking to make good, his obligation. He is asking only that illegal fines, dues, and other unauthorized charges against him be set aside. The intervener is, indeed, in no different situation from that of any other person who should have borrowed money from the insurance company. He must pay his debt, with interest. But the money which he has already paid into the treasury of the company, whether called monthly dues, interest, fines, or by any other name, should first be applied on this debt. If any balance then remain unpaid, the intervener will be a debtor as to that, but as to that only, and, on the payment by him of such balance, his bond should be canceled and surrendered and his mortgage satisfied of record." The court referred with approval to *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702, in which the principle of estoppel was applied in an action against a corporation.

## Iowa.

<sup>1</sup> *Mills County Nat. Bank v. Perry* (1887) 72 Iowa, 15, 2 Am. St. Rep. 228, 33 N. W. 341.

<sup>2</sup> *Benton County Sav. Bank v. Boddicker* (1898) 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632, where an action was held to be maintainable on a bond given by the defendants as sureties for the payment of a loan.

<sup>3</sup> *Bankers' Mut. Casualty Co. v. First Nat. Bank* (1906) 131 Iowa, 456, 108 N. W. 1046, where the right of an insurance company to recover on a note given by the

defendant for the amount of his premium was thus discussed on demurrer: "Assuming as an original proposition that appellee's construction of the statute is correct, does it necessarily follow that the policy issued by the appellant was void and the note in suit without any valuable consideration? This question we are constrained to answer in the negative. For the purposes of the organization of an insurance corporation with authority to do business in this state, the interpretation of the statute governing the same and the determination of the validity of such organization and its plan of business are committed primarily to the attorney general and auditor of state. Having adopted articles of incorporation expressly assuming to transact the business of burglary insurance, and having secured from the proper authority a finding that such business was authorized by the statute and that its organization was sufficient for such purpose, no court would permit it to escape liability on a contract issued by such authority on the plea of *ultra vires*. It is a plea not favored in law, and is never sustained save where the most persuasive considerations of public policy require it. . . . A corporation having received the benefit of a contract is estopped to plead want of power to enter into it. . . . Had the appellee sustained a loss within the terms of its policy, the appellant could not have successfully interposed the plea of *ultra vires*. It cannot be said, therefore, that the premium note was without consideration."

which violates an expressly prohibitory provision like the one in question. The language used in a still more recent case indicates an adoption of the broad principle that the party against whom suit is brought on a contract of which he has received the benefits cannot interpose the plea of *ultra vires*; or at all events embodies a theory which produces virtually the same consequences as that principle.<sup>3</sup> But the reasoning of the court is perhaps unnecessarily circuitous, in view of the fact that the circumstances seem to have been plainly suggestive of the applicability of the broad principle of estoppel which had previously been recognized in several Iowa cases with respect to actions against corporations.

## 33. Kansas.

In the earliest case which bears upon the subject of the present monograph, an action brought to restrain a national bank from enforcing notes and a mortgage given to it for the purpose of securing money borrowed by the plaintiff was held not to be maintainable, the reason

assigned being that, even if "the bank was guilty of an infraction of the law in making the loan, and by reason thereof it could never enforce payment in the courts," the petition disclosed no ground for granting the relief asked for, because "it is not enough for the plaintiff in an equity suit to show that the defendant has done wrong; he must also make it appear that he has done right."<sup>1</sup> This decision, however, if we advert to the general principle upon which it proceeded, and the hypothetical character of the language used with respect to the inability of the bank to make the loan, cannot warrantably be said to indicate that the court actually regarded the plea of ultra vires as being a bar to an ac-

tion brought by the bank directly against the borrower. Moreover, if it could be regarded as a definite precedent for such a doctrine, it would, so far as the remedial rights of national banks are concerned, be of no authority in view of the more recent rulings of the Federal Supreme Court, which are reviewed in § 17, supra.

The theory that, in an action brought by a corporation on a contract which it has performed on its side, the defendant is estopped from setting up the plea of ultra vires, has been applied in some of the more recent cases.<sup>2</sup>

In one instance the ground upon which the corporation was held to be entitled to enforce the contract was that ordin-

#### Kansas.

<sup>1</sup> *Elder v. First Nat. Bank* (1873) 12 Kan. 238.

<sup>2</sup> In *Alexandria, A. & Ft. S. R. Co. v. Johnson* (1897) 58 Kan. 175, 48 Pac. 847, where the defendant guaranteed to the plaintiff railroad company the repayment of money to be expended by it for another railroad company under a contract between such companies, it was held that they could not, after the money had been expended, escape the liability upon the guaranty by showing that the former company had no power to enter into the contract with the latter. The court said: "It is without doubt true that one may may refuse performance of an unexecuted contract ultra vires in its nature, because of the legal wrong of its performance; but the law is quite lacking in tenderness for such virtuous scruples as arise only after the receipt of benefits from its performance by the other side. In this case the costs of the survey have been paid by the Arcadia Company,—at least so claimed by it. The law, therefore, will not permit the Kansas City Company to refuse payment upon the ground of the invalidity of other and collateral conditions of the contract; and its sureties stand upon no better footing."

In *Farmers' Nat. Bank v. Robinson* (1898) 59 Kan. 777, 53 Pac. 762, a building company having a contract for the erection of a government building arranged with the First National Bank, of which Robinson was receiver, for a loan, the agreement being that the government warrants received as the work progressed should be forwarded to the bank, and then indorsed to it, to be applied on its debt. After several instalments of the loan had been repaid on this footing, the National Bank suspended. A treasury warrant subsequently issued was delivered, after the president of the building company had indorsed it, to Walworth, the temporary receiver of the bank, and by him it was transferred to the Farmers' National Bank, which had previously lent money to the First National Bank. The proceeds of the warrant were used by the transferee for its own purposes, with

the exception of a certain sum which it turned over to the receiver. An action brought by Robinson, the permanent receiver of the First National Bank, was held to be maintainable for reasons thus stated: "We think the First National Bank had an equitable claim upon this warrant and the fund, and that its claim was not defeated through the taking and appropriation of the same by the Farmers' National Bank. It is said that the First National Bank had no power to deal in such securities; that it can only carry on a commercial business and loan money on personal securities. If it be conceded that this security is not of a class which a national bank may take, the defense of ultra vires is not one that the building company could make after the loan had been made and the illegal contract, if it may be so termed, executed. Money had been loaned far in excess of the amount in the warrant wrongfully taken by the plaintiff in error. When the estimates were furnished, the amount of the same was credited to the building company. When the warrant therefor was issued, it was delivered by Clum & Dingman in behalf of the building company to the First National Bank, and for a time it had manual possession of the same. If the building company had brought an action to recover the draft, or the proceeds of the same, a court would hardly listen to a claim at that time that the bank was without authority to make the agreement which was made. It could not retain the money which had been loaned, and set up the claim that the bank had no power to make the agreement by which the loan of the money was obtained. After the contract was executed and the benefits received, the building company would be estopped to deny the authority and power of the bank. The plaintiff in error, which was acquainted with the facts, or chargeable with knowledge of the relations which existed between the building company and the defendant in error, is in no better position than the building company, and cannot set up a defense which the building company could not make." No reference was made to the Federal decisions

arily the question whether a corporation has exceeded its powers in entering into a contract can be raised only by the state or a stockholder.<sup>3</sup>

#### 34. Kentucky.

In an early case where the action was brought for the recovery of money lent by the plaintiff bank, a plea was held bad which averred that it had lent the defendant bank notes which were "bills of credit," within the meaning of the clause of the Federal Constitution which prohibits the issue of such instruments by any state.<sup>1</sup> The report does not give any information regarding the

ground upon which the ruling was based, but, in view of the date of the case, it is safe to say that the decision was in no wise referable to the principle of estoppel.

The following statement of doctrine by an eminent text writer has been approved by a recent case: "Where the corporation is plaintiff in the action, and is seeking to enforce a contract into which it had no power to enter, if the defendant has received the benefit of the contract he will not be allowed to defend on the ground that it was ultra vires, until he restores the benefits which he received."<sup>2</sup>

reviewed in § 17, supra. But the judgment was affirmed without opinion in (1900) 176 U. S. 681, 44 L. ed. 637, 20 Sup. Ct. Rep. 1027.

For a case in which the principle of estoppel was applied for the benefit of a public corporation, see *Electric Plaster Co. v. Blue Rapids City Twp.* (1908) 77 Kan. 580, 96 Pac. 68 (action to recover a stipulated sum).

<sup>3</sup> *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123 (where the actual point determined was that the plaintiff was not entitled to sue for the cancelation of the contract).

#### Kentucky.

<sup>1</sup> *Lampton v. Commonwealth's Bank* (1822) 2 Litt. (Ky.) 300.

<sup>2</sup> *Johnson v. Mason Lodge, I. O. O. F.* (1899) 106 Ky. 838, 51 S. W. 620 (suit on note given for loan), quoting *Thomp. Corp.* 1st ed. § 5274. The court rejected the contention that the doctrine stated in the text was inapplicable because the contract in question was expressly forbidden and contrary to public policy. This is one of the very few instances in which a contract of this description has been treated as being within the scope of the doctrine. See § 44 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

A later case which was presumably decided upon the same footing, although the language of the court is not entirely clear, is *Louisville Tobacco Warehouse Co. v. Stewart* (1902) 24 Ky. L. Rep. 934, 70 S. W. 285. There the contention that the note in question was void, because it had been given to the plaintiff corporation as one of the incidents of an ultra vires contract made with one Stewart to purchase tobacco from planters, was thus dealt with: "Such an objection must be pleaded; but, if pleaded, it would not be available, because the corporation is here suing Stewart for money which it paid to him, and, if it embarked in a business it had no power to carry on, its want of power to carry on the business might have been a good defense for it, if sued for refusing to carry out its contract, or if Stewart was suing it for damages sus-

tained by him in the transaction; but it is no reason, when the transaction has been voluntarily completed by it, that the court should give judgment in its favor against Stewart for the loss which it has thus sustained" [on the sale of tobacco purchased for it].

In *Louis Blitz & Co. v. Bank of Kentucky* (1900) 21 Ky. L. Rep. 1554, 55 S. W. 697, the substance of the petition was that, by virtue of a mortgage, the appellee bank became the legal owner of the De Pauw Company's glassworks, material on hand, and stock of goods; that the appellee authorized the company to manufacture, sell, and dispose of these goods, wares, and merchandise in the usual and ordinary course of trade, as their agents; and that while so acting the De Pauw Company contracted with plaintiff for certain glass, for the breach of which contract it seeks damages. The court, after observing that, if the mortgage was susceptible of the construction placed upon it by appellant, it was clearly ultra vires in so far as appellees undertake to carry on the manufacture of glass, continued thus: "It is a general principle of law that a party will not be permitted to set up this defense when retaining the fruits or benefits of the contract; but it is not alleged in any of plaintiff's pleadings that appellees ever received anything from the profits of the business or proceeds of the sale, or that they ever ratified, confirmed, or knew of the alleged contract made by the Indiana corporation with appellant. We are therefore of the opinion that the petition as amended fails to state facts sufficient to support a cause of action against appellees, and that the lower court did not err in sustaining the general demurrer to the petition."

In *Brown v. United States Home & Dower Asso.* (1890) 12 Ky. L. Rep. 283, 13 S. W. 1085, it was laid down that the maker of a note cannot, in an action brought thereon by a bona fide holder, escape liability by setting up the defense that the original holder, or corporation, had no authority to lend the money which was the consideration of the note. But it is not apparent from the opinion whether the defense of ultra vires was excluded with reference to the

## 35. Louisiana.

In an early case in which a suit to restrain an order of seizure by which the defendant corporation was attempting to enforce a mortgage was held not to be maintainable, the ground upon which the court proceeded was that the question whether the corporation, which was authorized by its charter to lend money upon mortgage on lands only where they were in a state of cultivation, had exceeded its authority by making a loan upon unimproved property, was one which concerned only the state and the stockholders.<sup>1</sup> The conclusion thus arrived at was manifestly the same as that which would have resulted from the application of the doctrine of an estoppel as based upon an acceptance of the benefits of the contract. But at the time when the decision was rendered, that doctrine had not yet been distinctly formulated by any American court.

The theory as to the exclusive right of the state to raise the question of a want of power in the plaintiffs to make the contract under review was also the ratio decidendi in one of the more recent cases.<sup>2</sup> In another the doctrine of estoppel was relied upon. It should be observed, however, that in this instance the evidence showed something more than merely the fact of the defendant's having enjoyed the fruits of the contract.<sup>3</sup>

theory of an estoppel predicated from the receipt of benefits, or to the special protection accorded to purchasers of negotiable instruments.

**Louisiana.**

<sup>1</sup> *Barrow v. Bank of Louisiana* (1847) 2 La. Ann. 453.

<sup>2</sup> *Southern Lumber Co. v. Holt* (1911) 129 La. 273, 55 So. 986, where the court quoted with approval the following statement 29 Am. & Eng. Enc. Law, 73: "If a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside the purpose of its creation, and not authorized by its charter, in an action to enforce such cause of action, want of corporate power to engage in such business cannot be interposed as a defense."

<sup>3</sup> The purport of *Keystone L. Ins. Co. v. Von Schlemmer* (1908) 122 La. 280, 47 So. 606, is thus stated in the opinion: "Sued by the plaintiff company on his subscription to 50 shares of its capital stock, the defendant seeks to escape liability by pleading an alleged fatal variance between the charter of the company and the terms of his subscription; the charter requiring subscriptions of stock to be 'paid in cash,' and the terms of his subscription being '25 per cent per month until full payment.' The L.R.A.1917B.

## 36. Maine.

The precise point affirmed by the court in an early case was simply that the right of the plaintiff "to claim compensation for boomage of logs, which it was by its charter authorized to collect and receive, could not be affected by an attempt to connect it with the performance of other unauthorized acts."<sup>1</sup> But it was also laid down that a corporation cannot by its vote confer authority upon an agent to enter into a contract which is outside the scope of its power. Having regard to the character of the doctrine thus propounded, and to the date at which the decision was rendered, it may reasonably be inferred that the court considered an ultra vires contract to be absolutely void in such a sense that it could not, under any circumstances, constitute the foundation of a legal claim.

In a subsequent case the court, taking the position that the statute by which savings banks were prohibited from lending money on the security of names alone was merely a direction to the trustees, and was designed for the protection of the depositors, held that such a bank might maintain an action on a promissory note, whether the purchase was or was not in conformity with the provisions of the statute.<sup>2</sup> Having regard to its rationale this decision seems to indicate that an ultra vires

district court and also the court of appeal (the case is here on writ of review) were of the opinion that by payment 'in cash' the charter means no more than that payment shall not be in anything but money, and that, moreover, defendant is estopped from contesting the subscription; he having made it after he had acted as one of the directors of the plaintiff company, and in order to qualify as such. We prefer to rest our decision on the estoppel."

**Maine.**

<sup>1</sup> *Bangor Boom Corp. v. Whiting* (1848) 29 Me. 123.

<sup>2</sup> *Farmington Sav. Bank v. Fall* (1880) 71 Me. 49. The court remarked that the reasons for its decision were adverted to in *Roberts v. Lane* (1874) 64 Me. 108, 18 Am. Rep. 242, which was not distinguishable in principle from the case before it, although the same statutory prohibition was not there invoked to invalidate the transfer of the note. It will be observed that the ground relied upon by the court was similar to one of those subsequently invoked by the Federal Supreme Court in the leading case of *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188. See § 17, *supra*.

contract was considered to be nonenforceable under all circumstances.

But the views of the court upon this point have ceased to be a matter merely of inference, for, in the latest case in which it has had occasion to express an opinion, the contention that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* was no defense to an action to recover the agreed rent, was rejected for reasons thus stated: "We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent, and that, while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing."<sup>2</sup>

### 37. Maryland.

The decisions in this state are so conflicting that, for the purposes of a complete historical summary, it has been

<sup>2</sup> Brunswick Gaslight Co. v. United Gas, Fuel & Light Co. (1893) 85 Me. 541, 35 Am. St. Rep. 385, 27 Atl. 525.

#### Maryland.

<sup>1</sup> Albert v. Savings Bank (1849) 1 Md. Ch. 407; United German Bank v. Katz (1881) 57 Md. 128; Black v. First Nat. Bank (1903) 96 Md. 399, 54 Atl. 88; Lazear v. National Union Bank (1879) 52 Md. 78, 36 Am. Rep. 355. The second and third of these cases are authorities for the doctrine that a corporation which has performed an *ultra vires* contract on its side is entitled to maintain an action on the contract. The first contains an obiter dictum to the opposite effect. In the fourth the right of action was expressly denied.

#### Massachusetts.

<sup>1</sup> In Little v. O'Brien (1812) 9 Mass. 423, an insurance company which was required by the terms of its incorporation to invest its stock in certain specified funds received private notes from the several stockholders in payment of their respective shares. It was argued that this conduct of the company was such a contravention of its duty as would avoid the note given by the L.R.A. 1917B.

deemed advisable to review in the same monograph both the cases in which the corporation was the defendant and those in which it was the moving party. See § 86 of the monograph appended to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A. 1917A, 737. In this place, therefore, it will be sufficient to give a list of the cases which bear upon the right of a corporation to suit upon the contract.<sup>1</sup>

### 38. Massachusetts.

The earliest cases which were concerned with the remedial rights of a corporation in respect of an *ultra vires* contract turned upon the general principle that the question of invalidity was one which only the state was entitled to raise.<sup>1</sup> These cases have sometimes been cited by courts which were arguing in favor of the theory of an estoppel as predicated from the acceptance of the benefits of the transactions, but manifestly they have no real relevancy in respect of that theory.

In the next case which bears upon the subject, the point actually decided was that, in an action on a promissory note, it was not a good defense that the plaintiff, a national bank, had no authority to purchase it.<sup>2</sup> The court answered in the negative the essential question which was deemed to be presented by the evidence; viz., "Can a party to a contract in itself lawful, and into which all the parties to it had authority to enter, be made null or be incapable of enforce-

defendant. But the court said: "Whether, for this misbehavior of the corporation, the government might not seize their franchise, upon due process, is a question not now before us. It is, however, a sufficient answer to the objection, that it does not lie in the mouth of a stockholder for this cause to avoid his contract, which, as between him and the company, was made on a sufficient consideration."

In Chester Glass Co. v. Dewey (1819) 16 Mass. 94, 8 Am. Dec. 128, the grounds upon which an action for the price of goods was held to be maintainable were thus stated: "As to the fourth objection, which was to the recovery on the count for goods sold and delivered, on the ground that the plaintiffs were prohibited from trading, it cannot avail. The legislature did not intend to prohibit the supply of goods to those employed in the manufactory. Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition by causing the charter to be revoked when they shall determine that it has been abused."

<sup>2</sup> National Pemberton Bank v. Porter (1878) 125 Mass. 333, 28 Am. Rep. 235.

ment, because the plaintiff has entered into and fully performed, with another and totally distinct party, a contract in reference to it which was unauthorized, even though by such contract he becomes a party to the contract in suit?" But the principle to which the earlier decisions were referred was also approved.

The doctrine as to the exclusive right of the state to raise the question of ultra vires constituted the primary ratio decidendi in a subsequent case in which it was held that the plaintiff, although incorporated for the purpose of manufacturing, and consequently not authorized to keep a store at which persons like the defendant, who were not in its employ, could purchase groceries and other commodities, was entitled to maintain an action in respect of certain goods supplied by it.<sup>3</sup> The court, after pointing out that the statement made in an earlier case with regard to the principle was "wholly obiter dictum,"<sup>4</sup> continued thus: "But the weight of authority, we think, supports the last reason given in its application to the facts of the present case. There is a distinction between a corporation making a contract in excess of its powers and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff." But the opinion also contains the following passage: "If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were ultra vires of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them.

Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defense; and, as the form of the transaction was that of contract, such should be the form of the action." These remarks, if they do not amount to an explicit approval of the doctrine of estoppel in respect of contracts which are merely ultra vires, as distinguished from those which are expressly prohibited, might apparently be construed, without any severe straining of the language, as an expression of the views of a court which did not condemn that doctrine. But as the decision belongs to a period during which the court made, with reference to actions against corporations, several rulings which were inconsistent with that doctrine (see § 87 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), it would seem preferable to assume that in this instance it did not intend to go any further than to affirm the right of the plaintiff to recover on a quantum meruit. That this was its actual position is strongly indicated by the reservation expressed in the statement that it was "not required to determine whether an action can be maintained to recover the price as distinguished from the value of the goods, as no exception has been taken to the measure of damages." The particular aspect of the case to which these words allude would most probably have been adverted to in somewhat different terms, if the principle of estoppel had been the real basis of the decision. But it must be admitted that, when all is said, the precise position of

This case, it will be observed, was decided in the same year as *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188, with which it is in accord so far as regards the conclusion arrived at, that the unauthorized character of the transaction was not an element which precluded recovery. But the Federal decision was based upon different grounds. See § 17, supra. It was not brought to the attention of the Massachusetts court, and possibly had not yet been reported.

In *Atlas Nat. Bank v. Savery* (1879) 127 L.R.A.1917B.

*Mass.* 75, involving similar facts, the earlier ruling was followed.

In *Lyndeborough Glass Co. v. Massachusetts Glass Co.* (1873) 111 *Mass.* 315, where it was contended that a contract of sale was ultra vires and therefore not enforceable, the ratio decidendi was simply that it was ultra vires.

<sup>3</sup> *Slater Woollen Co. v. Lamb* (1887) 143 *Mass.* 420, 9 N. E. 823.

<sup>4</sup> *Chester Glass Co. v. Dewey*, note 1, supra.

the court in respect of this phase of the case remains somewhat uncertain. The suggested construction of the language of the opinion is certainly open to the possible objection that, if the court intended merely to assert that the corporation was entitled to resort to remedies other than an action on the contract itself, the distinction which it had previously taken between contracts in excess of corporate powers and those which are prohibited as against public policy or immoral would be apparently pointless. As independent remedies are available also to persons who enter into contracts belonging to these contrasted categories, there would seem to be no occasion to differentiate them from ultra vires contracts, if merely the right to pursue those remedies is assumed to have been in question.

In a somewhat later case, where the fact that the corporate stock, for a certificate of which the action was brought, had been acquired by an insurance company in excess of its powers, was held not to constitute a valid defense, the court again relied upon the principle that the question of ultra vires could not be raised except by the state.<sup>5</sup>

In a still later case involving a claim for the price of an elevator furnished to the defendant by the plaintiff under a written agreement, the ratio decidendi was that facts constituting a defense were not shown by an answer which alleged that, at the time of its making and performing the agreement, the plaintiff's capital stock had not been paid in, and a certificate of the payment, etc., had not been filed, as required by the Pub. Stat. chap. 106, § 46, which forbids a corporation to "commence the transaction of the business for which it was organized" until those things are done. That is to say, the position was taken that the provision in question, "when construed with the rest of the chapter and in the light of former decisions, could not be taken to make the contract void."<sup>6</sup> In this point of view the court had no occasion to consider the significance of the circumstance that the contract had been performed by the plaintiff. Indeed, the following unqualified language might possibly be construed as indicating that the circumstance would

have been treated as immaterial if the contract had been considered void: "If, then, the contract sued upon bound the plaintiff, it would be entirely anomalous to hold that the defendant was free. The general rule is that, when a contract is made void by a prohibition, it is void against both sides. . . . The defense of ultra vires, in the sense that the contract was illegal or prohibited, has been set up by corporations so much oftener than against them, that it is hard to find cases of the latter sort, whereas if either party were to be precluded from it, it would be the corporation. It may be worth noticing, however, that the decisions assume that, if it is a defense to the corporation, it is a defense to the other party."

In one case in which the right of a national bank to sue on a contract made in excess of its statutory power was affirmed, the court simply followed the Federal decisions.<sup>7</sup>

From the foregoing summary it appears that in this state corporations which bring suit upon ultra vires contracts are, for practical purposes, in a position as advantageous as if the principle of estoppel were applied, but that the effect of performance as creating such estoppel has not as yet been definitely decided.

### 38a. Michigan.

In an early case it was laid down that the act of a bank in discounting a bill at higher rate of interest than that which it was allowed by its charter to reserve rendered the contract void and non-enforceable.<sup>1</sup> This is one of the cases which were decided before the principle of estoppel was distinctly laid down by any American judge, and with which, having regard to the facts involved, that principle is essentially inconsistent. The language used in the opinion also shows that the category of ultra vires contracts was assumed to comprehend those which were expressly prohibited as well as those which were merely unauthorized, and that no such distinction between these two descriptions of contracts as has been subsequently predicated in some jurisdictions was recognized by the court. In both these re-

<sup>5</sup> Chaffee v. Middlesex R. Co. (1888) 146 Mass. 224, 16 N. E. 34. The only authority cited was National Bank v. Whitney (1880) 103 U. S. 99, 26 L. ed. 443. See § 17, supra.

<sup>6</sup> Chase's Patent Elevator Co. v. Boston Tow Boat Co. (1890) 152 Mass. 428, 9 L.R.A. 339, 28 N. E. 300. L.R.A.1917B.

<sup>7</sup> Prescott Nat. Bank v. Butler (1893) 157 Mass. 548, 32 N. E. 909.

### Michigan.

<sup>1</sup> Orr v. Lacey (1846) 2 Dougl. (Mich.) 254.

spects the case affords an exact parallel to many of the earlier New York cases.<sup>2</sup>

The effect of performance on the part of the corporation was not explicitly determined until about forty years afterwards, when the court followed the numerous precedents which had by that time been accumulated in favor of the principle of estoppel by the decisions in other states. This principle was affirmed without qualification in several cases.<sup>3</sup> But in one instance where affirmative relief was granted against a party who had partially performed the contract on his side, the ratio decidendi was that "the doctrine of estoppel cannot apply where there was no power conferred upon the corporation to convey the title and interest claimed." The reason assigned was that "both parties to the contract were presumed to have contracted with full knowledge of the law and powers inherent in the corporation," and that no charge of fraud or misrepresentation was or could be claimed.<sup>4</sup> If carried to its logical conclusion, the broad doctrine thus laid down would manifestly be fatal to the theory that the receipt of the benefits of the contract creates an estoppel. The antinomy thus presented affords an interesting example of the inconsistencies in which the adoption of that theory may entangle a court. Upon the given facts, however, the decision itself would seem, in the final analysis, to amount simply to an affirmation of the rule that an ultra vires contract cannot, in any point of view, become obligatory as the result of its partial performance by the party who is seeking to enforce it.

### 39. Minnesota.

In an early case involving the remedial rights of a corporation in respect of a promissory note given by the defendant for an insurance premium, it was held, on demurrer to an answer which alleged an excess of power in

respect of the subject matter of the insurance, that the action was not maintainable.<sup>1</sup> The facts were plainly suggestive of the applicability of the principle of estoppel as predicated from the defendant's enjoyment of the benefits of the contract. But apparently none of the authorities which, even at the comparatively early date of the decision, were producible in favor of that principle, were known to the court. The ruling was based on the broad ground that "no person, natural or artificial, can enforce a contract which is void, illegal, or contrary to the policy of the law." With reference to the allegation that the plaintiff had been induced to enter into the contract by fraudulent representations, it was laid down that the doctrine of equitable estoppel could have no application in the case against the defendant, because "it is only invoked to prevent injustice and wrong, and when the party claiming its protection would in the eye of the law be defrauded, and the other party be guilty of a fraud by the allegation or proof of the truth."

In two later cases, where an action brought by a bank against the maker and indorser of a note which it had purchased from the latter was held not to be maintainable, the decision proceeded upon the ground that the purchase, being ultra vires, passed no title.<sup>2</sup> The question whether the receipt of the benefits of the contract precluded the defendants from relying on its invalidity was not considered. It is clear, however, that the conclusion arrived at is, upon the given facts, essentially inconsistent with the rule afterwards laid down by the court in a headnote prepared by it: "The plea of ultra vires, either for or against a corporation, cannot be permitted to prevail in cases of executed contracts, where it would not advance justice, but, on the contrary, accomplish a wrong under the forms of law."<sup>3</sup>

<sup>2</sup> See § 44, notes 3 and 4, *infra*.

<sup>3</sup> Hall Mfg. Co. v. American R. Supply Co. (1882) 48 Mich. 331, 12 N. W. 205 (contract for the exclusive right to sell patented article); Cleveland Paper Co. v. Courier Co. (1887) 67 Mich. 152, 34 N. W. 556 (sale of goods); Fifth Nat. Bank v. Pierce (1898) 117 Mich. 376, 75 N. W. 1058 (loan on mortgage).

<sup>4</sup> Hilldale College v. Rideout (1890) 82 Mich. 94, 46 N. W. 373, an injunction was granted to restrain the defendants from using a portion of the buildings of the plaintiff for the purpose of conducting a commercial school and maintaining dormitories.

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### Minnesota.

<sup>1</sup> Rochester Ins. Co. v. Martin (1868) 13 Minn. 59, Gil. 54.

<sup>2</sup> Farmers' & M. Bank v. Baldwin (1876) 23 Minn. 198, 23 Am. Rep. 683. This decision was followed in First Nat. Bank v. Pierson (1877) 24 Minn. 140, 31 Am. Rep. 341, involving similar facts. The latter case was decided before National Bank v. Whitney (1880) 103 U. S. 99, 26 L. ed. 443, with which it seems to be inconsistent.

<sup>3</sup> Central Bldg. & L. Assn. v. Lampson (1895) 60 Minn. 422, 62 N. W. 544 (action brought to recover the sum by which the proceeds of a foreclosure sale fell short of



This formula is a quotation from a leading New York case in which the doctrine of an estoppel as based upon the execution of the contract by the party seeking to enforce the contract was applied.<sup>4</sup>

#### 40. *Mississippi.*

An adoption of the doctrine of estoppel in its broadest form might seem to be imported by the following remark, made with regard to one aspect of an early case in which the plaintiff bank had discounted a promissory note at a rate of interest exceeding that authorized by its charter: "The contract on the part of the bank is executed, and the opposite party is secured in the enjoyment of the fruits beyond disturbance. How, then, can he object to the want of power?"<sup>1</sup> But the conclusion that this can scarcely have been the actual position which the court intended to take is indicated not only by the early date at which the case was decided, but also by the fact that in a somewhat later case involving the power of the plaintiff to lend the money for which the note upon which the action was brought had been given, the following reasons for refusing to sustain the defense of ultra vires were relied upon: "The distinction is obvious between a contract by a corporation made in reference to a subject lying entirely without the range of the objects for which its powers were granted, and an irregular or illegal exercise of a right conveyed by its charter. If a corporation makes a contract entirely foreign to the purposes of its institution, the act is void, simply for want of power in reference to the subject matter. . . . But where a corporation enters into a contract in reference to a subject embraced within the scope of its granted powers, but in so doing exceeds them, the contract will not thereby be rendered void. It might constitute a

the amount of the loss secured by the mortgage).

The rule stated in the text was also taken for granted in *Fergus Falls v. Fergus Falls Hotel Co.* (1900) 80 Minn. 165, 50 L.R.A. 170, 81 Am. St. Rep. 249, 83 N. W. 54, where it was held that a subsequent purchaser of property with notice of an existing mortgage lien cannot take advantage of the ultra vires character of the loan secured by the mortgage.

<sup>4</sup> *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 72, 20 Am. Rep. 504.

#### **Mississippi.**

<sup>1</sup> *Commercial Bank v. Nolan* (1843) 7 How. (Miss.) 508 (note discounted at excess L.R.A.1917B.

ground for the resumption of its franchises by the state, but could not be objected by the party sought to be charged."<sup>2</sup> The relevance of the principle of estoppel to the circumstances here under review is so manifest that it would almost certainly have been invoked if the court had regarded it as being an accepted qualification of the doctrine of ultra vires. As it stands, the decision would seem to amount simply to an assertion that the defense of ultra vires is not available in an action by a corporation, because the question of a defect of power is one which cannot be raised except by the state, and is applicable only to the first of the two descriptions of contracts specified. But possibly the court regarded the rule regarding the exclusive right of the state to interfere as one which was concurrently applicable to the former of the classes of contracts to which it refers. Upon any other supposition the case would be inconsistent with the last of the cases reviewed in this section, which clearly involved contracts belonging to that class.

The doctrine enunciated in the passage quoted above was again indorsed in a case in which the trustees of the school fund of a township were held to be entitled to enforce as a mortgage an absolute deed executed to secure a note given for a loan, although the regulating statute authorized them to lend the fund only on notes with good personal securities.<sup>3</sup> The circumstance from which the invalidity of the contract was here predicated was, it is apprehended, one which would be regarded by most courts as a mere informality, to which the expression "ultra vires" is applicable only in a secondary sense. See §§ 6-8, of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737. It would seem that, if this was really the nature of the transaction, the

sive rate). This case was approved in *Planters Bank v. Sharp* (1844) 4 Smedes & M. 75, 43 Am. Dec. 470.

In a somewhat later case, where the defense was that the contract provided for a higher interest than that specified in the plaintiff's charter, one of the grounds upon which the decision proceeded was that the contract was invalid only in respect of the excess. The court also invoked the doctrine that only the state can raise the question of ultra vires. *Grand Gulf Bank v. Archer* (1847) 8 Smedes & M. 151.

<sup>2</sup> *Haynes v. Covington* (1850) 13 Smedes & M. 408.

<sup>3</sup> *Littlewort v. Davis* (1874) 50 Miss. 403.

doctrine formulated in the earlier case was wrongly invoked.

In the most recent case that bears upon the remedial rights of a corporation, two counties which had subscribed for the bonds of a railroad corporation sought to have a sale of its franchises to another company canceled on the ground that the vendee had no authority to make such a purchase. The ground upon which the suit was held not to be maintainable was that, "whatever complaint might be made by creditors of the selling corporation or stockholders of the purchasing company, or by the state in its sovereign capacity, this objection cannot be made by the selling company or its stockholders."<sup>4</sup>

The foregoing summary indicates that, except perhaps in a single case which is of dubious significance in this regard, the doctrine of estoppel, as predicated from the execution of the contract, has never been recognized in this state with regard to actions in which the corporation was the claimant. But an affirmation of its applicability to such actions, whenever the question is explicitly presented, is a virtual certainty, having regard to the fact that it has now been definitively established with respect to actions against corporations. See § 90 of the monograph just referred to.

#### 41. Missouri.

In an early case which involved the right of the defendant corporation to set off a claim based on a promissory note executed by the plaintiff and assigned to it, the ground upon which judgment was held to have been properly rendered in its favor was simply that the plaintiff had not specified in his reply the facts on which he relied for the purpose of showing the illegality of the conduct of the defendant in receiving the note used as a set-off.<sup>1</sup> For

the purposes of this decision it would seem that the court must have assumed that no action could have been maintained upon the contract if it had been shown to be ultra vires.

The more recent cases have turned upon the broad doctrine "that the question of ultra vires can only be raised in a direct proceeding by the state against the corporation, and not in a collateral proceeding by another party, except when the charter of the corporation not only specifies, and therefore limits it to, the business in which it may engage, but by express terms, or by a fair implication from its term, invalidates transactions outside of its legitimate corporate business."<sup>2</sup> Apparently this is the only aspect under which general question of the right of the corporation to maintain an action has hitherto been considered by the supreme court. But with reference to the statute which authorizes the formation of banking corporations with power to loan money "at a rate of interest not to exceed 10 per cent per annum," it has been held that a note taken for a loan at a greater rate of interest is not wholly void, but merely nonenforceable in respect of the excessive rate of interest.<sup>3</sup>

The rulings of the court of appeals have proceeded on various grounds. Some of its decisions have, like those of the supreme court, proceeded upon the theory that the question of ultra vires is one which only the state can raise.<sup>4</sup> It has enunciated the doctrine that "where a corporation departs from its proper powers, either by exceeding them or by refusing to exercise such as are essential to the grant as a whole, and the departure involves questions of state policy or matters which affect the rights of the public, there, independently of any direct proceeding upon the part of the state for violation of char-

<sup>4</sup> *Hinds County v. Natchez, J. & C. R. Co.* (1904) 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

#### Missouri.

<sup>1</sup> *Hart v. Missouri State Mut. F. & M. Ins. Co.* (1855) 21 Mo. 93.

<sup>2</sup> *St. Louis Drug Co. v. Robinson* (1883) 81 Mo. 19 (accommodation indorsement of note).

For other cases which have proceeded upon the same ground, see *St. Joseph F. & M. Ins. Co. v. Hauck* (1880) 71 Mo. 465, former appeal (1876) 63 Mo. 112 (suit on note discounted by plaintiff); *Franklin Ave. German Sav. Inst. v. Board of Education* (1882) 75 Mo. 408 (suit on bond purchased by plaintiff); *Union Nat. Bank v. Hunt* (1882) 76 Mo. 439, affirming (1879) 7 Mo. L.R.A.1917B.

App. 42 (suit on note taken for some of its own stock which it had been obliged to purchase in order to protect itself from loss).

The decision to the opposite effect in *Matthews v. Skinker* (1876) 62 Mo. 329, 21 Am. Rep. 425, was reversed in *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188. See § 17, *supra*.

<sup>3</sup> *Farmers' & T. Bank v. Harrison* (1874) 57 Mo. 512.

<sup>4</sup> See *Mt. Vernon Bank v. Porter* (1893) 52 Mo. App. 244 (action against cashier of plaintiff to compel him to account for commission received for negotiating certain bonds), and the cases cited in § 8, with regard to the impeachment of the right of a corporation to hold real estate.

ter, the courts will refuse to countenance or lend their aid to actions or defenses which are based upon such departures."<sup>5</sup> The principle of an estoppel as predicated from the receipt

and retention of the benefits of the contract has been recognized by it in several cases.<sup>6</sup> In one case the contract has been regarded as entirely void.<sup>7</sup>

In one case where an action was held

<sup>5</sup> *St. Louis Stoneware Co. v. Partridge* (1880) 8 Mo. App. 217, where the actual point determined was that, where the president of a corporation, who had, with other officers, bought stock for the corporation, could not set up the doctrine of ultra vires as a defense to an action for conversion of the stock.

<sup>6</sup> In *St. Louis Drug Co. v. Robinson* (1881) 10 Mo. App. 588, it was laid down that, where a corporation indorsed notes for the accommodation of the maker, taking a mortgage from him as indemnity against its liability on the indorsement, and was thereafter compelled to pay the notes, the maker is estopped to assert that the mortgage was invalid because the indorsement was ultra vires.

In *St. Louis Carriage Mfg. Co. v. Hilbert* (1887) 24 Mo. App. 338, one Appel, the superintendent of the plaintiff company, after indorsing in blank two shares of stock which had been issued to him, delivered them to the defendant as security for a loan. Subsequently the transferee, by arrangement with Appel, called at the plaintiff's store and bought a carriage, for which he paid partly by turning over the stock to Appel, and partly in cash. In an action of replevin to recover the carriage, the trial judge gave an instruction which assumed that the stock might lawfully have been taken by Appel for the company in payment of the carriage, provided it was taken at its market value. But the court said: "The question what the market value of the stock was could only be material if the corporation had the legal power to take its own stock, and thus exchange its stock for its wares, and reissue it or retire it as it saw fit. A corporation in this state has no such power. It is not simply a question between the state and the corporation, or between the corporation and its creditors, as the defendant assumes, but a question affecting the validity of the contract itself." This passage might apparently be construed as indicating that a purchase of the company's own stock was regarded as a wholly void transaction. But a subsequent remark that no benefit had accrued to the company, because Appel still held the stock and had spent the money, seems to imply an acceptance of the principle of estoppel. A verdict for the defendant was reversed.

In *Russell v. Cassidy* (1904) 108 Mo. App. 577, 84 S. W. 171, the ratio decidendi was thus stated: "The present action is upon a note of which prima facie, and in absence of testimony to the opposite effect, defendant received the benefit, and it would be inequitable and unjust to permit defendant to question the power of the payee to accept the note from him. The maker of a

note cannot defend an action on the note brought by the corporation or its privy on the ground that the corporation had no corporate power to take the note."

In *Lemp Hunting & Fishing Club v. Cottle* (1913) 172 Mo. App. 574, 156 S. W. 799, the ground upon which the availability of the defense of ultra vires was denied in a suit for the specific performance of a stipulation in a lease for its renewal was that the original contract had been fully performed, and the lessor had received and retained the rent reserved. The same position was again taken in *Lemp Hunting & Fishing Club v. Hackmann* (1913) 172 Mo. App. 549, 157 S. W. 791, where it was remarked that the contract was not wholly executory, since the consideration for the renewal was the payment of the rent during the term of the lease, and this had been fully received. The correctness of these decisions is at least open to controversy. They seem to be essentially inconsistent with the cases cited in § 3 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A. 1917A, 737, which proceed upon the doctrine that no cause of action is created by a refusal to complete the performance of an ultra vires contract which had been partially executed. It is submitted that the analogy of those cases points clearly to the conclusion that the fact of the lessor's having received the whole of the rent for the original term did not involve the consequences deduced from it. They show that either party to an ultra vires lease or other contract, the performance of which extends over a definite period, is entitled to withdraw from it at any time, even though the consideration may have been fully paid until the withdrawal. It is difficult to see how any distinction can justifiably be based on the circumstances that, in the case before the court, the object of the action was to obtain a prolongation of the contract by way of renewal, and not to enforce the unperformed part of that contract. Indeed, it might plausibly be argued that, if any difference should be predicated between these two situations, there is less ground for judicial interference with respect to the latter than with respect to the former.

<sup>7</sup> *Kansas City v. O'Connor* (1899) 82 Mo. App. 655. There a municipal corporation brought an action on a bond given by O'Connor as principal and the other defendants as sureties, for the faithful performance of an entire contract, which, being partly void, was treated as wholly void. The court rejected the contention that, "since O'Connor, the contractor, has been paid for the work as provided by the contract, it has become performed by the city, and that he (or his sureties standing in his

to be maintainable by a national bank, the supreme court simply followed the Federal decisions.<sup>4</sup>

#### 42. *Nebraska.*

In a case where an action brought by a trustee in bankruptcy to enforce an ultra vires subscription to the stock of the bankrupt corporation was held not to be maintainable, one of the syllabi prepared by the court is as follows: "Where no money or property of any kind has been acquired or held by virtue of the transaction, mere inaction and neglect to repudiate it will not estop the subscribing corporation when sued upon such a subscription."<sup>1</sup> The qualifying clause at the beginning of this statement may, as it would seem, be regarded as importing that the doctrine of estoppel was recognized by the court as being controlling under appropriate circumstances. Compare § 92 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737, where similar phraseology is used.

In a case where a suit brought by a national bank to compel another company to transfer on its books certain stock which had been pledged by a debtor of the bank and purchased by it at a foreclosure sale was held to be maintainable, the ratio decidendi was that the right of the bank to hold the stock was a question which concerned only the government.<sup>2</sup>

#### 43. *New Jersey.*

In one case, where Runyon, C., refused to allow the defendant mortgagors to file supplemental answers setting up the defense that, in making the loan secured by the mortgage, the plaintiff corpora-

tion was acting ultra vires, the refusal was based upon the ground that "the ends of justice would not be promoted by granting the application," the defense being unconscionable in respect both of the defendants and of a subsequent mortgagee, who had taken his mortgage with full notice of the complainant's encumbrance.<sup>1</sup> Apparently it was assumed by the learned judge that the proposed defense, must have been treated as conclusive, if it had been interposed at the proper time. Such a doctrine would have been in harmony with that which was applied during the same period with respect to actions against corporations, but which has since been repudiated. See § 94 of the monograph just referred to.

#### 44. *New York.*

In the earliest case which bears upon the question of the remedial rights of a corporation in respect of an ultra vires contract of which the other party has received the benefits, it was urged that the plaintiffs, a Pennsylvania bank, were precluded from enforcing a mortgage taken concurrently with the loan in question, because their charter authorized them to take mortgages only for "debts previously contracted." Chancellor Kent, however, said: "If this objection was strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in this collateral way, to decide a question of misuser by setting aside a

shoes) cannot set up ultra vires against the city." The correct view was considered to be "that, if a contract is void, it cannot be validated by being partly performed. The limit to the right of a corporation to contract is made by the policy of the law, and a violation of the law ought not to be made to work out the validity of the contract." The precise position of the court is shown by the authorities relied upon, namely, amongst others, *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 85, 25 L. ed. 953; *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 54, 35 L. ed. 66, 11 Sup. Ct. Rep. 478, and *National Trust Co. v. Miller* (1880) 33 N. J. Eq. 162, in all which the doctrine was approved which had been laid down in *Ashbury R. Carriage & Iron Co. v. Riche* (1876) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. L.R.A.1917B.

*Cas. 304*, that an ultra vires contract can neither be made valid by the consent of every one of the shareholders, nor, by partial performance, become the foundation of an action. See also the comments on the case in *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721.

<sup>4</sup> *First Nat. Bank v. Gillilan* (1880) 72 Mo. 77 (suit on non-negotiable note discounted by bank).

#### *Nebraska.*

<sup>1</sup> *Nebraska Shirt Co. v. Horton* (1903) 3 Neb. (Unof.) 888, 93 N. W. 225.

<sup>2</sup> *Union Nat. Bank v. Touzalin Improv. Co.* (1901) 1 Neb. (Unof.) 116, 95 N. W. 489.

#### *New Jersey.*

<sup>1</sup> *Third Ave. Sav. Bank v. Dimock* (1873) 24 N. J. Eq. 26.

just and bona fide contract.”<sup>1</sup> But the actual ratio decidendi was that the objection thus criticized was founded upon an erroneous view as to the construction of the corporate charter. It seems clear, therefore, that the statement quoted cannot be regarded as possessing any higher authority than that which may be ascribed to an obiter dictum of a very eminent jurist. It will be observed, moreover, that the doctrine asserted is simply that the fact of a corporate contract's being in excess of the corporate powers is a matter which concerns the state alone, and which for this reason cannot be taken advantage of by the other party to the contract. A doctrine of this character and scope is essentially distinct from, and has no direct relevancy to, the doctrine which was subsequently formulated in this state; viz., that where a corporation is suing upon a contract already performed by it, such performance operates as an element which precludes the defendant from relying upon the plea of ultra vires. See *infra*. The most that can be said in this regard is that the evidential elements in the case under review were of such a nature that an application of the latter doctrine would have led to the same conclusion as that which was indicated by

the former. It is proper to emphasize this point, because these words of the learned chancellor have frequently been cited not only in New York, but in other jurisdictions, as an authority for the doctrine of an estoppel as predicated from the execution of the contract.<sup>2</sup> So far as the report shows that doctrine was not brought to his attention at all. Nor was it adverted to in any of the numerous cases in which, during the period immediately following the date of his remarks, it was held that a corporation could not maintain an action upon a contract which it was expressly prohibited to make. Most of these cases related to violations of the general provision of the Restraining Act to the effect that “no person, unauthorized by law, shall subscribe to, or become a member of, any association, institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation;” and that “all notes and securities for the payment of money or the delivery of property, made or given to any such association, institution or company, not authorized as aforesaid, should be null and void.”<sup>3</sup>

#### New York.

<sup>1</sup> *Silver Lake Bank v. North* (1820) 4 Johns. Ch. 370.

<sup>2</sup> It was one of the precedents cited by Comstock, Ch. J., in the famous opinion delivered in *Bissell v. Michigan S. & N. I. R. Co.* (1860) 22 N. Y. 258.

<sup>3</sup> 2 Rev. Laws 1813, p. 234, § 2. For later enactments of a similar tenor, see 1 Rev. Stat. 712 (construed in *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 531); Laws 1882, chap. 409, § 297, Rev. Stat. Codes & Laws (N. Y.) 1889, and Laws 1892, chap. 687, § 19.

In *Utica Ins. Co. v. Scott* (1821) 19 Johns. 1, the action was upon a promissory note discounted by an insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes, and that in so doing it had violated the Restraining Act. But the court said: “In analogy to the statute against gaming, the notes and securities are absolutely void into whatever hands they may pass; but there is a material distinction between the security and the contract of lending. The lending of money is not declared to be void, and therefore, whenever money has been lent, it may be recovered, although the security itself is void.” For another decision rendered at a later stage of the proceedings in this case, see this footnote, *infra*.

In *Utica Ins. Co. v. Kip* (1827) 8 Cow. 20, the action was upon a note discounted

by an insurance company, but the declaration also contained a count for money lent. On demurrer, it was held that a good cause of action was shown. The court said: “The company have authority to make loans; the note in this case was a security for the loan; the Restraining Act, at most, only avoids the note, and therefore leaves a good consideration for the money lent. This suit cannot be said to arise out of an illegal transaction which defeats a recovery. The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendant; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal does not avoid what was lawful. The action for money lent is rather a disavowance of the illegal contract. The plaintiffs claim nothing under it.” For another decision to the same effect, see *Utica Ins. Co. v. Cadwell* (1829) 3 Wend. 296.

In *Fulton Bank v. Benedict* (1829) 1 Hall, 480 (action to recover on a joint promissory note indorsed for accommodation by Benedict, and transferred by the Hudson Insurance Company to the plaintiff), a new trial was granted for the purpose of determining certain questions of fact; but the opinion was expressed that, as the note sued upon had been negotiated by a company having no banking powers, it was void under the Restraining Act; that if it was not void by that act, yet, as it was taken by the Hudson Company in a transaction not au-

Others turned upon the operation of special statutes applicable only to the cor-

porated by their charter, no action could be sustained on it by the company; and that, if the plaintiffs had notice when they took the note that it had been negotiated to the Hudson Company contrary to its charter, the illegality of the transaction could be set up against them as a defense.

In *Beach v. Fulton Bank* (1829) 3 Wend. 573, affirming (1829) 1 Paige, 429, where the notes sued upon were held void as having been discounted in violation of the Restraining Act and of the act incorporating the Hudson Insurance Company, the assignor of the plaintiff bank, the court of errors made the following comments upon the *Scott* and *Kip* Cases, supra: "If those cases are critically examined, it will be seen that the right of the plaintiffs in those cases to recover is placed upon the power given them by their charter to loan money. The Hudson Insurance Company has no such power, and therefore the contract of loan is void as well as the security, and for the same reason; viz., the want of capacity to make such contract either by parol or by taking a note. In the case of the note, there is the additional reason that the statute expressly declares it void. If the company have no capacity to make such contract, they have not the power to enforce it. The Utica Insurance Company have the power given them to invest their surplus funds, which the court say (*People ex rel. Atty. Gen. v. Utica Ins. Co.* (1818) 15 Johns. 385, 8 Am. Dec. 243) gives them power to loan money in any manner not prohibited by law. They have power, therefore, to loan money, though not to discount notes. Hence a note discounted by them is void, but the contract of loan may be enforced against the borrower. Although, therefore, the contract of loan is valid where such contract is not prohibited by law, and the security only is rendered void by statute, still the contract of loan must have competent parties capable by law to make the contract; and incorporated companies having no powers but such as are granted or necessarily incident, a company having no such power, express or implied, has no capacity to lend money, of course cannot sue for it."

In *Utica Ins. Co. v. Bloodgood* (1830) 4 Wend. 652, where the *Scott* Case, supra, was followed, it was held that the illegal note might be used as evidence.

In *Pennington v. Townsend* (1831) 7 Wend. 276, where the action was brought to recover the amount of a check discounted in New York by a New Jersey bank, it was contended that, if "the security should be declared void, the plaintiffs were entitled to recover the money loaned, on the common counts;" but the court refused to discuss the point, because no money had ever been loaned by the plaintiffs to the defendant.

In *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.* (1841) 25 Wend. 648. Nelson, J., felt "great difficulty" in assenting to the cases in which it had been laid L.R.A.1917B.

down that, though the securities for the moneys loaned are void, the contract of loan itself is valid, and may be enforced. But in the case under review the plaintiffs were met by a positive enactment of law, viz., 2 Rev. Stat. 373, § 2, by which it was provided that where, by the laws of the state, any act is forbidden to be done by a corporation or any association of individuals, without express authority of law, and such act be done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act or upon any liability or obligation, express or implied, arising out of or made or entered into in consideration of such act. The plaintiff company was prohibited from keeping an office for the purpose of receiving deposits or discounting promissory notes. They had kept such an office and loaned the money in question in pursuance thereof. The contract of loan, therefore, had grown out of the prohibited act, and no action could be maintained for the recovery of the money lent.

In *Green v. Seymour* (1846) 3 Sandf. Ch. 285, the complainants, standing in the place of the Utica Insurance Company, sought to enforce certain notes discounted by it and a mortgage assigned to it, both transactions being in violation of the Restraining Act. It was argued that the illegality of the transactions was a point which the defendants had no right to raise; that the sovereign power of the state had never interfered, and the original debtors to the corporation, instead of striving to avoid their obligations, sought to pay them by this assignment. But the court said: "The cases cited in support of this view were those in which the forfeiture of corporate franchises was set up to defeat a recovery, or in some other mode the continued existence of the corporation was questioned collaterally. This is not such a case. It is not denied that this corporation was in existence and could maintain suits till 1836, although its charter might have been forfeited at the instance of the people many years before. The question is whether the corporation obtained any title to this mortgage. The objection to their title is not that they had forfeited their charter but that the title was obtained by a positively illegal act. I confess that I cannot perceive any escape from the objection."

In *New York Firemen Ins. Co. v. Sturges* (1824) 2 Cow. 664, it was conceded that, if the discounting of the promissory note sued upon had been a transaction within the scope of the Restraining Act, the plaintiff could not have recovered. For another case in which the isolated discounting of a note was held not to be an infringement of the act, see *New York Firemen Ins. Co. v. Ely* (1824) 2 Cow. 678.

In *Utica Ins. Co. v. Scott* (1826) 8 Cow. 709, the action was upon a promissory note, and the defendant pleaded that the plaintiffs had discounted the note contrary to the

porations in question.<sup>4</sup> Having regard to the facts involved in these cases, they may be said to import by implication that the circumstance of a defendant's having received the benefits of a transaction was not deemed by any of the courts which decided them to be a controlling element. But this particular aspect of the matter was not discussed, or even adverted to, by any of those courts.

After the doctrine of estoppel had been adopted, and also declared to be applicable only to unauthorized contracts, and not to those which are expressly prohibited, these earlier cases were treated as illustrating that doctrine in respect of the limitation by which it was thus qualified.<sup>5</sup> But in the opinions as reported there is nothing that sustains, and much that repels, the inference

that the courts had in mind a doctrine of this character. An examination of the language used will, it is submitted, show with reasonable certainty that contracts which were expressly prohibited, as well as contracts which were merely unauthorized, were considered to belong to the category designated by the expression "ultra vires," and that both of these descriptions of contracts were equally, and for the same reasons, regarded as incapable of being enforced, irrespective of whether the action was brought before or after they had been performed on the side of the corporation.<sup>6</sup> If this conclusion is warranted, it will follow that the cases referred to must be taken as indicating that for a considerable period the doctrine adopted in New York was that, in an action brought by a cor-

poration. The plaintiffs replied that they lent only a part of their surplus fund on the note. On demurrer to the reply, it was held that the company might lend their surplus fund on bond, note, or mortgage.

For the judgment of ouster rendered against the company which was the plaintiff in the above cases, see *People ex rel. Atty. Gen. v. Utica Ins. Co.* (1818) 15 Johns. 358, 8 Am. Dec. 243.

<sup>4</sup>In *New York Firemen Ins. Co. v. Ely* (1824) 2 Cow. 678, the grounds upon which it was held that the plaintiff could not maintain an action on a promissory note which it had discounted were that it had been created for the "sole purpose of insurance," and that it had no power to lend money on any securities except those expressly specified in its charter. The contention of counsel that, though the note might be void, and the state might claim a forfeiture of the charter, the defendants could not object to paying the consideration, was not commented upon by the court.

In *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* (1831) 7 Wend. 31, where the decision was similar, the court reasoned thus: "There is a fundamental objection to the plaintiffs' recovery. They have no authority by their charter to loan money except on bond and mortgage. Laws 1822, p. 54. They cannot make a valid contract of loan in any other manner; and therefore not only the security which may be taken, but the contract itself is void, and cannot be the foundation of an action. Where a corporation is prohibited from discounting notes or taking any other particular security, but have a general power given them by their charter to loan money, if they make a loan and take the prohibited security, the security is void, but the contract of loan is valid, and the money may be recovered under the general counts; but where not only the security, but the contract also is illegal, it cannot be enforced."

In *Swift v. Beers* (1846) 3 Denio, 70, the court refused to permit a recovery against the guarantor of a note which on its face

was a violation of the act of 1840, prohibiting the issuing of post notes by banking associations.

In *Seneca County Bank v. Lamb* (1850) 26 Barb. 595, it was held that no action could be maintained upon a contract by which the plaintiff bank and the defendant mutually agreed, the one to deliver, and the other to receive, the note in suit upon a discount exceeding the rate to which the plaintiff was restricted by statute.

<sup>5</sup>See *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 531 (where the court, referring to the *Scott Case*, note 3, *supra*, and several of those which followed it, said that they had been criticized, but had never been overruled); *Pratt v. Eaton* (1880) 79 N. Y. 449, reversing (1879) 18 Hun, 293.

In *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, the following remarks were made: "Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed. The series of cases in this state, known as the *Utica insurance cases*, afford an apt illustration. It was held that the Restraining Acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers, and this although the object of the Restraining Laws seems to have been the protection of the chartered banks in the monopoly of banking."

<sup>6</sup>See, for example, the last of the sentences quoted from the opinion in *Beach v. Fulton Bank* (1829) 3 Wend. 582, note 3, *supra*.

poration upon an ultra vires contract, the fact of the defendant's having received the benefits of the contract did not enlarge the corporation's remedial rights in such a sense as to entitle it to recover.<sup>6a</sup> The earliest case in which the modern doctrine of estoppel was distinctly formulated with reference to an action brought by a corporation<sup>7</sup> was decided by the supreme court soon after the middle of the nineteenth century. It was there laid down broadly that, "when it is a simple question of capacity or au-

thority to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted to question its validity in an action founded upon it."<sup>8</sup> Two years afterwards this case was followed by another which has sometimes been regarded as authority for that doctrine. But the present writer ventures to think that no such significance can be ascribed to it.<sup>9</sup>

In 1860 the doctrine under which an

<sup>6a</sup> In *Tracy v. Talmage* (1856) 14 N. Y. 189, 67 Am. Dec. 132, the court, after referring to the doubts which, in *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.* (1841) 25 Wend. 648, Nelson, J., had expressed with regard to the soundness of some of the cases relating to the *Utica Insurance Company*, observed: "There is, undoubtedly, 'great difficulty' in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, that the court in the *Utica insurance cases* have given to the guilty party the benefit of a principle which is only applicable to the more innocent." But this statement was made in a case in which the right of recovery was being considered with reference solely to the question whether the parties were in *pari delicto*. The decisions commented upon simply affirmed the inability of the corporation to maintain an action upon a contract which, according to accepted principles, was clearly void. In this point of view the comparative innocency of the parties was, it is submitted, a wholly irrelevant consideration.

<sup>7</sup> For a previous instance of the application of the doctrine in an action involving the liability of a corporation, see *Indiana v. Woram* (1843) 6 Hill, 33, 40 Am. Dec. 378.

<sup>8</sup> *Steam Nav. Co. v. Weed* (1853) 17 Barb. 378. The plaintiff, a Connecticut corporation, was authorized by its charter to transport freight and passengers and to tow vessels by the power of steam, and to transact other business incident thereto. There was also a proviso that nothing contained in that act should be construed to authorize or empower such corporation to use its funds for banking transactions. The questions presented were whether a temporary loan made for the accommodation of a customer was an act of banking and a violation of the Restraining Act; and whether the defendants were at liberty to set up as a defense that the plaintiff had no right under its charter to make the loan. The conclusions of the court were thus stated: "There was no good reason for supposing that the making of the loan in this case was a violation of the Restraining Act. 1 Rev. Stat. 3d ed. 893. It was not the discounting of a note. It was a loan of money for a single day, without taking any note or security; and, for aught that ap-

pears, without charge or intention to charge for its use. It was a single, isolated casual transaction, not for the purpose of gain, but to oblige a customer. It was not an act of banking. *People v. Brewster* (1830) 4 Wend. 498. The question, then, was not whether the loan was a violation of an express statute, but whether the corporation had power, express or implied, to make it. In other words, it was not a question of illegality, but of authority. I think, in such cases, the defendant who has received the money is not at liberty to question the authority of the lender."

<sup>9</sup> *Mott v. United States Trust Co.* (1855) 19 Barb. 589. There the plaintiff sought to restrain the receiver of the Knickerbocker Savings Institution from suing on a promissory note which, together with a certificate for 450 shares of the stock of that corporation, he had delivered to it as security for a loan. The grounds upon which his motion was denied were thus stated: "This loan, he now says, his friends in the Savings Institution had no legal right to make, and he therefore, however much accommodated at the time, is under no legal obligation to repay it; and he accordingly files his bill in equity—the conjunction can hardly fail to provoke a smile—very modestly praying that the supreme court, sitting in its character of chancellor, and as such, of course, the guardian of charities, will order the receiver, without payment, or any offer of payment, to deliver up the note and certificate, on the pretended faith of which, with the concurrence of the friendly managers of the charity (unlawfully, as he contends), he had abstracted of the savings of the poor the large amount of \$10,000 and upwards! The charter of the Savings Institution, as amended in 1853, provides that its funds shall be invested in or loaned on public stocks or private mortgages: and that when loaned on—not invested in—such stocks or mortgages, 'a sufficient bond or other satisfactory personal security in addition shall be required of the borrower.' A stock note, therefore, like the one in question, being a personal security in itself, was perfectly lawful; and had the stock accompanying it been that of a 'town, city, county, or state,' no question could have been raised as to either. What, then, is the proposition advanced by the plaintiff? That if, as required by law, he had



estoppel against pleading ultra vires is deemed to be created by the fact of the claimant's having performed the contract on his side was definitively established with respect to the class of cases in which the corporation is the defendant. See § 95 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 749. But the decisions embodying that doctrine were not referred to in a case in which it was held five years afterwards that the plaintiff corporation could not recover in an action brought upon a draft which it had discounted at a higher rate of interest than that prescribed by statute.<sup>10</sup> Opinions were delivered by Brown and Wright, JJ. By both of these judges the fact of the transaction's having been in contravention of an expressly prohibitory provision was treated as being fatal to the right of action. In so far as the ruling was referable to this consideration, it was in harmony with all the New York decisions, whether early or recent. But, as the passage quoted in the footnote shows, Wright, J., also declared that the inability of the bank to recover was predicable on the

ground that the transaction was ultra vires. It is apparent from his language that he assumed this expression to be applicable to contracts which are expressly prohibited as well as to those which are merely unauthorized. But this theory as to its connotation is manifestly inconsistent with the view which has ultimately prevailed in this state, that, so far at least as cases involving the doctrine of estoppel are concerned, it is to be regarded as covering only contracts which belong to the latter category. See *infra*.

In a later case the right of the corporation to maintain the action proceeded upon the broad ground that "one who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was ultra vires, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation."<sup>11</sup> This decision has been frequently followed in later cases, the most

given good collateral security, his personal promise to pay, thus fortified, would have been binding; but having palmed off as collateral security a stock which was comparatively worthless, he cannot justly be called upon to pay anything, and is equitably entitled to be shielded from all possible prospective annoyance. . . . The bare statement of the proposition carries with it, to my mind, its own refutation." It is plain that the circumstances were such that the elementary principle, He who seeks equity must do equity, precluded the complainant from obtaining the relief asked for unless he should consent to restore the money borrowed, and that this was the real ground upon which the motion was denied, and the borrower was held liable on a counterclaim for the amount of the loan. The case, therefore, seems to have been improperly cited by Mr. Sedgwick (*Stat. & Const. Law*, p. 73) as an authority for the estoppel doctrine.

<sup>10</sup> *Bank of Salina v. Alvord* (1865) 31 N. Y. 473 (construing N. Y. Laws 1829, chap. 94, and Laws 1832, chap. 208). One of the grounds upon which Wright, J., relied, was thus stated: "The discount of the drafts by the banks was an act ultra vires, and not within its corporate power. It had no legal capacity to discount paper of the description of these drafts at a higher rate of interest than 6 per cent in advance. The charter of the plaintiffs limits their power, in the discount of paper maturing within sixty-three days, to discounts upon loans upon which only 6 per cent interest in advance shall be taken. Discounting the drafts in this case, and taking interest at

and after the rate of 7 per cent per annum in advance, was exercising a power which the corporation did not possess. It requires no argument to prove that a contract which a corporation has no power to make is void and cannot be enforced."

<sup>11</sup> *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504, reversing (1875) 6 Jones & S. 554. There the plaintiff company, which had sold goods to the Seal Lock Company, brought an action against its trustees to enforce their statutory liability for having failed to file certain reports specifying the amount of the company's paid-up capital, debts, etc. Proceeding upon the theory that, in respect of the enforceability of the claim for the price of the goods sold, the position of the vendee company was the same as that of its trustees, the court held the action to be maintainable, arguing as follows: "Whether the contract as originally made was ultra vires is not a very important inquiry at this time. If it was, the state under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes dehors the legitimate business of the corporation. The plea of ultra vires should not as a general rule prevail, whether in-

instructive being one in which it was held that a corporation which had taken a lease of the property and franchises of another corporation could not defeat a claim for past due rent by the plea that the lease was ultra vires.<sup>12</sup>

terposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. Here, as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. . . . It is very evident, as well upon principle as upon authority, that, had this action been against the debtor corporation, the objection that the contract was not authorized by the charter of the plaintiff would have been untenable, and the plaintiff would have been entitled to recover. Does the defendant and appellant stand in a different position, or can he avail himself of a defense to the original cause of action of which the corporation could not? There may be defenses personal to the defendant, but objections which go to the foundation of the claim and demand against, and the obligation of, the corporation, are not personal to one sued as trustee upon the statutory liability."

<sup>12</sup> Bath Gaslight Co. v. Claffy (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390. After referring to certain English cases which had been cited on behalf of the defendant, the court said: "Without questioning these cases, it is quite apparent that they stand in justice upon a very different basis from the action in this case, which is brought by the corporation to enforce a contract, the enforcement of which will indemnify the plaintiff and its stockholders for the deprivation of the use of the property of the corporation during its possession by the defendants under the unauthorized lease. . . . But the law affords ample remedy for the usurpation by corporations of unauthorized powers, through proceedings by injunction or for the forfeiture of their charters." The court then referred to what it regarded as the "misleading" use of the word "illegal" to designate ultra vires contracts, and, after conceding that, if the lease in question had been "illegal," no recovery could be had upon it, continued thus: "The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The L.R.A.1917B.

During the period that has elapsed since the right of a corporation to sue on an ultra vires contract which it had performed was established, the doctrine which, as has been shown above, was applied in all the earlier cases, viz., that no

parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant."

In *Bowers v. Ocean Acci. & Guarantee Corp.* (1906) 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed without opinion in (1907) 187 N. Y. 581, 80 N. E. 1105, an action brought by the receiver of the Mercantile Credit Guarantee Company to recover from the defendant the percentage of premiums stipulated to be paid by it as the consideration of a contract for the purchase of the good will of the former's business, the contention of the defendant that this contract was illegal and void in that the mercantile company agreed to abandon the business for which it was incorporated, and to transfer that business to a foreign corporation, thus divesting itself of its lawful functions, which it had no right to do, and that the contract was beyond the power of the directors and ultra vires, was thus discussed: "The agreement did not provide for the turning over to the defendant of all the assets of the mercantile company, and the corporation did not thereby divest itself of all of its property, and hence it did not bring itself within the rule which the appellant seeks to invoke. Whether the contract was ultra vires or not, it was fully performed by the mercantile company, and the defendant had the full benefit of it by obtaining a list of all of its policy holders and reinsuring a very large proportion of them. After such performance and the acceptance of the benefits thereof, the defendant is estopped from interposing the defense that the corporation had no power to make such a contract."

For other cases in which the doctrine of estoppel was applied in favor of a corporate plaintiff, see *Hurd v. Kelly* (1879) 78 N. Y. 588, 34 Am. Rep. 567, affirming *Hurd v. Green* (1879) 17 Hun, 327 (action on a bond by which obligor undertook to pay a

such remedial right exists in respect of expressly prohibited contracts, has been approved several times by the court of appeals and the supreme court.<sup>13</sup>

In one case where the argument of counsel that an implied prohibition might

bank a certain sum, if it continued in business for a specified period); *Rider Life Raft Co. v. Roach* (1884) 97 N. Y. 378 (action to recover profits of a sale made in pursuance of contract giving defendant full control of company's business); *Rome Sav. Bank v. Kramer* (1884) 32 Hun, 270 (action on note), affirmed in *Rome Sav. Bank v. Krug* (1886) 102 N. Y. 331, 6 N. E. 682, on the ground that even if the note and other securities were void, the amount lent might be recovered; *Homestead Bank v. Wood* (1892) 1 Misc. 145, 20 N. Y. Supp. 640, reversing (1891) 18 N. Y. Supp. 718 (action on note indorsed by defendant); *Fifth Ave. Bank v. Forty-Second Street & G. Street Ferry R. Co.* (1892) 63 Hun, 629, 17 N. Y. Supp. 826 (action for damages caused by refusal to transfer on its books to plaintiff certain stock which it had taken as security; estoppel question not alluded to in affirming judgment (1893) 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Koehler & Co. v. Reinheimer* (1898) 26 App. Div. 1, 49 N. Y. Supp. 755, reversing (1897) 20 Misc. 62, 45 N. Y. Supp. 337 (plaintiff, as guarantor of the covenants of a lessee, sued him, after being obliged to pay rent); *Booth Bros. v. Baird* (1903) 83 App. Div. 495, 82 N. Y. Supp. 432 (contract for sale and delivery of personal property); *Patrons of Industry F. Ins. Co. v. Plum* (1903) 84 App. Div. 96, 82 N. Y. Supp. 550 (principle of estoppel held not to be applicable, because defendant had received no benefit from contract).

In *Auburn Sav. Bank v. Brinkerhoff* (1887) 44 Hun, 142, where an action on a bond assigned to the plaintiff was held to be maintainable, it would seem that the doctrine applied in the above cases might have been invoked. But the ratio decidendi was that the regulating statute did not declare that a violation of the restrictive provisions with respect to the description of mortgages that might be taken should render the bonds and mortgages void.

<sup>13</sup> In *Crocker v. Whitney* (1877) 71 N. Y. 161, the following doctrine was laid down with respect to § 5137 of the Federal statute, Comp. Stat. 1913, § 9674, regarding national banks. "It is a settled principle that the courts will not enforce a contract, the subject-matter of which is either *malum prohibitum* or *malum in se*. A contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself." Since the date of this decision the Federal Supreme Court has placed a different construction upon this provision. See § 17, *supra*. But obviously this does not affect the significance of the statement as an expression of opinion by a New York court upon the general question of the right

to be read into the corporate charter for the purpose of precluding it from suing on the contract in question, was rejected, the court might, as it would seem, have rested its conclusion upon the broad ground that the theory of an im-

posed contract. The same remark applies to the earlier case of *Conklin v. Second Nat. Bank* (1871) 45 N. Y. 655, the effect of which is stated in § 17, note 2, *supra*.

In *New York State Loan & T. Co. v. Helmer* (1879) 77 N. Y. 64, affirming (1877) 12 Hun, 35, where an answer alleging that the plaintiff corporation had violated the expressly prohibitory provisions in 1 Rev. Stat. p. 559, § 4, and 1 Rev. Stat. p. 661, § 3, by discounting the note on which it sued was held good, the court distinguished between contracts made in contravention of enactments of this type and contracts which are merely unauthorized.

In *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 531, affirming (1877) 53 How. Pr. 506, it was held that, as the People's Safe Deposit and Savings Institution had no power under its charter to loan money on personal security, and was forbidden by the Restraining Act from engaging in the business of discounting notes and other commercial paper, its assignees in bankruptcy could not maintain an action on notes discounted in violation of the act. No allusion was made to the fact that, under the doctrine previously established the defendant would have been estopped to plead the invalidity of the contract so far as it was predicable merely on the ground of a defect of power. In this point of view it is plain that, in order to reconcile the decision with the modern New York cases, the inability of the plaintiffs to recover on the contract must be assumed to rest solely upon the illegality of the transaction under the Restraining Act. The same remark is applicable to the decision in *Pratt v. Eaton* (1880) 79 N. Y. 449, reversing (1879) 18 Hun, 293, where other notes discounted by the corporation were treated as being nonenforceable. In both cases the court held the plaintiffs to be entitled to relief independently of the contract.

In *Duncomb v. New York, H. & N. R. Co.* (1881) 84 N. Y. 190, where, in a suit to foreclose a mortgage and determine various conflicting rights, it was held to be error to reject certain bonds held by one Rucker as the assignee of the New York Loan and Indemnity Company, and those which he received as a pledge from the Bessemer Company. The objection made to the title of the loan and indemnity company, that it violated the law in discounting a note of \$25,000, and so the pledge fell with it (Rev. Stat. pt. 1, title 20, chap. 20, §§ 1 and 5), was deemed to be answered by a reference to the charter of the company (Laws 1870, p. 1803), which authorized it to "advance moneys, securities, and credit upon any property, real or personal," and also by the

plied prohibition could not be adopted without destroying the foundation of the doctrine of an estoppel, as applied in respect of contracts which fall within the unauthorized class. But the decision was referred to special considerations suggested by the language of the corporate charter and the nature of the contract under review.<sup>14</sup>

In several cases the principle of estoppel has been held to be applicable in respect of actions brought by municipal corporations.<sup>15</sup>

decisions in the two cases last cited, which were regarded as embodying the doctrine that, even if the note discounted by such a company was void, the loan and its security were valid, and capable of being enforced.

In *Otis v. Harrison* (1862) 36 Barb. 210, the ground upon which it was held that the receiver of an insurance company could not sue on premium notes was that the taking of these instruments was not merely ultra vires, but expressly prohibited.

The distinction between ultra vires and unlawful contracts was also adverted to in *Atlantic State Bank v. Savery* (1880) 82 N. Y. 291 (note discounted at unlawful rate of interest).

In *First Nat. Bank v. Cornell* (1896) 8 App. Div. 427, 40 N. Y. Supp. 850, where a note taken for a loan constituted a violation of an expressly prohibitory provision, the ground upon which recovery was allowed was that the loan itself was valid. Compare some of the cases cited under notes 3 and 4, supra.

<sup>14</sup> *Washington L. Ins. Co. v. Clason* (1900) 162 N. Y. 309, 56 N. E. 755, affirming 10 App. Div. 434, 45 N. Y. Supp. 27. There a mortgagor offered to prove, under his answer in foreclosure, that at the time the plaintiff, an insurance company, made him the loan secured by the mortgage, the property was encumbered, and was not worth 50 per cent more than the loan, and therefore all did not satisfy the standard prescribed by the Insurance Law (Laws 1892, chap. 690, § 16, amd. by Laws 1893, chap. 112, and § 13, amd. by Laws 1893, chap. 725). Held, that the facts thus relied on did not constitute a good defense to the suit. The court said: "The statute does not declare that loans made upon encumbered real estate, or upon real estate not worth 50 per centum more than the amount loaned thereon, shall be void, nor does it expressly forbid them, as it does investments in insurance stock; but the defendant's argument is that such loans are by implication prohibited, and are therefore void. Why make only one express prohibition if more are intended? This prohibition was added to § 16 by the amendment of 1893. The manifest intent of these provisions is to add to the protection of policy holders in insurance companies by requiring the companies to invest the moneys

#### 45. North Dakota.

One of the syllabi prepared by the court is to the following effect: "A contract of a corporation that is ultra vires not because prohibited by positive law or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has

intrusted to their care in securities of unquestionable soundness, certainly not to withdraw such protection and bestow such moneys upon borrowers by invalidating the investment whenever the security should prove to be below the prescribed standard. The defendant contends that, since the corporation has none but conferred powers, and as the power to invest in a security below the prescribed standard is not conferred upon the plaintiff, the power is denied. If the state should make this argument in the proper action, it might be difficult for the plaintiff to answer it, but the defendant is not the sovereign. The state may complain that the mortgage is not up to the standard, without asserting that it is not good for what it purports to be. If we place the defendant in the shoes of the state he would have no better position. Regard being had to the manifest intent of the statute, we can import nothing into it to aid the defendant contrary to that intent, and cannot imply a penalty against the plaintiff for the benefit of the defendant, and if necessary we should resort to strict construction to exclude such implication. The plaintiff has loaned its money to the defendant upon the mortgage, and the defendant seeks to escape from the obligation into which he voluntarily entered to obtain the loan. The statute permits the plaintiff to invest in mortgages of the prescribed standard. Whether real estate is already encumbered is a fact which a reasonably diligent inquiry may fail to disclose. Whether it is worth 50 per centum more than the amount for which it is to be mortgaged is a matter of opinion; subsequent facts may show that the mortgagee was mistaken in fact or in opinion. Public policy does not require that such a mistake shall be punished by depriving the mortgagee of the security the mortgage is adequate to afford. The penalty due to iniquity is not in such a case visited upon mistake or misfortune. Thus we can understand why the express prohibition was not extended to mortgages, but only to insurance stocks. The defendant's offer did not charge iniquity or exclude mistake or misfortune, and therefore was properly overruled."

<sup>15</sup> *New York v. Sonneborn* (1889) 113 N. Y. 423, 21 N. E. 121 (lease); *New York v.*

been fully executed by the other party."<sup>1</sup> But the conception that there are two categories of ultra vires contracts, and that the theory of an estoppel is applicable only to one of them, was not explicitly recognized in two other cases in which that theory was adverted to.<sup>2</sup>

In one case the ratio decidendi was that, as the defendant had not received or retained any property of the corporation for which he was either morally or legally obligated to pay, he had nothing to restore, and consequently that the remedial rights of the parties were governed by the general rule that "a con-

tract entered into contrary to law or public policy is simply void, and neither party to it is estopped from showing the fact."<sup>3</sup>

#### 46. Ohio.

The earlier decisions in this state are founded upon the broad doctrine that a corporation cannot enforce a contract made by it in violation of a statutory prohibition.<sup>1</sup> The language used in the opinions shows that this doctrine was regarded as being applicable, irrespective of whether the prohibition was express or merely implied. When viewed with

Huntington (1889) 114 N. Y. 631, 21 N. E. 998 (lease); Buffalo v. Balcom (1892) 134 N. Y. 532, 32 N. E. 7 (mortgage).

#### North Dakota.

<sup>1</sup> Tourtelot v. Whithed (1900) 9 N. D. 467, 84 N. W. 8, where the action was brought by the receiver of a national bank against the assignee of an insolvent company. Referring to the contract in question, under which the bank had taken the stock of the other company, the court said: "It is conceded that the bank might take the corporate stock as collateral security for a present loan, and in order to collect the loan it might sell the collateral and become the purchaser and legal owner thereof. It is also conceded that the bank might, in the language of counsel, 'take such stock in compromise of a doubtful or contested claim, where to do so would prevent a possible loss. If ultra vires, it was because of the circumstances under which it was made, and, as already stated, the plea of ultra vires will not avail.'"

<sup>2</sup> The syllabus of the court in Clarke v. Olson (1900) 9 N. D. 364, 83 N. W. 519, is as follows: "Where a building and loan association desires to do business in a state other than that in which it is chartered, and is authorized by its charter so to do, and in order to do so deposits, in compliance with the laws of such other state, its securities in a specified amount with the treasurer of such state, to be held in trust for the benefit of the shareholders and creditors in such state, and receives its license from such state to transact business therein, and so transacts business for a number of years, such association cannot, upon subsequent insolvency, nor can a shareholder not resident of such other state, plead that the act of the association in making such deposit of securities was ultra vires."

In Wald v. Wheelon (1914) 27 N. D. 624, 147 N. W. 402, the court made the following remarks, arguendo: "It has often been held that, where the loan is made on a contract which has been fully executed, the borrower cannot set up as a defense to an action on the contract the fact that it is ultra vires, or entered into in excess of the authority of the corporation, because to permit him to make such a defense in an action brought to recover on the indebted-

ness would result in his retaining the benefits, and this would be inequitable and unconscionable. Having dealt with the bank and received his consideration in such case, he is estopped from denying the authority of the bank to make the contract."

<sup>3</sup> Montgomery v. Whitbeck (1903) 12 N. D. 385, 96 N. W. 327 (receiver's action to recover assessment on policy of insurance).

#### Ohio.

<sup>1</sup> In Bank of Chillicothe v. Swayne (1838) 8 Ohio, 257, 32 Am. Dec. 707, the plaintiff bank sued in assumpsit on certain bills of exchange, the common counts being included in its declaration. Discussing the question whether the contract was void as having been made in violation of the clause in act incorporating the bank which provided that "the said corporation should not take more than at the rate of 6 per centum per annum on its loans or discounts," the court said: "This corporation has power to loan money, provided it loans it at a rate of interest not exceeding 6 per cent interest per annum; but it has no power or capacity to loan money at a rate above and beyond this. And if a contract, as before stated, relative to lands or goods would be void, certainly the unauthorized, the forbidden contract with respect to money must be . . . . The pleadings in the case before the court show that here was a loan of money, and a contract for the repayment of the principal sum with interest at a greater rate than that authorized by the plaintiffs' act of incorporation. This loan was effected by the discount of the bill of exchange now in suit. This contract is void not because the rate of interest is greater than the rate allowed by the general law of the land, but because it is such a contract as the plaintiffs had no capacity or power to make. In the present state of pleadings, the plaintiffs have no title to recover." This case was followed with respect to a similar contract in Creed v. Commercial Bank (1842) 11 Ohio, 489.

In Straus v. Eagle Ins. Co. (1855) 5 Ohio St. 59, the special point upon which the decision turned was that an insurance company authorized by its charter to invest its funds and capital stock as should be deemed best by the directors for the safety of the capital and interest of the stockholders had

relation to the facts involved, these decisions are essentially inconsistent with the theory that the acceptance and enjoyment of the benefits of an ultra vires contract are a circumstance which creates an estoppel against denying its validity. But this particular aspect of the matter was not discussed in any of the opinions delivered. It will be perceived that these earlier cases proceed upon precisely the same lines as those decided in New York during the same period.

A change in the views of the court is indicated by some cases of later date. In one of these it was laid down that, even if the amount of the loan for which the note sued upon was given should be assumed to be excessive, "it would not affect the validity of the note. . . . No part of the consideration was illegal in the sense of the maxim, 'Ex turpi causa non oritur actio.' If invalid at all, it would be so simply from want of corporate capacity on the part of the bank to make a contract in derogation of the authority conferred by its charter, and not because of any illegal element entering into the consideration of the note."<sup>2</sup>

In another case in which an action was held to be maintainable by a foreign cor-

poration for the recovery of royalties which had, under a contract of assignment to the defendant, been reserved in certain leases, the court proceeded upon the ground that the defendant was "estopped from denying the legal existence of the plaintiff as a New York corporation; from denying the power of the plaintiff to make a legal contract for the transfer of the leaseholds to him; from denying the right of the plaintiff to maintain an action to compel him to account. A person benefited by a contract, holding on to it and receiving the benefits arising out of it, cannot, in this collateral manner, question its validity."<sup>3</sup> The concluding statement in this passage embodies a rule sufficiently broad to cover all cases that involve ultra vires contracts. But it will be observed that the actual point decided was merely that the defendant's acceptance of the benefits of the contract estopped him, under the circumstances, from denying the capacity of the plaintiff to make such a contract in Ohio. See § 9 (b) supra.

In another case, where the corporation was the defendant, the following general rule was laid down: "Where a contract has been executed and fully

no power to purchase upon credit the promissory note of one insured by the company and entitled to indemnity for a loss, for the purpose of setting off such note against the claim. The court said that, under the power of investment, the company "had no power to become a party to the contract of indorsement by which it obtained the notes in question, and no capacity to take or hold the legal title." This decision obviously implies that, in the opinion of the court, no action could be maintained upon a negotiable instrument acquired by means of an ultra vires transaction. One of the cases cited was *Smith v. Alabama L. Ins. & T. Co.* (1843) 4 Ala. 558. See § 19, note 2, supra.

In *Vanatta v. State Bank* (1858) 9 Ohio St. 27, the action was brought by the state bank upon a promissory note transferred to it by the Licking County Bank. The plaintiff was authorized by § 64 of the act under which it had been incorporated to discount notes of which the negotiability was restricted by special indorsement. The court was "satisfied that the Licking County Bank had no power, under its charter, to discount the note in question because a negotiable form was given to it, in contravention as well of the spirit and policy as of the terms of the statute. And if for this reason the note was void in the hands of the Licking County Bank, no action could be maintained upon it by the State Bank of Ohio, which, upon the commission of the act of bankruptcy, succeeded, by operation of the statute, merely to the rights of the bankrupt corporation." L.R.A.1917B.

In *Niagara County Bank v. Baker* (1864) 15 Ohio St. 69, it was held that no action could be maintained on a usurious instrument which the regulating statute expressly declared to be "void."

See also *Miami Exporting Co. v. Clark* (1844) 13 Ohio, 1, where it was held that, in an action of assumpsit against the acceptor of bills illegally discounted by the plaintiff, it could not recover, even on the common counts, the money lent by it. This decision was criticized and explained in *Vanatta v. State Bank* (Ohio) supra.

<sup>2</sup> *Allen v. First Nat. Bank* (1872) 23 Ohio St. 97. The precise doctrinal standpoint of the court is, however, rendered somewhat uncertain by the fact that it refers not only to *First Nat. Bank v. Garlinghouse* (1872) 22 Ohio St. 492, 10 Am. Rep. 751, in which the ratio decidendi was that the fact of a note's having been discounted at a usurious rate of interest merely avoids it to the extent of the illegal interest, but also to *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 259, and *Parish v. Wheeler* (1860) 22 N. Y. 494, which are precedents for the principle of estoppel. It is submitted that the Ohio case does not sustain the statement based upon it, and that, in any event, the three cases cannot warrantably be grouped together as precedents, for they do not proceed upon the same doctrine. But the citation of the New York case may reasonably be regarded as indicating an approval of the principle of estoppel.

<sup>3</sup> *Newburg Petroleum Co. v. Weare* (1875) 27 Ohio St. 343.

performed on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company."<sup>4</sup>

In another case in which the defendant railroad company had, for the purpose of facilitating the construction of the roadbed, obtained permission from the plaintiff to fill a tailrace with earth, on the understanding that, whenever requested, it would restore the race to its former condition, it was held that a demurrer to the plea raising the question of a want of power to maintain the race should have been sustained. The court said: "Having thus obtained possession from the plaintiff, and secured the benefits of the contract, the defendant is estopped from denying either the right or power of plaintiff to enjoy and maintain the tailrace. As well might a tenant dispute his landlord's title."<sup>5</sup> The last sentence of this passage renders it somewhat uncertain whether the previous reference to securing "the benefits of the contract" is to be regarded as reflecting a doctrine of general application, or should be construed in such a sense as would confine the principle of estoppel to cases which involve simply questions of the title of a plaintiff corporation to the property which is the subject matter of the suit.

But the most recent authorities evince a reversion, more or less complete, to the doctrine originally applied. In one case it was held that a director of a national bank to whom it had made a loan was not estopped, in an action brought for the recovery of the money, to plead ultra vires in bar of the claim so far as it related to interest.<sup>6</sup> The actual ratio decidendi in another case was that, "where property which the corporation, under certain circumstances, is authorized by its charter to acquire, is purchased in a mode or for a purpose not authorized,

. . . the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer."<sup>7</sup> But it was also remarked that, "where there is an absolute or total want of power in a corporation to deal in respect to a given subject, it may be that acts done in the name of the corporation, in regard to such subject, would, as corporate acts, be void for all purposes and as against all persons. But there is an obvious distinction between such a case and one where the corporation deals with a subject within the scope of its granted powers, but for a purpose or in a mode not authorized by its charter." The doctrine thus propounded manifestly involves the corollary that a contract ultra vires in the sense thus indicated could not be enforced on the basis of an estoppel.

In another case, where it was held that no action could be maintained by a corporation on a contract by which a person to whom a larger number of shares had been allotted than that which was specified by the limiting provision agreed to pay certain instalments of money to discharge a loan received as part of the transaction, it was laid down that "the power of the corporation to make rules and contract with its members in relation to their stock is limited to such shares as they may lawfully hold, and all contracts as well as by-laws in relation to shares in excess of that number are ultra vires and void." The court said: "The doctrine that a corporation cannot enforce by action a special contract entered into by it in excess of its corporate powers, although fully performed on its part, . . . has been so repeatedly approved by this court in subsequent cases that we do not deem it advisable to enter again upon its consideration. This doctrine must be regarded as settled in this state."<sup>8</sup> Here

<sup>4</sup> Hays v. Galion Gaslight & Coal Co. (1876) 29 Ohio St. 330.

<sup>5</sup> Hamilton & R. Hydraulic Co. v. Cincinnati, H. & D. R. Co. (1876) 29 Ohio St. 341.

<sup>6</sup> National Bank v. Slemmons (1877) 34 Ohio St. 142, 32 Am. Rep. 364. The provisions violated were penal (National Bank Act, §§ 30, 31), so that the contract reserving excessive interest was "illegal" in the narrower sense which the word bears in those jurisdictions in which the doctrine of estoppel is held to be applicable to "unauthorized," but not "illegal," transactions. See § 70 of the monograph appended to Creditors' Claim & Adjustment Co. v. North-L.R.A.1917B.

west Loan & T. Co. L.R.A.1917A, 749. But the court did not allude to this phase of the subject. The right to recover the principal was affirmed on the authority of Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1877) 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432.

<sup>7</sup> Ehrman v. Union Cent. L. Ins. Co. (1880) 35 Ohio St. 324 (action on promissory note given by defendant to a company whose assets had been purchased by the plaintiff under a contract alleged to be unauthorized).

<sup>8</sup> Simpson v. Building & Sav. Assn. (1882) 38 Ohio St. 349.

the provision of the charter which was infringed was expressly prohibitory in its terms, and in treating the contract as ultra vires the court simply followed the earlier Ohio decisions.<sup>9</sup> But no reference was made to the theory adopted by many of the authorities, that the effect of the circumstance of the plaintiff's having performed the contract on his side is different according as the prohibition against making the contract in question is express or merely implied.

The same remark applies to another case, where it was held that no action could be maintained upon a contract by which the plaintiff agreed to take a certain number of shares of the defendant's stock in payment for goods to be manufactured for it. The court proceeded upon the ground that in Ohio, as well as elsewhere, "an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is ultra vires and void;" and that the contract came within the scope of the prohibitory provision in § 3266 of the Revised Statutes, to the effect that "no corporation shall employ its stock, means, assets, or other property for any other purpose whatever than to accomplish the legitimate objects of its creation."<sup>10</sup>

The apparent conclusion indicated by the foregoing summary of the decisions is that they cannot be fully harmonized upon any basis. The facts involved in most of them are such as to render it possible to consider them as being merely affirmations of the doctrine that the defendant's receipt of the benefits of a contract is not an element upon which an estoppel against raising the plea of invalidity can be predicated, if the contract was one which had been expressly prohibited. But so far the supreme court has not categorically declared its adhesion to the theory that, in respect of the operation of the principle of estoppel, there is an essential distinction between an express and an implied prohibition.

#### 47. Oklahoma.

In one case where it was laid down that the charter of the plaintiff corpora-

tion was "full and sufficient notice to the defendant of the limitations of the plaintiff's authority," and consequently of the ultra vires character of the contract in question, it might possibly be inferred from the language of the court, as construed with reference to the facts involved, that it did not accept the doctrine of an estoppel as based upon performance by the corporation. But the decision really turned upon the circumstance that a settlement had been made between the parties.<sup>1</sup> Moreover, having regard to the position taken in the state, that the doctrine of estoppel is controlling in cases where the corporation is the defendant (see § 99 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), there can be but little doubt that the court, whatever may have been its earlier views, could now apply that doctrine for the advantage of a plaintiff corporation.

#### 48. Oregon.

In one case, where the plaintiff was a national bank, the court simply followed the Federal decisions with regard to the remedial rights of such a corporation.<sup>1</sup> See § 18, *supra*.

#### 49. Pennsylvania.

The earliest case which calls for notice was one in which the defense of ultra vires was excluded on the ground that the commonwealth only was entitled to question the capacity of a corporation to hold real property which it is not authorized by its charter to acquire.<sup>1</sup>

In a subsequent case, where the action was brought upon certain notes purchased by a savings and loan company at a discount of more than 6 per cent, and it appeared that "this discount was not a single or casual act, but was made in the course of the business of purchasing and discounting notes and bills, which the plaintiffs had to a greater or less extent substituted for their legitimate business," the decision of Hare, J., turned upon the distinction between contracts which merely amount to "the misuse of a power by employing it for an end or purpose for which it ought not

<sup>9</sup> The precedent cited was *Bank of Chilli-cothe v. Swayne*, note 1, *supra*.

<sup>10</sup> *Valley R. Co. v. Lake Erie Iron Co.* (1888) 46 Ohio St. 44, 1 L.R.A. 412, 18 N. E. 486.

#### Oklahoma.

<sup>1</sup> *Peck-Williamson Heating & Ventilating Co. v. Board of Education* (1897) 6 Okla. 279, 50 Pac. 236. L.R.A.1917B.

#### Oregon.

<sup>1</sup> *Portland Nat. Bank v. Scott* (1891) 20 Or. 421, 26 Pac. 276.

#### Pennsylvania.

<sup>1</sup> *Leazure v. Hillegas* (1821) 7 Serg. & R. 313. For a later decision to the same effect, see *Goundie v. Northampton Water Co.* (1847) 7 Pa. 233.



to be employed, and was not given," and "contracts made without power in violation of an express legislative prohibition, or contrary to the plain intent and policy of the law." The conclusion reached, after an examination of the provisions of the statutes which defined the powers of the plaintiff, was that the transaction in question belonged to the latter of these categories, and consequently could not be made the basis of a legal claim.<sup>2</sup> Having regard to the circumstances under review, this decision was, by implication, inconsistent with the theory that an estoppel may be created by acceptance of the benefits of a contract. But this aspect of the matter was not adverted to, and, if it had been, the court would no doubt have taken the position that the theory was not applicable, because an express prohibition was involved.

In a case decided about ten years afterwards, in which it was held that an action of *scire facias sur mortgage* could not be maintained against a party to whom the mortgagor's estate had been assigned for the benefit of his creditors, the ground upon which the court proceeded was that the mortgage had been taken as a security for future advances, and was consequently a transaction which violated the provisions of the Federal statute by which the extent of the power of a national bank to hold real estate is defined.<sup>3</sup> The doctrine thus adopted, with respect to the consequences of an infringement of that statement, has been discredited by later rulings of the Federal Supreme Court. See § 17, *supra*. But this fact does not impair the significance of the case in so far as it bears upon the general theory entertained by the state court regarding *ultra vires* contracts of corporations. In this point of view, it is important to observe that the judgment contains a categorical statement to the effect that "there is no room for equitable presumptions or estoppels in cases of illegal contract." Having regard to the special meaning which, in the class of cases discussed in this monograph, has frequently been ascribed to the expression "illegal," these words might conceivably be treated as

embodying the doctrine that the operation of the principle of an estoppel is excluded only where the contract upon which suit is brought is the subject of an express prohibition. But the actual position taken by the court is indicated by its subsequent statement that one of the points decided in the case was that the effect of the Federal act with respect to national banks is to "prohibit them, by necessary implication, from lending money on the security of a mortgage."<sup>4</sup>

In another case, in which it was held that a national bank was entitled to recover on a promissory note, although it had been given for a loan which exceeded the amount authorized by the Federal statute, the ratio decidendi was that "an excess known to the bank only" is not "such an unlawful act, entering into the vitality of the loan, as will avoid it. The fact of an excess of indebtedness over one tenth of the paid-in capital is a matter aside from the loan itself, not entering into its terms, and therefore collateral. The loan of the money is an act within the authorized power of the bank; a part of its proper business, and therefore not in itself illegal. The note or security given for the money was an instrument within the power of the bank to accept. The drawer had a right to make it, and the bank a right to discount it."<sup>5</sup> The court was also of the opinion that the limitation of the indebtedness to the one tenth specified by § 29 of the Act, "was intended as a general rule for conducting the business of the bank,—a rule laid down from experience to regulate its loans for its own best interest and those of stockholders and creditors, not a rule to regulate its customers." The grounds here assigned for allowing the action to be maintained resemble those which were afterwards relied upon by the Supreme Court of the United States in the cases cited in § 17, *supra*, and were obviously such as to render it inappropriate to invoke the principle of estoppel. The same remark applies to a later case in which it was again unsuccessfully contended that the same provision of the act operated so as to avoid a promissory note.<sup>6</sup>

<sup>2</sup> *Manufacturers' & M. Sav. & L. Co. v. Conover* (1862) 5 Phila. 18.

<sup>3</sup> *Fowler v. Scully* (1872) 72 Pa. 456, 13 Am. Rep. 699.

<sup>4</sup> In *Stephens v. Monongahela Nat. Bank* (1878) 88 Pa. 157, 32 Am. Rep. 438.

<sup>5</sup> In *O'Hare v. Second Nat. Bank* (1874) 77 Pa. 96; *Fowler v. Scully*, note 3, *supra*, was distinguished on the ground that the very instrument itself upon which suit was there L.R.A.1917B.

brought "was illegal and void, being forbidden to the bank as well as to the mortgagor, who was presumed to know the law."

<sup>6</sup> *Stephens v. Monongahela Nat. Bank* (1878) 88 Pa. 157, 32 Am. Rep. 438, where it was observed that "the powers conferred on banks must be distinguished from regulations for their business. An act done without authority, and forbidden, is not like one which violates a regulation."

In two subsequent cases the theory of an estoppel as predicated from the circumstance of the defendants having enjoyed the benefits of the contracts in question was explicitly relied upon as a reason for affirming the right of foreign corporations or their privies to recover upon contracts, the alleged invalidity of which consisted in the failure of the corporations to comply with the provisions of the act defining the conditions precedent to their doing business in Pennsylvania.<sup>7</sup> It should be observed, however, that in most of the instances in which this principle has been invoked in actions brought by foreign corporations, the estoppel against pleading their want of authority in the premises has been predicated not from the fact of a reception of the benefits of the contract, but from the fact that the party by whom the defense is set up had dealt with the foreign corporation as a corporate body. See § 9 (b), *supra*.

In another still more recent case the court simply followed the Federal decisions in holding that the plea of *ultra vires* could not be interposed as a defense to an action brought by a national bank to recover the rent accruing in respect of a portion of a building the erection of which was alleged to have been *ultra vires*.<sup>8</sup> But the principle of an estoppel was again relied upon as the

ratio decidendi in a case in which it was held that the defense of *ultra vires* could not be interposed in an action upon a promissory note discounted by a corporation which, as was contended, had no authority to conduct a banking business. "The defendant," said the court, "having received the money on the discounted note, is not in a position to question the authority of the plaintiff to make the loan or to discount the paper. The defendant has received the benefit of the contract, and he cannot now deny the authority of the plaintiff to make it. Having the proceeds of the note in his pocket, neither the law nor common honesty will permit the defendant to avail himself of the plea of *ultra vires*."<sup>9</sup>

#### 50. South Carolina.

In an early case, where the plaintiff bank was held to be entitled to maintain an action upon a bond, it was urged in behalf of the defendant "that the express grant of the power to discount bills of exchange and promissory notes, and of the power to make loans on bonds secured by mortgage, impliedly forbids the taking of a bond secured in any other way, and renders such bond and its guaranty void." But this contention did not prevail, the court being of the opinion that the correct rule of construction under such circumstances was this: "When

<sup>7</sup> In *Holmes Co. v. Barnard* (1884) 15 W. N. C. 110, the right of the plaintiff to recover the stipulated price of a commodity sold to the defendant was affirmed.

In *Kilgore v. Smith* (1888) 122 Pa. 48, 15 Atl. 598, where an action of replevin for certain goods in the possession of the defendants was held to be maintainable by plaintiffs, whose title was derived from a Maryland corporation, the defendants were members of that body, the business of which was conducted on the footing that its members should can their goods, and pack them, and hold them subject to the disposal of the corporation, which acted as a general agent for all its members in making sales of their commodities. A contract was entered into between the corporation and Smith & Wicks (plaintiffs below) for the sale of all the canned goods then held by the association unsold at that time. A part of these goods was the subject of the controversy. The court said: "In any view of the case, the plaintiffs have not been parties to any illegal transaction. The title to the goods in question was in the corporation under its by-laws, which were signed in Maryland. The defendants were Pennsylvania stockholders who assented to those by-laws. The title was therefore in the corporation by the defendants' own act. How, then, can they be heard to object to the plaintiffs' title after they had purchased the property in

entire good faith and given a full consideration therefor? The defendants are estopped from setting up such a defense. If there have been any irregular transactions on the part of the company, the defendants have participated therein and enjoyed the advantages thereof, and they cannot now set up their own wrong against good faith parties who, for anything that appears, were in entire ignorance of all these matters."

<sup>8</sup> *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.* (1906) 215 Pa. 115, 114 Am. St. Rep. 949, 84 Atl. 374.

<sup>9</sup> *Mutual Trust Co. v. Stern* (1912) 235 Pa. 202, 83 Atl. 614.

In *Suburban Rapid Transit Street R. Co. v. Monongahela Natural Gas Co.* (1911) 230 Pa. 109, 79 Atl. 252, in a suit to enjoin the defendant from discontinuing the supply of gas, the court said: "The gas company, having accepted the right of way with the obligation to surrender it upon a failure to comply with the conditions of the grant, so long as undisturbed possession is enjoyed, is estopped from questioning the power of the turnpike company to make the grant." But the authorities cited show that the "estoppel" which the court had in mind was one analogous to that which precludes a tenant from questioning the title of his landlord.

the grant is silent as to the contract in question, we are to consider whether a power to make such a contract may not be implied as directly or indirectly necessary to enable the corporation to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose." The position taken with reference to this rule was that the directions concerning bonds secured by mortgage seems to amount "rather to an express permission for an unusual course of dealing, with guards to prevent abuses in it, than to create any inhibition of other loans consistent with the purpose of the institution;" that "it is, however, too strict to insist that a power which is contained in a general grant, and which in various forms may be pertinent to the purpose of a corporation, may be restricted to a particular form of directions for its exercise in that form;" and that "the contract was good, as between the corporation and the defendant, although, for abuse of its powers, the corporation might be answerable to the government which created it."<sup>1</sup> This decision, it will be observed, proceeded upon grounds similar to those which have led the Federal Supreme Court to the conclusion that national banks have the right to sue on contracts which are outside the range of those authorized by the statute which defines their powers. See § 17, *supra*. The circumstance that the defendant had received the benefits of the contract was not adverted to as one of the elements in the case. Indeed, the notion that this element is one of differentiating significance in respect of the remedial rights of a corporation had not been in terms propounded at the date when the decision was rendered. That it cannot justifiably be cited as a precedent with regard to the doctrine of estoppel is manifest.<sup>2</sup>

In a much later case, where a demurrer to a complaint claiming damages in respect of the refusal of a purchaser to receive goods sold under a contract made by a corporation in pursuance of a partnership agreement was held to have been properly overruled, the *ratio decidendi* was that the well-established doctrine

which declares that a corporation cannot enter into a partnership agreement "does not imply that the corporation does not acquire, as against the outside world, part ownership of property bought in part with corporate funds in the progress of an attempted partnership business. An incident of ownership is the power of sale, and the power to sell implies the power to hold those who agree to buy to perform their agreement or pay damages for its breach."<sup>3</sup> The theory of an estoppel as predicated from the receipt of the benefits of the contract was not adverted to, though the circumstances were apparently such that the sufficiency of the complaint might have been affirmed upon this ground. Having regard, however, to the fact that the court has accepted this theory so far as actions against corporations are concerned (see § 103 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737), it will presumably determine the enforceability of the claims of corporations on the same footing, whenever the point is directly presented.

#### 51. *Tennessee.*

In one case the *ratio decidendi* was that a purchase of shares in another corporation for the express object of controlling and managing it "was *ultra vires*, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the courts of the state, when such aid is invoked in furtherance of the unlawful agreement." The court rejected the contention of counsel for complainant, "that, where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice and enable defendant to repudiate his liability while holding onto the price he has received." Certain classes of cases in which the defense of *ultra vires* has been excluded were enumerated, and questions involved in them were distinguished from that which was presented in the one

#### South Carolina.

<sup>1</sup> *Bank of State v. Hammond* (1845) 1 Rich. L. 281.

<sup>2</sup> For an example of such a mistake, see *Texas Western R. Co. v. Gentry* (1888) 69 Tex. 625, 8 S. W. 98.

<sup>3</sup> *Huguenot Mills v. Jempson* (1904) 68 S. C. 363, 102 Am. St. Rep. 673, 47 S. E. 687. The court said: "The defendants are charged with knowledge that the plaintiff L.R.A.1917B.

could not enter into a legal partnership (*Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184), and that in the contract to purchase they were dealing with the plaintiff and Rountree as joint owners of the property, who as such had a right to sell it. For this reason they cannot now dispute the validity of the contract of purchase or the liabilities which fell upon them when they repudiated it."

under review. "The complainant sues upon its contract, and in affirmance of it seeks to have the defendant perform an agreement which sprang from and was collateral to it. It has received the shares it purchased, and holds onto them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it."<sup>1</sup>

#### 52. Texas.

In the earliest case in which the supreme court had occasion to express an opinion with regard to the significance of the circumstance that the claimant had performed the contract on his side, an action brought by a city to enforce a bond conditioned for the faithful performance by the defendant railway company of a contract to extend its line beyond the city in consideration of its being granted a right of way through the town was held to be maintainable. The actual ratio decidendi was that the city authorities had power to grant the defendant an easement in the streets. But the court also said: "After the company has received and is in the enjoyment of the fruits arising from such a contract, it will not be heard to complain and assert that the city could not confer

upon it the right that it had thus received and is now enjoying."<sup>1</sup> This sentence clearly imports that the defendant would not have been permitted to raise the defense of ultra vires, even if the grant had been ultra vires.

Subsequently, in a case involving the remedial rights of a private corporation, the court approved a ruling of the trial judge to the effect that, as the defendants had received the money for which they had executed the note upon which the action was brought, they were "estopped from denying the power of plaintiff to lend the money."<sup>2</sup> It was conceded that, if the contract had been not merely ultra vires, but illegal, as having been expressly prohibited, no estoppel could have been predicated.<sup>3</sup> But the contention put forward by the defendant on this point of view was rejected on the ground that, having regard to the terms of the enactment relied upon (Rev. Stat. art. 589), the case was one which came within the scope of the doctrine asserted to be the more authoritative, that "where the statute has a specific, but at the same time an implied, application, the doctrine of estoppel against the beneficiary of an executed contract is not changed." There is some support for this doctrine; but it is submitted that the court was not justified in citing as a precedent in its favor the decisions of the Federal Supreme Court with respect to the remedial rights of national banks. See § 17, *supra*.

The decision reviewed in the preceding paragraph has been followed by the court of appeals in several cases.<sup>4</sup>

#### Tennessee.

<sup>1</sup> *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427. There Harvey, the owner of the shares, transferred them to a trustee named by complainant, for its benefit, and, as part of this contract, the transferee agreed to pay off one half of certain liabilities existing against the corporation whose shares were purchased. The complainant, having been compelled to pay off these liabilities in full, brought the action to recover back one half the amount from Harvey.

#### Texas.

<sup>1</sup> *Indianola v. Gulf, W. T. & P. R. Co.* (1882) 56 Tex. 594.

<sup>2</sup> *Bond v. Terrell Cotton & Woolen Mfg. Co.* (1891) 82 Tex. 309, 18 S. W. 691. The court said: "It seems now to be settled by the great weight of authority, that where there is question of a contract between a corporation and another party, and the contract has been performed by the other party, and the corporation has received the L.R.A.1917B.

benefit of the contract, it will not be permitted to plead that on entering into the contract it exceeded its chartered powers.

. . . This rule operates conversely. If the other party has received from a corporation the benefit of a contract fully performed in good faith by it, he will not be heard to resist enforcement of the contract as to him by pleading the mere want of power in a corporation to enter into the contract." It was stated that the views expressed were in conflict with only one group of decisions; viz., those of the supreme court of Alabama; but an examination of the cases of earlier date, which are cited in § 11, note 1, *supra*, will show that this assertion is erroneous.

<sup>3</sup> As to this distinction, see, generally, § 44 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

<sup>4</sup> *Smith v. White* (1893) — Tex. Civ. App. —, 25 S. W. 809 (action held to be maintainable by innocent holder of note given for a loan made by a corporation which had no power to discount); *Keys v. Cleburne*

53. *Utah.*

In one case the claim of an individual to be declared the legal owner of certain corporate stock because another claimant, a corporation, had no power to subscribe to stock, was rejected on the ground that "the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed where it would defeat the ends of justice or work a legal wrong."<sup>1</sup> But the principle thus invoked was enounced not with reference to an estoppel created by the enjoyment of the benefits of the transaction, but as pointing to the conclusion that, as the

wrongful subscription by one company to the stock of the other, and the wrongful issue of the stock in dispute, were brought about by the individual claimant and his coadjutor, he should "not be permitted to retain the property, or the stock which represented it, secured by his fraudulent designs and actions."

54. *Vermont.*

In an early case in which the action was brought by a railway company to recover for work performed in repairing, at the request of the defendants, a steamboat which the plaintiff had previously

Bldg. & L. Asso. (1893) — Tex. Civ. App. —, 25 S. W. 809 (borrower from bank held liable on note given for loan alleged to be ultra vires); *Head v. Cleburne Bldg. & L. Asso.* (1893) — Tex. Civ. App. —, 25 S. W. 810 (similar decision).

In *Logan v. Texas Bldg. & L. Asso.* (1894) 8 Tex. Civ. App. 490, 28 S. W. 141, where it was held that Logan, having obtained from the plaintiff the money for which the note in suit was given, was precluded from interposing the defense of ultra vires, it was urged that the defense relied upon was not that of ultra vires simply, but that the contract was illegal and void, as regards the plaintiff, because it was prohibited by § 16, art. 16, of the Texas Constitution, which provides that "no corporate body shall hereafter be created with banking or discounting privileges." But the court said: "The provision is a limitation upon the powers of the legislature in creating corporations; it does not denounce banking and discounting, but prohibits the creation of artificial persons endowed with such privileges. Discounting is a legal, moral, and highly necessary business to the commerce of the country, and may be engaged in by any person having legal capacity to transact such business. A corporation whose charter, purposes, and powers do not embrace that character of business would not be legally authorized to transact such business, if this constitutional provision did not exist. It has only such powers as are granted by the charter, and may not legally exercise powers not given by the law of its creation. Whether the legislature upon unlimited discretion declines to grant a particular power to a corporation, or refuses by reason of a constitutional limitation upon its discretion to grant such power, the corporation may not exercise the power for the same reason in either case; namely, if, under the law of its creation, it does not possess the power, the act is ultra vires. This was not a contract which was illegal, because immoral, against public policy, or denounced by the law of the state; the only objection that can be urged is that the power to engage in such business is by law withheld from such corporations. It is the simple defense of ultra vires."

In *Cameron v. First Nat. Bank* (1896) — Tex. Civ. App. —, 34 S. W. 178, affirming L.R.A.1917B.

(1893) 4 Tex. Civ. App. 309, 23 S. W. 334, one of the defenses set up in an action to recover money lent, that the plaintiff national bank had no power to become a partner in the milling business, was held inapplicable in the case, on the ground that "the bank certainly had the power to lend money, and this suit was brought to recover in the capacity of creditor, and not as a partner to recover a share of the profits, of which there were none." The court added: "Other reasons might be assigned for the insufficiency of the ultra vires defense in this case," a remark which was apparently a reference to the doctrine of estoppel.

In *Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co.* (1898) 13 Tex. Civ. App. 103, 35 S. W. 337, one of the allegations in a creditors' bill filed against the Waxahachie etc. Company and the Citizens' National Bank was that the bank had attached the goods of the company for a debt which was nonenforceable for the reason that it was for borrowed money in excess of the authorized capital stock of the company. The decision proceeded upon the ground that, even if it were assumed in favor of the complainants that they were entitled to raise the question of invalidity in the proceeding as instituted, the notes given for the debt were valid, at least for the amount which the company was allowed to lend, and that, upon this basis, the result would not change the decree which awarded to the bank the net proceeds of the sale of the attached property, which was less than the sum which could be lawfully lent. But it would seem that the claim of the bank was unassailable for another reason also; viz., that the debtor was precluded, under the circumstances, from pleading ultra vires, and that the creditors were consequently incapable of asserting rights which could not be enforced except upon the hypothesis that this plea would have afforded a defense to an action brought by the bank.

In *Corpus Christi v. Central Wharf & Warehouse Co.* (1894) 8 Tex. Civ. App. 94, 27 S. W. 803, the doctrine of the above cases was applied in favor of a municipality.

**Utah.**

<sup>1</sup> *Bear River Valley Orchard Co. v. Hanley* (1897) 15 Utah, 508, 50 Pac. 611.

sold to them, the defense was that an earlier contract of purchase, by which plaintiff had acquired the title to the boat and its furniture and to the shop at which the repairs were made, was *ultra vires*, and that the excess of power thus assumed by the company was illegal, and rendered all contracts connected with the transaction inoperative by reason of such illegality. But this contention did not prevail. "If," said the court, "there had been a positive prohibition of entering into a particular class of contracts, and especially if such contracts had been declared void by the charter of the company or the general laws of the state, most unquestionably no action would lie upon the prohibited contract. But when no such prohibition exists, and it is only by construction of the charter that a class of contracts is declared to be beyond the power of the company, and when upon this point there is such reasonable ground of doubt as to induce a court to suppose the directors may have acted in good faith, and where the question is raised by one having no interest in it except for purposes of unjust advantage, courts have never been inclined to listen to the objections."<sup>1</sup> The language thus used indicates that, in the opinion of the court, a contract which is merely unauthorized is not absolutely void in the same sense as a contract which infringes an express prohibition. As this theory was propounded with reference to the adverse claim of a stranger to the anterior transaction which was impugned, the decision left it uncertain whether the same position would have been taken if the defendant had been a participant in the transaction.

In a case decided a few years afterwards, it was urged, in defense of an action on promissory notes given for a loan made by a bank, "that, by force of the prohibition in the charter and the banking laws of this state, the fact that the notes embrace in the principal sum interest beyond the prescribed limit, and also reserve on their face interest ex-

ceeding that limit, renders said notes void as contracts in toto." But the court rejected this argument, basing its opinion on the doctrine that "there is an important distinction to be made between cases in which there has been a mere transcending of the limits of a conferred right, on the one hand, and cases, on the other, in which there is an entire prohibition of right, whether accompanied or not by a provision of a penalty for violating such prohibition, or a provision that the prohibited contract or act shall be void." In this point of view the appropriate conclusion was considered to be that, as the bank was authorized to loan its money and take securities therefor at the rate of interest specified, the reservation of a higher rate operated merely so as to prevent the recovery of the illegal excess.<sup>2</sup> The second contention of the defendants, viz., that the loan exceeded the amount authorized by law, and that this fact constituted a complete bar to the action, was also rejected for the reason that it involved substantially the same principle as the other, and was determinable upon a similar footing. That the actual points decided in this case were not such as to evince an intention on the part of the court to adopt the doctrine of estoppel is sufficiently evident; but the fact that it quotes with approval an oft-cited statement of that doctrine<sup>3</sup> is a significant indication of its views upon this subject. Having regard, however, to the most recent rulings of the court with respect to the inadmissibility of this doctrine as a differentiating factor in actions brought against corporations (see § 107 of the monograph referred to in note 3, *supra*), it would presumably not be treated at the present day as such a factor where the moving party is the corporation itself.

In a later case that bears upon the subject, the court discussed the rights of the claimant with reference solely to the extent of the relief to which he was entitled independently of the *ultra vires* contract in question. The doctrine pre-

#### Vermont.

<sup>1</sup> Rutland & B. R. Co. v. Proctor (1856) 29 Vt. 93.

<sup>2</sup> Farmers' Bank v. Burchard (1860) 33 Vt. 346. This case was followed in Bank of Middlebury v. Bingham (1861) 33 Vt. 621, where it was stated that the purport of the earlier decision was this: that a prohibition against the taking of more than a certain rate of interest by a banking institution "had no other or greater effect upon notes taken by them than the same pro-

hibition has upon natural persons by the general law of the state; that it is not properly a case of a contract beyond the power and scope of their charter, but, like all usurious notes invalid, and not enforceable to the extent that it is usurious and in contravention of the statute."

<sup>3</sup> Sedgw. Stat. & Const. Law, p. 90. See § 41 of the monograph appended to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. L.R.A.1917A, 737.

vously laid down was assumed to be correct.<sup>4</sup>

In one case, where a national bank was the plaintiff, the court simply followed the Federal decisions as being of paramount authority.<sup>5</sup> See § 17, *supra*.

#### 55. Wisconsin.

Having regard to the nature and incidents of the transaction involved in the earliest of the cases in this state, the decision might apparently be considered as a precedent for the doctrine that a corporation cannot maintain an action upon a contract which it had no authority to make, even though the adverse party has received the benefits of the transaction.<sup>1</sup> But, as the decision in this particular point of view was founded upon the theory that the contract was executory, it cannot warrantably be

classified as an authority distinctly adverse to the principle of an estoppel. Whether the court was warranted in treating the contract as executory seems to be at least disputable.

In a later case, in which the action was brought to foreclose a mortgage securing a note given for a loan made by an insurance company,<sup>2</sup> it was argued that the debt was not recoverable, because the contract was unauthorized in two respects: (1) that the loan was for two years, the lawful period being one year; and (2) that a note was taken for the loan instead of a bond, which was prescribed by the statute. But this contention did not prevail, the court being of opinion that the remedial rights of the plaintiff were determined by the rule established by an earlier case;<sup>3</sup> viz., that there is a distinction "between contracts

<sup>4</sup> *Roberts v. W. H. Hughes Co.* (1912) 86 Vt. 76, 83 Atl. 807 (invalid issue of bonds).

<sup>5</sup> *Howard Nat. Bank v. Loomis* (1879) 51 Vt. 349 (mortgage of real estate).

#### Wisconsin.

<sup>1</sup> *Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co.* (1858) 7 Wis. 59. There the plaintiff, a corporation created for the purpose of building a plankroad, guaranteed the payment of a loan of money made to another corporation of like character, for the purpose of enabling it to build its road, the construction of which would be advantageous to the former. The borrower being in default, plaintiff discharged the debt. Held, that, as the guaranty was unauthorized, the payment created no legal liability on the part of the corporation for whose benefit the payment was made. The argument that, as the defendants had had the money for which the bills and mortgage in question were given, it was inequitable and fraudulent for them to set up the act of the plaintiff in aiding them to get the money, or in paying it when it became due to the lenders, for the purpose of defeating a recovery upon their mortgage was thus answered: "We do not think this view of the matter changes the legal rights of the parties. The plaintiff, of course, was aware of the extent of its own power. Those who managed the affairs of the corporation must have known that it had no authority to guarantee the payment of the notes or bonds of third persons, and that, if they attempted to do so, no legal obligation could result from such attempt. The payment of the money under such circumstances by the plaintiff was a payment in their own wrong, for which they cannot charge the defendants." The court also rejected the contention that the contract of the complainants had been executed, and that, as it was not illegal, but, at least, only unauthorized by the charter of the company, the court should not now interfere L.R.A.1917B.

to set it aside, after the defendants have reaped all its benefits, although, perhaps, it could not have been enforced. But this conclusion was based upon the theory that the contract, so far as it was relied upon for the purpose of affecting the defendants, was not executed, but executory merely.

<sup>2</sup> *Germantown Farmers' Mut. Ins. Co. v. Dhein* (1877) 43 Wis. 420, 28 Am. Rep. 549. The court observed that the case cited in note 1, *supra*, involved not a mere excess of power, but an entire want of power. The doctrine laid down in *Littlewort v. Davis* (1874) 50 Miss. 403, was approved.

<sup>3</sup> *Rock River Bank v. Sherwood* (1860) 10 Wis. 230, 78 Am. Dec. 669, where it was held that the plaintiff bank could recover the principal of a note and interest at the rate which it was authorized to take, although a higher rate was specified in the note. The court said: "Here the bank, it is conceded, had full and ample power to discount promissory notes, loan money, etc., and conduct a general banking business, but it could only reserve 10 per cent interest upon its loans. It is not a case where a corporation usurps a power not given by its charter, but where, in the exercise of a lawful power and in conducting its legitimate business, it has exceeded the limits fixed by law. Had the note been given drawing 10 per cent interest after it became due, there could have been no question as to the validity of the contract. But the objection is that the bank had no authority to discount a note at a greater rate of interest than the general banking law allowed; and if it does, the note is void for want of such power. Is this objection sound? I think not." The court declined to follow the decisions in *Bank of United States v. Owens* (1829) 2 Pet. (U. S.) 527, 7 L. ed. 508; *Bank of Chillicothe v. Swayne* (1838) 8 Ohio, 257, 32 Am. Dec. 707; *Creed v. Commercial Bank* (1842) 11 Ohio, 489; *Spalding v. Bank of Muskingum* (1843) 12 Ohio, 544; *Orr v. Lacey* (1846) 2 Doug.

of corporations which they have no authority to make, and those within the general scope of their powers, but which are, in some particulars, in excess of those powers," and that, "while the former class may be void, the latter are valid, unless by reason of such excess they are against public policy." It is clear that, whenever the contract under review is of such a character as to render the second subdivision of this rule applicable, the question whether the defendant is estopped from pleading ultra vires becomes an entirely negligible factor. But it should be remarked that the distinction thus predicated between the two specified classes of contracts has also been treated as the basis of a doctrine which affirms that the principle of estoppel is applicable to the latter class only. See § 43 of the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* L.R.A.1917A, 737.

In a subsequent case the inability of a member of a building and loan association to interpose the defense of ultra vires in a suit to foreclose a mortgage given by him to secure a loan made by the association was predicated from the consideration that, as a member of that body, he was bound to take notice of the limitations upon its contractual powers, and, having assented to the transaction, was estopped from contesting its validity.<sup>4</sup> Since the principle of an estoppel, as predicated from the defendant's receipt of the benefits of the contract, had, before the date of this case, been adopted with regard to actions against corpora-

tions, it would seem that the decision might with equal propriety have been referred to this description of estoppel also. But this aspect of the facts was not adverted to. It seems to be open to question whether the doctrine actually applied was correct. See § 3a, supra.

In some cases the ratio decidendi has been the principle "that, when a corporation enters into business relations not authorized by its corporate grant of power, the doctrine of ultra vires cannot be used by it or by the person with whom it assumes to deal as a means of defeating the obligations assumed. The state alone can take advantage of the abuse."<sup>5</sup>

From the foregoing summary it is apparent that, so far as regards actions in which the corporation is the plaintiff, the supreme court of this state has not only never enunciated categorically the principle that a defendant who has received the benefits of an ultra vires contract is estopped from pleading its invalidity, but has in some instances deliberately elected, even under circumstances which suggested the consideration, if not the application, of that doctrine, to refer the right of recovery to a doctrine under which the ultra vires character of the contract simply became an irrelevant factor. Nevertheless there can be but little doubt that, in view of the adoption of that principle with respect to actions in which the corporation itself is the defendant (see § 110 of the monograph referred to supra), it will be approved whenever the point is definitely presented.

(Mich.) 230. The authorities approved were *Commercial Bank v. Nolan* (1843) 7 How. (Miss.) 508, and *McLean v. Lafayette Bank* (1846) 3 McLean, 587, Fed. Cas. No. 8,888.

<sup>4</sup> *Provident Loan & Bldg. Asso. v. Carter* (1900) 107 Wis. 383, 83 N. W. 655.

In an earlier case *Leahy v. National Bldg. & L. Asso.* (1898) 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625, the doctrine that the members of a body of this description, being bound to take notice of the limitations on its powers, were precluded from contesting the validity of the contract in question, had previously been laid down in receivership proceedings.

<sup>5</sup> *Security Nat. Bank v. St. Croix Power Co.* (1903) 117 Wis. 211, 96 N. W. 74 (national bank which had taken an assignment of a contract for the performance of construction work, in order to secure a loan made to the contractor, and had completed the work after his death, was held to be entitled to foreclose a mechanics' lien), citing *John V. Farwell Co. v. Wolf* (John V. Farwell Co. v. Josephson) (1897) 96 L.R.A.1917B.

Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109 (suit to enforce certain claims for damages, of which plaintiff had taken an assignment after they had been reduced to judgment).

In *Madison v. American Sanitary Engineering Co.* (1903) 118 Wis. 480, 95 N. W. 1097, the following remarks were made in a case where a municipal corporation was the plaintiff: "Taxpayers whose money is about to be spent, or property owners whose land is about to be charged, may challenge the legality of municipal acts and contracts calling for such expenditures, on the ground that the proper legal steps have not been taken; but persons who enter into a contract with the city stand in a different position. Such a person cannot even make the defense of ultra vires or total lack of power on the part of the corporation to make the contract. *Security Nat. Bank v. St. Croix Power Co.* (Wis.) supra. If the defense of ultra vires cannot be made, it is very evident that the lesser claim of failure to execute a given power in the statutory way must also be ineffective."



**56. Canada.**

The English authorities are controlling in this country, and will doubtless be followed whenever a case arises in which the evidence shows that the person sued by the corporation has received the benefits of the contract.<sup>1</sup>

**Canada.**

<sup>1</sup> In two cases actions on guaranties were held not to be maintainable. *Williams Machinery Co. v. Crawford Tug Co.* (1908) 16 Ont. L. Rep. 245; *Union Bank v. McKillop & Sons* (1913) 30 Ont. L. Rep. 87, affirming (1913) — Ont. —, 11 D. L. R. 449, 24 Ont. Week. Rep. 549. But such cases do not present in its ordinary form the question of the effect of a receipt of benefits by the defendant himself.

<sup>2</sup> *Northern R. Co. v. Lister* (1807) 27 U. C. Q. B. 57. There the defendant, being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labor. Draper, Ch. J., in the judgment delivered for the court, argued thus: "We have no difficulty in holding that the plaintiffs' charter does not authorize them to carry on a trading or manufacturing business, or to deal in or manufacture for sale articles such as are stated in the particulars. . . . But it is obvious that the plaintiffs do not pretend to possess any such right. They are in fact complaining and seeking compensation from the defend-

The ratio decidendi in a case which involved somewhat peculiar circumstances was that the defendant was precluded by his own misconduct from setting up as a defense that the plaintiffs, under their charter, could not sue on the cause of action alleged in his declaration.<sup>2</sup>

ant, because, when in their service he abused the confidence placed in him, and used their property and employed their workmen in making certain articles for his own use, and which he got possession of. Assume this to be true; can he be heard to say to the plaintiffs, 'You shall not recover from me the value of the materials and labor which belonged to you, and of which I am enjoying the products, because your charter does not authorize you to engage in such a business.' The answer is that the plaintiffs never intended to become manufacturers or vendors of articles manufactured for the purpose of being sold; that the manufacturing and sale appearing in this case were not carried on by them as a part of their business; but that they seek to treat the defendant as vendee, and themselves as vendors of articles produced (without their knowledge) but at their expense, which the defendant, without any authority from them, caused to be made for himself, and has taken away; and they urge that he should not be permitted to set up this flagrant breach of duty, if it be no more, as a reason for keeping these goods without paying for them. We think their claim is maintainable, and that the case of *Hill v. Perrott* (1810) 3 Taunt. 274, 128 Eng. Reprint, 109, justifies this conclusion."

C. B. L.

**ARKANSAS SUPREME COURT.**

MAYME PAUL, Admr., etc., of John P. Paul, Deceased, Appt.,

v.

M. M. STUCKEY.

(— Ark. —, 189 S. W. 676.)

**Writ — service on attorney — attendance on court.**

An attorney is not exempt from service of civil process while attending court in a professional capacity in a county other than that of his residence.

*For other cases, see Writ and Process, II. d, 2, in Dig. 1-52 N. S.*

(November 20, 1916.)

**APPEAL** by plaintiff from a judgment of the Circuit Court for Pulaski Coun-

**Note.** — As to exemption of attorney from service of summons while in jurisdiction on legal business, see annotation following this case, post, 893.  
L.R.A.1917B.

ty sustaining a motion to quash a service of summons and dismissing a complaint filed to recover the amount of an indebtedness alleged to be due plaintiff as administratrix of the estate of John P. Paul, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Carmichael, Brooks, Powers, & Rector, for appellant:

There is no state statute exempting either local or nonresident attorneys from any legal process.

*Powers v. Arkadelphia Lumber Co.* 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842.

The common law does not allow counsel the privilege of immunity from service of civil summons.

*Weeks, Attorneys at Law*, §§ 107, 198; 3 Bl. Com. § 289; 8 Bacon, Abr. Privileges, B; *Greenleaf v. People's Bank*, 133 N. C. 292, 63 L.R.A. 499, 98 Am. St. Rep. 709, 45 S. E. 638.

The great weight of authority is decidedly

against privileging attorneys in such a manner.

*Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27; *Tootle v. McClellan*, 12 L.R.A. (N.S.) 942, note; *Levin v. Gladstein*, 142 N. C. 482, 32 L.R.A. (N.S.) 931, 115 Am. St. Rep. 747, 55 S. E. 371; *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614; *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 27 L.R.A. (N.S.) 333, 134 Am. St. Rep. 886, 90 N. E. 962; *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1124; *Grove v. Campbell*, 9 Yerg. 7; *Huntington v. Shultz*, Harp. L. 452, 18 Am. Dec. 660; *Martin v. Bacon*, 76 Ark. 161, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336; *Central Trust Co. v. Milwaukee Street R. Co.* 74 Fed. 442; *Holmes v. Nelson*, 1 Phila. 217; *Gilbert v. Vanderpool*, 15 Johns. 242; *Secor v. Bell*, 18 Johns. 52; *Lyell v. Goodwyn*, 4 McLean, 29, Fed. Cas. No. 8,616; *Larned v. Griffin*, 12 Fed. 590; *Mulhearn v. Press Pub. Co.* 53 N. J. L. 153, 11 L.R.A. 101, 21 Atl. 186; *Hoffman v. Bay County Circuit Judge*, 113 Mich. 109, 38 L.R.A. 663, 67 Am. St. Rep. 458, 71 N. W. 480; *Robbins v. Lincoln*, 27 Fed. 342; *Phillips v. Browne*, 270 Ill. 450, 110 N. E. 601; *Greenleaf v. People's Bank*, 133 N. C. 292, 63 L.R.A. 503, 98 Am. St. Rep. 709, 45 S. E. 638.

*Messrs. Campbell & Suits*, for appellee:

Parties to pending litigation are exempt from service of summons while attending to that litigation outside the county or state of their residence.

*Powers v. Arkadelphia Lumber Co.* 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842; *Martin v. Macon*, 76 Ark. 161, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336; *Bridges v. Sheldon*, 18 Blatchf. 295, 507, 7 Fed. 17; *Lyell v. Goodwin*, 4 McLean, 29, Fed. Cas. No. 8,616; *Com. v. Ronald*, 4 Call. (Va.) 97; *Gilbert v. Vanderpool*, 15 Johns. 242; *Secor v. Bell*, 18 Johns. 52; *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Holmes v. Nelson*, 1 Phila. 217; *Matthews v. Tufts*, 87 N. Y. 568; *Central Trust Co. v. Milwaukee Street R. Co.* 74 Fed. 442; *Hoffman v. Bay County Circuit Judge*, 113 Mich. 109, 38 L.R.A. 663, 67 Am. St. Rep. 458, 71 N. W. 480; *Whitman v. Sheets*, 20 Ohio C. C. 1, 11 Ohio C. D. 179; *Brooks v. State*, 3 Boyce (Del.) 1, 51 L.R.A. (N.S.) 1126, 79 Atl. 790, Ann. Cas. 1915A, 1133; *Williams v. Hatcher*, 95 S. C. 49, 78 S. E. 615; *Read v. Neff*, 207 Fed. 890.

Defendant's privilege is not contrary to reason and public policy.

*Woodruff v. Berry*, 40 Ark. 263; *Wernimont v. State*, 101 Ark. 216, 142 N. W. 194, Ann. Cas. 1913D, 1156; *Wood v. Keith*, 60 Ark. 425, 30 S. W. 756; *Seelbinder v. Witherspoon*, 124 Ark. 331, 187 S. W. 325. L.R.A. 1917B.

*Wood, J.*, delivered the opinion of the court:

The appellant filed her complaint against the appellee in the Pulaski circuit court, alleging that appellee was indebted to the estate of John P. Paul in the sum of \$700, and asking that she, as his administratrix, have judgment for that amount. She had summons issued. Appellee is an attorney. He was engaged in defending one Atkinson, who was on trial charged with a felony in the Pulaski circuit court. Appellee, while thus engaged, was called to the door of the court room, and the summons issued in the civil suit was served upon him. Appellee at that time resided in Jackson county. He moved to quash the service of summons. The court sustained the motion, dismissed appellant's complaint, and she appeals.

Was the service valid? The action instituted against the appellee belongs to that class that may be brought in any county in which the defendant is summoned. Kirby's Dig. § 6072. We have a statute expressly exempting witnesses from being sued in counties where they do not reside, while going, returning, or attending in obedience to a subpoena. Kirby's Dig. § 3129. But there is no such statute concerning attorneys at law. They fall, so far as statutory enactment is concerned, within the general class against whom suits may be brought in any county in which the defendant is summoned. Kirby's Dig. § 6072, *supra*.

The appellee contends that attorneys, while attending court in their professional capacity in counties other than their residence, should be exempt from the service of summons in civil actions against them in those counties, under the doctrine announced by this court in *Powers v. Arkadelphia Lumber Co.* 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842, and *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336, to the effect that suitors, while in attendance upon judicial proceedings in courts other than that of their residence, are privileged from the service of summons in other adverse proceedings instituted against them in those counties.

In *Powers v. Arkadelphia Lumber Co.* *supra*, we said: "One line of authorities rests the privilege solely on the familiar constitutional ground of freedom from arrest on civil process; but we prefer to rest it also on the ground of a sound public policy, so aptly expressed by the supreme court of Ohio in the case of *Andrews v. Lembeck*, 46 Ohio St. 40, 15 Am. St. Rep. 547, 18 N. E. 483, thus: 'The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own upon judicial proceed-

ings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered."

And again, quoting from *Lamkin v. Starkey*, 7 Hun, 479, we said: "The court has power, independently of the statute, to protect its suitors, officers, and witnesses."

In *Martin v. Bacon*, supra, we quoted the language of Judge Elliott in *Wilson v. Donaldson*, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250, as follows: "High considerations of public policy require that the law should encourage him [the nonresident suitor] to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders."

Public policy is defined as: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good; . . . the principles under which freedom of contract or private dealing is restricted by law for the good of the community the public good." 32 Cyc. 1251.

In *Woodruff v. Berry*, 40 Ark. 251, this court approved Lord Brougham's definition of public policy as follows: "Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy, in relation to the administration of the law."

Says the supreme court of Rhode Island: "The reasons assigned for the exemption of nonresident suitors . . . are that courts of justice ought to be open and accessible to suitors; that they ought to be permitted to approach and attend the courts in the prosecution of their claims and the making of their defenses without . . . molestation or hindrance; that . . . [they] ought not to be distracted . . . from prosecuting their just rights or making their just defenses to a suit by reason of their liability to suit in a foreign jurisdiction." *Baldwin v. Emerson*, 16 R. I. 304, 307, 27 Am. St. Rep. 741, 15 Atl. 85.

It is shown by numerous authorities collected in the note to *Mullen v. Sanborn*, 25 L.R.A. 721, that the rule arose and exists as one of the necessities of judicial administration, because without it it would be L.R.A.1917B.

impossible for the courts to fully and freely administer justice. It is there succinctly stated that "the rule exists in order that causes may be fully heard and justice administered in an orderly manner. . . . The privilege exists to subserve public interest."

Now the service of summons in a civil action upon an attorney while engaged in the trial of a cause pending in a county other than that in which he resides does not contravene any doctrine of public policy as above defined and as announced in our decisions supra. The service of summons is had by delivering to the defendant a copy thereof, or, if he refuses to receive it, by offering him a copy thereof. *Kirby's Dig.* § 6042.

We cannot see that the mere service of summons upon an attorney while in attendance upon a court in his professional capacity would in any way infringe upon the dignity or invade the prerogatives of the court. It could not interrupt the orderly progress of trials nor tend in the least to hamper and embarrass the courts in the administration of justice. Therefore, as we view it, the public good would not be adversely affected by such procedure, and the rule of public policy applicable to suitors does not obtain.

In *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 27 L.R.A.(N.S.) 333, 134 Am. St. Rep. 886, 90 N. E. 962, it is held that (quoting syllabus): "The exemption of a suitor, or witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay and witnesses or parties from the temptation to disobey process." It "is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him, and therefore the privilege should not be extended beyond the reason of the rule upon which it is founded."

Our statute giving a right of action "in any county in which the defendant is summoned" is but declarative of and in conformity with this natural right.

The appellee contends that the rule of public policy declared by this court in *Powers v. Arkadelphia Lumber Co.* and *Martin v. Bacon*, supra, exempting nonresident suitors from the operation of the statute, should also be extended, by analogy, to attorneys at law while attending in their professional capacity upon judicial proceedings in counties other than that of their residence. This contention is unsound. The reason upon which the rule is founded, as we have shown, is that it is to the public interest and for the public good that courts should be un-

trammelled in their efforts to administer justice between parties to causes pending before them. Parties litigant are entitled to be heard in court by themselves and counsel. In criminal prosecutions the accused is guaranteed this right by express constitutional and statutory law. Const. 1874, art. 2, § 10; Kirby's Dig. § 2273. So far as the interest of the public is concerned, the ends of justice are fully satisfied when suitors are protected in the right to be heard by themselves and counsel. The selection of counsel by suitors is a matter purely of private concern, and not of public interest. It is not essential to the administration of justice, and no rule of public policy therefore requires, that courts should extend the privilege, which was intended for the protection of its own authority and dignity and to enable it to do justice between the parties, so as to grant immunities to attorneys from their individual liabilities. The attorney is only the alter ego of his client in the limited sense that he may plead in matters pertaining to his client's cause. The attorney is not subject, like the suitor, to the process of the court issued to enable it to carry out its orders in pending causes. He cannot stand in his client's shoes as to the consequences of the judicial proceedings. Therefore it is not necessary for courts, in order to deal out justice between parties litigant, to shield a nonresident attorney from the service of process in a matter that concerns him only, and which in no manner affects his client's cause.

The effect of the service of summons upon a nonresident attorney does not operate, like an arrest, to deprive the client of the services of his attorney, nor does it tend to interfere with the dignity and authority of the court, and thus to delay and obstruct its orderly procedure in the administration of justice. Nor can it be said that the mere service of a summons upon an attorney while in attendance upon the court could have the effect to so embarrass the attorney and distract his attention from the cause of his client as to virtually deprive the latter of the benefit of counsel, and thus deny him his legal right.

When an attorney goes into a jurisdiction other than that of his residence to represent a client before a court in a cause there pending, he does so by virtue of private contract and of his own motion. His case is not like that of one who has to attend upon the court as a suitor, a juror, or a witness. He is not under the protection of the court because he is in attendance thereon in obedience to its process or because he has entered its portals as a suitor. While he takes an oath to support the Constitution and laws, and is an officer

of the court in the broad sense that he is licensed to practise before it and is amenable to rules adopted for the despatch of the business of the court, and subject to its orders in conducting any business he may have before the court, yet his employment is private, and while pursuing his practice before the court, he is engaged in his own private business. He does not occupy the relation to the court of one of the officers chosen by the public for the discharge of the public duty of assisting the court in the conduct of its business in the administration of justice. But, if he did, there is no rule of public policy requiring the court to shield even its officers from the service of process in civil actions, unless the service of such process would tend to impair the authority and dignity of the court, and to obstruct the administration of justice. We cannot see that the mere service of a summons in a civil action upon any of the officers of the court while in the discharge of their duties would in any manner reflect upon the dignity of the court, or lessen its authority or impede the administration of justice.

Our attention is directed by learned counsel for appellee to quite a number of cases in support of their contention that the privilege extends to attorneys as well as to witnesses and parties. We have examined these cases carefully, and it would too greatly extend this opinion to review them seriatim.

Mr. Blackstone says that "attorneys and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary processes of the court, but must be sued by a bill (called usually a bill of privilege) as being personally present in court." 3 Bl. Com. \*289.

In 8 Bacon's Abridgment, "Privilege," B, p. 171, it is said: "And it hath lately been laid down by the court of C. P. as a general rule that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest eundo et redeundo, provided they come bona fide. And in this description bail and barristers upon the circuit are included."

In 1 Tidd's Practice, p. 195, it is said: "The parties to a suit and their attorneys and witnesses are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the courts.

"It was an ancient privilege of attorneys," says Mr. Weeks, "to be exempt from arrest on mesne process, or being held to bail, because attorneys, being obliged to attend of-

ficially, and, as the law presumes, continually—upon the courts, they were always amenable to their own courts, and could not be drawn away to attend others. . . . These privileges arose from the supposition that the business of their clients would suffer by their being drawn elsewhere." Weeks, Attorneys at Law, §§ 107, 108, and cases cited in note.

"An arrest," says Mr. Blackstone, "must be by corporal seizing or touching the defendant's body." 3 Bl. Com. \* 288.

See also *Huntington v. Shultz*, Harp. L. 452, 453, 18 Am. Dec. 660.

Perhaps the strongest case cited by counsel for appellee is that of *Brooks v. State*, 3 Boyce (Del.) 1, 51 L.R.A. (N.S.) 1126, 79 Atl. 790, Ann. Cas. 1915A, 1133, where it is said: "The privilege of parties to judicial proceedings, as well as witnesses, attorneys, judges, jurors, and certain other officers of the court, of going to the place where they are held, and remaining as long as necessary, and returning wholly free from the restraint of process in other civil proceedings, has been long settled and liberally enforced. The rule is of ancient origin, and is mentioned in the Year Books as early as Henry VI. It came to us out of the common law with only such modifications as were required to make its principle harmonize with American institutions and to be in accord with American jurisprudence. . . . The privilege arises out of the authority and dignity of the court, it is founded on the necessities of judicial administration, it has for its primal object the protection of the court, and not the immunity of the person, and is extended or withheld only as judicial necessities require."

There was a time in England when men, however honest they may have been, if unable to pay their debts, were subject to arrest and imprisonment in the tower. This barbarous practice prevailed from the enactment of the "Statute of Merchants," in 1288, until it was finally abolished in the reign of Victoria, in 1868. Stat. 32 and 33 Vict. p. 571. There was also a long period in England when, under the influence and domination of a rampant ecclesiasticism, kings and popes alike granted numerous scandalous immunities and privileges to a favored few of special classes. 1 *World's History & its Makers*, p. 362; 1 *Green's History of England*, pp. 164 et seq. It is not surprising, therefore, that this doctrine of privilege from arrest should have taken root and flourished in the soil of England at a time when it was rich in the production of special privileges, and when poor but honest men had to live in mortal dread of being arrested and imprisoned for debt. It is L.R.A.1917B.

easy to see that in such times witnesses, jurors, suitors, and attorneys might be intimidated from attendance upon the courts, and that the courts would therefore be hampered in the administration of justice, and hence the necessity for extending the privilege from arrest to these persons while going to, attending upon, and returning from the courts. Thus arose the above doctrine of the common law which some American courts attempt, by analogy, to apply in this country. But there is no analogy. For here the whole fabric of government rests upon the principles of equality and liberty, and the doctrine of equal rights to all and special privileges to none finds expression not only in the Constitution of the United States, but in the organic law of every state in the Union.

We can readily understand how the arrest of an attorney during the progress of a trial, in the presence of the court, which would necessitate his giving bail, or else being removed from the court, would seriously encroach upon the dignity of the court and disturb its orderly procedure, and deprive the suitor of his right to be represented by the counsel of his choice, and also deprive the court of the aid of such counsel. But the service of a copy of a summons upon counsel, which is merely a notice to him that proceedings have been instituted against him in another jurisdiction, could have no such effect. There is no analogy whatever between the service of process of summons and the service of *capias*. All the reasons, therefore, for the common-law doctrine of privilege from arrest wholly break down in this country when they are attempted to be applied to the mere service of summons. Every reason for the rule having failed, the rule itself should fail.

To hold that nonresident attorneys are immune from the service of summons, or other process, not in arrest, while they are voluntarily in attendance upon the court upon their private business, would be to confer upon them a special privilege not enjoyed by resident attorneys. *Kutner v. Hodnett*, 59 Misc. 21, 109 N. Y. Supp. 1068. "The reason upon which those decisions are based" that so hold, as stated by the supreme court of North Carolina, "is not satisfactory to us." *Greenleaf v. People's Bank*, 133 N. C. 292, 63 L.R.A. 499, 98 Am. St. Rep. 709, 45 S. E. 638. We agree to the conclusions reached by Chief Justice Clark, in his concurring opinion in that case. It occurs to us that those decisions follow rather loosely the doctrine of the common law without a proper analysis and consideration of the reasons upon which such doctrine was founded.

The framers of our Code, who were pre-

sumably familiar with the doctrine of the common law, only exempted witnesses from being sued in counties other than that of their residence. Our court has exempted suitors, on the ground of public policy, and by this appeal we are asked to exempt non-resident attorneys. To do so would be approving a doctrine which is contrary to the genius of our institutions, and which should have no place in the jurisprudence of this country.

If we are correct in our conclusion that no rule of public policy in the administration of justice is infringed by denying the privilege to attorneys, then there is no more reason why the privilege from service of summons should be granted to them than to those of any other profession or business calling. To do so would put the courts in the attitude of establishing a highly discriminatory class privilege in favor of the legal profession.

In the case of *Elam v. Lewis*, 19 Ga. 608, a lawyer claimed the benefit of privilege from arrest because of the fact that he was a practising attorney in that state. Judge Lumpkin, rendering the opinion of the court, among other things, said: "Any decision which separates the bar from the people, in sympathy or identity of privileges, would prove one of the greatest curses which could befall the profession. From the day when it is made the bar itself will receive an impulse downwards in the eyes of the community. . . . So extensive a question should be determined upon the broad foundation that the general justice of the country should alike pervade all ranks and professions."

So we say.

The judgment is therefore reversed, and the cause remanded, with directions to overrule the motion to quash.

### **Annotation—Exemption of attorney from service of summons while in jurisdiction on legal business.**

Generally as to privilege and exemption of suitors and witnesses, see Index to L.R.A. Notes under the title, "Writ and Process."

#### **Introduction.**

The exemption of attorneys from the service of process by summons while attending court in jurisdictions other than those in which they reside is allowable, if at all, as are the exemptions of parties and witnesses, upon the ground of public policy; that is, for the purpose of protecting courts from interruption and delay, and for the promotion of the free and fair administration of justice. It is clear that the service of a *capias* upon an attorney while attending court, which necessitates the giving of bail, tends directly to interfere with and clog the wheels of justice, but the result of such service is entirely different from the service of a summons, which entails no arrest, and it will be noted that the present annotation deals only with the question whether attorneys are exempt from service of the latter kind. The cases may, for convenience, be considered under two groups; those where the service is attempted to be made when an attorney is in a county other than that in which he resides, and those in which, at the time of the attempted service, he is attending court in a state other than that of his residence. The authorities under both of these situations are in conflict. Some of the courts come to the conclusion that public policy does

not justify an exemption of attorneys from the service of summons while they are attending court in a foreign county or foreign state, while others hold that such an exemption is justified on the ground of public policy; i. e., for the purpose of securing the fair and unhampered administration of justice in the courts. There would appear to be a much stronger ground for upholding the exemption from service while an attorney is actually engaged in the trial of a cause than where he is not, at the time, actually attending court; as, for example, where service is attempted to be made while he is waiting for a train, to return to his home, and this distinction has been emphasized in some of the cases.

#### **In county other than that of attorney's residence.**

As stated in the introduction, the cases as to an attorney's right to exemption from service of process while attending court in a county other than that of his residence are in conflict.

It will be noted that the court in *PAUL v. STUCKEY*, ante, 888, decided that an attorney, while trying a case in a county other than that of his residence, was not exempt from the service of summons in a civil suit, the court holding that such service was not against public policy, and that a statute exempting from service witnesses attending court in a county other than that in which they reside did not apply to attorneys. It

will also be noticed that in this case the attorney was called from the court room while engaged in the trial of a criminal case, and that the summons was served upon him at the door of the court room, and that the facts, therefore, presented a strong case for arguing in favor of the attorney's privilege.

In *Parker Sav. Bank v. McCandlas* (1889) 6 Pa. Co. Ct. 327, service upon an attorney of Allegany county, which was had while he was waiting for a train, to return to his home at Butler, after having appeared as an attorney in a case in Pittsburgh, was held valid. The court referred to the ancient privilege of exemption of attorneys from arrest on mesne process, and stated that the privilege was that of the court in which the attorney appeared, rather than that of the attorney himself, and said: "The reasons for most of these ancient privileges from arrest or to sue or be sued have disappeared. There is good reason for exempting an attorney from arrest or service of summons while in actual attendance at court, or of a witness or party compelled to appear, and especially if called from another county. There is good reason for exempting from service of process an attorney from another county in attendance on the United States courts or in the Supreme Court. There might be good reason for exempting from service of process an attorney of another county casually here, and admitted to practise for a special case. But there is no more real necessity or propriety for exempting our own attorneys from service of process—except in presence of the court—than for exempting a merchant who is engaged in purchasing goods, or a bank officer during the banking hours. Some of these ancient privileges of barristers and attorneys have been abolished by statute in England. There is neither public good nor private advantage to the bar, nor public justice to be subserved by extending the privileges beyond the precedents. No precedent has been cited to us for this case although there are dicta that might cover it. We have several attorneys who are residents of adjoining counties, but whose business is that of practising attorneys of the Allegheny county bar. Many Philadelphia lawyers reside in the adjoining counties. Certainly the cause of justice is not to be promoted by requiring that attorneys so doing business shall be exempt from service of process in the county in which their business is transacted. We see no

sufficient reason for extending to attorneys of our courts who reside out of the county privileges beyond those given to practising attorneys residing within the county."

And in *First Nat. Bank v. Doty* (1892) 12 Pa. Co. Ct. 287, it was held that an attorney who traveled from one county to another in the practice of his profession could not claim exemption from the service of a writ while going to or returning from court, it being stated that there was no good reason why he should be privileged, that his attendance upon the court was voluntary, and not in obedience to any subpoena or demand of the court, and it was held that the fact that he was sworn as a witness did not affect the question, where, so far as appeared, he was not in attendance as a witness.

But in *Whitman v. Sheets* (1899) 20 Ohio C. C. 1, 11 Ohio C. D. 179, it was held that a service of summons requiring an attorney to answer to a suit in a county other than that in which he lived could not be made upon him while he was attending court in the foreign county, the court stating that this holding was in accord with the rule of public policy which, in the proper administration of justice, recognizes the necessity of safe conduct to suitors and counsel to and from jurisdictions foreign to those of their residence and locality, and that counsel and client, whose presence are necessary at the forum wherein the rights of the suitor are pending, may be free to come and go without incurring liability or submitting to inconvenience.

And in *Hoffman v. Bay County Circuit Judge* (1897) 113 Mich. 109, 38 L.R.A. 663, 67 Am. St. Rep. 458, 71 N. W. 480, it was held that an attorney was privileged from the service of process while attending upon the supreme court, and also while going to and returning from the court to the county of his residence, the decision being upon the ground that public policy in the due administration of justice demanded it.

And this privilege from service of process was held not to be affected by a statute regulating the privilege of attorneys from arrest.

In several New York cases it does not clearly appear whether the attorney, at the time of the attempted service, was in the county where he resided or in another county, the question considered being the right of attorneys to exemption from service while the supreme court was in session.

Thus, in *Gilbert v. Vanderpool* (1818) 15 Johns. (N. Y.) 243, an act taking away the privilege of an attorney in cases of debt of a certain sum, "unless it shall appear that the court wherein he shall be such attorney or counselor shall be then sitting," was held to leave attorneys completely under the protection of their common-law privileges during the terms of their courts, and the service of process issued out of a justice court upon an attorney of the supreme court, which was sitting at the time the summons was issued and served, was held invalid, although the writ was returnable on a day subsequent to the last day of the term of the supreme court. The court reasoned that the term of the supreme court might continue until the day before the return day of the summons, and that the defendant would then have only one day instead of six to prepare his defense,—the legal intentment being that the attorney or counsel was occupied exclusively in the business of the term during its continuance.

The decision in this case was followed in *Van Alstyne v. Dearborn* (1829) 2 Wend. (N. Y.) 586, where a plea of privilege of an attorney of the supreme court was held to be effectual in a suit prosecuted against him in a justice court, which was commenced by a summons served while the supreme court was sitting.

In *National Press Intelligence Co. v. Brooke* (1896) 18 Misc. 373, 41 N. Y. Supp. 658, service of an order in supplementary proceedings upon an attorney while in the supreme court for the purpose of arguing a motion there was held valid. The court stated that at common law and prior to the passage of the Revised Statutes, providing that an attorney is "exempt from arrest during the sitting of the court of which he is an officer" if he is "employed in some cause pending and then to be heard in such court," an attorney was exempted from arrest or from being sued during the actual sitting of the court if he was employed in a pending cause. It was stated that the reason of exemption which obtained prior to the passage of the Revised Statutes was that an attorney should not be taken while in court in discharge of his duties by a ca. sa., but that, under the present procedure, a summons would not interfere with the discharge of the attorney's duties, and that the reason for the exemption had therefore ceased to exist. Although the L.R.A.1917B.

service was held legal in this case, the court stated that they strongly condemned the propriety of serving papers on an attorney in open court.

**In state other than that of attorney's residence.**

As before pointed out, the authorities do not agree upon the question of the exemption of an attorney from the service of process while he is in a state other than that of his residence, for the purpose of attending to legal business. Some of the courts reason that no necessity exists for the allowance of such an exemption.

Thus, in *Kutner v. Hodnett* (1908) 59 Misc. 21, 109 N. Y. Supp. 1068, an attorney of another state who voluntarily came into New York to conduct a litigation for a client was held not privileged from service of process, it being held that the reason for the exemption of parties and witnesses, that is, the promotion of a due and efficient administration of justice, did not apply to foreign attorneys at law, and that to extend the rule to them would enable foreign attorneys to practise law constantly in the state, and at the same time extend to them immunity from process of the courts of the state.

And in *Greenleaf v. People's Bank* (1903) 133 N. C. 292, 63 L.R.A. 499, 98 Am. St. Rep. 709, 45 S. E. 638, it was held that service upon a New York attorney at his hotel while attending the circuit court of the United States in North Carolina was valid, there being no statute exempting attorneys from such service, and nothing at common law which exempted an attorney from being served with process in the nature of a summons.

In *Robbins v. Lincoln* (1886) 27 Fed. 342, an Illinois statute providing that all attorneys should be liable to be arrested and held to bail, and be subject to the same legal process as other persons, but that attorneys should be privileged from arrest while they were attending court and while going to and returning from court, was construed to create a privilege only from being arrested and held to bail, and not to create a privilege from service of process not involving imprisonment or holding to bail; and it was held that an Illinois attorney might be served with summons while in attendance upon a Federal court in Illinois, and that an attorney from another state, attending one of the United States courts in Illinois, had no greater privi-



lege, and might be served with a summons in a civil action.

In *Coleman v. Tim* (1886) 18 W. N. C. (Pa.) 240, a member of the Philadelphia bar who, for some years, had resided in New York, but who, according to some of the evidence, continued to practise in Philadelphia, was held not exempt from the service of a summons while in Philadelphia for the purpose of attending court, it being stated that he was still a member of the Philadelphia bar, and to some extent in practice there, and must take this privilege cum onere.

In some cases the privilege of an attorney attending court in a foreign state from service by summons is upheld on the ground that the administration of justice in the courts demands it.

Thus, in *Williams v. Hatcher* (1913) 95 S. C. 49, 78 S. E. 615, a nonresident attorney who came into the state of South Carolina for the sole purpose of attending court was held exempt from the service of process for the same reasons that parties and witnesses are exempt.

And in *Nelson v. McNulty* (1917) — Minn. —, L.R.A. —, —, 160 N. W. 795, where a resident of South Dakota, who was an officer of a corporation and also one of the attorneys in an action by its receiver, pending in South Dakota, went to Minnesota to take the deposition of a witness for use in the action, it was held that the attorney was not, under the circumstances, exempt from the service of process while in Minnesota. The court, in reaching their conclusion, stated that no case was pending in the courts of Minnesota with reference to which the attorney came into that state.

And in *Read v. Neff* (1913) 207 Fed. 890, an Illinois attorney employed to appear in an action pending in the United States court in Iowa was held privileged from being sued in the latter state while he was attending at the trial, and the fact that he did not leave immediately after the jury had retired, but waited over until the next day in anticipation that a verdict would be returned by the jury, was held not to affect the privilege. The court in this case said: "It may be true that Mr. Neff could have gotten an Iowa lawyer who could have presented his case just as well. But Mr. Neff desired the services of Mr. Strawn, and such selection was the concern of no other person. There is a spirit of comity between all courts, national and state, by reason of which any court allows, on motion, an attorney from an-  
L.R.A.1917B.

other jurisdiction to appear in a particular case. And it is not within the spirit of fair dealing and such comity for this court to hold that, if a lawyer from another state comes into this court, he does so at the peril of being sued. The contention that Mr. Strawn should have left on the first train that left Creston after the jury had been charged need only be stated as a refutation of such a statement. Ordinarily it is the duty of a lawyer to be in attendance when a verdict is returned and judgment thereon rendered. Mr. Strawn elected to attend to his duty, but finally concluded to await no longer, and left the matter in the hands of his associate, Mr. Higbee."

And in *Central Trust Co. v. Milwaukee Street R. Co.* (1896) 74 Fed. 442, where a New York attorney went to Wisconsin to attend the Federal courts there for a client, and immediately after a hearing, and while he was engaged in the office of the clerk of the Federal court in matters relating to his client's interest, he was served with a subpoena requiring his attendance as a witness, the service was held invalid on the ground that he was privileged from such service. It appeared in this case that the attorney's duty to his client required his departure immediately after he had completed his duties in Wisconsin to various distant points in other states. This decision was reached although the attorney was the president of a Wisconsin corporation which was a party to the suit in which he was summoned as a witness. The court stated that if the service was held valid, it would compel his attendance in Wisconsin at a time which would seriously interfere with the further attention which he owed to his clients in other courts, and that to so hold would avoid the principles which seem to protect all having business before the courts.

In *Holmes v. Nelson* (1850) 1 Phila. (Pa.) 217, which was an action against stockholders of a corporation, it was held that service on a nonresident while he was attending in Pittsburgh in the double capacity of a stockholder and attorney upon a notice to take depositions in a case pending in the Supreme Court of the United States between the state of Pennsylvania and the corporation of which such person was a stockholder, was invalid. It was admitted in this case that an attorney coming from another county to attend cases before the supreme court of Pennsylvania was exempt from the service of summons in

a civil action, but the case was attempted to be distinguished on the ground that the nonresident attorney was a foreigner, and that the United States court was a foreign court, and that the defendant in the action in which the attorney appeared was a mere corporation, and not properly an individual person. There was, however, held to be no merit in either of the contentions raised, it being held that the law called upon the attorney to prepare for the trial of the cause brought against the corporation of

which he was a member, and that the law protected him from all other civil process while obeying that call; that the fact that he was a citizen of another state did not distinguish the case from the general rule, as the Constitution of the United States declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; and that the Supreme Court of the United States was not a foreign court, but a part of the institutions of the state. J. T. W.

IOWA SUPREME COURT.

SUSAN J. O'CONNOR  
v.  
KNIGHTS AND LADIES OF SECURITY,  
Appt.

(— Iowa; —, 158 N. W. 761.)

Insurance — acceptance of payment over due — waiver.

The acceptance by a benefit society of a check for dues dated within the month during which they were payable, but not received by it until the following month, and its return of a receipt with notice where to pay future dues, which are accepted until death, waives a provision in the certificate suspending a member for failure to pay dues within the month when they are due, and providing that he cannot be reinstated unless he is in good health, and recovery may be had thereon, although when the payment was received he had been stricken with his last illness, of which fact the insurer was ignorant. For other cases, see *Insurance*, V. b, 5, d, in *Dig. 1-52 N. 8*.

(June 29, 1916.)

**A**PPEAL by defendant from a judgment of the District Court for Chickasaw County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

Statement by Gaynor, J.:

Action to recover amount alleged to be due on a benefit certificate issued on the life of plaintiff's husband. Judgment for the plaintiff in the court below. Defendant appeals.

**Note.**—As to waiver by officer of subordinate lodge of forfeiture for nonpayment of assessments, see notes to *Royal Highlanders v. Scovill*, 4 L.R.A.(N.S.) 421; *Bixler v. Modern Woodmen*, 38 L.R.A.(N.S.) 571; and *Hartman v. National Council*, K. L. S. L.R.A.1915E, 152. L.R.A.1917B.

Messrs. M. E. Geiser, for appellant:

The fact that Victor E. O'Connor was mortally ill from and after February 22d, 1914, would not excuse him from making payment within the time prescribed by the by-laws.

*Kidder v. Supreme Commandery*, U. O. G. C. 192 Mass. 326, 78 N. E. 469.

The by-laws of the defendant provided that a failure to pay the monthly dues or assessments within a certain time forfeited the policy or certificate of insurance without any action on the part of defendant. O'Connor, having failed to pay within the specified time, lost his membership and forfeited his policy.

*Grand Lodge, A. O. U. W. v. Marshall*, 31 Ind. App. 534, 99 Am. St. Rep. 273, 68 N. E. 605; *Supreme Lodge, L. H. v. Hahn*, 43 Ind. App. 75, 84 N. E. 837; *Fowler v. Metropolitan L. Ins. Co.* 116 N. Y. 389, 5 L.R.A. 805, 22 N. E. 576; *Thompson v. Fidelity Mut. L. Ins. Co.* 116 Tenn. 557, 6 L.R.A.(N.S.) 1039, 115 Am. St. Rep. 823, 92 S. W. 1098.

The contract in relation to forfeiture was self-executing, and a failure to pay assessments within the specified time ipso facto terminated the contract and forfeited O'Connor's policy.

*Lehman v. Clark*, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222; *Munger v. Brotherhood of American Yeomen*, — Iowa, —, 154 N. W. 879.

Under the contract and by-laws, the parties had agreed that O'Connor's membership should cease on the nonpayment of dues. It was competent for them to so agree, and the courts will enforce such agreement.

*Ronald v. Mutual Reserve Fund Life Assn.* 132 N. Y. 378, 30 N. E. 739.

The members of a mutual benefit association are conclusively presumed to know its laws, and the assured was held to know that a failure to pay assessments within the time prescribed caused a forfeiture, and that a payment thereafter would not reinstate

him unless he was at the time in good health.

*Royal Highlanders v. Scovill*, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206.

Being mortally ill prior to the time of forfeiture and up to the time of his death, under the express provisions of the by-laws Victor E. O'Connor could not be reinstated because of his ill health, and his policy was therefore void at and prior to the time of his death.

*Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971; *Munger v. Brotherhood of American Yeomen*, supra; *Brown v. Grand Council*, N. W. L. H. 81 Iowa, 400, 46 N. W. 1086; *Bosworth v. Western Mut. Aid Soc.* 75 Iowa, 582, 39 N. W. 903; *National Council, K. L. S. v. Dillon*, 212 Ill. 320, 72 N. E. 367, 244 Ill. 202, 91 N. E. 417; *Lyon v. Supreme Assembly*, R. S. G. F. 153 Mass. 83, 26 N. E. 236; *Fowler v. Metropolitan L. Ins. Co.* 116 N. Y. 389, 5 L.R.A. 805, 22 N. E. 576.

The fact that O'Connor paid to the local council assessments for February, March, and April, 1914, after his suspension, would not under the facts constitute a waiver of the forfeiture, and would not result in reinstating him.

*McQuillan v. Mutual Reserve Fund Life Asso.* 112 Wis. 665, 56 L.R.A. 233, 88 Am. St. Rep. 986, 87 N. W. 1069, 88 N. W. 925; *Ronald v. Mutual Reserve Fund Life Asso.* supra; *Rundell v. Anchor F. Ins. Co.* 128 Iowa, 575, 25 L.R.A.(N.S.) 20, 105 N. W. 112; *Dillon v. National Council, K. L. S.* 244 Ill. 202, 91 N. E. 417; *Lyon v. Supreme Assembly*, R. S. G. F. 153 Mass. 83, 26 N. E. 236; *Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971; *Rice v. Grand Lodge, A. O. U. W.* 92 Iowa, 417, 60 N. W. 726; *Leffingwell v. Grand Lodge, A. O. U. W.* 86 Iowa, 279, 53 N. W. 243.

A payment of assessments to the officers of the local council after forfeiture, even with knowledge of the ill health of the policy holder, was without authority, and not binding on defendant.

*Royal Highlanders v. Scovill*, supra; *Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971; *Brown v. Grand Council*, N. W. L. H. 81 Iowa, 400, 46 N. W. 1086; *National Council, K. L. S. v. Dillon*, 212 Ill. 320, 72 N. E. 367.

The burden of proving waiver was on the plaintiff.

*Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971.

*Messrs. Smith & O'Connor*, for appellee:

Forfeitures are not favored by the courts, and they are inclined to grasp any circumstances upon which to establish a waiver L.R.A.1917B.

thereof on the part of the insurance company.

*Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L.R.A. 317, 21 Am. St. Rep. 203, 25 N. E. 126; *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; *Appleton v. Phenix Mut. L. Ins. Co.* 59 N. H. 541, 47 Am. Rep. 220.

The rule as to waiver is not less favorable to insured in fraternal or lodge insurance than in ordinary insurance.

*Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; 29 Cyc. 185.

If the society, with knowledge of facts giving it the right to avoid the contract, or to declare a forfeiture, recognizes the contract as continuing in full force and effect, it is thereby precluded, on the ground of estoppel or waiver, from afterward asserting those facts to avoid liability.

29 Cyc. 193; *Murray v. Home Ben. Life Asso.* 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Rice v. New England Mut. Aid Soc.* 146 Mass. 248, 15 N. E. 624.

The right to avoid liability for nonpayment of dues or assessments within the prescribed time is waived where the society accepts payment unconditionally after that time, or where it accepts from the member who is in default dues or assessments subsequently accruing.

*Bailey v. Mutual Ben. Asso.* 71 Iowa, 689, 27 N. W. 770; *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 261, 33 N. W. 663; *Warnebold v. Grand Lodge, A. O. U. W.* 83 Iowa, 23, 48 N. W. 1069; *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 140 Am. St. Rep. 905, 110 Pac. 680; *Collver v. Modern Woodman*, 154 Iowa, 615, 135 N. W. 67.

Inferior lodges and their officers and agents are generally held to be the agents of the society, and hence they may, by acts or omissions founding an estoppel or waiver, preclude the society from relying on grounds of forfeiture.

29 Cyc. 42, 43, 189; *Supreme Tribe, B. H. v. Hall*, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. E. 780; *Davidson v. Supreme Tribe, B. H.* 135 Iowa, 88; *Trotter v. Grand Lodge, I. L. H.* supra; *Collver v. Modern Woodman*, 154 Iowa, 615, 135 N. W. 67; *Alexander v. Grand Lodge, A. O. U. W.* 119 Iowa, 519, 93 N. W. 508; *Henton v. Sovereign Camp, W. W.* 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869; *Pringle v. Modern Woodman*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Modern Woodmen v. Colman*, 64 Neb. 162, 89 N. W. 641, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Rasicot v.*

Royal Neighbors, 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048; Young v. Grand Council, A. O. A. 63 Minn. 506, 65 N. W. 933; Murphy v. Independent Order, S. D. J. A. 77 Miss. 830, 50 L.R.A. 111, 27 So. 624; Supreme Lodge, K. P. v. Kalinski, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Bixler v. Modern Woodmen, 38 L.R.A. (N.S.) 571, note; Supreme Lodge, K. H. v. Davis, 26 Colo. 252, 58 Pac. 595; Bragaw v. Supreme Lodge, K. L. H. 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905; Supreme Lodge, K. P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611.

Where a member of a benevolent association violates some provision of the laws of the association, and his subordinate lodge, with full knowledge of the violation, continues to recognize him as a member, a forfeit incurred by the violation is waived by the acts of the subordinate lodge.

Modern Woodmen v. Breckenridge, 10 L.R.A. (N.S.) 136, note.

Under the provision that failure to pay dues within a specified time shall work a forfeit, coupled with a further provision that a suspended member may be reinstated upon certain conditions, nonpayment does not operate ipso facto to terminate the contract, but some further affirmative act on the part of the association is necessary.

Brooks v. Conservative L. Ins. Co. 132 Iowa, 377, 119 Am. St. Rep. 560, 106 N. W. 913, 11 Ann. Cas. 339.

Where the facts and circumstances relating to waiver are admitted or clearly established, it becomes a question of law.

Swedish American Nat. Bank v. Koebornick, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020; Keller v. Robinson, 153 Ill. 458, 38 N. E. 1072; Schuster v. Knights & Ladies of Security, 60 Wash. 42, 140 Am. St. Rep. 905, 110 Pac. 680; Henton v. Sovereign Camp, W. W. 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869.

Gaynor, J., delivered the opinion of the court:

This action is brought to recover an amount alleged to be due on a certificate of insurance, issued by the defendant company to Victor E. O'Connor, in the amount of \$2,000. This certificate was issued on the 21st day of October, 1913, and the plaintiff was named as beneficiary. The assured, Victor E. O'Connor, died on the 2d day of April, 1914, within six months from the issuance of the certificate. The certificate provided that if the assured died within six months from the issuing of the policy, the beneficiary should be entitled to receive but 60 per cent of the total amount named in the policy. It is admitted that due proofs

of death were filed as required by the certificate and laws of the company. The national executive committee of the appellant company passed upon plaintiff's claim and rejected the same. The assured paid all the assessments required by the certificate and the laws of the society up to the time of his death. The defense is based on the claim that the February, 1914, assessment and dues were not paid during the month of February; that the same were not paid to the local council until the 5th day of March, 1914; that he was at the time, and prior to the time of payment, in ill health, and dangerously sick, and that this fact was not known to the insurers at the time the February assessment was paid and received. The defense is based on the constitution and by-laws of the society, which provide, in substance, and so far as material to this controversy, as follows:

"On or before the last day of each month, the members shall, without notice, pay the sum of one assessment and the local dues to the financier of the local council. The financier of each subordinate council shall keep a book wherein all regular and special assessments and dues received from each member holding a valid certificate shall be credited. Such entries shall be made showing the date when actually received by the financier."

"All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month shall, by the act of such nonpayment, stand suspended without notice, and no act on the part of the council or any officer thereof, or of the national council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited."

The constitution and by-laws further provide: "No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the order, with reference to reinstatement."

It further provides: "Each member who has been suspended for nonpayment of dues, or nonpayment of an assessment or assessments, shall only be reinstated in accordance with the constitution and laws of the order."

Under the heading, "How a Member May Be Reinstated Within Sixty Days," we find the following: "Any beneficiary member suspended by reason of nonpayment of an assessment or assessments or dues may, within sixty days from the date of such suspension, be reinstated upon the following conditions, and none other; By payment within sixty days from the date of suspension of all arrearages of every kind, including

assessments and dues, for which he would have been liable had he remained in good standing: Provided, however, that he be in good health at the time of making payment to the financier, with a view to reinstatement. The payment of any such assessments and dues for reinstatement shall be a warranty by such member that he is in good health at the time of such payment. Provided, further, that the receipt and retention of such assessments and dues, in case the suspended member is not in good health, . . . shall not have the effect of reinstating said member, or of entitling him or his beneficiary to any rights under this benefit certificate."

The laws further provide: "The national council shall not be bound by the acceptance of arrears of assessments and dues from suspended members who are not entitled to reinstatement in accordance with the laws of the order. The receiving of such arrears and receipting therefor by any officer of a subordinate council, . . . or by any other person, or the payment by or on behalf of any suspended member, or arrears of assessments and dues, with a view of reinstatement, except as provided for in the laws of the order, shall not be binding upon the National Council. The failure of any financier to report to the National Council, as suspended, any suspended member of his council, shall not operate, in any case, as a waiver of the forfeiture occurring on account of the suspension."

The laws further provide: "The retention by the financier or by the order of assessments and dues paid by members, or for them, with a view to reinstatement, other than as provided in the laws of the order either before or after death, shall not constitute a waiver of any provision of these laws until a demand has been duly made for their return by such member or his beneficiary, or legal representative."

It is further provided: "The national council is not bound by knowledge of or notice to officers or members of local councils, and no officer of the society, or any local council officer, or member thereof, is authorized or permitted to waive any of the provisions of the by-laws of this society which relate to the contract between the member and the society, . . . and no knowledge or information obtained by or notice to any subordinate council or officer or member thereof . . . shall be held or construed to be the knowledge of or notice to the national council or officers thereof, until after said information or notice be given in writing to the national secretary of the order."

There is a further provision that the local L.R.A.1917B.

council and its officers are the agents of the members in making application for membership, admission of members, reinstatement of members, the collection and transmission of all assessments to the national council; and that the national council shall not be liable for any neglect in any of these members, nor be bound by any irregularity, neglect, or illegal action by a subordinate council, or by any of its officers.

It is the contention of the defendant that, under these by-laws, Victor E. O'Connor became suspended from the defendant society on the 1st day of March, and was not a member of the society at the time of his death; that in September, 1914, it tendered back to the representatives of Victor E. O'Connor and the plaintiff all assessments and dues received by it, or its local council, from said Victor E. O'Connor, from and after the date of his suspension aforesaid: to wit, March 1, 1914, which they refused to accept, and that it is now ready and willing to return said dues.

Defendant's contention, briefly stated, is this: That the February, 1914, assessment was due by the terms of the constitution and by-laws of the order, which were a part of the contract, on the 1st day of February: that a failure to pay this assessment during the month of February, on or before the last day, worked a forfeiture of the certificate and all rights under the certificate. Reliance is had upon the provision reading as follows: "All payments shall be due and payable on the first day of the month. On or before the last day of each month, the member shall, without notice, pay the monthly assessment and the local dues to the financier of the local council. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month shall, by the act of such nonpayment, stand suspended without notice. No act on the part of the council or any officer thereof shall be required as essential to such suspension, and all rights under said certificate shall be forfeited."

The assessment for the month of February was not paid on the last day of the month, was not paid until the 5th day of March following. It is therefore claimed that, under these provisions, which were a part of the contract, the assured became, by reason of the failure to pay within the month of February, suspended, and all rights under this certificate forfeited, and that the plaintiff, therefore, has no claim against this defendant upon the certificate. It must be conceded, and is conceded for the purposes of this case, that the insured, upon becoming a member of this order, was bound to take notice of its by-laws; that these by-

laws entered into and became a part of the contract the same as if they were written in the contract itself. The contract so provides, and proof of a failure on the part of the assured to comply with these provisions of the contract would work a forfeiture of his certificate, and all rights under the certificate, and would be a complete defense to plaintiff's claim to recover upon the certificate, if nothing further appears.

The plaintiff, however, claims that the defendant company, with knowledge of the fact that the assessment and dues for the month of February were unpaid, accepted payment thereof on the 5th day of March, and issued to the assured a receipt in the following words:

No. .... \$2.50  
 Knights and Ladies of Security,  
 Waterloo Council, No. 1051.  
 Located at Waterloo, State of Iowa,  
 March 5, 1914.  
 Received of Victor E. O'Connor, two and  
 fifty one hundredths dollars, payment for  
 month of February, 1914.  
 [Signed] John C. Kascht.

With the following words indorsed on the receipt: "Please send your remittance to J. C. Kascht, 229 East 4th St., after this."

That the company not only accepted and received the amount so remitted as payment of the dues for February, but has ever since retained the same; that thereafter, on the 28th day of March, 1914, assured paid the dues and assessments for the month of March, 1914, and that the defendant, with knowledge of the fact that the February dues had not been paid within the time provided by the laws of the order, accepted this March payment without objection, and issued a receipt in the following words:

March 28, 1914.  
 Received of Mr. and Mrs. Victor E.  
 O'Connor five and thirty-five hundredths  
 dollars, payment for the month of March,  
 1914

That thereafter the assured paid the dues and assessments for the month of April, 1914, and the same were received by the company with knowledge of the fact that the February assessment had not been paid strictly within the time required by the laws of the order, and it has retained the said payment, and, upon receipt of the payment, issued to the assured the following receipt:

April 6, 1914.  
 "Received of Victor E. O'Connor, two and  
 fifty one hundredths dollars payment for  
 the month of April, 1914.  
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That the defendant still holds and retains the payments made for the month of February aforesaid, and March and April; that the defendant accepted said payments with knowledge of all the facts then existing which could, under the laws of the order, constitute a forfeiture of the membership of Victor E. O'Connor; that by reason of the facts herein stated the defendant is now estopped from claiming any forfeiture by reason of the delay in making the February payment; that the assured made the subsequent payments relying upon the conduct of the defendant in accepting and retaining the payment made for the February assessment.

It will be noted that the defendant company seeks to avoid payment on this certificate, not alone on the ground that the assured was dangerously sick at the time the February payment was received, but because the payment was not made within the month of February, as required by the by-laws. The fact that the February assessment was not paid within the time required by the by-laws was known to the defendant company at the time it received and accepted for the payment, and directed, on the receipt, where future payments should be remitted. If this payment was made in time, if it had been made during the month of February, the fact that the assured was dangerously ill at the time of the making of the payment would be no ground for forfeiture of the policy. The only tenable ground for forfeiture is the ground laid in the constitution and by-laws; to wit, a failure to make the payment promptly within the time prescribed by the by-laws. It is the failure to make the payment within the time that, by the terms of the by-laws, forfeits all rights under the policy and suspends the member. We will concede that this required no affirmative action on the part of the company; that a failure to pay, in and of itself, suspended the member and forfeited all rights under the certificate. This provision of the policy is made, not for the benefit of the assured, but for the benefit of the company. It is a provision in the policy, therefor, which the company itself might waive, or by its subsequent conduct be estopped from insisting upon as against the insured, as we will endeavor to show hereafter more fully by the authorities bearing upon this point.

This controversy therefore turns upon this question: Did the company so conduct itself, after it knew the forfeiture had taken place by the terms of its contract, that it is now estopped to insist upon such forfeiture as against the plaintiff? Did it, by its subsequent conduct, waive, as between itself and the insured, a strict en-

enforcement of these provisions of its contract, as to forfeiture against the insured? The record discloses that at the time this payment was received and accepted on the 5th of March, no inquiry was made touching the then health of the insured, nor was it accepted subject to any showing as to the health of the insured at that time, and this is true of the subsequent payments made and received and accepted by the company. Though the fact is that the assured was ill at the time this February payment was received by the company, and, conceding that if this had been known to the company at the time it received it, it might have rejected the payment and insisted upon the forfeiture, yet we are not prepared to say from this record, as will hereafter more fully appear, that the assured practised any fraud, or purposely concealed the fact of his condition from the company at the time. When this payment was made on the 5th day of March the company knew, or had reason to believe, we think, that the payment was not made for the purpose of reinstatement, but was made for the purpose, on the part of the assured, and with the intent, to comply strictly with the requirements of his contract, and pay, not for reinstatement, but for the purpose of complying with his contract.

The record discloses that the check for the February assessment was received by the president of the local council on the 5th day of March; that it came to him in an envelop properly addressed, and presumably properly stamped by the postoffice authorities. The envelop is not before us, nor is its absence accounted for. Upon the receipt of this letter containing the check, the president of the company carried it to the financier and delivered it to him, and it was duly recorded upon the books of the company as a payment of dues for the month of February. This check was dated on the 16th day of February, 1914, showing an intent on the part of the insured to pay his February assessment at that time. The date of this check was unquestionably known to the president of the local council and to the financier when they received it, cashed it, credited plaintiff on the book as for the month of February, and sent the receipt hereinbefore set out. They were then charged with notice, from the date of the check, that the purpose of the payment was not for reinstatement, but for the purpose of complying strictly with the requirements of his contract, and making the payment within the month of February. Why it was not received earlier than the 5th day of March does not appear. Some light might have been given us upon this question had the envelop in which the check was received

been produced upon the trial. It seems that the company had been changing its financiers about that time. The remittances were made, as a rule, to the financier. This check seems to have been mailed to the president of the local council and received by him. The president and the financier in receiving this check, crediting the amount on the book, and receipting for it, treated it, not as for the purpose of reinstatement, but as made and received for the purpose of payment of the February dues. No notice was ever given the assured that his check was received too late, under the rules of the order, neither when this was received and credited, nor when the other subsequent payments were credited and receipted for. If the contention of the defendant is now to be sustained, the assured forfeited all his rights under the certificate on the 1st of March.

It is claimed that the assured knew that if his payments were not made during the month, he was automatically suspended, and all rights under the certificate forfeited, and we may concede this. The defendant also knew when it received this check, if its contention is now true, that a strict application of the contract and by-laws to the defendant's claim did automatically suspend the plaintiff and forfeit all his rights under the certificate. These laws were made, not only for the government of the assured, but also for the government of the insurer. They were made especially for the benefit of the insurer, and could be insisted on or waived by it. It chose not to insist upon the forfeiture, but to accept the payment, not for the purpose of reinstatement, but for the purpose of discharging the original obligation under the contract to pay within the month of February. All its conduct discloses this purpose and intent on its part, not only its conduct at the time of the receipt, but its subsequent conduct touching subsequent payments.

The record further discloses that, on the 16th day of February, at the time this check was prepared and signed, the assured was in good health; that he was not taken ill until the 22d day of February; that he was then taken suddenly ill with some acute trouble that required an operation, from the effect of which he died. There is no evidence that the assured knew that his check had not been received within the month of February. True, the receipt was dated on the 5th day of March, but it recited that the payment was made and received for the month of February, 1914. There was nothing to indicate to the assured, other than the date of this receipt, when this check was actually received by the company. Therefore no fraud or wilful concealment

can be charged to the assured. His check was dated February 16th, in time to meet the requirements of the contract. It was forwarded to the society. Why it was not received earlier does not appear. When the society received it, and receipted for it, as a payment under the contract for the month of February, he had a right to assume that it was received and accepted as a payment made in time for the February dues, and that his contract was not forfeited, and was in full force as originally issued. His sickness was therefore immaterial. Sickness and death were what the company undertook to insure him against. If the payment had been made in February, the certificate would have been continued in full force, notwithstanding his sickness at the time of payment. If the payment was made as a payment for the month of February, and not for reinstatement, and was accepted by the company as such, with knowledge of the fact that it was made too late under the contract, it became, as between the parties, a payment under the original contract, preserving its life and vitality. The forfeiture was waived, and, the forfeiture being waived, the contract continued in full force, with its indemnity against sickness and death.

It is argued, however, that, as the company did not know that he was sick at the time it received these payments, it cannot be said to be estopped or to have waived the forfeiture. It did know of the provisions of its policy, and that a failure to pay within the month suspended the member, and forfeited all his rights under the policy, and this would be true even if he were not sick, and it was then that it could have insisted upon the terms of its contract and treated the plaintiff as suspended and the contract forfeited. It elected not to do this, not to treat the plaintiff as suspended, or his contract forfeited for a mere failure to pay within the time. It continued his contract in force, notwithstanding this fact and knowledge of this fact, and received further assessments and dues. It therefore waived any forfeiture based upon the failure to pay within the time.

A different question would arise if the forfeiture had been insisted upon and the assured had undertaken to be reinstated under the terms of the policy. Then it would be incumbent upon the assured to make a showing as to his health, and any fraud practised by him touching this matter would have avoided a reinstatement, or any concealment on his part of a fact that would prevent reinstatement would have been fatal to his right. We must keep always in mind the thought that the suspension and forfeiture relied upon here are related to and

are involved in the one act, and that is, the failure to pay the February dues during the month of February. The right to be reinstated, if forfeiture had been insisted upon, is a different matter. Then the question of the health of the assured would be a matter for consideration.

It is insisted, further, that as the society did not know of his sickness at the time it received these dues, it cannot be held to have waived the forfeiture, because, as it is assumed, if it had this knowledge, it would not have done these acts which now are alleged to constitute the waiver. But, however, the record discloses that it made no inquiry touching his health at the time it received these dues; that the dues were not accepted subject to any showing as to his health; that the dues were received and accepted as a compliance with the requirements of the original contract. The company owed some duty, if it desired to insist upon the forfeiture, and if it desired to accept the fees subject to a showing as to health, to so indicate to the assured, or, at least, to have made some inquiry touching the matter before accepting the fees as a full performance of the original contract. If this is not so, we might have this situation presented: On a certain month the assured fails to pay his dues for that month within the time prescribed by the certificate and by-laws. It is provided that a failure to pay promptly within the time fixed automatically suspends the member and forfeits all his rights under the contract. After the time when the forfeiture could be insisted upon, the timely dues are paid, and accepted by the company on the contract. Plaintiff, at the time the defaulted payment was made, was sick, and continued such, and not in a condition for reinstatement, more than sixty days. He recovers and continues timely payments on his contract for five years, and then dies. Defendant finds that at the time the defaulted payment was made, the assured was very sick; that it had no knowledge of this fact at the time this payment was accepted, and did not learn of it until after his death. It then refused payment on the ground that, five years before, the assured had failed to make one monthly payment at the time stipulated in the contract. In a suit upon the certificate, defendant pleads this failure as a bar to the action, claiming that the assured became automatically suspended, and his policy forfeited, though during all this time it received and receipted for payments as if made upon the contract, and without objection and without insisting upon the forfeiture. An application of what the defendant contends for here would defeat the plaintiff in a suit upon the certificate, un-



der the conditions supposed. This would be neither good law nor good morals.

It is a rule of general recognition that forfeitures are not favored in the law; that where a contract, rightly and intelligently entered into, provides for forfeiture, the one who desires to avail himself of the forfeiture must act promptly and fairly with the party whose rights are to be forfeited under the terms of the contract. As said in *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, page 526, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; "Courts will be vigilant and quick to discover and give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance."

*Rice v. New England Mut. Aid Soc.* 146 Mass. 248, 15 N. E. 624. This action was to recover on a mutual benefit certificate. The defense relied upon was that, under the laws of the order and the terms of the certificate, the certificate had lapsed for failure to make payment as required, and was therefore null and void. The certificate provided that if a member omitted or neglected to pay within thirty days of the date of notice, then the certificate should be null and void. The assured did not pay within the time. The assessment was made on the 17th day of July, and he was required to pay within thirty days. He did not pay until the 19th day of August. On the 17th day of August, he became violently ill. On the 19th, he was taken to his home in a weak condition. He died on the 17th day of December. The cashier of the defendant company received the assessment, without inquiry or objection, on the 19th day of August, two days after it was due, and stamped a notice, "This assessment is accepted on condition that the member is in good health," and receipted for the sum paid. At the time the payment was made, on the 19th day of August, the money was sent by a messenger, who gave no information to the company as to the condition of the assured. Thereafter, and before the death of the assured, six other payments were made on this certificate, each made within the proper time. These subsequent payments were received unconditionally by the defendant, and the defendant made no inquiry as to the health of the assured. No information was furnished as to his health. In fact the case disclosed the company was ignorant of the assured's health on the 19th day of August, and had no knowledge of his condition at the time of any subsequent payments. The lower court held that the acceptance of the six assessments, after the one paid on August 19th, without making any inquiry to ascertain the facts concern-

ing the health of the assured, was a waiver of the breach of the certificate at the time of the August payment; that if the company received the assessments without inquiry subsequent to August 19th, this would amount to a waiver of a default of the payment made on August 19th. The supreme court of Massachusetts, in passing upon this question, said, in substance: If it be assumed that the payment on the 19th day of August was too late, the question remains whether the company, by subsequent acts, waived the right to treat the policy as voided on that ground.

It further said that, without expressing any opinion as to the effect of the retention of the money, the levy of the subsequent assessments and the acceptance of the money paid upon them amounted to such a waiver; that when the time came for the levy of a new assessment, if the company intended to treat the policy as still in force, he could properly be included in the assessment, otherwise not, and it held that as the company acted under no deception or misrepresentation from the assured, but with all the information which it cared to take the pains to acquire, it made the levy and received the assessment; that it was its duty to know the condition of the assured's health after the default, before accepting subsequent payments; and concluded by saying that an unconditional acceptance of an assessment waives all former known grounds of forfeiture. The court used this language: "If, before levying a new assessment, the company wished to know the particulars as to [Mr.] Rice's health, and thus to determine whether that payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so; instead of notifying him that it wished for some positive evidence or statement upon the subject; instead of imposing a further condition relating back to the time of the former payment,—the company made an unconditional call upon him for the payment of a new assessment. . . . Suppose the payment of the former assessment had never been made at all, and the company, without insisting upon the nonpayment as a ground of forfeiture, had levied new assessments upon the assured, which were all . . . paid and accepted without condition, could it be contended that there was no waiver? An unconditional acceptance upon assessment waives all former known grounds of forfeiture."

See also *Murray v. Home Ben. Life Asso.* 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309, an action similar to the one in question, in which it is said: "There can be no doubt that the failure of the deceased to pay the assessments of June and August

within thirty days after notice thereof released the defendant from all further liability upon the certificate held by him, if the defendant company had so elected; but conditions like that before [us] . . . which, in effect, provide for a forfeiture of all rights thereunder unless payment of assessments is made within the time specified may always be waived by the party for whose benefit they are inserted in the contract; and the rule is firmly established in this class of cases that if the insurance company, after knowledge of any default for which it might terminate the contract, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treat it as still in force, the right to claim a forfeiture for such previous default is waived" (citing authorities). "Imposing or collecting an assessment by a mutual insurance company, after the company has knowledge of facts entitling it to consider the policy no longer binding upon it, without its assent, is, upon this principle, held to be a waiver of the right to claim the forfeiture which otherwise it might have insisted upon. The cases are numerous which hold that the acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture which might have been enforced because it was not paid when due. . . . In speaking of acts showing an election to continue the existence of the policy of insurance, and to waive a forfeiture incurred, the Supreme Court of the United States in the case of *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689, say: 'It is conceded that the acceptance of payment has this effect: and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy.'

In *Supreme Tribe, B. H. v. Hall*, 24 Ind. App. 316, 79 Am. St. Rep. 262, 56 N. W. 780, it is said: "The courts not favoring forfeitures are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations, insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim forfeiture" (citing authority).

See the following authorities supporting this contention: *Rasicot v. Royal Neighbors*, 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 138 L.R.A.1917B.

*Am. St. Rep.* 180, 108 Pac. 1048; *Henton v. Sovereign Camp*, W. W. 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869; *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 140 Am. St. Rep. 905, 110 Pac. 680; *Modern Woodmen v. Colman*, 64 Neb. 162, 89 N. W. 641. We are not without support on these propositions in our own state. See *Bailey v. Mutual Ben. Asso.* 71 Iowa, 689, 27 N. W. 770; *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 261, 33 N. W. 663; *Collver v. Modern Woodmen*, 154 Iowa, 616, 136 N. W. 67.

It is next contended that, under the by-laws and constitution of the order, this defendant was not charged with knowledge of the facts known to the local council, and that the waiver, if any, on the part of the local council was not binding upon this defendant. This contention cannot be sustained. All the acts which constitute the waiver are, by this record, laid at the door of the president of the local council or camp and its financier. This contention is answered by what is said in *Trotter v. Grand Lodge*, I. L. H. 132 Iowa, 519, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533, in which it is held that, notwithstanding the provisions of the contract to the contrary, the local council and its officers are the agents of the national council in respect to the matters here under consideration; that it does not matter what you call one; his character must be determined from what he is. The relationship of these parties to the national council created the agency which binds the principal. These parties were the agents of the mother lodge. Their conduct was its conduct. What they knew was its knowledge. It received the application for membership, received fees, charges, and assessments, kept the record, and made report. The knowledge of the agent is the knowledge of the principal within the scope of his employment. On this point see cases above cited. In *Davidson v. Supreme Tribe, B. H.* 135 Iowa, 92, 111 N. W. 46, it is said: "Whether a person is an agent of another or of an association must be determined by their relations one to another, and, if one is actually authorized to act for another in certain matters as agent, the mere fact that it has been agreed that the relationship of agency shall not exist does not obviate the fact of such agency. . . . Had the local scribe, as agent of defendant to collect and receive the dues of the supreme tribe, the power to waive the consequences of omission to make payment as required? The constitution, laws, and regulations do not deny such authority save as this may be inferred from

declaring that suspension shall follow from failure to pay when due. Notwithstanding similar conditions, courts have repeatedly held that the acts of the agents may be such as will estop the company or association from taking advantage of a forfeiture" (citing *Trotter v. Grand Lodge, I. L. H. supra*).

As especially bearing upon this point, see *Raicot v. Royal Neighbors*, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048, and cases therein cited. In *Supreme Tribe, B. H. v. Hall, supra*, the court used this language: "It is true that . . . the by-laws after designating the officers of the subordinate courts, conclude: 'These officers, when duly qualified and installed, are the agents of the members of this court, and are not for any purpose agents of the supreme tribe.' The duties of an officer determine the question of his agency, and not what he may be called. He is the agent of the supreme tribe for doing what its by-laws require him to do as between the members of the order and the supreme tribe" (citing authority).

In *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, it is said: "It is the duty of an agent to communicate to his principal every fact affecting the transaction intrusted to his care which comes to his knowledge in the course of or during its performance, and this duty, in an action between the principal and the adverse party, the agent is conclusively presumed to have obeyed" (citing *Hargadine McKettrick Dry Goods Co. v. Krug*, 2 Neb. (Unof.) 52, 96 N. W. 286).

See also *Alexander v. Grand Lodge, A. O. U. W.* 119 Iowa, 519, 93 N. W. 508; *Supreme Tent, K. M. v. Volkert*, 25 Ind. App. 627, 57 N. E. 203.

It is contended, however, that, assuming that the local council and its officers were the agents of the defendant company, and that their act was its act, their knowledge was its knowledge, yet the payment of these dues, after the time fixed in certificate and by-laws, did not reinstate the defendant for the reason that, at the time of the payment, he was mortally ill, and therefore under the law could not be reinstated. This, we think, is begging the question which we have here under consideration. The date of the check indicated to the local officers, and therefore to the defendant company, that the intention of the assured in sending the check was not that he might be reinstated under the provisions of the law for reinstatement, but as a payment on the original contract. If it had been received by the defendant company within the month of February, the condition of his health would have nothing to do with the continuation of the policy. L.R.A.1917B.

The forfeiture is not traceable to the condition of his health, but to the fact of non-payment within the time provided in the policy. The defendant company, by accepting the money under these conditions as a payment under the original contract, and not for the purpose of reinstatement, continued the policy in force, and waived the failure to pay within the time. Waiver of the failure to pay within the time made the payment, in legal effect, the same as if made within the time. The acceptance of the payment after the time, with knowledge of the default, and the issuing of the receipt, with the words indorsed upon it directing the sending of future assessments, the acceptance of further assessments under the policy, were a waiver of the failure to pay within the time, and therefore made the payment the same in its legal effect as if made within the time, and bound the defendant to the contract as originally issued.

Reliance is had upon *Kennedy v. Grand Fraternity*, 36 Mont. 325, 25 L.R.A.(N.S.) 78, 92 Pac. 971, and *Royal Highlanders v. Scovill*, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206. These cases involve the question of reinstatement after suspension, and after conditions had arisen which, under the contract, made the reinstatement impossible, and are not authority upon the question here.

We are not unmindful of the fact that some cases have held that all contracts of life insurance fall in one or the other of two classes. The first class comprehends all contracts which provide that upon default of the member he is liable to be suspended, and the second class comprehends all contracts by the terms of which the member's delinquency ipso facto works a suspension and forfeiture of rights under the policy. We are not unmindful that, under the first class, some affirmative action on the part of the society is necessary in order to fully terminate the membership, and that, under the second class, no affirmative action is required. We are not unmindful that under contracts of the first class, notwithstanding the delinquency, there is the necessity for affirmative action on the part of the society, without which the delinquent remains a member of the society, with certain rights and claims, while, under the second class, immediately upon the delinquency happening, the membership is terminated, and the delinquent is no longer a member of the society. With this distinction in mind, it has been argued that the assured never becomes a member of the society, under the second class, after delinquency, unless reinstated; that the reinstatement constitutes a new contract, which requires for its support some new considera-

tion, while, in the first class, before affirmative action is taken, the delinquency may be forgiven or waived, and the member continued in the society under the original contract.

It is contended that the assured, in the case at bar, came under the second provision, and therefore, his relation having ceased upon his failure to pay for the month of February, within the month of February his contract ceased, and that it would require some affirmative action on the part of the assured to reinstate him; that the mere payment of the assessment after the time, or subsequent assessments, did not constitute a reinstatement; that there was no consideration; that the assured could not have been misled because there was nothing that he could have done to reinstate himself. He was mortally sick, and died from the sickness existing at the time of the default. The contract provided that the payment for the month of February should be made within the month of February. It provided that the member became suspended, and his contract forfeited, if that payment was not made within that time.

We are not dealing here with the question of estoppel, but rather with the question of waiver. Waiver involves an intention, on the part of the person who is charged with having waived, not to insist upon an enforcement of that provision of the contract concerning which the waiver is sought to be shown. Here, the waiver is of the failure to pay within the time; the acceptance of the dues for the month of February as paid within the time, with notice of the fact in the check itself that it was the intention of the assured to pay within the time. It is the waiver of the right to insist upon payment within the time stipulated by the contract, that holds the original contract in force, and therefore not under the holdings of some courts, the making of a new contract. As bearing upon this question, see *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668; *Buchanan v. Exchange F. Ins. Co.* 61 N. Y. 26; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689. In the last case, the policy provided that "if the said premium shall not be paid on or before twelve o'clock noon, . . . then, and in every such case, the company shall not be liable to pay the sum assured or any part thereof, and said policy shall cease and be null and void, without notice to any party or parties interested therein."

The policy provided that the premium should be paid annually on the 20th day of April in each year. The assured died, and the defense rested on the fact that the policy was forfeited by reason of the non-

payment of certain notes given for the last premium, which was due April 20, 1875. The court said in passing upon the question: "The written agreement of the parties, as embodied in the policy, . . . was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on, but a party always had the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. . . . Much stress, however, is laid on the fact that the extension claimed to have been given in this case was not given, or applied for, until after the first note became due and the forfeiture had been actually incurred. But we do not deem this to be material. . . . The material question is whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity as by one made before. In either case, the legal effect of the indulgence is this: The company say to the insured, Pay your note by such a time, and your policy shall not be forfeited. If the assured agrees to do this, and does it, or tenders himself ready to do it, the forfeiture ought not to be exacted. In both cases, the parties mutually act upon the hypothesis of the continued existence of the policy."

The court further said: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice."

See also *Cohen v. Continental F. Ins. Co.* 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296, in which it is said, in substance, that it may be considered as settled law that when a policy provides for forfeiture upon a failure to pay premiums when due, but does not stipulate that upon such failure the overdue premiums shall be considered as earned, the demand and payment of such premium constitute a waiver of the forfeiture, and that this is upon the principle that in such cases the insurance and the premium are obligations which depend upon each other, and hence a receipt of the latter necessarily implies that the insurer recognizes or renews the original contract, and thereby assumes the continuance of the risk. The receiving of the premium, with knowledge of the fact that it was not paid in time to avoid a forfeiture of the policy, and the receiving of subsequent premiums, constitute an election on the part of the company not to avail itself of the provisions of the policy

touching forfeiture. It is a waiver of the provisions of the policy touching forfeiture, and continues the policy in force.

The contract between these parties was to give and receive indemnity. The premiums were paid to secure indemnity. Subsequent payments were made for the purpose of continuing the right to indemnity under the original contract. The receipt and retention of the subsequent premiums said to the assured, "We continue your right to indemnity under your contract." We see now no legal reason why the company should not be required to make indemnity

in accordance with the provisions of the original contract.

The facts in this case are not in dispute. There was no question of fact for the jury. The court did not err in sustaining the plaintiff's motion upon the record made. We find no ground for disturbing its judgment, and the case is therefore affirmed.

Evans, Ch. J., and Ladd and Salinger, JJ., concur.

Petition for rehearing denied.

## MAINE SUPREME JUDICIAL COURT.

### CITY OF BELFAST

v.

### BELFAST WATER COMPANY.

(— Me. —, 98 Atl. 738.)

**Municipal corporation — ultra vires contract — right of other person to avoid.**

1. One cannot avoid his contract to furnish water to a municipal corporation because the municipality had no authority to enter into it.

*For other cases, see Municipal Corporations, II. d, in Dig. 1-52 N. S.*

**Injunction — against cutting off water supply.**

2. A water company will be enjoined from cutting off the water supply of a municipal corporation to force it to come to its terms with respect to compensation for the service.

*For other cases, see Injunction, I. f, in Dig. 1-52 N. S.*

**Note.**—For cases passing upon the construction, validity, and enforceability of contracts, franchise or charter stipulations fixing rates for service of public service corporations, see notes to *Pinney & B. Co. v. Los Angeles Gas & E. Corp.* L.R.A.1915C, 282; *Benwood v. Public Service Commission*, L.R.A.1915C, 261; and *State ex rel. Webster v. Superior Ct.* L.R.A.1915C, 287; and the following recent cases in this series: *Union Dry Goods Co. v. Georgia Public Service Co.* L.R.A.1916E, 358, and *Raymond Lumber Co. v. Raymond Light & Water Co.* L.R.A.—, —.

**BELFAST v. BELFAST WATER Co.**, it will be observed, is against the great weight of authority, which holds that statutes forbidding discrimination in rates are applicable to existing contracts, and that statutes creating public service commissions, and authorizing them to regulate rates, permit the latter to set aside prior contracts, valid when made, without violating constitutional provisions against the impairment of L.R.A.1917B.

**Water — perpetual contract for municipal supply — validity.**

3. A contract for a municipal water supply, adopted under legislative authority, is not unenforceable against the water company because it ignores the right of the state to control the terms and conditions of service by fixing terms and conditions unalterable for all time.

*For other cases, see Municipal Corporations, II. d, in Dig. 1-52 N. S.*

**Public service corporation — free service to municipality — discrimination.**

4. A contract to furnish free water service to a municipality forever after it has paid certain rates for a period of time is not invalid after the payments have been made, for discrimination against other consumers, since the service is purchased by the payments made.

*For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.*

**Same — free public service — validity.**

5. Free service by a public service corporation to the public is not invalid for discrimination against other consumers.

*For other cases, see Public Service Corporations, in Dig. 1-52 N. S.*

contracts. It will be observed that the rights of three parties may be involved in contracts fixing rates for public service. As to the rights of the corporation, under its charter or its franchise, and as to the rights of the municipality under its charter, it is held that the regulation of rates by the state, or the enactment of a statute authorizing a commission to regulate rates, is a valid exercise of the reserved power to alter corporate or municipal charters; and it is also held that it is competent for the state to waive the rights of the public in contracts fixing rates for public service. As to the rights of patrons and consumers in contracts with public service corporations fixing rates, it is held that such contracts must be considered as having been made in contemplation of and with reference to the power of the state to regulate rates, since the parties could not, by contract, suspend the power of the state to regulate rates.

**Statute — retroactive effect — existing contracts.**

6. A statute forbidding rebates, discount, or discrimination in respect to service rendered or to be rendered by a public utility does not apply to existing contracts.

*For other cases, see Statutes, II. d, in Dig. 1-52 N. S.*

**Tax — remission — power of municipality.**

7. A municipal corporation may be authorized to remit taxes upon a public service corporation in consideration of service rendered to it.

*For other cases, see Municipal Corporations, II. a, 1, in Dig. 1-52 N. S.*

(September 28, 1916.)

**R**EPORT by the Supreme Judicial Court for Waldo County for the determination by the full bench of a bill filed to enjoin defendant from preventing plaintiff's use of hydrants, to compel defendant to maintain the hydrants, and to furnish an adequate water supply. Bill sustained.

The facts are stated in the opinion.

Messrs. Carleton Doak and Robert F. Dunton, for plaintiff:

The parties to this suit were legally authorized to make the contract.

40 Cyc. 788; 3 Dill. Mun. Corp. § 1307.

The defendant corporation, having adopted the contract entered into by its promoters, and obtained its benefits, "must take it with its obligations and burdens, cum onere. It must do what the promoters agreed to do."

Robbins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A. (N.S.) 983, 62 Atl. 136; 1 Clark & M. Priv. Corp. p. 310.

Public service corporations are required to serve.

Wood v. Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; Wyman, Pub. Serv. Corp. §§ 330, 331.

A city may agree, as a part of the consideration for a municipal water supply, to remit all municipal taxes on the property of the water company, or to pay all taxes assessed on its property up to a certain limit.

40 Cyc. 788; Alpena City Water Co. v. Alpena, 130 Mich. 518, 90 N. W. 323; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Washburn v. Washburn Waterworks Co. 120 Wis. 575, 98 N. W. 539; Monroe Waterworks Co. v. Monroe, 110 Wis. 11, 85 N. W. 685; Little Falls Electric & Water Co. v. Little Falls, 74 Minn. 197, 77 N. W. 40.

Defendant, having received the benefits of the contract, is estopped from denying its validity.

2 Parsons, Contr. 9th ed. p. 961; Hathaway v. Payne, 34 N. Y. 92; 16 Cyc. 787; L.R.A. 1917B.

Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; Clark v. Deadwood, 22 S. D. 233, 18 L.R.A. (N.S.) 402, 117 N. W. 131.

The contract is not ultra vires the city, either as regards the obligation to pay hydrant rental, or as regards the provision for payment of taxes for certain water service.

Maine Water Co. v. Waterville, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 830; Portland v. Portland Water Co. 67 Me. 135; 40 Cyc. 788; Alpena Water Co. v. Alpena, 130 Mich. 518; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Washburn v. Washburn Waterworks Co. 120 Wis. 575, 98 N. W. 539; Monroe Waterworks Co. v. Monroe, 110 Wis. 11, 85 N. W. 685; Little Falls Electric & Water Co. v. Little Falls, 74 Minn. 197, 77 N. W. 40; Bartholomew v. Austin, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; Grant v. Davenport, 36 Iowa, 396; Utica Waterworks Co. v. Utica, 31 Hun, 431; 3 Dill. Mun. Corp. § 1310; Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. L. 378, 6 Atl. 24.

If it should be held that the provision of the contract relating to the remission of taxes in consideration of a supply of water for certain purposes is ultra vires, the remainder of the contract may be enforced.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Western U. Teleg. Co. v. Baltimore & S. W. R. Co. 3 McCrary, 130, 11 Fed. 1; Saginaw Gaslight Co. v. Saginaw, 28 Fed. 529.

Injunction is a proper remedy, if the defendant is under legal obligation to furnish the service which it threatens to discontinue.

2 Joyce, Inj. § 1285; 3 Dill. Mun. Corp. § 1317; Wood v. Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906.

Messrs. Harvey D. Eaton and H. C. Buzzell, for defendant:

The government has the complete right at all times to regulate and control the service of this company and the prices to be charged therefor, and its right in this respect cannot be thwarted by a contract.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.)

671, 31 Sup. Ct. Rep. 265; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287.

Hydrant service shall be rendered without compensation after twenty years. This is a large and important service which should be paid for by the city in its corporate capacity.

*Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

Savage, Ch. J., delivered the opinion of the court:

In 1886, two men, who will be called the promoters, entered into a written contract with the city of Belfast. The contract contained these provisions, among others: The promoters agreed to construct in Belfast a complete system of waterworks for the extinguishment of fires, and for domestic, manufacturing, and other purposes. They agreed to place in the system 45 hydrants, and more, if desired by the city. The city agreed to pay, for not exceeding 50 hydrants in number, set upon pipe described in the construction plan, an annual rent of \$900. For additional hydrants set upon new pipe the promoters were to receive \$40 each annually. It was agreed by the promoters that at the expiration of twenty years from the time water was first let into the pipes the payment of rent for each and all hydrants should cease, and that at all times thereafter they would furnish water for the hydrants free to the city.

The promoters further agreed to supply all water for sprinkling streets and flushing gutters, and for all buildings within the limits supplied by its pipes, used by the city for municipal and school purposes, including the public library and a city hospital, and for four drinking troughs or fountains for man and beast, and for two ornamental fountains, for such sums annually as the city should assess taxes upon the franchise and works of the water system.

Further, the promoters agreed to sell and convey the system to the city at any time for such price as might be agreed upon, or, in case of failure to agree, for such price as might be determined by commissioners in a manner prescribed by the contract.

The city agreed that the promoters should have the privilege and right to supply water for domestic and other purposes, and should be authorized to dig up the ways and streets for the purpose of laying pipes, and for doing such other work as might be necessary in the operation of the waterworks.

It was agreed that such of the agreements and stipulations in the contract as the city might not then have the power to L.R.A.1917B.

make without authority of the legislature were not to be binding until such authority was granted by a charter satisfactory to the city, to be procured by the promoters.

In accordance with the contract, the promoters procured a charter from the legislature by which they and one other were incorporated under the name of the Belfast Water Company, the defendant in this case. P. & S. Laws of 1887, chap. 94. The chartered purpose of the corporation was to furnish water to the people of Belfast for domestic and other usages, and to the city of Belfast for the extinguishment of fires and other public uses. Among other things, the corporation was empowered to dig up the streets for the purpose of laying its pipes, and to fix and collect water rates. The charter provided that, after the corporation should commence receiving pay for water supplied by it, it should be bound to furnish, at a reasonable rate, water for the inhabitants of the city for said uses, and to the city in its corporate capacity for public uses. The charter authorized the city to contract with the corporation for water for public uses, on such terms as the parties might agree upon, including the remission of taxes upon the real estate, fixtures, and plant of the corporation.

The Belfast Water Company, in 1887, constructed its waterworks in Belfast. The contract between the promoters and the city was not assigned by the promoters to the water company. And no new contract was made by the city with the defendant company, as was authorized by the company's charter. But December 1, 1887, the defendant notified the city of the completion of its works in this language: "The works of the Belfast Water Company, so far as they relate to the fire service contracted for with the city are now ready for use, and we have the honor of turning over to the city the hydrant wrenches, and the use of the hydrants for fire service, in accordance with the terms of said contract."

And from that time until recently both parties have conducted themselves in apparent recognition of the contract with the promoters. The company has set the hydrants and furnished water, and the city has paid the agreed hydrant rental, amounting to between \$30,000 and \$40,000. And the company has brought divers suits to enforce contract rights. The compensation for the use of water for sprinkling and other public uses mentioned in the contract, except for hydrants, has been paid by the remission of taxes, as the contract provided.

In January, 1916, the defendant, being advised, as it says, that the contract between the promoters, or the company itself, and and the city, was illegal, and that it

was wrong for it to be performed further, notified the city that from and after April 1, 1916, it should refuse to recognize it as of binding force, and should thereafter refuse to perform thereunder. It also notified the city that unless arrangements were made by the city to pay a fair compensation for all hydrants in use, it would, after April 1st, cease to maintain said hydrants or permit their use by the city.

Thereupon this bill was brought, setting forth the essential facts, and praying that the defendant be enjoined from preventing the plaintiff's use of the hydrants, and that it be commanded to maintain the hydrants and to furnish an adequate supply of water therefor. The case comes before us on report.

In argument, the defendant does not question the conclusion that the promoters' contract has been impliedly adopted by both parties, nor that the defendant is bound by the engagements entered into by its promoters as far as they were legal. It is settled that if a corporation expressly or impliedly adopts the contract made by its promoters, and obtains its benefits, it must take it with its obligations and burdens. It must do what the promoters agreed to do. *Robbins v. Bangor R. & Electric Co.* 100 Me. 496, 1 L.R.A. (N.S.) 963, 62 Atl. 136.

But the defendant contends that the contract, is illegal, null, and void for three reasons: (1) That it "ignores the right of the state to regulate and control the terms and conditions of service by fixing terms and conditions unalterably for all time;" (2) that it "ignores the principle that utilities must serve all alike on fair terms, by a provision that a large and important part of the service shall be rendered without compensation for all time after the expiration of twenty years;" and (3) that it "ignores the right of the state to levy taxes upon a just and reasonable basis by fixing for all time certain public services as the measure of all taxation of the company's property."

For these reasons the defendant claims that it is under no duty or obligation to furnish water to the city, and that it has a legal right to discontinue the water service to the city, unless and until the city will make arrangements to pay fair compensation.

The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was ultra vires, it was so only as to the city, and that the question of ultra vires, and the contention that the contract

was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not contra bonos mores, he should not be permitted to question the validity of it; that he is estopped. *Ft. Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 38 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Collins v. Cobe*, 202 Ill. 469, 66 N. E. 1079; *State ex rel. Pope v. Germania Bank*, 90 Minn. 150, 95 N. W. 1116; *Gibbs v. Craig*, 58 N. J. L. 661, 33 Atl. 1052; *Flower v. Barnekoff*, 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370; *Dyer v. Walker*, 40 Pa. 157; 2 *Parsons Contr.* 961. And in *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

Again, while it is true that in general the courts will refuse to enforce contracts contra bonos mores, there is good reason for saying that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, and no case where it has sought to be relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provision. They, and they alone, can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others not complaining. *Williamson v. Carlton*, 51 Me. 449; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham, & I. Bridge Turnp.*



Corp. v. Norfolk County, 6 Allen, 353; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the Federal courts in national bank cases are illustrative. They point to the doctrine that the ultra vires transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they were impliedly forbidden, they are valid unless questioned by the government. *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129.

Again, we think it should be said that it is at least questionable whether the company should be permitted to discontinue its service, in order to compel the city to come to its terms, for that would be the effect of it. After maintaining relations for nearly thirty years, strictly under the provisions of the promoters' contract, it is now too late to say that the parties have not adopted it, and are not bound by it, so far as lawful. A controversy as to its legality has arisen. The city certainly had sufficient reason to assert its legality. The courts are seldom willing to give a water company the arbitrary power to compel the settlement of disputed claims by refusing to supply water. *Wyman, Pub. Serv. Corp.* § 458. Some expressions of the court in *Wood v. Auburn*, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906, are peculiarly apposite. Applying them to this case, they would read as follows: The parties are not on equal ground. The city, once taken onto the system, becomes dependent on that system. To suddenly deprive it of water puts it to an enormous disadvantage. It must surrender its sense of injustice. Such a power in the company places the city at its mercy. The city cannot resist lest it lose the water. The case of *Wood v. Auburn*, supra, is not a precedent for this case, for the circumstances are not alike. But the reasoning of the court is significant.

The foregoing considerations impress us strongly, and we think afford sufficient grounds for awarding an injunction against L.R.A.1917B.

the defendant. But were it otherwise, we think the contention of the defendant cannot be sustained.

By the charter of the company, the city was authorized to contract with it for water for public uses on such terms as the parties might agree upon, including the remission of taxes. Instead of making a new contract, the parties, as we have seen, adopted an existing contract. And this we think they might do under the statute. It was in effect making a contract. So that the contract which the parties have mutually acted under for nearly thirty years is based upon legislative authority. The state gave the authority. We are not called upon to consider now whether the state has reserved authority to regulate and control the terms and conditions of service. The state has not yet undertaken to do it, in this case. The state so far has said only that the parties might contract on such terms as they might agree upon. And so far as the contract was within the authority given by the charter, it must be held to be valid. The legislature placed no limit upon the length of time for which they might contract, and therefore we cannot. Whether the legislation was wise or unwise was a question of public policy. It was a question for the legislature. And a legislative determination of public policy, within constitutional limitations, is conclusive upon the courts. Cities, as well as corporations, are creatures of the state. And we know of no constitutional provision which forbids a contract between city and company for a supply of water for an unlimited period.

A similar question arose in *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24, where the city resisted the payment of water rates, on the ground that the contract for the same was without limit as to time. The court suggested that the contract, like the contract in this case, was not necessarily unlimited in time, because the city had the right at any time to put an end to it by purchasing the works. The court then said: "But, waiving this, the conclusive answer to the position is that the power to provide the city with a supply of water has been conferred by the legislature upon the common council in an unqualified form, and that the court has no competency to circumscribe such a grant."

Mr. Dillon says: "When a city has statutory authority to enter into contracts for a supply of water and gas for its own use, and for the use of its inhabitants, the manner in which its statutory authority shall be exercised and the terms of any contract which it may enter into, including the number of years during which it is to

continue, rests within the discretion of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud, or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court on the established principles of law or equity. . . . The decisions do not disclose that there is any stated term which the courts will regard as so unreasonable as to be an unfair and unreasonable exercise of the discretionary powers of the municipality." 3 Dill. Mun. Corp. § 1307.

But it is said that, even if the city had authority to make a contract unlimited in time, it had no authority to make one that violates the legal principle that public utilities must serve all alike, without discrimination. In other words, it could not make an illegal contract. And it is claimed that the provision for free hydrant service after twenty years is violative of that principle. It is true that, by the common law, a public service corporation must serve all similarly situated whom it is under a duty to serve, upon equal terms, and without discrimination. Free service to some is discriminatory. The same principle is declared in the public utilities law of this state. Laws of 1913, chap. 129, § 32. The purpose of the law, both common and statutory, is to protect the public. Persons sui juris, and business corporations, are presumed to be able to protect themselves.

But one answer to the contention is that the hydrant service is not free. It has been bought and paid for. Under the unlimited powers given by the charter we see no reason why the parties might not lawfully have contracted for a hydrant service for all time, to be paid for in one gross sum. If so, there is no reason why they might not contract for a gross sum to be paid in instalments. The company, on the whole, is entitled to reasonable returns only. And the sums contributed by the city whether at one or many times, serve so far to lessen the burden upon other consumers. We can see no more reason why a city whose statutory power is without expressed limit may not lawfully contract for a future perpetual hydrant service for a present payment than that it may buy or build and pay for a municipal structure for a future perpetual use. There is no mystery about a hydrant rental contract. It is a pure business proposition. The state invested the city with wide discretionary powers. It must be assumed, in the absence of proof to the contrary, that the powers have been exercised in a manner supposed to be advantageous to both parties. There is nothing in the case which shows that the contract was un-

reasonable, inequitable, or unfair to the city. Instead of contracting for a gross sum, or for annual payments, they contracted for 20-year payments. In effect, the city paid the entire hydrant rental in twenty years. A telling point is that the city has paid the entire contract price. The company has received it, and still keeps it. It would be grossly inequitable to permit the company to repudiate the contract now. See *Union Nat. Bank v. Matthews*, 98 U. S. at page 629, 25 L. ed. 188. It must abide the contract so far as hydrant rentals are concerned.

Another answer is that free service to the public is not, at common law, unreasonable, and therefore unlawfully, discriminatory. The law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public, are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absence of legislation upon the subject such discriminations cannot be held illegal as matter of law without overturning the foundation upon which the rule itself is built. *New York Teleph. Co. v. Siegel-Cooper Co.* 202 N. Y. 511, 30 L.R.A.(N.S.) 560, 96 N. E. 109. So in *Superior v. Douglas County Teleph. Co.* 141 Wis. 363, 122 N. W. 1023, a contract binding a telephone company to maintain, without charge, telephones in the public offices of the city, was held not to be invalid as against public policy. The court said: "The contract in this case having been made before the legislation occurred prohibiting discriminatory rates, such legislation does not cut any figure in the case. If the contract were valid when made, it is within the constitutional protection precluding the legislature from impairing the obligations of contracts. . . . Discriminatory contracts between public utility corporations and their patrons which are held to be void as inimical to the public good are so held because unreasonable advantage is thereby given to one customer or a class over others, whereas all have a moral and legal right to equality of treatment. In case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular customer has over general customers obviously inures to the benefit of the latter in the aggregate. In other words, in the ultimate there is no discrimination which is inimical to the public good, and hence no violation of public policy."

See *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.)

1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 278, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; National Waterworks Co. v. School Dist. (C. C.) 4 McCrary, 198, 48 Fed. 523; Dempsey v. New York C. & H. R. R. Co. 146 N. Y. 290, 40 N. E. 867; Wyman, Pub. Serv. Corp. § 1304.

This states the case as at common law. If it be said that the common-law rule has been abrogated by statute, and that the state under its reserved power may enact regulatory provisions which in effect abrogate the contract, it may be answered that the state has not attempted to do so in this case, except, as it may be urged, by the Public Utilities Statute (Laws of 1913, chap. 129). Section 31 of that statute forbids unreasonable preferences. But, as we have seen, discrimination in favor of a municipal corporation is not unreasonable. Section 32 makes it unlawful for any person or corporation to receive any rebate, discount, or discrimination in respect to any service rendered, or to be rendered, by any public utility. We think there is nothing in this statute which tends to show that the legislature intended to impair the obligation of any existing lawful contract. The language indicates that the legislation was to have a prospective, not a retroactive, effect. See similar case of Public Service Electric Co. v. Public Utility Comrs. 88 N. J. L. 603, P.U.R.1916D, 107, 96 Atl. 1013. Besides, to give it a retroactive effect would impair the obligation of a contract valid at common law, which is forbidden by the Federal Constitution. See *Superior v. Douglas County Teleph. Co.* supra.

But it is said further that the contract is illegal because of the provision for the remission of taxes in consideration of water furnished for several public uses. With respect to this contention it may fairly be said that its determination is not necessarily involved in this case. The contract provision for free hydrant service and for other public service to be compensated by remission of taxes are distinct and separable. One might be invalid without affecting the validity of the other, and we have held the hydrant service provision to be valid. The issues raised by the bill in this case relate only to the hydrant service. But the question of remission of taxes has been argued, and we will notice it briefly.

The power of remission is granted by the charter. And it may be said here that all the cases where municipalities have attempted to contract without legislative authority are not pertinent to the present discussion. Here the legislative permission, which is precise and express, must control, L.R.A:1917B.

unless unconstitutional. It is not claimed to be unconstitutional. The state has said that these parties may, by contract, fix the value of certain public services, as the equivalent of the amount of taxes assessed upon the company's property, so that one may offset the other. In *Portland v. Portland Water Co.* 67 Me. 135, it was settled that the legislature may authorize the exemption or remission of taxes as equivalent compensation for public service rendered. So are the cases elsewhere. See cases collected in 40 Cyc. 788. In the *Portland Case* the power was granted by statute for six years only. In *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 830, it appeared that there was legislative authority for a contract for a municipal supply of water, for which such compensation was to be paid as might be agreed upon, but nothing was said about remission of taxes. A contract was made by which the city agreed to pay for water service a sum annually which should "be equal to the tax annually assessed against the company." The court held the contract, which was limited in time to twenty years, to be valid. It said: "A municipality may, for a reasonably adequate consideration, in the way of service rendered to it for municipal purposes, agree to make compensation therefor, for a term of years not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company . . . may be obliged to pay as taxes assessed upon its property."

The *Waterville Case* is to be distinguished from the one at bar in this respect: That in that case there was no express legislative authority to remit taxes. The remission was made and upheld under a general grant of power to make a contract. In this case the charter is express, and fixes no limit of time for the operation of the contract. This distinction is noticed in *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 20 Sup. Ct. Rep. 50, cited by the defendant.

And if, notwithstanding the charter, the question of public policy were open to us, it may be said that if such a contract is to be deemed reasonable at the outset, for a limited time, it is not unfair to presume, in the absence of proof to the contrary, that the value of the public services and the amount of taxes assessed would continue, *pari passu*, to be equivalent.

We conclude that the contract is valid, and that an injunction should be awarded as prayed for.

Bill sustained, with costs.

Permanent injunction to issue as prayed for.

MISSISSIPPI SUPREME COURT.  
(Division B.)MISSISSIPPI CENTRAL RAILROAD  
COMPANY, Appt.,  
v.

DAVE McWILLIAMS.

(— Miss. —, 72 So. 925.)

**Master and servant — wood thrown  
from engine — liability for injury.**

A railroad company is not liable for injury to one walking along its right of way by wood thrown from an engine by a fireman, for his own use, without the knowledge or consent of the company, and against its rules.

For other cases, see *Master and Servant*, III. a, 2, in *Dig. 1-52 N. S.*

(November 27, 1916.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Forrest County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. S. E. Travis, for appellant:

Defendant is not liable for plaintiff's injury, which resulted from the act of the fireman on the train while engaged in his own personal enterprise, throwing wood from the tender for his private use, without the knowledge or consent of defendant.

6 Labatt, Mast. & S. p. 6906; Pittsburgh, Ft. W. & C. R. Co. v. Maurer, 21 Ohio St. 421; Burke v. Shaw, 59 Miss. 443, 42 Am. Rep. 370; Illinois C. R. Co. v. Latham, 72 Miss. 32, 16 So. 757; Sullivan v. Morrice, 109 Ill. App. 650; Goodloe v. Memphis & C. R. Co. 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166; Louisville, N. O. & T. R. Co. v. Douglass, 69 Miss. 723, 30 Am. St. Rep. 582, 11 So. 933; Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 84 Am. St. Rep. 620, 28 So. 823; Walton v. New York Cent. Sleeping Car Co. 139 Mass. 556, 2 N. E. 101; Chicago, B. & Q. R. Co. v. Epperson, 26 Ill. App. 79; Galveston, H. & S. A. R. Co. v. Currie, 10 L.R.A. (N.S.) 396, note; Walker v. Hannibal & St. J. R. Co. 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360.

Plaintiff was at most a mere licensee upon defendant's right of way at the time

**Note.**—As to liability of railroad company for personal injuries by objects thrown from moving train, see annotation following this case, post, 916.  
L.R.A.1917B.

of his injury, to whom it owed no duty, except that of not inflicting upon him a wilful or wanton wrong.

Illinois C. R. Co. v. Arnola, 78 Miss. 787, 84 Am. St. Rep. 645, 29 So. 768; Yazoo & M. V. R. Co. v. Smith, — Miss. —, 71 So. 75.

Messrs. Currie & Currie for appellee.

Potter, J., delivered the opinion of the court:

The appellee in this case, plaintiff in the court below, recovered a judgment for \$250 against the appellant, defendant in the court below, on account of personal injuries sustained by him. The plaintiff in this case alleged and proved that he was walking on a path used a number of years by the general public as a footpath across the railroad right of way of the defendant company, and that when he reached a point on the railroad where the said path crosses same, a worktrain of the appellant was returning to the city of Hattiesburg, and the fireman on said train, for his own private use, and without the knowledge or consent of appellant or any of its agents, threw some wood from the tender of the engine in question opposite his home, and, without seeing or knowing where the appellee was, struck him with the wood and injured him. It appears without contradiction in this record that the fireman was engaged in an enterprise of his own when he was hauling the wood on the tender of the engine. He had done this only two or three times previous to this occasion, and the conductor of the train did not know that the fireman was hauling wood on the tender of the engine. And, further, that this act on the part of the fireman was in violation of the rules of the railroad company, and the fireman was ordered to stop this practice, if such it had become, as soon as the conductor found out about it, at the time the accident occurred.

This case must be reversed. The fireman on defendant's engine was acting entirely outside of the scope of his employment. The enterprise he was engaged in was his own. He was hauling wood for his own use, without the knowledge or consent of defendant's agents. Burke v. Shaw, 59 Miss. 443, 42 Am. Rep. 370; Illinois C. R. Co. v. Latham, 72 Miss. 32, 16 So. 757; Louisville, N. O. & T. R. Co. v. Douglass, 69 Miss. 723, 30 Am. St. Rep. 582, 11 So. 933; Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 84 Am. St. Rep. 620, 28 So. 823.

Reversed, and judgment here for appellant.

**Annotation—Liability of railroad company for personal injuries by objects thrown from moving train.**

The earlier cases on the question under discussion may be found in note to *Louisville & N. R. Co. v. Eaden*, 6 L.R.A.(N.S.) 581.

The liability of railroad company for injuries to an employee by object thrown from train by train employee in course of his duty is the subject of a note to *Illinois C. R. Co. v. Hart*, 52 L.R.A.(N.S.) 1117.

The following annotations are also pertinent to the question discussed in this note:

Liability of master for injury from the sportive manner in which a servant performs an act done in the discharge of his duty. *Soderlund v. Chicago, M. & St. P. R. Co.* 13 L.R.A.(N.S.) 1193. Liability of master for injuries inflicted upon an employee maliciously or in sport by other employees. *Medlin Mill. Co. v. Boutwell*, 34 L.R.A.(N.S.) 109 and *Robinson v. Melville Mfg. Co.* 52 L.R.A.(N.S.) 385.

Liability to passenger for injury by article falling from passing train. *Bradley v. Lake Shore & M. S. R. Co.* 44 L.R.A.(N.S.) 1148.

Liability of railroad company for personal injuries from negligent operation of trains, to persons on adjoining property or highway. *St. Louis, I. M. & S. R. Co. v. Jackson*, 31 L.R.A.(N.S.) 980.

Liability of railroad company for injury to persons, not employees, caused by defectively loaded car. *Covington & C. R. Transfer & Bridge Co. v. Mulvey*, 26 L.R.A.(N.S.) 204.

Liability of elevated railway company for personal injury to one on surface. *Carney v. Boston Elev. R. Co.* 42 L.R.A.(N.S.) 90.

As stated in the note in 6 L.R.A.(N.S.) 581, it is generally held, in cases of injury by mail bags thrown from moving train, that the fact that a mail agent is not in the railroad company's employ will not relieve it from liability if it appears that it is the custom to throw the pouch from the moving train and the railroad company has knowledge of such negligent practice.

So it is stated in *Southern R. Co. v. Rhodes* (1898) 30 C. C. A. 157, 58 U. S. App. 349, 86 Fed. 422, 4 Am. Neg. Rep. 733, that in order to affect the railway company with the charge of negligence, it is necessary to prove that the company had notice of a practice of the L.R.A.1917B.

postal employees to throw off the mail pouch at a place where it was dangerous; that notice may be expressed or implied from a long continuance of such practice. The company was held not liable for injury to passenger on platform by mail pouch thrown by employee of postoffice department, the evidence being insufficient to justify a finding that the custom existed for a period sufficiently long prior to the accident to charge the company with notice.

But where a passenger, after visiting a restaurant, stood in the public street alongside of the platform and train which he had just left and received an injury resulting in death by being struck with a piece of timber thrown from a car by an employee, the company was, in *Jeffersonville, M. & I. R. Co. v. Riley* (1872) 39 Ind. 568, held liable; the court upheld instructions to the effect that the deceased, whether a passenger or not, had a right to stand in the street in or alongside of which the railroad was located, and being properly there, the railroad company had no right to throw sticks of wood from the train to the street without first ascertaining whether such action would endanger the person of anyone walking or standing there. "It is not necessary that a person should actually be on the train of the railroad in order to be regarded as a passenger, and have the rights of such against the company. He may sustain that relation and not be actually on the train or in a car. This, as well as other companies, had its places of stopping for refreshments. Accommodations for leaving the train, and going to and returning from the dining rooms, had been provided, and passengers were thus invited to leave the train for that purpose. This was a necessary and proper purpose. The deceased was not negligent or in fault in leaving the train, or in standing by it on his return. On the contrary, he was doing only that which was customary, and what he was, by the surroundings, invited and expected to do. It is true that he was not on the main platform in front of the depot, for that was on the other side of the train from the dining room. Nor does the evidence show that he was actually standing on the narrow platform on the west side of the train; but he was near to it, and it is not material that he should have been exactly on that

platform," there probably being no regulation or usage which required passengers to walk on the planks and nowhere else.

In these cases it is essential that the evidence should show that it was the custom to throw the mail where it was liable to do injury to some person, but it is not essential that the evidence show that it was thrown customarily at the exact spot where the party was eventually struck. *Pittsburgh, C. C. & St. L. R. Co. v. Warrum* (1907) 42 Ind. App. 179, 82 N. E. 934, rehearing denied in (1908) 42 Ind. App. 196, 84 N. E. 356.

In *Pittsburgh, C. C. & St. L. R. Co. v. Warrum* (Ind.) supra, a railroad was held liable where a person passing along a platform dedicated by the company to the public for a street was injured by mail sacks thrown by a postal clerk from a train passing at a high rate of speed. The person was neither a trespasser nor mere licensee, but was where he had a lawful right to be, and the railroad company was bound, in the exercise of its rights, to observe reasonable care not to injure him. It was bound to observe the same care toward him as it was required to exercise toward those who used the platform for some purpose connected with the company's business. The court says that the distinction between this case and the *Muster Case* (1884) 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223 (employee injured by mail sack) set out on page 582 of the note 6 L.R.A.(N.S.) is that in this case the evidence affirmatively shows that at the point where the mail was customarily discharged there was danger of injuring persons by throwing it from the moving train, while in the *Muster Case* the evidence does not disclose that the place where the mail was discharged was one where danger of injury to any person could reasonably have been apprehended.

So where a railroad ran through a public street and a boy fifteen years old, while passing along the walk of the baggage car, was injured by a trunk thrown out of the car by an employee, the railroad company was, in *St. Louis Southwestern R. Co. v. Underwood* (1905) 74 Ark. 610, 86 S. W. 804, held liable, the railroad company owing the boy a duty to employ reasonable means and exercise reasonable care to avoid injuring him. The court held inapplicable the principle that the railway company owed plaintiff no duty except to use ordinary care not to injure him after having discovered his place of peril, or, in L.R.A. 1917B.

other words, that it was the duty of the railway company only to avoid such gross and wanton negligence as was equivalent to a wilful or intentional injury. The court observed that there was no error in assuming that plaintiff was rightfully in the place where he was injured, and in refusing the request of defendant for an instruction to the effect that defendant was not liable unless its employees inflicted the injury upon plaintiff with "wilful and wrongful intention."

So the railroad company was held liable in *Toledo, W. & W. R. Co. v. Maine* (1873) 67 Ill. 298, where a person, rightfully upon a depot platform for the purpose of ascertaining the departure of a certain train, was injured by a piece of timber thrown from a box car standing on the track beside the platform, which car the employees of the company were at the time unloading.

The case of *Willis v. Maysville & B. S. R. Co.* (1905) 119 Ky. 949, 85 S. W. 716 (1906) 122 Ky. 658, 92 S. W. 604, 13 Ann. Cas. 74, set out in the earlier note on page 583, and involving injury to boy standing on street, was reaffirmed on third appeal (1907) 31 Ky. L. Rep. 1249, 104 S. W. 1016, the court stating that "the jury were instructed that if the agent 'negligently threw or kicked' the lump of ice from the train, injuring appellee, they should find for him in damages. It is objected that the word 'threw' had no place in this instruction, as it was entirely unsupported by the evidence, which showed that the ice was kicked from the train. In the connection these words were used, there is no substantial difference between them; and it would be exceedingly far-fetched to say that the jury were misled, or the right of the appellant prejudiced, by the insertion of the word 'threw,' when the evidence showed that the lump of ice was kicked from the train."

Where a section hand was injured by a crossarm thrown by a telegraph employee from a moving freight train, the railroad company was held liable in *Geddings v. Atlantic Coast Line R. Co.* (1912) 91 S. C. 477, 75 S. E. 284, the court stating that it was the duty of the railroad company to unload its freight, and it could not escape liability by delegating such duty to the telegraph company. The court observed that the fact that the right of way where the injury was sustained was constantly, and with the knowledge and consent of the railroad company, traveled by the public, tended to show that it was recklessness

to throw the crossarm from the train at that point.

Where, however, a baggage-master, for the purpose of assisting a contractor under defendant railroad company in dropping tools along the route, threw from a passing train a crowbar, injuring an employee of the contractor, the railroad company was, in *Cunningham v. Grand Trunk R. Co.* (1871) 31 U. C. Q. B. 350, held not liable, the baggage-master's act not being within the scope of his employment.

A railroad company has been held liable to a trespasser injured by ice thrown from a moving train by a baggageman, who was acting within the scope of his employment, and had discovered the presence of the former in time to have prevented the injury. *Louisville & N. R. Co. v. Petrey* (1915) 167 Ky. 223, 180 S. W. 370.

So the decision in *Dorsey v. Kansas City, P. & G. R. Co.* (1901) 104 La. 478, 52 L.R.A. 92, 29 So. 177, held the railroad liable where a brakeman, instead of waiting a few moments to oust a trespasser after a stop of the train, chose to pelt him with rocks and clods to make him get off the rod where he was riding, stealing a ride under the car. The trespasser, in endeavoring to escape from under the car while it was running, fell and was killed. It was, observed the court, within the course of the brakeman's employment to compel him to stop trespassing and leave the car, and had he exercised the right in a proper and legal manner, there would have been no good cause to complain. The damage arose from the manner of the removal. It was unnecessarily violent and illegal. The act of trespassing was not of itself contributory negligence justifying defendant's servant to resort to the acts he did, when there was not the least reason to infer that there was necessity to resort to any violence at all to remove the trespasser.

So the decision in *Pierce v. North Carolina R. Co.* (1899) 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399, held that the tortious act of a brakeman in throwing coal at a boy on the tender of an engine, by which he knocked him off or frightened him so that he jumped off, causing him to be run over and killed by the engine, rendered the railroad company liable.

So, in a similar case, *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418, it was stated that although the plaintiff had no right to be on the car, the jury would have been justified in finding, as they L.R.A.1917B.

did, such reckless, gross, and culpable negligence as to render the defendant liable for damages, if the brakeman had been shown to have been acting in the line of his duty and within the scope of his employment. In this case a brakeman attempted to drive boys off a moving coal car by throwing coal at them, some pieces of which struck the plaintiff in the face and partially blinded him, in consequence of which he slipped and fell in trying to get off the train.

The doctrine that railway companies are liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered has no application in cases where the servants' acts causing the injury are beyond the scope of their employment. Consequently, where a yardmaster in violation of the rules of the company threw coal from a freight car, injuring a trespasser walking through the yards, the company was, in *St. Louis, I. M. & S. R. Co. v. Laven-dusky* (1908) 87 Ark. 540, 113 S. W. 204, held not liable, the yardmaster's act being beyond the scope of his employment and of no benefit to the railroad. The court distinguished such cases as *Fletcher v. Baltimore & P. R. Co.* (1897) 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35, set out in the earlier note on page 583, where the person at the time of his injury was upon a street crossing where he had the right to be and where the company owed him the duty to exercise ordinary care to avoid injuring him; and *St. Louis South Western R. Co. v. Underwood* (1905) 74 Ark. 610, 86 S. W. 804, where the person injured was upon a public street.

So a railroad company was held not liable in *Louisville & N. R. Co. v. Routt* (1903) 25 Ky. L. Rep. 887, 76 S. W. 513, where a fireman on a passing train purposely and maliciously threw a piece of coal at and injured a person, such act not being within the scope of the servant's employment. In this case plaintiff testified that he was walking along the path, at the edge of the ties, usually taken by people on their way to town, when, on stepping out of the way of an oncoming train, he was struck by a piece of coal.

See also *MISSISSIPPI C. R. Co. v. Mc-WILLIAMS*, ante, 915, where railroad is held not liable for personal injury by wood thrown from engine by fireman for his own use. The plaintiff in this case alleged and proved that he was walking on a path used a number of years by

the general public as a footpath across the railroad right of way.

So it was held in *Chesapeake & O. R. Co. v. Ford* (1914) 158 Ky. 800, 166 S. W. 605, that the railroad company cannot be held liable for injury to person walking along a railroad right of way caused by being struck and scalded by a stream of hot water thrown from a locomotive by those in charge, the act being malicious and wilful, and not within the scope of the servant's employment. The court said: "If the plaintiff, in the case at bar, had been on the freight train, or attempting to board it, and the railway company's servants, in an effort to prevent his boarding the train, or in an effort to eject him after he had boarded it, had thrown the scalding water upon the plaintiff and thereby injured him, the company would be liable for such act, upon the ground that it was an act performed within the scope of the authority of the servants in question.

"But it is not shown in the record, and the court, in the absence of evidence to that effect, will not presume, that those in charge of a freight train are charged by the company with any duty of driving trespassers off of the right of way. Had such duty been proven, and had the servants of the company, in the discharge of that duty, thrown the hot water upon the plaintiff and thereby injured him, the company would be responsible for the act.

"If the plaintiff had been in a place where he had a right to be, and it had been the duty of the company's servants upon the locomotive to have thrown the water, and the servants had negligently performed that duty and thereby injured plaintiff; or if such servants in the performance of their duty had intentionally and maliciously thrown hot water upon plaintiff and thereby injured him, the company would be liable, even though plaintiff may have been a trespasser. But there is no claim by the plaintiff that any duty was being performed by the company's servants at the time they threw the hot water upon plaintiff; in fact, all the evidence for plaintiff goes to show, upon the part of such servants, a wilful and deliberate departure from the course of their employment, and the performance by them intentionally and wilfully of an act wholly without the scope of their authority; and, under this state of fact, the lower court erred in overruling the motion of defendant to direct the jury to find a verdict for it.

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"The only instruction given by the court for the plaintiff directed the jury to find for plaintiff if they believed from the evidence that plaintiff, 'while walking along on the right of way of defendant company in a peaceable and orderly manner, and not interfering with the company's servants in the operation of the train, was injured by the servants of defendant company wrongfully, unlawfully, and maliciously throwing hot water upon him.' If there had been evidence to authorize an instruction upon the theory that defendant company's servants were acting within the scope of their authority, and such instruction had been given, then the instruction that was given by the court would have been proper if changed so as to direct the jury to find for defendant, instead of plaintiff, if they believed as stated in this instruction." (As to liability of railroad company for injuries inflicted by its employees, on a trespasser after the latter had left the train, see note to *Cincinnati, N. O. & T. P. R. Co. v. Rue*, 34 L.R.A.(N.S.) 200.

The decision in *Johnson v. Chicago, R. I. & P. R. Co.* (1913) 157 Iowa, 738, L.R.A.1916F, 945, 141 N. W. 430, holds that a railroad company does not by its trusting signal torpedoes to a brakeman become liable for injury caused by his using one for a weight to aid in delivering a personal note, to a person living near the right of way, by throwing it from the train. In this case the act complained of was not within the real or apparent scope of the brakeman's employment in a legal sense, being, apparently, purely personal between the brakeman and the plaintiff. J. D. C.

#### ARKANSAS SUPREME COURT.

ROZE E. BENNETT, Appt.,

v.

J. R. THOMPSON.

(— Ark. —, 189 S. W. 363.)

**Appeal — peremptory instruction — question open.**

1. The question before the reviewing court where the trial court gave a peremptory instruction is whether or not the evidence in favor of the prevailing party,

**Note.** — For right of broker to recover commissions where owner has refused to make the sale for a price otherwise satisfactory, because of broker's misrepresentations as to offers obtained, see annotation following this case, post, 922.



viewed in its strongest light, is sufficient to sustain the verdict.

*For other cases, see Appeal and Error, VII 1, in Dig. 1-52 N. S.*

**Broker — compensation — concealment of facts.**

2. A broker employed to find a purchaser for real estate is entitled to no compensation if he conceals from his employer the true amount offered for the property, by reason of which the employer refuses to transfer the property.

*For other cases, see Brokers, II. b, 2, in Dig. 1-52 N. S.*

(November 6, 1916.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in plaintiff's favor in an action brought to recover the amount of broker's profit on a sale by plaintiff of defendant's real estate. Reversed.

The facts are stated in the opinion.

Messrs. J. W. House, J. W. House, Jr., and A. F. House, for appellant:

Whether one acts as a broker or agent, the duty to his principal is the same, and the compensation, when not expressed, is the same.

Haas v. Ruston, 14 Ind. App. 8, 56 Am. St. Rep. 288, 42 N. E. 298; Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717; Featherston v. Trone, 82 Ark. 381, 102 S. W. 196; Taylor v. Godbold, 76 Ark. 396, 88 S. W. 959; Little v. Phipps, 208 Mass. 331, 34 L.R.A.(N.S.) 1046, 94 N. E. 260.

Another prerequisite for the recovery of commissions is that the agent must show that he has produced a purchaser who was ready, willing, and able to take the property upon the exact terms proposed by the seller.

Poston v. Hall, 97 Ark. 23, 132 S. W. 1001; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15; Cadigan v. Crabtree, 179 Mass. 480, 55 L.R.A. 77, 88 Am. St. Rep. 397, 61 N. E. 37; 4 R. C. L. Brokers, § 52; McGavock v. Woodlief, 20 How. 224, 15 L. ed. 884; Boysen v. Robertson, 70 Ark. 58, 68 S. W. 243; Snow v. Macfarlane, 51 Ill. App. 448; Kellogg v. Keeler, 27 Ill. App. 244; Gross, Real Estate Brokers, ¶ 216; Matheney v. Godin, 130 Ga. 713, 61 S. E. 703.

Messrs. Hutton & Harkey for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted by appellee against appellant to recover the amount of brokers's profit on a sale of real estate. Appellant owned a tract of land at Magazine, Arkansas, and authorized appellee to find a purchaser for her, which he did, and re-

ported the sale to her; but appellant refused to consummate the deal on the ground that appellee had deceived her by withholding the true amount of the agreed price, and appellee sues to recover the difference between the amount of the price which appellant agreed to accept for the land and the amount he was to receive from the purchaser. The case was tried before a jury in the circuit court, and both sides asked a peremptory instruction. The court gave the appellee's requested instruction, so the question presented to us on this appeal is whether or not the testimony, viewing it in its strongest light in appellee's favor, is sufficient to sustain the verdict. St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339. The testimony will therefore be stated in its strongest light favorable to appellee's right of recovery.

The two parties to the controversy met in Little Rock, where appellee resided, and appellant informed appellee that she owned land at Magazine, and asked him to find a purchaser for her. Nothing was said at that time about the price, nor about the payment of any commission. Appellant then returned to her home in Muskogee, Oklahoma, and later appellee found a prospective purchaser who agreed to take the land at the price of \$750. He wrote to appellant, informing her that he had found a purchaser, and that he could sell the land so as to get her the net price of \$500, but said nothing about the price he was to get from the purchaser. She replied by telegram, accepting the offered price, and appellee then wrote to her instructing her to make the deed to the purchaser, reciting a consideration of \$750, and forward the deed to one of the banks in Little Rock, with instructions to pay him (appellee) \$250 out of the consideration to be paid. Appellant refused to consummate the sale when she ascertained the true price for which the land was sold.

Appellee testified that he was not acting as agent for Miss Bennett, the appellant, and was not buying the property for himself, but was acting as a broker, and expected to earn as a profit the difference between the price Miss Bennett agreed to accept and the price to be paid by the purchaser. He testified that the customary commission of a real estate agent was 5 per cent on the amount of the sale, but that it was customary for a broker to earn a greater profit on a deal negotiated by him. Under this state of facts, we are of the opinion that appellee's conduct in withholding from appellant the information as to the amount of the purchase was a wrongful act which prevents him from recovering the amount claimed, or any amount. The case is ruled by several decisions of this court.

In *Boysen v. Robertson*, 70 Ark. 56, 68 S. W. 243, the facts were that Robertson, a real estate broker, agreed to seek a purchaser for Mrs. Jones, the owner of certain lands, at the price of \$3 per acre net to her. Boysen's agent, Thweatt, was authorized to purchase the land at \$4 an acre, and the two agents Robertson and Thweatt, got together and negotiated a sale and purchase between their principals for \$4 an acre. One half of the difference between the net price which the owner had agreed to accept and which the prospective purchaser had agreed to pay was to be allowed to Robertson for his commission. The two principals subsequently disregarded this agreement, and negotiated a sale direct between themselves at the price of \$4 per acre. Robertson sued Boysen for the commission he was to receive, and in denying the relief sought this court said: "The contract meant that the land must bring to Mrs. Jones \$3 per acre over and above all expenses and deductions. . . . This was only a limitation upon his power to sell. It was still his duty to sell the land for the highest price obtainable, and to account to Mrs. Jones for the proceeds, less a compensation not greater than the excess of the purchase money over \$3 per acre net, and at the same time not exceeding a reasonable compensation. The whole amount for which he sold the land was due to and recoverable by Mrs. Jones. If he had collected it, he might have reserved out of it what his principal was owing him on account of the sale. But the contract made by him was never completed."

In *Taylor v. Godbold*, 76 Ark. 395, 88 S. W. 959, the facts were similar, except that the subject-matter of the contract was personal property. The court delivering the opinion quoted the following statement of the law from *Mechem on Agency*, § 952: "Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. . . . It is his duty, therefore, to fully and freely disclose to his principal at all times the fact of any interest of his own or of another client which may be antagonistic to the interests of his principal, and he will not be permitted to take advantage of the situation to make gain for himself by forestalling or undermining his principal."

It was held that the broker was not entitled to recover any commission.

The same doctrine is announced in *Featherston v. Trone*, 82 Ark. 381, 102 S. W. 196.

It is contended by counsel for the appellee that the principle announced by this court does not control for the reason that he was acting not as an agent, but as a broker. This argument overlooks the fact L.R.A.1917B.

that a brokerage transaction is governed by the doctrine of agency. "A broker is a peculiar kind of an agent," says the Indiana court, "and brokerage is a peculiar kind of agency. It is the business of a broker to negotiate contracts between others in matters of trade and commerce. He usually deals with the contracting parties, and not with the things which may be the subject of the contract. He has neither interest in nor possession of the property which it is his business to buy or sell for others, and ordinarily he has no implied power to buy or sell in his own name. It is in these respects that a broker differs from a factor and from an ordinary agent." *Haas v. Ruston*, 14 Ind. App. 8, 56 Am. St. Rep. 288, 42 N. E. 298.

The rule is again stated as follows: "A broker acting strictly as middleman to effect a purchase and sale of property is the common agent of both buyer and seller; otherwise he is the agent of the party originally employing him." 19 Cyc. 191.

To the same effect, see *Rapalje, Real Estate Brokers*, § 2, and *Gross, Real Estate Brokers*, § 141.

The Supreme Court of the United States, in *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, quoted with approval a text-writer's definition of "broker" and "principal" as follows: "The engagement of a broker is like to that of a proxy, a factor, or other agent; but with this difference, that the broker, being employed by persons who having opposite interests to manage, he is, as it were, agent both for the one and the other to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain, the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally."

The duty therefore rests upon the broker the same as any other agent to make disclosure to his principal of the terms of the negotiation, so that the principal may act advisedly in determining whether or not the proposal is satisfactory. A broker can undoubtedly make a contract whereby he will be entitled to the difference between the amount of the price the seller agrees to accept and the amount the purchaser agrees to pay, regardless of what the amount is. But such a contract must be plainly expressed in order to relieve the broker of the duty he owes to his principal to make full disclosure concerning the terms of the negotiation.

This rule is very aptly stated by the Georgia court as follows: "We do not mean to hold that, if the real estate brokers who are plaintiffs in this case had alleged an express contract that if they should procure a purchaser for the property listed with them, they might have as compensation for their services all that they might sell the property for, above a fixed sum, they would not be entitled to such excess as compensation for their services, in case they procured a purchaser. But where the owner agrees with brokers for them to sell property for a named amount 'net to him,' such language will not be held to import by implication a contract to allow the brokers, as a fee or profit, all of the purchase price in excess of the sum so named." *Matheney v. Godin*, 130 Ga. 713, 61 S. E. 703.

It follows therefore that appellee is not entitled to recover the profit which he claims to have earned by the sale. If appellant, after receiving knowledge of the terms of the sale, had accepted the price offered and consummated the sale, she would have been liable to appellee for a reasonable compensation. *Boysen v. Robertson*, supra. But appellant refused to consummate the sale after she ascertained the true conditions, and appellee did not ask for a consummation on any other terms. Appellant had a right to disregard the trade on account of appellee's unfaithfulness, and is therefore not liable to him for any amount. *Featherston v. Trone*, supra; *Little v. Phipps*, 208 Mass. 331, 34 L.R.A. (N.S.) 1046, 94 N. E. 260.

The judgment of the Circuit Court is therefore reversed, and the cause is dismissed.

**Annotation—Right of broker to recover commissions where owner has refused to make the sale for a price otherwise satisfactory, because of broker's misrepresentations as to offers obtained.**

Generally, as to real estate broker's commissions as affected by default of principal in entering into or carrying out contract with purchaser, see note to *Brackenridge v. Claridge*, 43 L.R.A. 593. And as to right of broker to commissions where he procures purchaser at price stated by his principal, but on slightly different terms in regard to cash or time of payment, and the owner refuses to consummate the sale, see note to *Jepsen v. Marohn*, 21 L.R.A. (N.S.) 935. And, generally, as to fraud and secret dealings or interest of real estate brokers as affecting their commissions, see extensive annotation to *Leathers v. Canfield*, 45 L.R.A. 33. Many other concrete questions concerning the right of a broker to commissions are treated in notes referred to in the Indexes to L.R.A. Notes under the title, "Brokers."

The few authorities which have passed upon the question presented in the present annotation seem to be unanimous to the effect that a broker employed to sell property is entitled to no compensation from the principal if he conceals or makes misrepresentations with respect to the amounts of offers for the property obtained by him, by reason of which the principal refuses to transfer the property.

This was the rule applied in *BENNETT v. THOMPSON*, ante, 919, it being held that where a broker employed to sell certain lands without agreement as to commissions obtained a purchaser for \$750, L.R.A.1917B.

and reported that he could sell so as to net the principal \$500, but said nothing about the offer of \$750 received by him, which offer of \$500 was accepted, the broker could recover neither the \$250 difference in price, nor the reasonable commission to which he would have been entitled had the sale been consummated, the principal having refused to convey after receiving knowledge of the true terms of sale.

And the rule above outlined finds direct support in *Bolla v. Martin* (1914) 187 Ill. App. 266, wherein it was held that where a broker authorized to sell property for \$1,600, of which \$75 was to be commission, sold same for \$1,700, but reported to his principal that he had sold it for \$1,600, and concealed the fact that the purchaser was his wife, but the principal, becoming suspicious, repudiated the sale, the broker could not recover a commission.

And in *Braden v. Randles* (1905) 128 Iowa, 653, 105 N. W. 195, where a real estate agent who was to have as commission all that certain property sold for over \$2,000 found a purchaser who was willing to pay \$2,100, but reported to the principal that the purchaser would not pay more than \$2,000, and that if he closed the deal he should have some compensation, whereupon it was agreed that he would be paid \$20 upon the closing of same, it was held that the agent's fraud in procuring the agreement for the added compensation violated the en-

fire contract so as to prevent recovery of commissions for services rendered in procuring a purchaser, the principal having repudiated the agreement, and having refused to convey the land thereunder. In reaching this conclusion the court stated the rule as follows: "An agent owes his principal the utmost good faith, and if he fraudulently and falsely misrepresents the situation for the purpose of increasing his compensation and securing a more advantageous contract for himself, he cannot recover anything thereunder."

So, in *Murphy v. Earle* (1912) — **Tex. Civ. App.** —, 150 S. W. 486, where an agent employed to sell land at \$40 per acre for a 10 per cent commission procured a purchaser at that price, but induced the principal to execute a contract in favor of a third person at \$20 per acre, who was to convey to the real purchaser, by fraudulently concealing the offer of \$40, and representing that only \$20 per acre could be obtained, it was held that the agent could not maintain an action based on the owner's failure to perform the contract of sale, he having refused to carry out the contract after discovering the true facts.

And again in *Cardozo v. Middle Atlantic Immigration Co.* (1914) 116 **Va.** 342, 82 S. E. 80, it was held that commissions for having procured a purchaser for real estate could not be recovered where the broker had not dealt fairly with the principal, and because of this the sale was not completed. In this case the broker had a contract with defendant to sell a farm upon a 10 per cent commission, and procured a purchaser for \$13,000, and entered into a contract with him on that basis. The broker notified defendant that he had a purchaser, and asked if he would take \$8,500, and, upon his refusal, asked if he would take \$10,500 net, which latter offer was accepted in ignorance of the contract of sale for \$13,000, by reason of which the broker's commissions were increased from \$1,300 to \$2,500. In addition to the mentioned concealment, it also was not positively denied that the plaintiff had led defendant to believe that he was getting only \$11,000 for the property. And in holding that such conduct constituted unfair dealing and precluded the broker from recovering commissions in an action based on the ground that the sale was not completed because of the fault of defendant, the following controlling principles were stated: "A broker or agent who undertakes to procure a purchaser of property

placed with him for sale is required to act in good faith in presenting to his principal a purchaser. It is the duty of the agent to place his principal in full possession of the facts bearing upon his personal interest and relations to the subject and toward the prospective purchaser. It is not enough for the broker or agent to say that he thought his principal was advised as to all the facts, nor is it sufficient if he be able to point out circumstances from which an inference might be drawn that the principal knew or had means of knowledge. It may be true that the principal has suffered no injury by reason of his ignorance of the facts, but the law makes no such inquiry. In order to remove temptation from the path of agents, as far as can be done, it stamps, from motives of public policy, all such dealings with the seal of its condemnation. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents, and so careful is the law in guarding this fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on the opposite side in the same transaction."

And in *Taylor v. Godbold* (1905) 76 **Ark.** 395, 88 S. W. 959 (referred to in *BENNETT v. THOMPSON*, ante, 919), where an owner of cotton seed quoted same to a broker at \$14 per ton, and the broker obtained a purchaser at \$15, but did not inform his principal of the price offered, it was held that the broker, upon the refusal of the principal to consummate the sale at \$14 per ton, could not recover a commission on the alleged sale, the court saying that "it is unquestionably good law, as well as good morals, that the unfaithful broker who seeks a profit from the transaction other than the commission for his brokerage could not recover of his principal for any commissions."

And the same principle was laid down in *Humphrey-Gibson v. Robinson* (1904) 134 **N. C.** 432, 46 S. E. 953, wherein the owner of \$12,000 in notes employed brokers to invest same in real estate, who thereupon procured an offer of certain lands for \$10,155, which were offered to the principal for \$12,300, the actual price to be paid for the land not being disclosed. The principal failed to comply with the contract calling for \$12,300, and it was held that the brokers could not recover damages for such failure, the court saying that it was their

duty as agents "to communicate to their principal all the facts known to them and which were material to the transaction, and they will not be permitted to benefit either directly or indirectly by any dealing conducted in her name in which this was not done. The principal reposes trust and confidence in the agent, and the latter owes in return the duty to his principal of being faithful in all things, and he must at all times and in all circumstances put his principal's advantage above his own. This relation involves the duty of carefully guarding the interests of the principal and reporting to him all material matters which may come to the agent's knowledge. The principle is of universal application that an agent or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his

benefit to the injury of the principal. . . . We think it is well settled that a broker cannot recover his commissions, and certainly not damages in the place of them, if he has failed in any respect to make a full disclosure of the material facts to his principal, nor if the latter is prejudiced thereby."

Another case of interest is *Martin v. Bliss* (1890) 57 Hun, 157, 10 N. Y. Supp. 886, affirmed without opinion in (1892) 132 N. Y. 551, 30 N. E. 865, wherein it was held that a broker employed to sell real estate for \$50,000, who attempted to induce his principal to sell at a less sum, although such price had already been accepted by a proposed purchaser, could not recover any commission for his services, the principal having refused to complete the contract. G. J. C.

#### MISSISSIPPI SUPREME COURT.

MOBILE & OHIO RAILROAD COMPANY,  
Impleaded, etc., Appt.,

v.

GREENWALD & CHAMPENOIS.

(104 Miss. 417, 61 So. 426.)

#### Commerce — interference by state — penalty for failure to settle claim.

1. A penalty imposed by a state upon a carrier for failure promptly to settle a claim for injury to property in its possession for transportation is not invalid as an interference with interstate commerce.

*For other cases, see Commerce, II. c, in Dig. 1-52 N. S.*

#### Courts — jurisdiction — amount involved — statutory penalty.

2. The amount of the statutory penalty for failure to settle a claim for injury to property in possession of a carrier for transportation, which is included in the complaint against the carrier for damages, should be considered in determining whether the suit involves a sum within the jurisdiction of the courts in which it is brought.

*For other cases, see Courts, II. a, 3, in Dig. 1-52 N. S.*

#### Appeal — failure of jury to assess damages — assessment by court.

3. The entry of judgment for the amount demanded in the petition upon a verdict merely finding for plaintiff, without naming the amount of damages, is not reversible error if, from the evidence, it appears that

a new trial would result in a verdict for that sum.

*For other cases, see Appeal and Error, VII. m, 8, in Dig. 1-52 N. S.*

(March 31, 1913.)

**A**PPEAL by defendant Mobile & Ohio Railroad Company from a judgment of the Circuit Court for Lauderdale County in plaintiff's favor in an action brought to recover damages for injury to property while in defendant's possession for transportation, and to recover the amount of the statutory penalty for failure to promptly settle the claim. Affirmed.

The facts are stated in the opinion.

Messrs. Baskin & Wilbourn for appellant.

Messrs. Fewell & Cameron for appellee.

Cook, J., delivered the opinion of the court:

Appellees obtained judgment for \$215 against appellant for damages to a mule occurring in its transportation from Tupelo to Meridan. The suit was filed against the Mobile & Ohio Railroad Company and the St. Louis & San Francisco Railroad Company, jointly, for actual damages to the mule, \$190, and for \$25 damages for the failure of the railroad company to settle the claim for damages within the time prescribed by chapter 196 of the Laws of 1908.

To this declaration a demurrer was interposed, upon the grounds: (a) The circuit court was without jurisdiction, because the suit was for less than \$200; (b) that chapter 196 of the Laws of 1908 is in violation

**Note.**—As to constitutionality of statute imposing penalty or added liability for failure of railroad or carrier to pay claim, see annotation following this case, post, 926. L.R.A.1917B.

of the interstate commerce clause of the national Constitution. This demurrer was overruled.

The verdict of the jury was as follows: "We, the jury, decide for plaintiff against the Mobile & Ohio R. R. Co." Upon this verdict the court entered a judgment against appellant for \$215.

Appellant says that the judgment should be reversed for two reasons, viz.: Because the court erred in overruling its demurrer; and because the court erred in entering the judgment for \$215 on the verdict of the jury, the jury having failed therein to assess the damages to be recovered by plaintiff.

We will consider the constitutional question first. Appellant cites two cases decided by this court to support its contention that chapter 196 of the Laws of 1908, prescribing a penalty of \$25 to be recovered by shippers from railroads that fail to settle claims for damages to freight within the prescribed limits, is void as an attempt to regulate commerce between the states. The first case is *Alexander v. Western U. Teleg. Co.* 66 Miss. 162, 3 L.R.A. 71, 14 Am. St. Rep. 556, 5 So. 397, and the second is *Marshall v. Western U. Teleg. Co.* 79 Miss. 154, 89 Am. St. Rep. 586, 27 So. 614.

In *Alexander v. Western U. Teleg. Co.* it is decided that the statutory penalty cannot be recovered for a failure to deliver a telegram sent from Starkville, Mississippi, to Chattanooga, Tennessee. We think this decision correctly announces the law. It is undoubtedly true that the penal statutes of a state can have no extraterritorial effect. The state cannot penalize an omission of duty occurring wholly within another jurisdiction. In *Marshall v. Western U. Teleg. Co.* the question here involved is not decided at all, because the court said that the statute did not penalize delays in the transmission of telegrams.

It is certain that this court in neither of the cases cited has said anything tending to support appellant's contention. In *Marshall v. Western U. Teleg. Co.* supra, Judge Whitfield cites and comments upon *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, which case is directly in opposition to appellant's view of the law.

The Supreme Court of the United States, in *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399, decided April 3, 1911, puts this question entirely at rest. In that case Judge Lurton states the question decided in this way: "The only question for decision is whether a statute of the state of Virginia, which imposes a penalty for the failure to transmit a despatch received at an office of the company in the state for transmission to a per-

son in another state, is a valid exercise of the power of the state; the delay occurring in the state." After reviewing other cases decided by that court, Judge Lurton announces the court's opinion upon the validity of a state statute penalizing a failure to transmit a message sent from one state to be delivered in another state, as follows: "The requirement of the Virginia statute as here applied is a valid exercise of the power of the state, in the absence of legislation by Congress. It is neither a regulation of, nor a hindrance to, interstate commerce, but is in aid of that commerce."

It will be observed that Judge Whitfield, when he said in *Marshall v. Western U. Teleg. Co.* 79 Miss. 161, 89 Am. St. Rep. 585, 27 So. 615: "We also think it fairly deducible from both cases that a state statute imposing a penalty for delay in the transmission of the message over the wires from one state to another state would be an interference with interstate commerce within the meaning of the Federal Constitution (§ 8 of article 1)," interpreted the decisions of the United States Supreme Court differently from that court's subsequent interpretation thereof in *Western U. Teleg. Co. v. Crovo*, supra.

It is idle to discuss the relative value of the decisions of this court and the decisions of the Supreme Court of the United States upon questions involving the interpretation of the national Constitution, as, right or wrong, we are bound by the decisions of the latter tribunal. So we conclude that the court below did not err in overruling the demurrer challenging the validity of chapter 196 of the Laws of 1908.

Coming, now, to the first ground of demurrer, that the circuit court was without jurisdiction to try the case. The declaration demands judgment for actual damages and for the penalty of \$25, making in all \$215. It is contended that the amount which controls the jurisdiction of the court is the actual damages inflicted upon the mule, and that the penalty is a mere incident to the suit, like interest and costs. In the many cases touching the jurisdiction of the justice of the peace and circuit courts, in none do we find any aid in the solution of this question. The precise point seems never to have been raised; if so, the case has not been called to our attention, and we have found no such case. The penalty inflicted by the statute does not depend upon the railroad's contract to transport the freight. The railroad may be ever so derelict in its duties and grossly unmindful of its contractual obligations, and still the penalty does not follow. For the negligent loss of, or damage to, freight, the company is responsible; but this alone forms no basis for the

recovery of the statutory penalty. The penalty arises from the failure and refusal to settle the claim for damages; and this must be disclosed and proven independently before the penalty may be recoverable. There must be a claim made, it is true; but the settlement of the claim does not necessarily defeat the right to recover the penalty.

While the recovery of the penalty depends upon the right to recover actual damages, yet it is not necessary that suit be brought for actual damages before a suit is maintainable for the penalty. The railroad company may have paid the claim after the time limit had expired, but this would not defeat the right to recover the penalty. We decide that the circuit court was the proper court in which to bring this suit, the amount of demand being in excess of \$200.

The jury, by its verdict, merely found against appellant, but did not find the damages of the plaintiff. Upon this state of the record, the court rendered judgment for the full amount declared. This is assigned as error, and it is earnestly urged that for this error the judgment must be reversed, and the cause remanded, if for no other reason,

because there was a conflict in the evidence upon the quantum of damages. We have given very careful consideration to the evidence disclosed by the record, and, properly understood and interpreted, we believe that there is no real conflict in the evidence. A casual reading of the testimony of the veterinary surgeon would disclose an apparent conflict between him and the other witnesses with reference to the value of the animal after the injury; but a more careful reading has convinced us that his opinion of value was mere vague conjecture, or estimation, and could have no weight with the jury. If the case should be reversed, the question of the amount of damages alone would be submitted to the jury, and, as we believe from the record that the finding would necessarily correspond with the amount for which judgment was given, we are of opinion that a reversal would be unwarranted.

Affirmed.

Writ of error dismissed by the Supreme Court of the United States, under agreement of the parties August 17, 1914, 235 U. S. 717, 59 L. ed. 438, 35 Sup. Ct. Rep. 197.

### **Annotation—Constitutionality of statute imposing penalty or added liability for failure of railroad or carrier to pay claim.**

This note is supplemental to the two notes in 42 L.R.A.(N.S.) 102 and 106, where the earlier cases are collected.

The question of validity of provision for attorney's fee is excluded, as it is treated in the notes to *Builders' Supply Depot v. O'Connor*, 17 L.R.A.(N.S.) 910, and *Missouri, K. & T. R. Co. v. Harris*, L.R.A.1915E, 943.

#### **Statutes affecting carrier as such.**

Supplementing note in 42 L.R.A.(N.S.) 106.

#### **—as interference with interstate commerce.**

It seems to be generally considered that state statutes of this character as regards interstate shipments have been superseded since the so-called "Carmack amendment of 1906," and that this effect is to be given to the decision in the *Varnville Case* (U. S.) *infra*, in 1915. Under this view the case of *MOBILE & O. R. Co. v. GREENWALD*, *ante*, 924, is no longer authority.

It was provided in such Carmack amendment: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to L.R.A.1917B.

the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It was held in *Charleston & W. C. R. Co. v. Varnville Furniture Co.* (1915) 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715, *Ann. Cas.* 1916D, 333, reversing (1913) 98 S. C. 63, 79 S. E. 700, a case where it did not appear where the loss

occurred, that Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by the act of June 18, 1910 (36 Stat. at L. 539, chap. 309, Comp. Stat. 1913, § 8563), and the act of June 29, 1906, known as the "Carmack amendment" (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), amending respectively §§ 1 and 20 of the act of February 4, 1887 (24 Stat. at L. 386, chap. 104), as to invalidate the provisions of S. C. Civ. Code 1912, § 2573, in so far as they may subject a terminal carrier to the prescribed penalty of \$50 for failure to pay promptly a claim for damages to an interstate shipment, no matter where the loss occurred, unless the carrier proves that the shipment never came into its possession, or succeeds, within the forty days allowed, in shifting the loss by giving notice as to when, where, and by which carrier the property was damaged, or by showing that it used due diligence, but was unable to discover where the damage occurred; nor is the statute saved by calling it an exercise of the police power, nor by the proviso in the act of June 29, 1906, saving the rights of holders of bills of lading under existing law. The court said, *inter alia*: "As was said in *Missouri, K. & T. R. Co. v. Harris* (1914) 234 U. S. 412, 420, 58 L. ed. 1377, 1382, L.R.A. 1915E, 942, 34 Sup. Ct. Rep. 790, the result of many recent cases there cited, beginning with *Adams Exp. Co. v. Croninger* (1913) 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and coming down through *Boston & M. R. Co. v. Hooker* (1914) 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593, is that 'the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded.' It is true that in that case the inclusion of the attorney's fee, not exceeding \$20, in the costs upon judgments for certain small claims, was upheld, although incidentally including some claims arising out of interstate commerce. But, apart from the effect being only incidental, the ground relied upon was that the statute did not 'in any wise enlarge . . . the responsibility of the carrier' for loss, or 'at all affect the ground of recovery, or the measure of recovery' (pp. 420, 422)." The court points out that the claims dealt with in *Atlantic Coast Line R. Co. v. Mazursky* (1910) 216 U. S. 122, 54 L. ed. L.R.A.1917B.

411, 30 Sup. Ct. Rep. 378, cited in the earlier note in 42 L.R.A.(N.S.) 107, arose before the date of the Carmack amendment.

Upon the authority of the foregoing *Varnville Case*, it has been held that state statutes imposing a penalty for failure to pay claims within a specified time do not relate to interstate shipments. *Farmers Elevator Co. v. Great Northern R. Co.* (1915) 131 Minn. 152, 154 N. W. 954; *Blalock Hardware Co. v. Seaboard Air Line R. Co.* (1915) 170 N. C. 395, P.U.R.1916A, 1051, 86 S. E. 1025; *J. S. Pinkussohn Cigar Co. v. Clyde S. S. Co.* (1915) 101 S. C. 429, 85 S. E. 1060; *Trakas v. Southern R. Co.* (1915) 102 S. C. 211, 86 S. E. 492.

In the *Minnesota case* the claim was for part of the goods lost in transit, shipped from without the state to within the state, the defendant being the carrier throughout the journey; in the *North Carolina case* the claim was for overcharge on the entire journey, against the terminal carrier, whose carriage was entirely within the state, on a shipment from without the state. As to the *South Carolina cases* it is sufficient to refer to the view taken by the state court of the *United States Supreme Court* decision in the *Varnville Case*. In the *Pinkussohn Case* (1915) 101 S. C. 429, 85 S. E. 1060, the *South Carolina court* said: "Since the decision of this case on circuit, the decision of this court in *Varnville Furniture Co. v. Charleston & W. C. R. Co.* (1913) 98 S. C. 63, 79 S. E. 790, affirming the constitutionality of the statute under which the penalty of \$50 was recovered in this case, has been reversed by the *Federal Supreme Court*, which holds that the statute is unconstitutional and void as applied to interstate commerce. (1915) 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715, Ann. Cas. 1916D, 333, 100 S. C. 229a. The penalty must, therefore, be remitted." And in the *Trakas Case* (1915) 102 S. C. 211, 86 S. E. 492, it was said: "We think the judgment of the circuit court must be affirmed, except as to so much of it as allows the penalty. The final arbiter of that question has, since the trial on circuit, outlawed our penal statute in those shipments which move from one state to another; and this is one of that sort."

These recent decisions in *North Carolina* and *South Carolina* dispose of the authority of the earlier cases of *Thurston v. Southern R. Co.* (1914) 165 N. C. 598, 81 S. E. 785; *Macon County Supply Co. v. Talluloh Falls R. Co.* (1914) 166 N. C. 82, 82 S. E. 13; *Du Pre v. Colum-*



bia, N. & L. R. Co. (1912) 98 S. C. 468, 79 S. E. 310; *Stukes v. Southern Exp. Co.* (1913) 96 S. E. 383, 80 S. E. 612.

In *Morphis v. Southern Exp. Co.* (1914) 167 N. C. 139, 83 S. E. 1, decided before the *Varnville Case*, it was held that a state statute imposing a penalty on common carriers for failure to pay claims for damages no longer applied to interstate shipments, since "the Interstate Commerce Commission, acting under the authority conferred by Congress, adopted a rule on 24 July, 1913, to be effective 1 February, 1914, applicable to common carriers, providing that 'in the event of a claim being made in writing, the company shall immediately acknowledge its receipt, and shall, within six months of the date thereof, notify the claimant in writing of the disposition made thereof. Claims for personal loss or damage shall be given equally prompt disposition.'"

Prior to the *Varnville Case* it had been held in South Carolina that an action by the shipper of goods from South Carolina to North Dakota against the initial carrier, to recover the penalty of \$50 provided by the state statute of 1910 (26 Stat. at L. 717), for failure to pay the loss or damage or trace the property and inform the person interested when, where, and by which carrier the said property was lost, damaged, or destroyed, within forty days, could not be sustained, as the "Carmack amendment" of 1906 controlled the matter. *Meetze v. Southern Exp. Co.* (1912) 91 S. C. 379, 74 S. E. 823.

(In this connection reference may be made to *Wichman v. Atlantic Coast Line R. Co.* (1915) 100 S. C. 138, 84 S. E. 420, where, after a carriage from Illinois to Charleston, South Carolina, was completed, the defendant tortiously took the property from the carrier and forwarded it to Waterboro, South Carolina, and refused to deliver it except in payment of the additional cost of transportation from Charleston to Waterboro; and it was held that the plaintiff was entitled to recover the overcharge and penalty for failure to pay the claim within forty days.)

—other constitutional questions.

As pointed out in the note in 42 L.R.A. (N.S.) 106, statutes imposing a penalty for delay in payment ought to be limited to cases where the recovery equals or exceeds the amount of the claim which the carrier failed to pay. With this limitation, such statutes imposing moderate penalties have been generally approved. L.R.A.1917B.

Thus, a statute imposing upon a common carrier a penalty of \$25 for the failure to settle and adjust within sixty days a claim against it, and imposing a like penalty upon a person presenting a fraudulent claim, no penalty to be recovered unless the claimant recovers the full amount claimed by him, is not against due process of law; nor does it deny to the carrier the equal protection of the law; nor is it unconstitutional as class legislation. *Riskin v. Great Northern R. Co.* (1914) 126 Minn. 138, 147 N. W. 960, Ann. Cas. 1915D, 823.

So, a statute is not against due process of law which provides for a penalty of \$50 for failure of a common carrier to adjust and pay within a time named every claim for loss or damage to property or overcharge for freight, "provided, that unless such claimant shall in such action recover the full amount claimed, no penalty shall be recovered, but the recovery shall be limited to the actual loss or damage or overcharge, with interest thereon from the date of filing said claim;" nor does such a statute infringe the constitutional provision that "no person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state in person, by attorney or both." *Southern R. Co. v. Lowe* (1913) 139 Ga. 362, 77 S. E. 44; but the judgment for the plaintiff was reversed on another ground.

A statute requiring a common carrier to furnish cars, etc., and providing that on failure to pay damages within thirty days after notice, double damages and attorney's fee may be recovered, is not unconstitutional in that the title of the act did not permit the provision giving the right to recover double damages when such right is not placed "within the control of the board of railroad commissioners,"—the title being: "An Act to Regulate Common Carriers and to Define the Powers and Duties of the Board of Railroad Commissioners of the State of South Dakota in Relation Thereto, and Imposing Penalties for the Violation of the Provisions of This Act." *Dunlap v. Chicago, M. & St. P. R. Co.* (1913) 32 S. D. 581, 144 N. W. 226.

It has been held in North Carolina that it was not contrary to due process of law to enable a plaintiff to recover the penalty for failure to pay a claim for a charge in excess of its printed tariff, even if his demand or notice was for more than he recovered, although the statute provided that the shipper must recover the amount claimed in his notice,

to entitle him to the penalty. *Macon County Supply Co. v. Tallulah Falls R. Co.* (1914) 166 N. C. 82, 82 S. E. 13; *Tilley v. Southern R. Co.* (1916) — N. C. —, 90 S. E. 309.

Compare *Stupeck v. Union P. R. Co.* (1912) 200 Fed. 192, in the second division of this note.

**Statutes affecting railroads in capacity other than that of carrier.**

Supplementing note in 42 L.R.A. (N.S.) 102.

As to the constitutionality of statutes imposing penalties upon railroad companies for failure to fence track or build cattle guards, see the note in 31 L.R.A. (N.S.) 863.

And as to the constitutionality of statutes making railroad companies absolutely liable for damages by fire or to stock, irrespective of negligence, see the note in 35 L.R.A. (N.S.) 1016.

As shown in the earlier note, statutes of this character ought to be limited to cases where the recovery equals or exceeds the amount of the claim which the carrier failed to pay.

In a case where the owner's demand and declaration were for more than his recovery, it was held that a statute is unconstitutional, as depriving a railroad company of its property without due process of law, which provides that the company, in case of a loss by fire set by its locomotive, shall be liable for double the amount of damage actually sustained unless it pays the full amount within sixty days from notice, but that if, within sixty days, it shall "offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages, when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs." *Chicago, M. & St. P. R. Co. v. Polt* (1914) 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301, reversing (1910) 26 S. D. 378, 128 N. W. 472, where the court said: "No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of

an excessive demand. The case is covered by *St. Louis, I. M. & S. R. Co. v. Wynne* (1912) 224 U. S. 354, 56 L. ed. 799, 42 L.R.A. (N.S.) 102, 32 Sup. Ct. Rep. 493. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just. *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* (1912) 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40."

Followed in *Chicago, M. & St. P. R. Co. v. Kennedy* (1914) 232 U. S. 626, 58 L. ed. 762, 34 Sup. Ct. Rep. 463, reversing (1911) 28 S. D. 94, 132 N. W. 802.

In *Stupeck v. Union P. R. Co.* (Fed.) supra, where it does not appear what the claim was for, it was said: "The demand made upon the defendant was greatly in excess of the amount which the judgment of the court declared to be its legal liability. The effect of the statute, if given the construction contended for by plaintiff, is thus to penalize the defense of the company against what the result shows to have been an excessive claim, and is therefore repugnant to the 14th Amendment of the Constitution. The case is thus controlled by *St. Louis, I. M. & S. R. Co. v. Wynne* (U. S.) supra."

It was held in *Seaboard Air Line R. Co. v. Robinson* (1914) 68 Fla. 407, 67 So. 139, that the statute authorizing a recovery of double damages and attorney fees for failure of a railroad company to pay for live stock killed by a train of the railroad company, within sixty days after presentation of the claim for such stock killed, is not invalid in its application, where a verdict is rendered for the amount agreed to have been demanded and to be the value of the live stock killed.

*Kansas City Southern R. Co. v. Anderson* (1912) 104 Ark. 500, 149 S. W. 58, cited in note in 42 L.R.A. (N.S.) 103, was affirmed in the United States Supreme Court in (1914) 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599, and the statute which was held unconstitutional in *St. Louis, I. M. & S. R. Co. v. Wynne* (U. S.) supra, as applied to a case where the claimant sued for less than the amount demanded before suit, was sustained as to a case of stock killed, where the jury awarded the amount claimed before suit; the statute providing for double damages and an attorney's fee for stock killed or injured by railroad trains. The decision passed on the due process clause and also denied the contention that the statute deprived the railroad company "of the equal pro-

tection of the laws, in that it singles out railroads and subjects them to the payment of double damages and attorneys'

fees when litigants in general are not subject to the same burdens."

B. B. B.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE GAS COMPANY, Appt.,  
v.

BOARD OF PUBLIC UTILITY COMMISSION et al.

(— N. J. —, P.U.R.1915E, 251, 94 Atl. 634.)

**Certiorari — to review rates fixed by Public Commission.**

1. Certiorari lies to review an order of a Public Utility Commission fixing rates for the service rendered by a public service corporation, either on behalf of the public, because the rate fixed is too high, or on behalf of the utility company, because it is too low.

*For other cases, see Certiorari, I. a, in Dig. 1-52 N. S.*

**Public service corporation — rates — going value.**

2. The value of the property of a gas company organized to serve the public, upon which rates are to be based, should include "going value," which includes the permission which it has to use its property for the purposes of its incorporation and to occupy public streets with its mains, and also the burdens which it has assumed and performed in the public interest, as contemplated by the legislature.

*For other cases, see Gas, III. b, in Dig. 1-52 N. S.*

**Same — earning capacity — right to consider.**

3. In fixing the value of the franchises of a public service corporation for the purpose of establishing rates, nothing should be included because of earning capacity, although such element is taken into consideration for purposes of taxation, and affects the value of the stock, since the state's omission to enforce reasonable rates in the past, which may have resulted in high earning power, does not affect the duty to charge only reasonable rates in the future, and the right to exact reasonable rates cannot be capitalized so as to entitle the corporation to earnings on the increased value thereby

**Note.**—The treatment to be given to "going concern" value or "going" value in the valuation of the property of public service corporations is discussed in an exhaustive note to *Omaha v. Omaha Water Co.* 48 L.R.A.(N.S.) 1084. See also the following recent cases in this series: *People ex rel. Kings County Lighting Co. v. Wilcox*, 51 L.R.A.(N.S.) 1; *Oshkosh Waterworks Co. v. Railroad Commission*, L.R.A.1916F, 592; *Murray v. Public Utilities Commission*, L.R.A.1916F, 756. L.R.A.1917B.

added, since such addition would at once make the rate unreasonable.

*For other cases, see Gas, III. b, in Dig. 1-52 N. S.*

(Gummere, Ch. J., and Parker, Bergen, and Vredenburg, JJ., dissent.)

(June 14, 1915.)

**A** PPEAL by the Gas Company from a judgment of the Supreme Court affirming an order of the Public Utility Commission, fixing the rate to be charged the public by it for gas. Affirmed.

The facts are stated in the opinion.

Messrs. Frank Bergen, Robert H. McCarter, and Richard V. Lindabury, for appellant:

Before the Utility Commission is authorized to prescribe a rate for gas furnished by a company it must find that the existing rate is "unjust, unreasonable, insufficient, or unjustly discriminatory or preferential."

*Marshall Oil Co. v. Chicago & N. W. R. Co.* 14 Inters. Com. Rep. 210.

The Commission can only proceed in the manner provided by the statute, and must prescribe "a just and reasonable rate;" not a rate that may just escape condemnation as confiscatory. A hearing under the statute means a full and fair hearing that must take into consideration all of the property of the public utility, and all elements of its value.

*Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *People ex rel. Bridge Operating Co. v. Public Service Commission*, 153 App. Div. 129, 138 N. Y. Supp. 434; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Franklin County v. Nashville, C. & St. L. R. Co.* 12 Lea, 521; *Pittsburgh C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421-429, 38 L. ed. 1031-1037, 14 Sup. Ct. Rep. 1114; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470-479, 38 L. ed. 238-242, 14 Sup. Ct. Rep. 396.

The inquiry whether an existing rate for public service is reasonable or not is a judicial proceeding.

*Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Special franchises cannot be disregarded in estimating the value of property for rate making.

Hoboken Land & Improv. Co. v. Hoboken, 36 N. J. L. 540; State, Richards, Prosecutors, v. Dover, 61 N. J. L. 400, 39 Atl. 705; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 77; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, L.R.A.—, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906; 3 Kent, Com. pp. 377, 378; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Parker v. Elmira, C. & N. R. Co. 165 N. Y. 274, 59 N. E. 81; Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Authority to alter, amend, or repeal a charter does not reserve the right to destroy or impair the value of property acquired while the corporation exists.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; New York v. Twenty-Third Street R. Co. 113 N. Y. 311, 21 N. E. 60; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; State ex rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 145, 121 N. W. 919; Com. v. Essex Co. 13 Gray, 239; Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 311; Belvidere Water Co. v. Belvidere, 82 N. J. L. 601, 83 Atl. 241; West Jersey R. Co. v. Cape May & S. L. R. Co. 34 N. J. Eq. 164; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362.

Messrs. Edward F. Merrey, Albert O. Miller, and George L. Record, for appellees:

Franchise value cannot be allowed as basis of rate making.

Smyth v. Ames, 169 U. S. 545, 546, 42 L. ed. 848, 849, 18 Sup. Ct. Rep. 418; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 213, 214, 48 L. ed. 406, 413, 24 Sup. Ct. Rep. 241; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A.(N.S.) 1209, 118 Pac. 354; Spring Valley Waterworks v. San Francisco, 192 Fed. 137; Re Advances in Rates—Western Case, 20 Inters. L.R.A.1917B.

Com. Rep. 307; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966, affirmed in 223 U. S. 655, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668; Mayhew v. Kings County Lighting Co. 2 P. S. C. R. (1st Dist. N. Y.) 659; Consolidated Gas Co. v. New York, 157 Fed. 849; Willcox v. Consolidated Gas Co. 212 U. S. 19, 44, 53 L. ed. 382, 396, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Lincoln Gas & Electric Light Co. v. Lincoln, 182 Fed. 926; Appleton v. Appleton Water Works Co. 5 Wis. R. C. R. 215; Savannah & Suburban R. Improv. Assn. v. Savannah & Electric Co. (Ga. R. Com.) decided Jan. 5, 1912.

Nor can going values be considered.

Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa, 426, 48 L.R.A.(N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966; Mayhew v. Kings County Lighting Co. 2 P. S. C. R. (1st Dist. N. Y.) 659; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 113 Pac. 668; Re Third Ave. R. Co. 2 P. S. C. R. (1st Dist. N. Y.) 94; Appleton v. Appleton Waterworks Co. 5 Wis. R. C. R. 215; Re Queens Borough Gas & E. Co. 2 P. S. C. R. (1st Dist. N. Y.) 544; Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Knoxville v. Knoxville Water Co. 212 U. S. 1, 9, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148.

No allowance should be made for goodwill value.

Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; Consolidated Gas Co. v. New York, 157 Fed. 849; Spring Valley Waterworks v. San Francisco, 192 Fed. 137; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L.R.A. 856, 54 Atl. 6.

White, J., delivered the opinion of the court:

This case and the two city appeals (Nos. 3 and 4 of this term) present appeals by two municipalities upon one side and by a public utility company on the other from the judgment of the supreme court with respect to an order by the Public Utilities Commission fixing the rate to be charged the public for gas by the utility company in a district which includes the two municipalities.

I am unable to agree with the supreme court that certiorari is not the municipalities' remedy in their cases. I know of no other remedy, and, of course, it cannot be that they have none. The Commission has

fixed a rate of 90 cents, and the municipalities are dissatisfied with the order fixing that rate. They think the rate fixed is too high, just as the utility company thinks the rate too low. Neither can bring mandamus, because the Utilities Commission is vested by law with a discretion in fixing the rate. It would be like asking the court to mandamus or order a jury to agree upon a certain smaller named sum as its verdict in a case where a question of fact involving the amount of the verdict was to be decided. The verdict rendered might be too high or too low to accord with the legal principles governing the case; but, while a question of fact remains, a mandamus or a court direction is out of the question. The remedy is to set the verdict aside. So here the remedy is to set the Commission's order aside because erroneous, and the proper procedure to accomplish this is by certiorari, irrespective of whether the claim is that the rate fixed is too high or too low. I think, therefore, that the municipalities' cases cannot be dismissed upon the ground stated by the supreme court, and that, that court having in fact passed upon the facts involved, we should, as it seems to me, now consider these cases also upon the merits.

Two principal questions are involved in the cases before us: One, was it improper to allow an element of "going value" in coming to a valuation of the commercial value of the utility company to be protected in a rate-making order? and the other, was it improper to exclude the element of the commercial value of the franchise (not an exclusive one) in reaching such valuation? The municipalities maintain the affirmative of the first proposition, and the gas company the affirmative of the second.

Taking up the first inquiry: It is quite evident from the testimony and from the findings of the supreme court that, with the exception of the commercial value of the franchise, the term "going value" in these cases embraced what the Commission thought was the fair present value of all of the elements of the intangible property of the gas company, including the necessary spark of life represented by adequate permission to use its property for the purposes of its incorporation and in the public streets where it was locally authorized to go. To this extent I think the property of the gas company is entitled to protection in rate-making orders, because a failure of such protection permits confiscation. I agree, therefore, with the view of the Commission upon this point. To value the present mere physical property of the company, in absolute disregard of its previously discharged burdens assumed and performed in the public interest and clearly L.R.A.1917B.

contemplated by the legislation by which it was invited to enter upon the public service, is, in my judgment, confiscatory. Likewise, to value it without considering it as endowed with its life-giving permission to continue its public functions would be confiscation.

I therefore favor an affirmance, upon the merits, of the order of the Commission in the cases wherein the cities of Paterson and Passaic complained that "going concern value" had been used as an element of value in establishing the rate.

Coming now to the gas company's appeal, wherein the complaint is that an additional value of the franchise (apart from its life-giving function to the company's other property), and dependent upon earnings present and prospective of the company, was not included, I incline to the opinion that the Commission took the proper view of this point also.

I take it that this claim must resolve itself into dependence upon one or both of two propositions, viz.: (1) That the gas company has a property right to continue to charge unreasonably high rates in the future because of the present market value of its securities as a result of its having been suffered to do so, in violation of its charter obligations, in the past; or (2) that its charter right to charge reasonable rates is, of itself, a valuable property right which must be permitted, under the guise of its own protection, to enlarge itself into a right to charge unreasonable rates.

Taking up the first of these propositions: It is not questioned that the universally acknowledged obligation of the gas company to serve the public at reasonable rates reserves to the public (the state) the right to regulate the rates to be charged so that they shall conform to this obligation. It follows as a necessary corollary that the franchise of the gas company to charge rates is at all times subject to this right of the state to so regulate them. That the granted franchise to charge rates is a property right protected by law, which cannot be destroyed or impaired, except by due process of law and upon compensation, and that it, as an element of property value (dependent in amount upon the rate permitted and likely to be permitted to continue), is subject to taxation, seems to me to be quite apparent; but that this fact should not be held to work a forfeiture of one of the conditions of the grant, viz., that the state should have the right at all times to require that the rates charged shall be reasonable, seems to me to be equally clear. A man might build a hotel, 20 stories high, at the seashore, and so arranged that nearly half of its guest rooms

have an unobstructed ocean exposure and view to the southwest over his neighbor's land, and the probabilities may seem to indicate that, by reason of lack of demand for additional hotel accommodations, or inability, or lack of inclination, of the neighbor to build, this exposure and view would continue uninterrupted for a long time, and by reason of this advantageous exposure the hotel might be very profitable, so that it had a fair market value of \$2,000,000. No one would doubt that it could not be condemned and taken by the state or the municipality for any public purpose without the owner being paid this market value, nor could he doubt that it was subject to be taxed at this value; but, on the other hand, no one would contend that the owner had thereby acquired a right to prevent his neighbor from building a like hotel, 20 stories high, on his own land, shutting off the ocean exposure and view of the first one, although the effect of his so doing would be to decrease the market value and the tax value of the first one by \$1,000,000. If in fact the first hotel had been sold in the interim for \$2,000,000, this circumstance would not in any respect alter the ultimate result.

So in the case of a gas franchise, subject, as here, to reasonable rate regulation by the state; it is quite evident that if the state, for what reason soever (and many may be thought of), omits for a great number of years to enforce its rights, and thus allows the company to charge unreasonably high rates, and there seems every likelihood that this permissive omission would continue, the property value of the franchise in the open market, as reflected by the market value of the company's stock, would be much higher than it would be if the state had at all times and consistently enforced its rights, and there was every prospect that it would continue to do so. Assuming, for the purpose of illustration, that an unreasonably high rate has been charged by this company in the past, upon what theory can it be contended that, because of this permissive omission on the part of the state in favor of the company, during all these years, the state has now forfeited the rights of the public to enforce a condition which it was always the duty of the company to perform, whether the state compelled it to do so or not? I think there is none. I suppose it may fairly be assumed that, with all the other conditions exactly as they were in this case at the time of the order, if the rate charged by this company in the district in question before the order had been \$1.40 instead of \$1.10, the claim of the company to be allowed for value of franchise would have been at least double in amount what it now

is, and that the higher property value, as indicated by market value of securities and by valuation of franchise for taxation, would have more than substantiated such enlarged claim. Clearly no part of such increase of claim could have any proper foundation for consideration in arriving at a just and reasonable rate, although it would have all the property right backing now urged for the present claim.

I think we may properly conclude, therefore, that the charging of unreasonably high rates in the past, if they have been so charged, can furnish no ground for the continuation of these rates in the future, and this although a shrinkage of commercial and taxing value of the franchise will be the result of the state's enforcement of its contract right to require the rates to be reasonable in the future.

Taking up the second proposition, that the company's charter right to charge reasonable rates is in itself a valuable property right entitled to consideration in rate making, I suppose it must be conceded that the franchise to charge as a "reasonable rate," sufficient to yield a net profit of 8 per cent on the value of the company's property, as allowed and established respectively by the findings of the Utilities Commission in this case, is a very valuable property right. Certainly I think it is. That this valuable privilege is the company's is beyond question. That it is property is undoubted. That the law protects it against confiscation and subjects it to taxation follows as a matter of course. But that this valuable property right to charge "reasonable rates" should, by virtue of its own existence, have the effect of converting itself into a still more valuable property right to charge "unreasonable rates," is, of course, preposterous. Presumably the incorporators went into this public utility business because they expected that their charter privilege to charge "reasonable rates" for the gas they were to manufacture, distribute, and sell would be a valuable one; but that fact, and the fact that it has become so, cannot have the effect of altering the terms of the contract made with the state. The mere statement of this proposition is sufficiently convincing, but, if anything more were needed, a glance at the absurd practical result of the contrary view would be illuminating. If the franchise to charge 90 cents in order to pay 8 per cent on the value of the company's property, not including the franchise, is worth \$1,000,000, and must be included and have 8 per cent paid on it also, the rate would have to be \$1 instead of 90 cents; but, if the company has the property right to charge \$1, the franchise is worth \$2,000,000 instead of \$1,000,000, and

so the rate must be \$1.10 in order to pay 8 per cent. On this additional million, and so on indefinitely.

That the company's contract with the state to charge "reasonable rates" cannot be thus evaded is, of course, quite obvious. The plain fact is that the commercial value of the company's property right in its franchise can have no effect in fixing the rate it can charge, because by the terms of its contract with the state the stream of its

franchise value arises from the spring of its right to charge "reasonable rates," and in the very nature of things no stream can rise higher than its source.

For the reasons above stated, I concur in the affirmance of the judgment of the Supreme Court in the gas company's appeal.

Gummere, Ch. J., and Parker, Bergen, and Vredenburg, JJ., dissent.

## IOWA SUPREME COURT.

W. B. MURPHY, Appt.,

v.

CONTINENTAL INSURANCE COMPANY.

(— Iowa, —, 157 N. W. 855.)

**Insurance — statement by agent — effect.**

1. An insurance company is not bound by a statement of a mere soliciting agent as to what the policy will cover when issued, so as to require settlement according to such statement in case of loss, if the policy does not in fact correspond with the statement.

*For other cases, see Insurance, I. d., in Dig. 1-52 N. S.*

**Same — haystacks.**

2. Insurance on hay in stacks does not cover hay in a mow in a barn.

*For other cases, see Insurance, III. d, 1, in Dig. 1-52 N. S.*

**Same — farm utensils — windmill and scales.**

3. A windmill and farm scales are within insurance on farm utensils, although not in use, and stored in the farm buildings.

*For other cases, see Insurance, III. d, 1, in Dig. 1-52 N. S.*

(May 10, 1916.)

**A** PPEAL by plaintiff from a judgment of the District Court for Iowa County in defendant's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Mr. W. E. Wallace for appellant.

Messrs. Stapleton & Stapleton, for appellee:

Talks and agreements in reference to matters in future performance are merged in and presumed to be expressed in the policy, which, as in cases of other contracts, becomes effective as the consummation of their issues and contentions by its delivery on the part of the company and its acceptance by the assured.

**Note.** — As to property covered by policy of insurance on "farming utensils," see annotation following this case, post, 937. L.R.A.1917B.

Cornelius v. Farmers Ins. Co. 113 Iowa, 185, 84 N. W. 1037; Moore v. State Ins. Co. 72 Iowa, 416, 34 N. W. 183; Baldwin v. State Ins. Co. 60 Iowa, 497, 15 N. W. 300; Stephens v. Capital Ins. Co. 87 Iowa, 283, 54 N. W. 139; Ostrander, Ins. p. 186.

Nor can anything the soliciting agent may impart concerning the future contingency operate as an estoppel against the insurer or the company.

Cornelius v. Farmers Ins. Co. 113 Iowa, 186, 84 N. W. 1037; Hartford F. Ins. Co. v. Davenport, 37 Mich. 609; Fuller v. Phoenix Ins. Co. 61 Iowa, 350, 16 N. W. 273.

If personal property is described as kept or contained in a certain building, its loss will not be covered if destroyed elsewhere. And the removal of the property to another building or location takes it out of the description of the policy.

19 Cyc. 664, 665; Lakings v. Phoenix Ins. Co. 94 Iowa, 476, 28 L.R.A. 70, 62 N. W. 783; Harris v. Royal Canadian Ins. Co. 53 Iowa, 236, 5 N. W. 124; British-American Assur. Co. v. Miller, 91 Tex. 414, 39 L.R.A. 545, 66 Am. St. Rep. 901, 44 S. W. 60; Green v. Liverpool & L. & G. Ins. Co. 91 Iowa, 615, 60 N. W. 189; L'Anse v. Fire Asso. of Philadelphia, 119 Mich. 427, 43 L.R.A. 838, 75 Am. St. Rep. 410, 78 N. W. 465; Rosenthal v. Insurance Co. of N. A. 158 Wis. 550, L.R.A.1915B, 361, 149 N. W. 155.

Insurance on grain in stacks cannot be construed to cover unthreshed grain in a mow in a barn.

Benton v. Farmers' Mut. F. Ins. Co. 102 Mich. 281, 26 L.R.A. 237, 60 N. W. 691.

A windmill is a fixture, and is not a farm implement, and when attached to or used in connection with a farm for the purpose of pumping water, etc., constitutes an appurtenance to the real estate.

Phelps & B. Windmill Co. v. Baker, 49 Kan. 434, 30 Pac. 472; Badger Lumber Co. v. Marion Water Supply E. L. & P. Co. 48 Kan. 182, 15 L.R.A. 652, 30 Am. St. Rep. 301, 29 Pac. 476; Phelps & B. Windmill Co. v. Shay, 32 Neb. 19, 48 N. W. 896.

A scales, such as described in the testimony, when used upon a farm, is not a utensil or farm tool, but is a fixture.

Thomson v. Smith, 111 Iowa, 718, 50 L.R.A. 780, 82 Am. St. Rep. 541, 83 N. W. 789; 19 Cyc. 1042-1047; State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A. (N.S.) 376, 106 N. W. 764; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Bacon v. Thompson, 60 Iowa, 284, 14 N. W. 312; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120, 10 N. W. 842; McGorrick v. Dwyer, 78 Iowa, 279, 5 L.R.A. 594, 16 Am. St. Rep. 440, 43 N. W. 215.

Ladd, J., delivered the opinion of the court:

The defendant issued its policy of insurance to plaintiff on February 19, 1912, agreeing to indemnify him against "loss or damages by fire \$700 on farming utensils, cream separator, mowers, harvesters, reapers, corn binders, farm and garden tools (other than threshers, clover hullers, and engines) on the premises of the assured, . . . \$500 on hay in stacks on cultivated premises on farm herein described . . . situated (except as otherwise above provided) and confined to premises described in application, occupied by assured, . . . 440 acres, sections 28, 29, 33, township 81, range 11, county of Iowa, state of Iowa."

The plaintiff had purchased a new windmill several years previous and stored it in his corner crib until he could put it up. Stock scales had been taken down and stored in an old granary. Both buildings, with their contents, were destroyed August 20, 1913. A few days previous hay estimated at 30 tons in a barn situated on what is designated the Hall farm was burned. This Hall farm was operated under oral lease by the assured when the policy issued, and until bought by him June 7, 1913.

I. The policy, among other things, insured the barn and "\$100 on hay therein." This was the fifth item, and the twelfth item read, "\$500 on hay in stacks on cultivated premises on farm herein described." In the application, instead of "on cultivated premises," as in the policy, the words "or cultivated premises" followed "farm," and plaintiff testified that after preparing the application it was found the insurance was not rightly distributed on hay, and that the agent added the words as stated, and explained that by changing the application the policy would cover all hay the insured raised, and it was alleged in an amendment to the petition that they agreed: "That said policy was to cover and insure all hay that plaintiff might raise or produce on said sections, and that said written insertion was made with mutual intention and understanding to cover their agreement as aforesaid to cover all such hay."

But the insured must be assumed to have L.R.A.1917B.

known that the application was not the contract, and that the policy for which he was applying would state the terms of their agreement. The insured does not contend that any fact was misrepresented or that any fraud was practised on him by the agent. His contention is that, the agent having advised what the policy would insure, the company is estopped from asserting otherwise. To construe or interpret the policy issued or to be issued is no part of the agent's duty. In Dryer v. Security F. Ins. Co. 94 Iowa, 471, 62 N. W. 798, the insured testified that the agent told him that he could move his property to any place in the county by giving notice to the company, and in denying liability for loss of property elsewhere than covered by the policy the court, speaking through Robinson, J., said: The agent "appears to have been only a soliciting agent, and, if that was his true character, it was no part of his duty, and not within the scope of his powers, to contract for his principal, to construe its policies, or to determine their legal effect. As he was a special agent, not clothed with any apparent right to do more than to solicit insurance, and to perform such acts as were incident to that power, the plaintiff was charged with knowledge of the limitations of his agency, and was not authorized to give any contractual effect to the statements he made. His principal was bound by the knowledge he had when the application was prepared and accepted, but not by statements he made outside the scope of his apparent powers."

In Cornelius v. Farmers Ins. Co. 113 Iowa, 184, 84 N. W. 1037, the agent had represented that, for an additional premium, he would make the application so that the property would be insured when vacant, and we there said: "It thus appears that the application contained no misstatement of any existing fact or past transaction, nor did it omit any. What was said related solely to an anticipated, though no settled, use of the property. It was an arrangement as to conditions of the policy, with which a soliciting agent had nothing to do, rather than a representation of the existing or past conditions of the property to be insured. That such an agent has no authority to make a binding contract for insurance, or what shall be the provisions of a policy, is too well settled to require any citations. The scope of his authority is limited to taking applications; and as, within this, it is his duty to see that the condition of the property is truly and fully disclosed when he undertakes to prepare them for the assured, the company may not take advantage of omissions or misstatements of facts or conditions affecting the risk. Fitchner v. Fidelity Mut.



Fire Asso. 103 Iowa, 280, 72 N. W. 530. But, whatever he may say as to the effect of the policy or what it shall cover, or of its conditions, is mere opinion on his part, pertaining to matters wholly without the scope of his employment. Talks and agreements in reference to matters of future performance are merged in, and presumed to be expressed in, the policy, which, as in the case of other written contracts, becomes effective as the consummation of their wishes and intentions by its delivery on the part of the company and acceptance by the assured. *Moore v. State Ins. Co.* 72 Iowa, 416, 34 N. W. 183; *Baldwin v. State Ins. Co.* 60 Iowa, 497, 15 N. W. 300; *Stephens v. Capital Ins. Co.* 87 Iowa, 283, 54 N. W. 139; *Ostrander, Ins.* 186. Nor can anything he may impart concerning a future contingency operate as an estoppel against the insurer. This is: First, because he is given no such authority; and, secondly, for the reason that the doctrine of estoppel is never applied save where the representation relates to a present or past fact, or state of facts, unless it has reference to an intended abandonment of an existing right, upon which another has relied."

Here there was no misrepresentation of or omission to state any fact of which the company would be assumed to know from the knowledge of its agent. See *Funk v. Anchor F. Ins. Co.* 171 Iowa, 331, 153 N. W. 1048. What the agent undertook was to tell the assured what the policy would cover, and this was clearly beyond the scope of his agency. In so far as appears from the record, the only evidence bearing thereon was that he solicited the insurance and prepared the application which was signed by the assured. This was the work of a soliciting agent, and, in the absence of evidence that he possessed powers in excess of those exercised therein, it ought not to be assumed that he was something more. In other words, we cannot assume without proof that the agent was endowed with authority to say what the policy in response to the application will be or its meaning. It was retained by the assured without objection and without claim but that he was aware of its contents. Unless it covered the hay put in the barn, then there can be no recovery for loss of the hay. The insurance was on "hay in stack" only. A stack of hay, grain, straw, or the like is a large quantity thereof collected and usually built up in layers in conical, oblong, or rectangular form to a point or ridge at the top so that it will be preserved against the inclemencies of weather. See *People v. Doyle*, 13 Cal. App. 611, 110 Pac. 458; *Farmers' Mutual v. Reser*, 43 Ind. App. 634, 88 N. E. 349. Of course, it may be stacked under cover or cover may be

placed over it. In *Farmers' Mutual v. Reser*, supra, it was stacked in a shed. In *Reg. v. Munson*, 2 Cox, C. C. 186, haulm was stacked under cover in a building which had been used as a stable. The accused insisted that there was a variance between the charge of having set fire to a stack of haulm and the proof, but Coleridge, J., said: "I do not think it essentially necessary to the character of a 'stack' that it should be erected out of doors. It is enough if the material is collected direct in the field and 'stacked' in a building."

In *Benton v. Farmers' Mut. F. Ins. Co.* 102 Mich. 281, 26 L.R.A. 237, 60 N. W. 691, the court decided that "the term 'stack' has a well-defined meaning, and cannot be said to include grain in a mow in a barn."

Nor do we think "hay in stack" susceptible to being construed as hay in the mow of a barn. Such is not the ordinary meaning of the expression. No one would think of hay stowed away in a barn as being a stack. The court rightly denied recovery for the hay burned.

II. Was the windmill or scale a farm tool or farming utensil? "Tool" is defined in Webster's Dictionary as: "An instrument of manual operation, as a hammer, saw, plane, file, or the like, used to facilitate mechanical operations as distinguished from an appliance moved and regulated by machinery; the instrument of a handicraftsman or laborer at his work; an implement; as the tools of a joiner, smith, shoemaker, etc."

A similar definition is to be found in the Century Dictionary. Evidently by the words "garden tools" is meant instruments or devices movable in character and operated by hand, or possibly by other motive power in the performance of work or in doing work in the garden or on the farm. The word "utensils" is much broader in meaning, though it may be applicable to many implements designated tools in common parlance. The Century Dictionary defines "utensils" as: "An instrument or implement; as utensils of war; now, more especially, an instrument or vessel in common use in a kitchen, dairy, or the like, as distinguished from agricultural implements and mechanical tools."

Webster's Dictionary says it is: "An instrument or vessel, especially one used in the kitchen or in a dairy."

The supreme court of North Carolina, in *Elliott v. Posten*, 57 N. C. (4 Jones, Eq.) 433, said: The word "'utensil' will embrace everything . . . 'for household purposes or applicable to the trade to which the term has reference.'"

In *Laporte v. Libbey*, 114 La. 570, 38 So. 457, the court expressed the same view: "The word 'utensils' more especially means an implement or vessel for domestic or farm-

ing use. See Standard Dictionary, verbo. As used in Civil Code, art. 3259, 'utensils' is a translation of 'ustensiles,' used in article 2101 of the Code Napoléon. This word in France has been held to include a . . . threshing machine. Fuzie-Herman, Code Civil, vol. 4, 873. In French jurisprudence the word is used as synonymous with 'agricultural instruments,' whatever may be their nature. Baudry-Lacantinerie, *Detroit Civil, Des Privilèges*, vol. 1, 445, No. 472. Laurent says that the word 'ustensiles' has a very extended meaning. It has been held in other states of the Union that 'mowers' and 'combined harvesters' used by debtors for necessary farmwork are within the meaning of the term 'farming utensils or implements,' as used in exemption laws. . . . We are of the opinion that a steam thresher is clearly within the term 'farming utensils' as used in Civil Code, article 3259."

A combined harvester was held to be a utensil in *Re Klemp*, 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062, and a thresher was so found to be in *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653, 933. In *Lahn v. Carr*, 120 La. 797, 45 So. 707: A steam engine, used in connection with a pump for irrigation, with a thresher, and with machinery for cultivating a crop of rice, and not shown to have been used for any other purpose than the cultivation and harvesting of such crop, is a "farming utensil" within Civ. Code, art. 3259, on which the privilege of the vendor is superior to that of the lessor of the land, and this whether the engine was bought as part of the pump, or of the thresher, or any other time and from any other source.

In *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273, the court adjudged a hay press a farming utensil. In *Royston v. McCulley*, — Tenn. Ch. App. —, 52 L.R.A. 899, 59 S. W. 725, blacksmith tools used in operating a farm were held to pass under a bill of sale as utensils. This court found "binding twine" to be included in "stock of implements" in *Davis v. Anchor Mut. F. Ins. Co.* 96 Iowa, 70, 64 N. W. 687. See *Reynolds v. Iowa & N. Ins. Co.* 80 Iowa, 563, 46 N. W. 659. No case precisely in point has been cited, nor have we been able to discover any. Of course, neither the windmill nor the scale can be said to come within the definition of "farm tool." But "farming utensil," as pointed out, is of much broader significance than "farm tools." The policy does not

limit the expression to any particular phase of farming. The word is used in its generic sense. See *Bank of Dearborn v. Matney* (D. C.) 132 Fed. 75. And by "farming utensils" was intended any instrumentalities within the meaning of the word "utensils" made use of on a farm. The assured was engaged in general farming, including the keeping and raising of stock. Teams and stock must have water, and the modern farmer requires scales by which to test the values of feed, the growth of his stock, and to protect himself in the matter of weight when disposing of grain or stock on the market. Both are in common use and are appropriate to successful operation of the farm, and, as we think, are fairly within the meaning of "farming utensils;" at least, when not permanently attached to the realty. That they may be so annexed to the soil as to become part of the realty is well settled. See *Thomson v. Smith*, 111 Iowa, 718, 50 L.R.A. 780, 82 Am. St. Rep. 541, 83 N. W. 789; *State Security Bank v. Hoskins*, 130 Iowa, 339, 8 L.R.A. (N.S.) 376, 106 N. W. 764; *Phelps & B. Windmill Co. v. Baker*, 49 Kan. 434, 30 Pac. 472. But either may be so attached as to be removable as a trade fixture. Neither was attached at all, and it would not seem that, even though designed for permanent annexation to the soil, this alone would preclude their classification as farming utensils. Surely an implement establishment carrying a full line of farm implements would not exclude windmills from their stocks. That its motive power is wind is not controlling; for many utensils are operated by steam. Moreover, were the pumping done by an engine, as is common, there would be no hesitancy in declaring it a utensil, which, in its derivation, means an implement for use. These were implements for pumping and weighing, and, though not in actual use, were utensils within the language of the policy. If not, what were they? They were not appurtenances to the land, and that they might become such did not obviate the application of nomenclature which seems correct, appropriate, and fairly within the terms of the contract.

Reversed.

Evans, Ch. J., and Gaynor and Salinger, JJ., concur.

Petition for rehearing denied.

### Annotation—Insurance: property covered by policy on "farming utensils."

In *MURPHY v. CONTINENTAL INS. CO.* ante, 934, a windmill which had not been put up, and stock scales stored in a granary, were held to be "farming

utensils" and within the protection of a policy issued to one engaged in general farming, which insured such utensils.

But one other case has been disclosed

dealing with the question under annotation.

In *Phoenix Ins. Co. v. Stewart* (1893) 53 Ill. App. 273, a hay press was held to be covered by a clause insuring for a stated sum "on reapers, mowers, harvesters, and other farming utensils." The court here said: "We are not inclined to hold, as insisted by appellant, that the term 'farming utensils' includes only such utensils as are generally used upon an ordinary farm. If the utensil is used

in carrying on a particular kind of farm, as, for instance, a hay farm, it would be a farming utensil. Nor is it necessary to be in general use. The hay press is included within the term 'farming utensils.'"

The meaning of the term "utensils" in connection with other subjects than insurance is discussed by the court in *MURPHY v. CONTINENTAL INS. CO.*

J. T. W.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

DIETRICH E. LOEWE, Surviving Partner of the Firm of D. E. Loewe & Company, Plff. in Err.,  
v.

SAVINGS BANK OF DANBURY.

(236 Fed. 444.)

**Garnishment — bank deposit — right to interest.**

1. Where savings bank deposits may be garnished to meet an anticipated judgment, and the attachment binds the obligation as it exists when the attachment is served, the attachment binds dividends subsequently declared, as against an assignee of the attachment debtor, since they are incident to the deposits.

*For other cases, see Garnishment, II. a, in Dig. 1-52 N. S.*

**Interests — wrongful withholding of money — rival claimants.**

2. A bank which withholds funds attached as those of its depositor because of a claim to them by a stranger, until the true title can be ascertained, does not act wrongfully within the rule making one wrongfully withholding money liable for interest thereon.

*For other cases, see Interest, I. a, in Dig. 1-52 N. S.*

(July 3, 1916.)

**ERROR** to the District Court of the United States for the District of Connecticut (Thomas, District Judge) to review a judgment in favor of plaintiff, in part only, in an action brought to recover certain savings bank accounts which had been levied upon by attachment. Modified and affirmed.

The facts are stated in the opinion.

Argued before Cox and Rogers, Circuit Judges, and Augustus N. Hand, District Judge.

Messrs. Daniel Davenport and Walter Gordon Merritt for plaintiff in error.

**Note.**—On the question of levy upon property as including increase thereof, see annotation following this case, post, 944. L.R.A.1917B.

Messrs. John H. Light, John R. Booth, and J. Moss Ives, for defendant in error:

The depositors, whose accounts were attached, are not entitled to anything more by way of interest than the 4 per cent dividends declared, and plaintiff did not gain a greater right by virtue of his attachment.

*National Bank v. Western P. R. Co.* 157 Cal. 573, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Lyman v. Gaar, S. & Co.* 75 Minn. 207, 74 Am. St. Rep. 452, 77 N. W. 828; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595.

Plaintiff is not entitled to recover 6 per cent interest on attached bank accounts from the date of the marshal's demand on December 24th, 1912.

*Osborn v. Byrne*, 43 Conn. 159, 21 Am. Rep. 641.

Plaintiff is not entitled to recover 6 per cent interest because of use of the funds attached.

*Bank Comrs. v. Watertown Sav. Bank*, 81 Conn. 265, 70 Atl. 1038; *Candee v. Skinner*, 40 Conn. 464; *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993.

Messrs. Martin J. Cunningham and William F. Tammany for the United Hatters.

Rogers, Circuit Judge, delivered the opinion of the court:

An action was commenced by the present plaintiff and others in the circuit court of the United States for the district of Connecticut thirteen years ago to recover damages from the members of a trade union charged with conspiracy in restraint of interstate commerce. The questions involved were before that court at various times, and were before this court on several occasions, and were three times before the Supreme Court of the United States. The plaintiffs were manufacturers of hats at Danbury, Connecticut, where they maintained a factory. The

defendants in the original suit were members of a combination called the United Hatters of North America, and they were charged with being in a conspiracy to compel the plaintiffs to unionize their factory. The Supreme Court in *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815 (1908), sustained the right to maintain the action. In 1912 the Supreme Court refused a writ of certiorari, and in 235 U. S. 522, 59 L. ed. 341, 35 Sup. Ct. Rep. 1170 (1915), that court, affirming the decision of this court in 128 C. C. A. 445, 209 Fed. 721 (1913), sustained a judgment rendered against the defendants in that action in the sum of \$353,130.90.

When the action above referred to, known as the Danbury Hatters' Case, was commenced, a writ of attachment was issued, dated August 31, 1903, demanding \$240,000 damages and costs. The writ directed the United States marshal for the district of Connecticut to attach to the value of \$250,000 the goods and estate of over 150 named defendants, and it was duly served upon them and upon the Savings Bank of Danbury, defendant herein, "as agent, trustee, and debtor of and to each of the aforesaid persons named therein as defendants."

The process under which the money deposited in the Savings Bank was attached was issued under § 880 of the General Statutes of Connecticut, Revision of 1902, which reads as follows: "When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered, are concealed in the hands of his agent or trustee so that they cannot be found or attached, or where a debt is due from any person to such defendant, or where any debt, legacy, or distributive share, is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the session of the court to which it is returnable, with such agent, trustee, or debtor of the defendant, or, as the case may be, with the executor, administrator, or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy, all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy, or distributive share, due or that may become due to him from such executor, administrator, or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

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When the judgment was obtained in the main action, an execution was taken out and put into the hands of the marshal, who, acting by the direction of the plaintiffs made demand upon the Savings Bank of Danbury, the defendant herein, as agent, trustee, and debtor of and to each of the judgment debtors severally of the sums named in the execution and of any estate of each of the several judgment debtors severally. This demand the Savings Bank refused to comply with, although at the time it was served it was indebted to each of the defendants severally in various amounts which it refused at the time to disclose. At the time the marshal made his demand, the Savings Bank had on deposit \$18,461.54 to the credit of various of the defendants. The execution was returned wholly unsatisfied.

An action in scire facias was then brought, pursuant to § 931 of the General Statutes of Connecticut, Revision of 1902, to recover attached Savings Bank accounts levied upon by the writ of attachment above mentioned. Section 931 reads as follows: "If judgment be rendered in favor of the plaintiff in any action by foreign attachment, all the effects in the hands of the garnishee at the time of the attachment, or debts then due from him to the defendant, and any debt, legacy, or distributive share, due or to become due to the defendant from any garnishee as an executor, administrator, or trustee, shall be liable for the payment of such judgment; and the plaintiff, on praying out an execution, may direct the officer serving the same to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of any debt due to the defendant, and such garnishee shall pay said debt or produce said effects, to be taken and applied on said execution; and if he shall have, in any manner, disposed of the effects of the principal in his hands when the copy of the writ was left with him, or shall not expose and subject them to be taken on the execution, or shall not pay to the officer, when demanded, the debt due to the defendant at the time the copy of the writ was left with him, such garnishee shall be liable to satisfy such judgment out of his own estate, as his proper debt, if the effects, or debt, be of sufficient value or amount; if not, then to the value of such effects, or to the amount of such debt. A scire facias may be taken out from the clerk of the court where the judgment was rendered, to be served upon such [court] garnishee, requiring him to appear before such court and show cause, if any he have, to the contrary; and the plaintiff may require the defendant, and the defendant shall have the right, to disclose, on oath, whether he has any of the effects of the debt-

or in his hands, or is indebted to him; and the parties may introduce any other proper testimony respecting such facts. If it be found that the defendant has the effects of such debtor in his hands, or is indebted to him, or if he makes default of appearance, or refuses to disclose on oath, judgment shall be rendered against him, as for his own debt, to be paid out of his own estate with costs; but if it appear on the trial that the effects are of less value, or the debt of less amount than the judgment recovered against the debtor, judgment shall be rendered to the value of the goods, or to the amount of the debt; and if it appear that the defendant has no effects of such debtor in his hands, or is not indebted to him, he shall recover costs."

An Congress in 1872 provided as follows: "In common-law causes in the circuit and District courts . . . the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the state in which such court is held" for the courts thereof; "and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the" states where they are held "in relation to attachments and other process: . . . Provided, that similar preliminary affidavits or proofs, and similar security as required by such" state "laws, shall be first furnished by the party seeking such attachment or other remedy." Act June 1, 1872, chap. 255, § 6, 17 Stat. at L. 197, Comp. Stat. 1913, § 1539.

No question has been raised but that the action is one which the plaintiff is entitled to bring under the laws of Connecticut and of the United States.

It appears that in December, 1903, after the attachment of the deposits in the Savings Bank and before the rendition of final judgment in the original action, the defendants in that action assigned to the United Hatters of North America, a voluntary association having an office or principal place of business in the city and state of New York, the dividends or interest accruing on said deposits and which were declared after the attachment.

The United Hatters of North America was given notice of the pendency of the proceeding according to the terms of the Connecticut statute under which the proceeding was instituted, and it appeared and filed an answer in which it alleged that the dividends or interest accruing and declared subsequent to the original attachment were not held by the attachment, but passed to it and became its property by virtue of the assignments. The United Hatters notified L.R.A.1917B.

the Savings Bank that it claimed to own the dividends declared or the interest due on such accounts, and demanded payment of the same, which payment was refused.

It is admitted that at the time of the attachment the amount held in the Savings Bank account to the credit of the various defendants in the original action amounted to \$18,461.54. And the district judge has found that, subsequent to the commencement of the present proceeding, the defendant, with the consent of the United Hatters, paid to the plaintiff \$17,558.37, on June 26, 1915, and the further sum of \$474.65 on account of the principal of said deposits.

The important question involved is whether the interest or dividends which have accumulated in the hands of the defendant, and which would belong to the depositors but for the assignment, belong to the judgment creditor by virtue of the original attachment, or to the assignee of the fund by virtue of the assignment made after the attachment.

It is understood that similar actions are pending, brought by the plaintiff against other savings banks in Connecticut, involving the same issue, and that the parties have stipulated that the judgment in those actions is to be controlled by the decision in this suit. The accumulated dividends on the various deposits in the various actions are said to amount to about \$20,000.

The district judge came to the conclusion that the attaching creditor was not entitled to the interest or dividends, but that the same belonged to the United Hatters as assignee. He accordingly gave judgment to the plaintiff in the sum of \$428.52; that being the amount of the principal which it is admitted remained unpaid in the hands of the Savings Bank of Danbury, the defendant in the action.

The attachment of deposits in a savings bank is a proceeding unknown to the common law. In *Haber v. Nassitts*, 12 Fla. 589, 608, the supreme court of Florida declares that "no such process was known at common law, and the proceeding is traced to a custom of London whereby, 'if a plaint was affirmed and returned nihil,' the plaintiff had a garnishment against debtors of the defendant, and after certain proceedings was entitled to judgment."

However that may be, the remedy by attachment in this country owes its existence entirely to statutory enactment. In *Penoyar v. Kelsey*, 150 N. Y. 77, 34 L.R.A. 248, 44 N. E. 788 (1896) the New York court of appeals, in speaking of the remedy by attachment, says: "It exists, as a provisional remedy, only when authorized by statute, and, as such, is comparatively recent in its origin."

And see *Gause v. Cone*, 73 Tex. 241, 11 S. W. 162 (1889); *Hubbell v. Kingman*, 52 Conn. 19 (1884); *Kittredge v. Bellows*, 7 N. H. 399; *Baldwin v. Flagg*, 43 N. J. L. 496. But in *Mack v. Parks*, 8 Gray, 517, 69 Am. Dec. 267 (1858), the court said: "Our system of attachment on mesne process was derived from the ancient rule of the common law, by which, as part of the service of civil process, goods which were properly subject to distress were allowed also to be taken by a species of distress, and held as *vadii* or pledges to compel the appearance of the defendant."

As the remedy by attachment is statutory, the rights of an attaching creditor are governed by the state law as declared by the highest court of the state enacting the statute, and the decisions of that court will be followed by a court of the United States having jurisdiction of the proceedings. *Wolf v. Cook* (C. C.) 40 Fed. 432 (1889); *Rice v. Alder-Goldman Commission Co.* 18 C. C. A. 15, 36 U. S. App. 266, 71 Fed. 151 (1895); *L. Bucki & Son Lumber Co. v. Fidelity & D. Co.* 48 C. C. A. 436, 109 Fed. 393 (1901).

And as the remedy by attachment is regarded as being in derogation of the common law, the courts have sometimes construed strictly the statutes giving the remedy. *Ritchie v. Sayers* (C. C.) 100 Fed. 520; *Brigham v. Avery*, 48 Vt. 602; *Penoyar v. Kelsey*, *supra*. But in a number of the states the statutes themselves expressly provide that they are not to be strictly construed. See 6 C. J. 37. In other states the courts, having regard to the intention of the legislatures, have been inclined to adopt a liberal construction independently of express statutory provision. *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Gunby v. Porter*, 80 Md. 402, 31 Atl. 324; *Best v. British & A. Mortg. Co.* 128 N. C. 351, 38 S. E. 923; *Strock v. Little*, 45 Pa. 416; *Cole v. Utah Sugar Co.* 35 Utah, 148, 99 Pac. 681. The Connecticut statute, once construed strictly (*Hubbell v. Kingman*, 52 Conn. 19 (1884)), is now liberally construed (*Ransom v. Bidwell*, 89 Conn. 137, 93 Atl. 134 (1915)). The policy of the state of Connecticut is declared by its highest court in the case last cited to be that "all the property of a debtor not exempt from execution shall be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

Under such statutes as that in Connecticut, it is, of course, not questioned but that a creditor of a depositor in a savings bank can attach the deposit. A bank is bound to respect such process, and the courts do not

permit it to apply the fund attached to the payment of any debt due from the depositor to anyone. *Bolles*, Bkg. vol. 2, p. 778. The difficulty arises when the fund so deposited is upon the interest, and it becomes necessary to determine whether the attachment binds interest thereafter accruing. The district judge thought it did not. He fully recognized the principle that the question should be governed by the decisions of the Connecticut court, so far as those decisions throw light upon the subject. He reviewed at some length the decisions in that state. There are a number of cases in which the Connecticut court has decided that attaching creditors acquire no more or greater rights than the depositors had at the time of the attachments, and he therefore concluded that all interest accruing after the attachment belonged to the assignee by virtue of the assignment, and not to the attaching creditors.

But the exact question presented in this action has never been presented to the supreme court of the state of Connecticut. That court has held that, under the foreign attachment statute of that state, there is no right to attach unless there is an existing obligation or debt due; and that where there is a condition precedent to the liability, there is not an existing indebtedness which can be garnished. See *Fitch v. Waite*, 5 Conn. 117 (1823); *Coburn v. Hartford*, 38 Conn. 290 (1871); *Holcomb v. Winchester*, 52 Conn. 447, 52 Am. Rep. 609 (1885); *Sand-Blast File-Sharpening Co. v. Parsons*, 54 Conn. 310, 7 Atl. 716 (1886); *Cunningham Lumber Co. v. New York, N. H. & H. R. Co.* 77 Conn. 628, 60 Atl. 107 (1905). These decisions, however, are not conclusive of the question involved in the present action. Not only is the question one upon which the Connecticut courts have not passed, but it is one upon which there seems to be little authority. While it is true that under the Connecticut decisions it is the existing obligation or the debt due which is bound by the attachment, and that at the time the attachment was served the dividends in question had not been declared and were not in existence, nevertheless they would be subject to the attachment if they are to be considered a necessary incident of the deposits. For whatever binds the principal binds that which is inseparable from the principal. An attachment of a freehold, for example, gives a lien on the timber trees and on the building attached thereto. In *Coke on Littleton*, vol. 1, 151b, it is said that a thing is "incident to another when it appertains to, or follows on, that other which is more worthy or principal." The lexicographers say that an "incident" is a thing that is necessarily or inseparately connect-

ed with another. That it is something characteristically, naturally, or legally depending upon, connected with, or contained in another thing as its principal. Webster says that it is something necessarily appertaining to or depending on another, which is termed the principal. So that the question is whether the "dividends" on these deposits so appertained to and were so connected with the latter that the attachment of the deposits created a lien on the deposits and the dividends, including those subsequently declared. In *Shinn on Attachment and Garnishment*, 1896, vol. 1, § 316, pp. 609, 610, the writer says: "Whether or not the rents and profits accruing upon the attached property are subject to the attachment lien cannot be said to be judicially ascertained."

In *Cook on Corporations*, 7th ed. 1913, vol. 2, § 484, p. 1359, that writer says that "dividends on the stock which is attached follow the stock and are covered by the attachment."

In *Jacobus v. Monongahela Nat. Bank* (C. C.) 35 Fed. 395 (1888), a case in a United State district court, a creditor attached shares of stock in a railroad company, the shares standing in the name of Jacobus, and, when the railroad company and Jacobus were summoned as garnishees, Jacobus pleaded *nulla bona* and the railroad company pleaded that the stock belonged to Jacobus. The original case was decided in 1883 by the Supreme Court of the United States (109 U. S. 275, 27 L. ed. 935, 3 Sup. Ct. Rep. 219) in favor of the garnishees. It appears that, at the time the attachment was served, the railroad company had in its hands a dividend of \$264 on said stock, and from time to time thereafter 21 other dividends of \$264 each were declared, and all said dividends were retained by said railroad company until the decision by the Supreme Court, when the railroad company paid the money to Jacobus without interest. Suit was then brought on the recognizance furnished by the bank to pay damages caused by the attachment, and the question arose as to whether the attachment compelled the railroad company to withhold the payment of subsequent dividends. The court held that the attaching creditor was entitled to the dividends and said: "The dividends were but an incident to the stock—the mere fruits thereof—and were as much within the grasp of the attachment as the corpus of the stock was."

In *Moore v. Gennett*, 2 Tenn. Ch. 375 (1875), Chancellor Cooper in an attachment case said that "Dividends are as much an incident to the stock as rent is to the reversion of land, or interest to a debt." L.R.A.1917B.

He added: "Besides, the increase or income of property, after the levy of an attachment, is given to the creditor by Code, § 3536."

The connection clearly shows that in his opinion the provision of the Code was merely declaratory of what the law would have been without the Code.

In *Syracuse City Bank v. Coville*, 19 How Pr. 385 (1860), the court held that, where an attachment issued and was levied on a money bond payable in instalments, and at the time only one instalment was due, the creditor only acquired a lien on the amount actually due upon the bond at the time of service of the writ. The case is distinguishable from the case of *Jacobus v. Monongahela Nat. Bank*, *supra*, and is not to be regarded as controverting it in the least. What was attached in the *Syracuse City Bank Case* was the debt due at the time of the levy. The debts due on the subsequent instalments were not incidents of the debt attached, but were wholly independent thereof.

In the case under consideration the property attached was not stock, but deposits in the Savings Bank. Now a savings bank is conducted solely for the benefit of its depositors. It receives deposits and loans them for their benefit; and a savings bank, which is conducted solely for the benefit of the depositors, and in which the profits, after deducting necessary expenses, inure wholly to the benefit of the depositors, does not stand in the relation of a debtor to a creditor, as does an ordinary bank to its depositors. Its relation is more nearly that of trustee and *cestui que trust*. *State v. People's Nat. Bank*, 75 N. H. 27, 70 Atl. 542, 21 Ann. Cas. 1204. The depositors intrust their money to the bank as their trustee to keep and invest the same according to the charter and the laws. If there is a profit, they receive it; if there is a loss, they share it according to the amount of their deposits. In *Cary v. San Francisco Sav. Union*, 22 Wall. 38, 22 L. ed. 779 (1874), the Supreme Court held that the share of profits paid by a savings bank to its depositors constituted "dividends." Chief Justice Waite wrote the opinion, in the course of which he said: "The interest received for the loan of each deposit was not kept by itself, and paid to the depositors after deducting a charge to cover expenses, but all was placed in a common fund, and, when the net result of the business was ascertained, that was divided among the several contributors according to the value of their contributions. Such a division clearly produces a dividend according to the common understanding of that term."

The question in the case was whether the

share of the profits paid a depositor was to be considered as "interest" or as "dividends." But that was a case where the Savings Bank had a capital stock and a reserve fund, and under its charter the directors, at the expiration of every six months, after deducting certain salaries and expenses, would set apart a certain proportion of the profits, not exceeding one tenth, to the stockholders as a compensation for furnishing the capital. "Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing." 2 Morse, Banks & Bkg. § 618. The mere designation of a bank as a savings bank does not make it one. To determine its true character, its organization, powers, and mode of doing business must be considered. 3 R. C. L. p. 694. And the record in this case does not disclose the organization, powers, and mode of doing business of the Danbury Savings Bank. We do not know whether it had a capital stock or not. If it did not have, but held the deposits as a trustee, and not as a debtor, the plaintiff could still attach them. The law is clear that, if a trustee has funds in his hands belonging to a cestui que trust, they are liable to foreign attachment. *Easterly v. Keney*, 36 Conn. 18 (1869). Whether the income funds so held produce "dividends" in a technical sense is not important to the decision of this case, such income being, in our opinion, an incident of the deposits in either case.

The matter may be considered from another view point. In *Mattingly v. Boyd*, 20 How. 128, 15 L. ed. 845 (1857), the Supreme Court said that "as a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. *Updegraff v. Spring*, 11 Serg. & R. 188; *Drake, Pr.* 725; *Hunter v. Spotswood*, 1 Wash. (Va.) 149."

Undoubtedly what the court referred to was not the interest due from a debtor to a creditor at the time of the service of the process, but interest on the money thereafter; and in that case, while acknowledging the general rule to be as stated, the garnishee was charged with interest from the time when the attachment process was served, for the reason that he had used the money, and interest was charged from October 23, 1827, when process was served, to August 25, 1861.

In *Woodruff v. Bacon*, 35 Conn. 97 (1868), the supreme court of Connecticut applied the same principle to a case in which the garnishee had used the fund. The court said: "But we cannot recognize the principle that should allow the plaintiffs to recover the debt and not allow them to re-

cover the interest which is the mere incident to the debt, arising from the defendant's use of it."

So in *Cox v. Cronan*, 82 Conn. 176, 135 Am. St. Rep. 268, 72 Atl. 927 (1909), the same court said: "When money belonging to a defendant is attached in the hands of a third party by process of foreign attachment, the garnishee cannot safely pay it over to either party pending the continuance of the suit in which it is attached, but must hold it to abide the result of the action. If he is not under contract to pay interest, and makes no use of the money, but retains it as a mere stakeholder, he will not be liable for interest until the result of the suit determines to which party he shall pay it. *Candee v. Skinner*, 40 Conn. 464, 468; *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 432, 68 Atl. 993. But when he mingles the money attached with his own and has the use of it, he is liable for the interest on it."

In 14 Am. & Eng. Enc. Law, 837, 838, the rule is laid down as follows: "It is well settled that a garnishee is liable to the plaintiff for interest on the amount of his indebtedness to the defendant during the pending of the garnishment proceedings if he had promised the defendant to pay interest, or if he received interest or used the money during that time."

In 22 Cyc. 1559, 1560, the rule is stated as follows: "Attachment or garnishment.—

(1) In general.—Where interest upon a debt is recoverable as damages, and not by reason of a contract to pay it, the debtor is not usually liable for interest during a period in which he is prevented from making payment by reason of the debt being attached or garnished in his hand by some third person, or by the debtor being summoned as a trustee of the creditor under trustee process. But if the contract on which the debt is founded draws interest during the time payment is thus delayed, interest will not be suspended. If a debtor against whom trustee or garnishment proceedings are issued causes unreasonable delay in making his answer thereto or otherwise, for the purpose of obtaining a longer use of the money, or falsely denies his indebtedness, he will be liable for interest during the pendency of the proceedings. (2) Use of funds by garnishee.—If a garnishee, during the pendency of the proceedings, employs the funds in his hands so as to derive a profit therefrom, he will generally be held to account for interest."

In *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161 (1855), the court held that a person to whom money is intrusted to be paid over to a designated recipient, and who deposits the money in bank for some time,



afterward paying it over to the person entitled to receive it, is liable to such person for the interest paid to him on the money while deposited in the bank, although such interest is paid after the money has been turned over. Where it affirmatively appears that the funds have been profitably employed, and the principal has been augmented by virtue of such profitable employment, the principal and the increment are inseparable and belong to the attaching creditor. If the attached fund, in this case the deposits, produces earnings during the period of the attachment, those earnings are an incident of the attached fund and subject to the lien. It makes no difference by what name the earnings may be called, whether interest or dividends. As long as the attached fund is used for profit, the profit, whether earned for the benefit of the garnishee or the debtor, is impounded for the benefit of the attaching creditor, and is subject to the same ultimate disposition as the principal of which it is the incident. Is it said that in this case the Savings Bank was not using the funds for its own benefit, but for the benefit of the depositors? But surely that cannot help the case, for, if the argument be sound, then this extraordinary result would follow: That a person garnished could not use the attached funds for his own benefit without being chargeable with interest, but he could use them for the benefit of the debtor defendant who is being pursued by the attaching creditor, and if he did, the defendant, and not the attaching creditor, would be entitled to the accumulated interest. A principle leading to such an unjust and irrational result cannot be sound and need not be further considered.

That the deposits attached were used and earned a profit during the period of litigation is conceded. The court below made the following finding of fact which was embodied in the judgment: "That since that attachment, the defendant herein has, in accordance with the terms of its charter, used and improved the moneys so deposited with it,

and has regularly declared dividends upon said several deposits, payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits, levied upon by said writ of attachment, is \$11,278.13."

The plaintiff contends that he is entitled to recover 6 per cent interest from the date of the demand made by the marshal after final judgment on December 24, 1912. The General Statutes of Connecticut, Revision of 1902, § 3440, provide that the net income of savings bank in excess of  $\frac{1}{2}$  of 1 per cent of its deposits, actually earned during the six months last preceding, and no more, may be semiannually divided among its depositors. It is then added that no dividend shall exceed a rate of 4 per cent per annum except as provided in § 3441. The plaintiff's claim to 6 per cent does not rest upon anything in that section, but upon the principle that the refusal to comply with the marshal's demand was wrongful, and, when one wrongfully withholds moneys, he is chargeable with the legal rate of interest, which, in Connecticut, is 6 per cent. At the time the marshal made his demand, the interest or dividends were claimed by the United Hatters of North America under the assignment, and the proceeding now under review was instituted to determine the rights of the respective parties. A withholding by the defendant under such a circumstance cannot be regarded as unlawful, and the interest to be allowed must be limited to the savings bank rate.

The judgment below must be modified so as to include the dividends declared by the defendant according to law. Those dividends the plaintiff is entitled to recover in addition to the balance of the deposits, \$428.52, and his costs in both courts.

The judgment, so modified, is affirmed.

Affirmed by the Supreme Court of the United States, January 8, 1917, 242 U. S. 357, 61 L. ed. —, 37 Sup. Ct. Rep. 172.

### **Annotation—Levy upon property as including subsequent increase thereof.**

This note is intended to include cases which have considered the question whether, when property of a debtor has been levied upon, the natural increase of such property, as, for example, dividends on stock, rents of land, or offspring of animals, follows the thing levied upon; and upon such question there is a surprising lack of authority.

The real question before the court in *LOEWY v. SAVINGS BANK*, ante, 938, so far as it relates to the question under anno-

tation, seems to have been whether the interest on savings bank deposits was dividends; and such question having been decided in the affirmative, it followed as a matter of course that the attachment covered interest subsequently accruing, as, by the statutes of Connecticut, which controlled in this case, levies of attachments and executions upon shares of a corporation include dividends growing due thereon.

No other case has been found involv-

ing interest on bank deposits, and it is doubtful whether *LOEWE v. SAVINGS BANK* would be authority in a case where the deposit was in a bank other than a savings bank.

*LOEWE v. SAVINGS BANK* was affirmed by United States Supreme Court in (1917) 242 U. S. 357, 61 L. ed. —, 37 Sup. Ct. Rep. 172, that court holding that a garnishment of savings bank deposits reaches the so-called dividends accrued since the writ was served upon the garnishee, where, under the local laws, a garnishment, while reaching only effects in the hands of the garnishee at the time of such service, holds the subsequently accruing interest on an interest-bearing debt as well as the principal, although such local law gives the right to release the attachment by giving a bond equal to the value of the effects attached.

On the question as to the analogy between the so-called dividends of a savings bank and dividends of a corporation, or interest due by contract upon a debt, the court said: "The plaintiff in error is an ordinary savings bank without stockholders. It is subject to a fiduciary duty to hold and invest for the benefit of its depositors all the funds that it receives, and to pay over to them all the net income earned, after the retention of enough to constitute a small safety fund. . . . This duty certainly is no less because created by statutes rather than by contract. It is guarded by other statutes limiting the investments allowed and requiring inspection, with the object of making principal and income secure rather than large. . . . The minimum amount of the dividends generally is as fixed in practice as if it were written in a bond. The practical certainty that a savings bank will pay is greater, in short, than that an average debtor will pay 6 per cent, according to his promise in a note. The only element of uncertainty other than that conditioning all future conduct is the possibility that the dividends may be greater than that which experience has led the depositor to expect. He has a vested right to the dividends,—a vested right that the corporation should take the most prudent steps to secure them, with an identified fund devoted to the result. We do not perceive why the possibility of there being no earnings because of fraud or a cataclysm, or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment, than the L.R.A.1917B.

right to the capital which runs the same risk, . . . or than that arising from the promise of a debtor, who may fail or abscond, or, if a corporation, may have no assets. The case certainly is not weakened, it rather seems to us to be strengthened, by the fact that the statutes of Connecticut provide that the levy of attachments and executions upon even the shares of a corporation shall include dividends growing due thereon. The provision indicates a policy, and although, of course, the words do not include dividends from savings banks, as, in our opinion, they did not need to, it is only by imagining unreal distinctions that the policy embodied in the statute, and extending by the common law to interest due upon contract, can be held to exclude the claim to subsequently earned income of ordinary savings banks, when that claim, as we have tried to show, is a vested right. . . . No argument against our conclusion can be based on the right to release the attachment by giving a bond equal to the value of the effects attached. . . . We presume that ordinarily a plaintiff would be satisfied with a bond for the principal of a debt or deposit. If he should raise a question, we will wait for the Connecticut courts to decide whether he might or might not be entitled to more. Finally, the assignment, of course, has no effect upon the rights of the defendant in error. If the attachment would have held dividends as against the original defendant, it holds them as against the assignee."

That dividends on stock which is attached are covered by the attachment was held in *Jacobus v. Monongahela Nat. Bank* (1888) 35 Fed. 395. The court stated that it is not a case of a distinct and independent fund coming into the garnishee's possession after plea filed, but that the dividends are but an incident to the stock,—the mere fruits thereof,—and are as much within the grasp of the attachment as is the corpus of the stock.

And that dividends to accrue are impounded by a levy upon stock of the debtor is the decision in *Farmers & M. Nat. Bank v. Mosher* (1904) 68 Neb. 713, 94 N. W. 1003, 100 N. W. 133; *Norton v. Norton* (1885) 43 Ohio St. 509, 3 N. E. 348.

So, also, in *McCarthy Co. v. Boothe* (1905) 2 Cal. App. 170, 83 Pac. 175, the court declared that profits and dividends to accrue from stock are impounded equally with the stock itself. And see,

to the same effect, *Cates v. Consolidated Realty Co.* (1914) 25 Cal. App. 531, 144 Pac. 301.

And in *Moore v. Gennett* (1875) 2 Tenn. Ch. 375, the court said the increase or income of property after the levying of an attachment is given to the creditors by the Code, § 3536.

Rents are not impounded by reason of the levy of an attachment on real estate. *Columbia Bank v. Ingersol* (1888) 21 Abb. N. C. 241, 1 N. Y. Supp. 54.

That the levy of an attachment upon land confers no right to take the issues or profits of the land so attached was also held in *Kothman v. Markson* (1886) 34 Kan. 542, 9 Pac. 218. Until the sale and conveyance are made, the court said, the right of possession remains in the debtor; and until the sale is completed in pursuance of the judgment and decree, neither the judgment creditor nor the purchaser at the sale acquires any right to the rents, issues, or profits of the real estate.

But in *Stockton v. Hyde* (1850) 5 La. Ann. 300, it was held that, by the service of an attachment, the sheriff is in possession of land for the benefit of whom it may concern, the attaching creditor or other parties interested, and so rents accruing from the possession belong to the party for whose benefit the possession is held.

And to the same effect is *Summers v. Clark* (1878) 30 La. Ann. 436. The decisions in these Louisiana cases, how-

ever, are based on the Code provision that "the fruits of an immovable . . . produced while it is under seizure are considered as making part thereof and inures to the benefit of the person making the seizure;" and the further provision that "when the sheriff seizes houses or land he must take at the same time all the rents, issues and revenue which this property may yield."

And in *Young v. Hail* (1880) 6 Lea (Tenn.) 179, it was held that rents follow the land and go first to the attaching creditors, by virtue of the Code provision that "the property attached if not replevied with its proceeds or increase from the date of levy will be subjected to the satisfaction of the judgment or decree."

Earnings of an attached vessel between the time of the levy of the attachment and the time of sale belong to the owners of the vessel. *Richardson v. Kimball* (1848) 28 Me. 463.

A colt foaled after the levy is as much in the possession of the constable as the mare; and the rights of property therein are not different from those in the mare. *Talbot v. Magee* (1894) 59 Mo. App. 347.

And in *Blum v. Light* (1891) 81 Tex. 414, 16 S. W. 1090, there is a dictum to the effect that if a lien has been acquired by levy on cows with calves, it will, as between the parties themselves, carry with it a lien on the calves after they are born.

J. H. B.

## ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS  
EX REL. JOHN B. GASKILL, Appt.,

v.

FOREST HOME CEMETERY COMPANY  
et al.

(258 Ill. 36, 101 N. E. 219.)

**Cemetery — right to exclude colored persons.**

1. An incorporated cemetery association, having no power of eminent domain, and no monopoly of the burial places in the vicinity, is not bound to admit to burial the bodies of colored persons who are not lot owners.

For other cases, see *Civil Rights*, in *Dig.* 1-52 N. S.

**Same — tax exemption — effect.**

2. The mere exemption of a cemetery from

Note. — On forbidding burial of negro in cemetery controlled by white persons, see annotation following this case, post, 948. L.R.A.1917B.

taxation does not fix its character as a public one, so as to prevent its excluding colored persons from burial within its limits. For other cases, see *Civil Rights*, in *Dig.* 1-52 N. S.

**Civil rights — cemeteries.**

3. A statute giving colored persons the right to equal accommodation in public conveyances and funeral hearses "and all other places of public accommodation and amusement" does not entitle them to accommodation in cemeteries.

For other cases, see *Civil Rights*, in *Dig.* 1-52 N. S.

**Constitutional law — 14th Amendment — acts of private corporation.**

4. The 14th Amendment to the Federal Constitution does not prevent the exclusion of colored persons from the right to burial in cemeteries owned by private corporations.

For other cases, see *Constitutional Law*, II. a, 1, in *Dig.* 1-52 N. S.

(February 20, 1913.)

**A**PPEAL by relator from a judgment of the Circuit Court for Cook County dismissing a petition for a writ of mandamus to compel respondents to receive the body of relator's wife for burial. Affirmed.

The facts are stated in the opinion.

Mr. George W. Wilbur for appellant.

Messrs. Pearson & Herrick for appellees.

Cartwright, J., delivered the opinion of the court:

The circuit court of Cook county sustained the demurrer of appellees, the Forest Home Cemetery Company and its officers, to the petition of the people, on the relation of John B. Gaskill, for a writ of mandamus, commanding the appellees to receive for burial the body of Pinkie G. Baskill, deceased, late wife of the relator, and to permit the burial thereof in the usual and customary manner, and in a place suitable for such burial, upon the payment of the usual and fixed charges for such service and accommodation. The relator elected to stand by the petition, whereupon it was dismissed at his cost. The petition alleged that the denial by the appellees of the right of burial in the Forest Home Cemetery was an infringement of the rights of the relator under the Constitution of this state and the United States, and an appeal to this court was prayed for, allowed, and perfected.

The following are the material facts alleged in the petition and admitted by the demurrer: The Forest Home Cemetery Company is a corporation organized under the general incorporation act of 1872 (Laws 1871-72, p. 296) to establish a cemetery in Cook county, to acquire lands for that purpose and subdivide and improve the same, and to sell lots for burial purposes. The corporation obtained about 200 acres of land about  $3\frac{1}{2}$  miles west of the city limits of Chicago, and entered upon the business for which it was formed. It has sold many lots to the general public for burial purposes, and still owns and holds many lots for sale for the same purpose. The relator is a colored citizen of the United States and of Cook county. From 1890 to 1896 four of his children died, and they were buried in the cemetery in single burial places, separate from each other. The corporation passed a resolution that, after December 31, 1907, the cemetery would be maintained for the interment of the remains of persons of the white race only, but the remains of colored persons owning lots in the cemetery, and their direct heirs, should be admitted for burial in the lots owned by them. On March 16, 1912, Pinkie B. Gaskill, wife of the relator, died, and he applied for space for the burial of her body, and permission was refused L.R.A.1917B.

solely because it was the body of a colored person. He was ready, willing, and able to pay the fixed charges for the accommodation asked for, but the privilege was denied, and the reason was explained in a letter stating that the officers had no personal prejudice nor ill will toward the colored people, but there had been so much trouble and objection that it was for the best interest of the cemetery to exclude them, and saying: "If the colored people did buy lots it would only make the neighbors angry and kick and remove to some other part of the cemetery or possibly to some other cemetery." The letter placed the refusal upon business grounds and the necessity for the corporation to do what was best for its own interest.

Corporations are creatures of the legislative branch of the government, and their powers and duties are to be determined from their charters, where such powers and duties are defined, having in view at all times the presumption that the general assembly intended to promote the public interest by creating them. If they are created for the purpose of performing a service for the public, or invested with powers concerning which the public at large have a direct and substantial interest, they cannot arbitrarily select the persons for whom they will perform the service or exercise their powers, contrary to the public policy of the state. A corporation formed to serve the public must serve all who apply, on equal terms, and if the corporation devotes its property to a use in which the public have an interest, the owner must submit to be controlled and regulated by the public to the extent of the interest created. Corporations organized to serve the public generally, such as those which furnish water, gas, or electric lights in cities, cannot select their patrons, but must furnish accommodations to all who apply, on equal terms and at reasonable rates. *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Danville v. Danville Water Co.* 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118. As to such corporations there is the additional reason that they have exclusive control of the supply, and those whom they refuse to serve cannot be served at all, which impresses the property with a public interest. One reason for determining that the property of the corporation is affected with a public interest and devoted to a public use is that the corporation may exercise the sovereign power of eminent domain, which can only be granted to a corporation for a public use. That was the fact in the case of *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L.R.A. 568, 75 Am. St. Rep. 184, 56 N. E. 822, in addition to the fact that the Associated Press had a practical

monopoly of furnishing news required by the public and in which the public were vitally interested. So, also, property becomes clothed with a public interest when used in such a manner as to make it of public consequence, and to affect the community at large. *New York & C. Grain & Stock Exch. v. Board of Trade*, 127 Ill. 153, 2 L.R.A. 411, 11 Am. St. Rep. 107, 19 N. E. 855. None of these considerations apply to the Forest Home Cemetery Company. There is no provision of its charter or rule of public policy declared by any authority competent to make known or establish such policy, requiring it to admit for burial all persons who may apply for the privilege. There is no element of monopoly, since it does not control all burial places in the vicinity of Chicago, and the community at large is not affected so as to impress its property with a public interest. In *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685, the corporation possessed the right to condemn property, and on that ground it was held to be a quasi public corporation, and bound to exercise its rights and privileges fairly and impartially as between the owners of lots. The relator in this case was not the owner of a lot, and did not come within the decision in that case, nor the case of *Mt. Moriah Cemetery Asso. v. Com.* 81 Pa. 235, 22 Am. Rep. 743, where the colored man was the owner of a lot in the cemetery. This corporation did not deny the right of burial to anyone who was the owner of a lot. Undoubtedly a corporation for cemetery purposes may be incorporated to serve the public generally, and endowed with the power of eminent domain. A corporation organized under the Act of 1903 (Laws 1903, p. 90), is authorized to acquire land by condemnation which is necessarily for a public use. But this corporation has no such power.

It is argued that exemption from taxation fixes the character of the corporation as a public one, but the right to exempt it rests on the constitutional provision which includes property used for schools, religious and other purposes, where the corporations are not required to admit to their privileges all persons who may apply. As to private schools, it has been held that they may refuse to admit colored students. *State ex rel. Clark v. Maryland Institute*, 87 Md. 643, 41 Atl. 126; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 24

L.R.A.(N.S.) 447, 120 N. W. 589. The exemption from taxation does not fix the character of the corporation. (238 U. S. 606, 59 L. ed. 1486, 35 Sup. Ct. Rep. 602.)

It is also claimed that the duty sought to be enforced is conferred by the Act of 1911, concerning civil and legal rights. Laws 1911, p. 288. That act declares that all persons within the jurisdiction of this state shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities, and privileges of various enumerated places of public accommodation and amusement, including with railroads, street cars, and other public conveyances, funeral hearses, the use of which is not involved in this case, and concluding with the words, "all other places of public accommodation and amusement." Cemeteries are not of the same class as those places which are enumerated, and there is a special provision concerning cemeteries, which shows that they were not intended to be embraced within the description of places of public accommodation and amusement. That provision is that there shall be no discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead, and that provision would be superfluous if cemeteries were already included in the general provision. It was held in *Cecil v. Green*, 161 Ill. 265, 32 L.R.A. 566, 43 N. E. 1105, that a drug store in which soda water was sold was not a place of public accommodation and amusement within the Civil Rights Act (Hurd's Rev. Stat. 1911, chap. 38, §§ 42i-42j) then in force, and that the keeper thereof might refuse to sell soda water to a colored person. At least as convincing reasons could be given for excluding cemeteries.

The refusal to permit the body of relator's late wife to be buried in the Forest Home Cemetery did not infringe any right of the relator under the Constitution of this state, and he has no right respecting such burial under the 14th Amendment to the Federal Constitution, which only applies to acts of the state. *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524.

The judgment is affirmed.

Petition for rehearing denied April 3, 1913.

Writ of error dismissed by the Supreme Court of the United States, March 8, 1915.

### **Annotation—Forbidding burial of negro in cemetery controlled by white persons.**

Supplementing the note to *Richmond Cemetery Co. v. Walker*, 7 L.R.A.(N.S.) 155. L.R.A.1917B.

PEOPLE EX REL. GASKILL v. FOREST HOME CEMETERY Co. ante, 946, appears to be the only case decided since the

preparation of the earlier note. But attention is directed to *Hertle v. Riddell*, 127 Ky. 623, 15 L.R.A.(N.S.) 796, 128 Am. St. Rep. 364, 106 S. W. 282, holding that the property rights of a lot owner in a cemetery set apart for the burial of the white race, and for cemetery purposes only, are violated by the burial of a dog in an adjoining lot, and that the fact that a physical nuisance is not thereby created is immaterial. It was further held in this case that such burial of a dog might be remedied by mandatory injunction against the cemetery and the offending lot owner.

See also *St. Peters Evangelical Lutheran Church v. Bean* (1906) 15 Pa. Dist. R. 636, holding that a certificate declaring that the holder is entitled to a certain lot, to be used for burial purposes only, but transferring no interest in the soil, authorizes the interment only of

human bodies, and that the holder can neither bury his dog nor erect a monument thereon to its memory. It is further held that such a use might be enjoined, although there was no general regulation on the subject, inasmuch as the authorities were not required to anticipate an attempt to do such an act.

As to the validity of regulations concerning the care or improvement of cemetery lots, see the note to *Nicholson v. Daffin*, L.R.A.1915E, 168.

Various other questions in relation to cemeteries are treated in notes cited in *Indexes to L.R.A. Notes*, under the title, "Cemeteries," and many phases of discrimination against colored persons are discussed in notes indexed under the title "Civil Rights" and other titles referred to by cross references under that title.

L. A. W.

# IOWA SUPREME COURT.

FALK J. YOUNKER, Appt.,

v.

R. R. McCUTCHEN et al.

(— Iowa, —, 159 N. W. 441.)

**Party wall — change of temporary to permanent building — duty to contribute to cost of wall.**

1. That the building on one side of a wall used as a party wall was constructed by tenants with the right to remove it, and that for most of its length the wall was constructed entirely on the property of the adjoining owner, does not, in case the latter removes it and constructs a new wall on the true line, to bear the weight of a larger building, replacing the connections of the tenants' building as they were before, take it out of the operation of a statute giving every coproprietor of a wall the right to increase its height and strength at his own expense, to which the adjoining owner shall contribute when he utilizes the addition, and therefore the owner of such adjoining property is not, upon purchasing his tenant's interest and improving the building on his property, bound to contribute to the cost of the additions to the wall unless he makes use of them, although his building has become part of the reality.

*For other cases, see Party Wall, in Dig. 1-52 N. S.*

**Same — use by tenant — contribution by property owner.**

2. A property owner is not bound to contribute to the cost of a party wall erected

by his adjoining owner, and utilized by his own tenant while the lease continues.

*For other cases, see Party Wall, in Dig. 1-52 N. S.*

(September 29, 1916.)

**A**PPEAL by plaintiff from a judgment of the District Court for Polk County sustaining a motion to dismiss a petition filed to recover the value of one half of a party wall owned and constructed by plaintiff and used by defendants, and to recover the value of one half of the ground upon which the wall was located. Affirmed.

Statement by Preston, J.:

Action at law brought by appellant to recover the value of one half of what plaintiff calls a wall in common, owned by and constructed at the cost of the appellant and used by appellee, and to recover for the value of 9 inches of ground, being one-half of the ground upon which said wall is located. Appellant alleged in his petition that shortly after the plumbing company removed from defendants' premises, and when, as he says, it had no longer any right in, or to, the use of the premises nor the building situated thereon, the defendants used and are using the west wall of plaintiff's building up to the top of the second floor thereof, being a distance of 42 feet, as a wall in common or party wall, and is the east wall of the building on their premises; that defendants have made openings in said wall, inserted joists and timbers for the building, and removed bricks therefrom; that they have failed and refused to pay plaintiff the value of so much of said

**Note.** — For utilization of party wall by lessee as affecting lessor's duty to contribute to cost thereof see annotation following this case, post, 960.

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wall as they are using as a wall in common and for 9 inches, or one half of the ground upon which said wall is located; that the value of the wall as used by defendants is \$750, and the value of the 9 inches of ground \$1,125. Trial was had to the court without a jury. At the close of the evidence defendants moved that plaintiff's petition be dismissed and the motion was sustained. Judgment was rendered against plaintiff for costs, and he appeals.

**Messrs. Strock & Wallace and Miller & Wallingford**, for appellant:

The building joined temporarily to plaintiff's wall was personal property up to the time it was acquired by defendants under contract and bill of sale from their tenants.

*Corwin v. Moorehead*, 43 Iowa, 466; *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104; *Union Terminal Co. v. Wilmar & S. F. R. Co.* 116 Iowa, 392, 90 N. W. 92; *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780.

Temporary or provisional use of a wall abutting a division line will not suffice to charge the adjoining owners; nor will such use justify a purchaser in assuming that all rights with reference to party walls between neighbors have been adjusted.

*Deere, W. & Co. v. Weir-Shugart Co.* 91 Iowa, 422, 59 N. W. 255; *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732; *Percival v. Colonial Invest. Co.* 140 Iowa, 275, 24 L.R.A.(N.S.) 293, 115 N. W. 941; *Pew v. Buchanan*, 72 Iowa, 637, 34 N. W. 453.

The right to recover contribution for the party wall arose when the adjoining owners made permanent use of it.

*Zugenbuhler v. Gilliam*, 3 Iowa, 391; *Bertram v. Curtis*, 31 Iowa, 46; *Deere, W. & Co. v. Weir-Shugart Co.* 91 Iowa, 422, 59 N. W. 255; *Pew v. Buchanan*, 72 Iowa, 637, 34 N. W. 453; *Molony v. Dixon*, 65 Iowa, 136, 54 Am. Rep. 1, 21 N. W. 488; *Monroe Lodge v. Albia State Bank*, 112 Iowa, 487, 84 N. W. 682; *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732; *Pier v. Salot*, 134 Iowa, 357, 111 N. W. 989.

Every proprietor joining a wall has the right of making it a wall in common by repaying to the owner thereof one half of the value of the part he wishes to hold in common, and one half of the value of the ground on which it is built, if the person who has built it has laid the foundation entirely upon his own ground.

*Molony v. Dixon*, 65 Iowa, 136, 54 Am. Rep. 1, 21 N. W. 488; *Murrell v. Fowler*, 3 La. Ann. 165; *Heine v. Merrick*, 41 La. Ann. 194, 5 So. 760, 6 So. 637. L.R.A.1917B.

**Messrs. Cummins, Hume, & Bradshaw**, for appellees:

Iowa's "Party Wall Statute" violates the Constitution of the state, taking, as it does, private property for private use, without just compensation, and without due process of law, and is sustained by this court only under the doctrine of stare decisis, and as an extreme exercise of the police power of the state.

*Thomson v. Curtis*, 28 Iowa, 229; *Bertram v. Curtis*, 31 Iowa, 46; *Lederer v. Colonial Invest. Co.* 130 Iowa, 157, 106 N. W. 357, 8 Ann. Cas. 317; *Swift v. Calnan*, 102 Iowa, 206, 37 L.R.A. 462, 63 Am. St. Rep. 443, 71 N. W. 233.

In the legal sense of the term, a party wall can only exist in two ways,—by contract or statute. The common law creates no such right.

30 Cyc. 775; 22 Am. & Eng. Enc. Law, 2d ed. 240, 242; *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; *Gilmore v. Driscoll*, 122 Mass. 207, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; *Quinn v. Morse*, 130 Mass. 317; *List v. Hornbrook*, 2 W. Va. 340; *Bonomi v. Blackhouse*, 9 H. L. Cas. 504; *Priess v. Parker*, 67 Ala. 500; *Sherred v. Cisco*, 4 Sandf. 480; *Orman v. Day*, 5 Fla. 385.

The right to enforce contribution to the cost of party walls is to be strictly limited to the terms of the statute.

*Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351.

Where a lot owner does not build exactly upon the dividing line between his and his neighbor's lot, as provided by the statute, but, by mistake, extends his wall a few inches over upon the adjoining lot, the wall cannot be regarded as a statutory party wall, and the builder will be compelled, by order of court, to remove the projecting portion of the wall from off the adjoining lot.

*Pile v. Pedrick*, 167 Pa. 296, 46 Am. St. Rep. 677, 31 Atl. 646, 647.

Where "party walls" bestride a coterminal line, the coproprietors own in severalty the portions of the wall resting upon their own land, and the middle line of the wall marks the line of the adjacent lot owners.

*Lederer v. Colonial Invest. Co.* 130 Iowa, 157, 106 N. W. 357, 8 Ann. Cas. 317.

In the absence of proof overcoming the presumption that the cost of the wall has been adjusted, and that it is a wall in common, both de facto and de jure, the wall, to the center thereof, passes to the vendee of the adjacent owner, free from any liability to contribute to its cost.

*Bertram v. Curtis*, 31 Iowa, 46.

Party walls do not necessarily have to be located exactly upon the true dividing line,

but, provided they are used for party-wall purposes, they may stand a considerable distance therefrom, and do not thereby lose their character as party walls under the statute.

*Molony v. Dixon*, 65 Iowa, 136, 54 Am. Rep. 1, 21 N. W. 488; *Zugenbuhler v. Giliam*, 3 Iowa, 391.

Where, by agreement of adjoining owners, the wall of an old building belonging to one of them is destroyed, and the wall of a new building belonging to the other is erected in its place, the insertion of the joists of the old building into the new wall, thereby connecting it with the new building, does not make the owner of the old building liable for contribution, even though the old building be extended some feet to the rear, and the new wall be used as a wall of this extension.

*Shaw v. Hitchcock*, 119 Mass. 254; *Fox v. Mission Free School*, 120 Mo. 349, 25 S. W. 172.

The Des Moines Plumbing & Heating Company being the "first user" of the new wall, it, and it alone, if anyone, became liable for contribution to the plaintiff.

*Thomson v. Curtis*, 28 Iowa, 229; *Bert-ram v. Curtis*, 31 Iowa, 46; *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732; *Capital City Invest. Co. v. Burnham*, 143 Iowa, 147, 121 N. W. 708; *Percival v. Colonial Invest. Co.* 140 Iowa, 275, 24 L.R.A.(N.S.) 293, 115 N. W. 941.

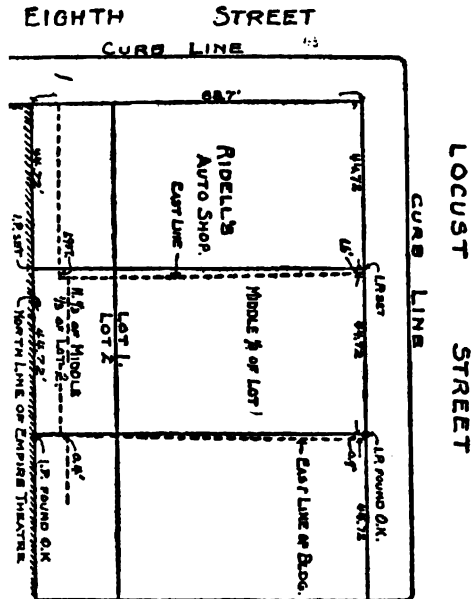
All liability for contribution for that portion of the wall built by plaintiff and now used by defendants as their west wall, if any there was, was adjusted, settled, and discharged by the written contract of July 12, 1909, between plaintiff and defendants' lessee, the Des Moines Plumbing Company, which contract was thereafter fully executed and performed.

*Harvey v. Tama County*, 58 Iowa, 228, 5 N. W. 130; *Porter v. Chicago, I. & D. R. Co.* 99 Iowa, 351, 68 N. W. 724; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456.

*Preston, J.*, delivered the opinion of the court:

The case is somewhat complicated, but the facts are not in dispute. There was some evidence introduced, but the facts are shown largely by the pleadings and the admissions therein and the stipulations of counsel. That there may be a better understanding of the situation we attach a plat of the properties in controversy.

L.R.A.1917B.



The plaintiff and defendants bought their properties at about the same time in November, 1906. The defendants claim that the wall between the properties is a party wall under § 2999 of the statute, to be later referred to, and, as we understand it, appellant claims it to be a party wall under § 2994 and other sections of the statute, though in his reply argument he claims that the east wall was at no time a party wall, but that, if it was such, that characteristic of the wall was lost when the appellees and appellant entered into the contract fixing the dividing line, and made the conveyances to each other which put almost, if not all, of this wall on plaintiff's premises. No mention is made in that contract and the conveyances of the wall in question.

The contract fixing the dividing line and the conveyances to each other were executed May 7, 1907. Plaintiff purchased his property of one Bertha Clapp Harbach. On said May 7, 1907, plaintiff was the owner, and by and through his tenants was in possession of his property, which is described: "The east third of lot 1 and of the north third of lot 2 in block 1 of the town of Fort Des Moines, now within the corporate limits of the city of Des Moines, Polk county, Iowa."

Plaintiff's property comprised two business lots fronting north on Locust street, and the business lots were locally known as 712 and 714 Locust street. There was a public alley east of it, and the property extended south from Locust street 88 feet. The building on the property was 80 feet



deep, leaving a private alley 8 feet wide in the rear. On the date last mentioned defendants were owners in fee and by their tenants were in possession of their property described as follows: "The middle third of lot 1 and of the north third of lot 2, in block 1 of the town of Fort Des Moines, now within the corporate limits of the city of Des Moines, Polk county, Iowa."

This parcel of land also comprised two business lots, fronting north, adjoining on the west the plaintiff's property. Defendants' lots were locally known as 716 and 718 Locust street 716 being east of 718. There were buildings upon both plaintiff's and defendants' properties, partly two story and partly one story. After plaintiff purchased his property, it was learned that the frontage on Locust street from the alley to Eighth street was about 2 feet more than 132 feet, as then supposed; that there was some dispute as to the west boundary line of the property described in his contract of purchase. The frontage was divided equally by the three lot owners, so that appellant owned one third, or 44.72 feet west of the alley, and defendants owned 44.72 feet next west; and on May 7, 1907, a written contract, before referred to, was entered into, fixing the boundary line between appellant's and appellees' properties.

The contract of May 7th was signed by plaintiff and defendants and their wives, and by plaintiff's grantor, Bertha Clapp Harbach. The contract established a line 44 feet and 6 $\frac{1}{2}$  inches west of the east line of lot 1, and north one third of lot 2, as the boundary line between the properties, and each party quitclaimed to the other the real estate lying on the other side so established. But no mention was made in this agreement or in any agreement entered into between the plaintiff and defendants of or concerning the party wall then and theretofore separating the buildings upon the adjoining lots.

As the east side of the east wall of the old building No. 716 Locust street (defendants' east lot) was  $\frac{1}{2}$  of a foot, or 4.8 inches, east of the newly established dividing line at the rear, and as it veered slightly to the east as it approached Locust street, until, at the south line of Locust street, its east side was  $\frac{1}{2}$  of a foot, or 10.8 inches, east of said newly established dividing line, this newly established dividing line cut off most of the east wall, and, at the front, 2 or 3 inches of the building No. 716. In other words, most of the old wall and 2 or 3 inches of the building itself, near Locust street, were thus made to extend over and to rest upon the plaintiff's lot. For this reason, as defendants claim, and for the reason that the Des Moines Plumbing Com-

pany still held a lease of said building which did not expire until April 1, 1910, the following provisions were incorporated in the agreement, to wit:

"This agreement and conveyance is made subject to the lease or leases now held by the Des Moines Plumbing Company, covering a portion of the premises hereinbefore described, and is not in any way to affect or disturb any rights of said Des Moines Plumbing Company which have been heretofore acquired upon said lease or leases, or which have been acquired by it, by possession and occupancy of said premises, or any part thereof.

"Neither shall this agreement convey or give any right whatsoever to the said Bertha Clapp Harbach and Falk I. Younker, or either of them, their successors or assigns, to any lease or leases with the Des Moines Plumbing Company, nor to collect or receive any part or portion of the rents payable by said company under said lease or leases, or any part of the premises now occupied by it thereunder; but the said R. R. McCutchen and W. F. Mitchell, their successors or assigns, shall have the same right to said rents, and to collect and receive the rents hereafter payable by said Des Moines Plumbing Company, its successors or assigns, under said lease or leases, for the use and occupancy of any part of the said premises now occupied by the said Des Moines Plumbing Company thereunder, until the expiration of the period covered by said lease or leases, as though this agreement had not been made."

At the time this contract was executed defendants' property No. 716 Locust street was occupied by the Des Moines Plumbing & Heating Company, a copartnership composed of W. M. Kubec and C. W. Rosene, under a ten-year written lease from the former owner of the property, one Sarah A. Clapp. The lease will be referred to later. Some fifteen years before the date of the contract fixing the dividing line, or on October 1, 1892, Sarah A. Clapp, the then owner of the premises now owned by defendants, had made an eight-year lease of the premises No. 716 Locust street to one C. W. Fowler, which lease expired April 1, 1900. The Fowler lease provided that the lessee "agrees not to sell, assign, or transfer this lease, nor underlet said premises, or any portion thereof, without the written consent of the lessor." Another paragraph of the lease provides that the lessee "agrees to erect a building, to be used for plumbing and gas-fitting purposes on said premises." Another paragraph of the lease provides that the lessee reserve the right "upon the termination of this lease to remove the buildings from said

premises provided he has complied with the covenants and agreements herein contained; otherwise the same shall remain as security for the performance and discharge thereof."

Fowler built the building No. 716 shortly after he leased the premises, and plaintiff, in his petition, alleges that he built it in compliance with said written lease. Defendants, in their answer, admit that Fowler built the building in the summer of 1892. Kube, one of the occupants, testified that he had been a member of the Des Moines Plumbing & Heating Company for nineteen or twenty years, and that Fowler built the building and that the plumbing company went into the property in the early 90's. The ten-year lease, before referred to, from Sarah A. Clapp to the plumbing company for the property known as 716 Locust street began April 1, 1900, and expired April 1, 1910. The lessee named in and who subscribed this lease is the Des Moines Plumbing Company, and appellees regard it as important that in this lease the premises are described as real estate is usually described, with no reservation of or reference to the ownership of the brick building located thereon. The plaintiff alleges in his petition that the Des Moines Plumbing Company, a partnership consisting of C. W. Rosene and W. M. Kube, some time during the year 1895, with the consent of the lessor, succeeded to all the rights of the lessee, C. W. Fowler, in and to the eight-year lease and the building erected by said Fowler. This is denied by the answer, and defendants specifically deny that the Des Moines Plumbing Company, or any other person, firm, or corporation other than the owner in fee of the leased premises, viz., the said Sarah A. Clapp, became the owner of said building upon the termination of said lease. While, as above stated, plaintiff alleges in his petition that the plumbing company, with the consent of the lessor, succeeded to the rights of Fowler, there is no evidence in the record of the assignment of the eight-year lease by Fowler to the plumbing company or its members or to anyone; nor is there any evidence in the record of the written consent of the lessor, Sarah A. Clapp, to an assignment of that lease, nor of her verbal consent to an assignment of it; and there is nothing to show that Mrs. Clapp ever waived any provision of the lease. It should be noticed also that the ten-year lease was granted to the Des Moines Plumbing Company, a different person than C. W. Fowler, who was the lessee of the prior eight-year lease; the lease to the plumbing company gives no title to, or right of removal of, the brick building located upon the premises. There is nothing in the ten-L.R.A.1917B.

year lease itself showing it to be a renewal or extension of the eight-year lease, and nothing to show that the plumbing company was the vendee of Fowler of the building built by him, or the assignee of his conditional right to remove said building at the termination of his lease. The situation remained the same from May 7, 1907, until July 12, 1909, when the plaintiff, having, in the fall of 1908, acquired a deed from his vendor, Bertha Clapp Harbach, and being about to erect a new brick building upon his lots, three stories in height, with a basement under it, by written agreement of said date, plaintiff purchased from the Des Moines Plumbing & Heating Company, lessee, a right to remove that portion of the building No. 716 Locust street which extended east of the dividing line theretofore agreed upon by the owners of the properties, and to build the west wall of his new building upon the dividing line theretofore established by the fee owners. This agreement provided, among other things, as follows: "And the said party of the second part (the plaintiff) will, at his own cost and expense, insert the joists that reach said new wall and attach the building now occupied by the party of the first part (the Des Moines Plumbing Company) to the said wall constructed by the party of the second part, and finish the west surface of said newly constructed wall for a distance of two (2) stories above the ground, so that the rooms in said building and the building now occupied by the said party of the first part shall, as soon after the completion of the said wall as possible, be left in as good condition as the same are now in; that the party of the second part will do such repapering and refinishing on the inside of the rooms now occupied by the party of the first part as shall be necessary to leave the same in as good condition as they are now in. And the said party of the second part agrees that he will construct said new wall and perform the terms of this contract as soon as practicable."

The defendants were not parties to this agreement. Upon the execution of this agreement plaintiff proceeded to erect his building. He tore down the east wall of defendants' building, a party wall, as is claimed, and undermined it. The concrete foundation, or at least the footing for the foundation of the new wall, was built so as to project from 4 to 6 inches west of the dividing line and upon defendants' property. The brick wall of the basement, above the foundation, was built entirely upon plaintiff's ground, the west side thereof abutting upon the dividing line agreed upon in the contract of May 7, 1907, excepting at the north or Locust street end, where it was

widened into a pier 3 feet wide east and west, and 4½ feet long north and south. Seventeen inches of this pier projects west of the dividing line and over and upon defendants' lot.

In accordance with the contract between the plaintiff and the plumbing company of July 12, 1909, as plaintiff's west wall was being built, the plaintiff himself inserted in it the joists of the main floor, the second floor, and the roof of the building No. 716, and restored, or at least partially restored, the inside of the east wall of said No. 716, as provided in said contract with the lessee of the building. On March 25, 1910, the ten-year lease of the Des Moines Plumbing Company of the building No. 716 being about to expire, and, as defendants claim, in order to settle and amicably to adjust the rights of said company, or, as it was then styled, the Des Moines Plumbing & Heating Company, if any it had in and to the building, heating plant and fixtures in the buildings, the defendants entered into a written contract with the Des Moines Plumbing & Heating Company with reference thereto. This contract provides among other things: "Party of the first part (Des Moines Plumbing & Heating Company) does hereby sell, assign and transfer to the parties of the second part (R. R. McCutchen and W. F. Mitchell) all their right, title, and interest in and to the building now owned, and warranted to be free from liens and encumbrances, and occupied by the party of the first part; except the party of the first part reserves the right to take from said building the heating plant, and pipes and radiators connected with the same, the glass and doors in the present front of the first story of said building, the sash at the rear end of the present building, and the sash in the front of the rear of the second story, and the plumbing fixtures on the first floor."

About April 15, 1910, the "Des Moines Plumbing Company," or the "Des Moines Plumbing & Heating Company," having surrendered possession of the building No. 716 to the successor of its lessor, the defendants herein, the latter commenced and proceeded to remodel the front thereof, strengthen its floors, repair its roof, and repair and redecorate its interior walls, without paying, or offering to pay, or in any way acknowledging liability to, the plaintiff for any portion of the cost of the west wall of plaintiff's building with which he had replaced the old wall of defendants' building.

In making the changes or repairs on their building, defendants have not put any basement thereunder. Defendants' building No. 716 Locust street was built about the year 1892. It was 80 feet deep. It had no cellar or basement under it, and, as we under-

stand it, there was no cellar or basement under plaintiff's building until he rebuilt. The foundation of the east wall of defendants' building, for its full length, rested upon the surface, or upon the ground a few inches below the surface, of the lot. For a distance of 25 feet south of Locust street the brick wall of defendants' building was two stories high; thence south 20 feet it was one story high, and built of brick. For the next 19 feet south it was two stories high, the first story built of brick, the second story built of wood; 2 by 6 studding or uprights resting upon the top of the brick wall, not lathed or plastered, but built against the adjoining weather board wall of the building to the east, No. 714. There was no space between this wooden portion of defendants' wall and the corresponding wall to the east; one was built against the other. The rear 16 feet of this wall, two stories high, was built of studding, and this portion of the wall was the wall for both buildings, Nos. 716 and 714. Testimony shows that the roofs were practically one roof over the two buildings and that there was no division between the two roofs. One of plaintiff's witnesses, a general contractor whose shop was the second story of plaintiff's building, No. 714 Locust street, up to the time it was demolished by plaintiff, testified: "I moved out just before Younker commenced to improve; noticed the work occasionally as it progressed. He tore down the walls along the west side of his property and built a brick wall there. They sawed off the joists of the other, to my recollection, and let them stick in on the brick wall they were building up, and bricked around them, and that held the joists. When they built up their wall to the first floor, they cut off the joists long enough to stick into that wall, and then bricked up. When they came to the second floor, they did the same thing. When they came to the roof, they did the same thing, and I should say they flashed the roof on the Younker wall. It is flashed there now, so that Younker's new wall now, the west wall, is the dividing wall, and the east wall of the building No. 716 Locust street, back 80 feet."

One of the defendants' witnesses who is also a general contractor, testifies: "They built, in the construction of our building into their wall, the whole distance of 80 feet. The joists at the rear end and towards the rear of the building reached to the new wall. Probably all of them did not reach. On the short pieces they spiked pieces, or nailed pieces of joists onto the sides of them, and extended them through so they would reach into the wall. I am sure all the first-floor joists went into the new wall. The second story was connected

in the same manner, and the floor joists were put into the Younker wall by Younker. The ceiling and the roof were connected in the same manner. They finished the repairs of the building and put it back in the same condition it was before they tore this wall down. They plastered portions of the brick wall, and papered some of them, and put baseboards along the brick wall on that side where it had been taken out; restored the building practically in accordance with the Younker contract with the Des Moines Plumbing Company. The roof was fastened on. I do not think it was counter-flashed. What I mean by 'counter-flashed' is putting tin up over the tarred and graveled roof, so as to keep the water from running down behind at any time."

In April or May, 1910, soon after it was vacated by the plumbing company, defendants commenced repairing their building, No. 716. The dimensions of the building were not changed in any particular nor was the east wall extended in any direction, either up or down, or north or south.

In describing what they did, one of the defendants testified as follows: After the plumbing company vacated, we put in a new plate glass front in our building; put in a new floor on the first floor; plastered all the walls of the first floor—a part of the first floor was plastered. We finished plastering the back, to the rear, put new windows at the rear to give more light, and new doors, and fixed up the skylight with new glass, new frame, and painted it. We did nothing with the east wall except plastering, papering, and painting it, except in front, at the sidewalk line, against the east wall, we put in an iron post where there was a wooden one. The iron post rested on the foundation that the wooden post rested on.

Q. Was that all you did with the wall?

A. Yes, sir; we put in some extra floor joints along by the side of some that were not, we considered, strong enough, in the way they had been spliced, to reach the brick wall.

Q. Where Younker had spliced them in some places, you put in new solid ones?

A. Joists. We in no way changed the size or the shape of the building, nor occupied any more wall than before. Did not increase the size of the light wall, did not excavate under the building. Our east wall is no longer in any dimension than it was prior to the Younker improvement.

Upon cross-examination Mr. Mitchell said:

In putting in these new joists we took out the brick alongside of the joists that had been built in, and made that hole larger, L.R.A.1917B.

and stuck our joists into that hole, by the side of the other joists. We made a new hole for the new joists. Enlarged the hole that was there.

And upon redirect examination, to the following questions he made the following answers:

Q. Did you make new holes, or simply enlarge the holes that Younker had already made?

A. Enlarged the holes that were already made.

Q. And put these new joists alongside of the old ones, which had already been run into the wall?

A. Yes, sir.

Q. Were there no no other joists put in except those by you?

A. No, sir.

This testimony is not disputed. It was stipulated that the surface area of the Younker wall, now used as the east wall of defendants' property, is 80 feet by 23 feet, less 20 by 10 feet above the first-floor joists. As we understand it, the 20 by 10 feet just referred to is the east side of the open court or light well which is and has always occupied a space in the center of the second story of defendants' building. Defendants allege that they paid to the plumbing company \$148.40, referred to in the contract of March 25, 1910, and permitted the plumbing company to occupy the premises free of rent to April 15, 1910, and claim that by this they paid to the plumbing company for the use of the wall for which plaintiff is now asking pay, and the evidence shows that they did pay such sum of money and permitted the plumbing company to remain in the building, but plaintiff denies that this constitutes a payment for the interest in the wall. The east line or side of the plumbing company building extended over and upon plaintiff's property its entire length; but, as the witnesses put it, it was askew, so that it extended farther on the north line than it did at the south. The plaintiff, in his petition, at first offered to remove so much of the foundation or footing as extended on defendants' lot, but by an amendment withdrew such offer, and pleaded as an estoppel against defendants that defendants were present when the footing and foundation of plaintiff's new wall was being constructed. There may be some other facts to which it may be necessary to refer in discussing the different points.

At the close of the testimony appellees moved the court to dismiss appellant's petition and to enter judgment against him for costs on substantially the following grounds: That the evidence fails to establish a cause of action against the appellees,

or that they are indebted to the appellant; that the first person who used the appellant's west wall as a party wall was the Des Moines Plumbing & Heating Company, appellees' leasees, said leasees, if anyone, being liable to appellant for the cost of said wall; that all liability of appellant's neighbor to contribute to the cost of appellant's wall was adjusted and settled by the contracts exhibit D, dated July 12, 1909, between the appellant and the Des Moines Plumbing & Heating Company, and that appellees are not liable to appellant because they received a bill of sale dated March 25, 1910, from the Des Moines Plumbing & Heating Company, conveying the Des Moines Plumbing & Heating Company building to appellees free from liens and encumbrances; and that the wall erected by appellant comes within § 2999 of the Code, and the evidence fails to show that the appellees were using as the east wall of their building any more of the new wall erected by the appellant than of the old wall which formerly divided the coterminous properties.

1. Appellant's first proposition is that the building joined temporarily, as they say, to appellant's wall, was personal property up to the time it was acquired by appellees under contract and bill of sale from appellees' tenants, and they cite in support of the proposition: *Corwin v. Moorehead*, 43 Iowa, 466; *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104; *Union Terminal Co. v. Wilmar & S. F. R. Co.* 116 Iowa, 392, 90 N. W. 92; *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780.

Appellees contend that, under the circumstances of this case, the cases cited do not support appellant's contention. Some of them are cases where a building was erected on leased land; that, as between the parties, the building should be considered as personal property. Others involved the question of purchasers with notice of the agreement. In one of them it was held that the execution of a lease providing that the lessee should deliver the leased premises in as good condition as they were then in, upon the termination of the lease, does not deprive the lessee of the right granted to him by the lessor under a prior lease to the same premises to remove improvements erected by him, the occupancy being continuous under both leases. Counsel for appellees concede that from these holdings the court is inclined to hold that where a lessee holds under a lease which reserves to him the right to remove the fixtures, by taking a renewal lease which contains no such reservation he does not surrender his claim to the fixtures. But that this is where the L.R.A.1917B.

subsequent lease ran from the same owner, or his grantee, who had notice of the reservation, to the same lessee. This is true, that in none of the cases cited is recognized the right of removal by a lessee of a building erected upon real estate by a prior and different lessee, under a prior and different lease, simply because the first lease granted to the lessee therein any such right of removal.

On the other hand, it is contended by defendants at this point that at all times during their ownership of the east building lot now owned by them they have been owners of the building No. 716 located on the east of said lots as well as of the earth beneath it, and that the plumbing company, defendants' lessee, has never been the owner of said building, and they cite in support of this 1 Co. Inst. 4; 2 Bl. Com. 17-19; *Tiedeman, Real Prop.* § 2; and that a conveyance of land, unless exceptions or reservations be therein made, includes not only the earth, but everything attached to it, whether by nature, as trees, etc., or artificially, by man, as buildings and the like; citing *Van Wagner v. Van Nostrand*, 19 Iowa, 422. And they say that, in cases where walls in common or party walls bear on a coterminous line, the coproprietors own in severalty the portions of the wall resting upon their own land, and the middle line of the wall marks the line of the adjacent lot owners; citing *Lederer v. Colonial Invest. Co.* 130 Iowa, 157, 106 N. W. 357, 8 Ann. Cas. 317. Appellant also contends that the temporary or provisional use of a wall abutting a division line will not suffice to charge the adjoining owners; nor will such use justify a purchaser in assuming that all rights with reference to party walls between neighbors have been adjusted. As we understand it, appellant's theory is that because, as they claim, the building erected by Fowler was personal property, and, being such, was movable and temporary in character, and that the east wall of the building was, for the same reason, but temporarily joined to appellant's west wall, that it was a temporary or provisional use of the wall. In support of the proposition they cite *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732; *Deere, W. & Co. v. Weir-Shugart*, 91 Iowa, 422, 59 N. W. 255; and other cases.

Appellees refer to the same cases in support of their contention that the east wall of appellees' building and the west wall of appellant's building, after the same was reconstructed by appellant, is permanent in character, and forms the partition wall of the two buildings. We think the fact that a building may be torn down or removed from leased premises at the termination of

the lease does not necessarily affect the character of its walls or the permanency of their jointure with adjoining walls. We are dealing now with the new wall as reconstructed by appellant, and the rights and obligations of the parties therein under the record in this case. Again, if appellant's theory is that, because the building No. 716 was personal property, the east wall, prior to its destruction by appellant, was temporary in character, then we think such a claim is not borne out by the testimony. It is shown that the whole building and wall were built in 1892. The wall had been used as a wall in common of the adjacent properties for eighteen years. Had it not been replaced by the appellant, it would doubtless still be doing duty as a party wall. It is suggested by appellees that, even if the plumbing company had the right to remove the old building, upon the ground that it was personal property belonging to it, without proof that it had succeeded to the rights of a prior owner, it would have no right to remove the east wall,—a wall in common used by it and its neighbor on the east. But, after all, it seems to us the question is, What are the rights and obligations of the parties as to the new wall? No claim is made by appellant that it is entitled to contribution for the old wall, but only as to the new wall built by appellant to take its place. It seems to us that these propositions are not controlling in this case, but that the determination of the case turns upon points discussed later in the opinion.

It should be said here that appellant also claims that he built the new wall under § 2994 of the Code, and that the right to recover contribution for the party wall arose when the adjoining owners (defendants) made permanent use of it. They claim also that, under the statute and decisions, every proprietor adjoining a wall has the right of making it a wall in common by repaying to the owner thereof one half of the value of the part he wishes to hold in common, and one half the value of the ground upon which it is built, if the person who has built it has laid the foundation entirely upon his own ground. We shall hereafter refer to the party wall statutes. As shown in the statement of facts we have given, the plumbing company, appellees' tenants, were the first users of the new wall reconstructed by appellant as a party wall, and they had so used the old wall for many years, and it appears without dispute that the defendants have not used the new wall in any different way than was the old and the new wall used by the plumbing company. There has never been any agreement between the owners of the fee in regard to the party wall in controversy. The contract of May

7, 1907, before referred to, makes no reference to the party wall in question, so that, as before shown, the only agreement in regard to this wall was between the tenants of some of the owners and some of the owners.

2. Appellant concedes the correctness of the first and second legal propositions of appellees. The first of these propositions is that the Iowa Party Wall Statute, title 14, chap. 10, of the Code (§§ 2994-3003), was taken from articles of the Civil Code of Louisiana; these from the Code Napoleon; that the constitutionality of the statute is sustained by the courts only under the doctrine of *stare decisis*, and as an extreme exercise of the police power of the state. The second proposition of appellees is that party walls are unknown to the common law. They are creations either of contract or of statute. Being derogatory of the common law, they are strictly construed, and, in order to enforce any rights thereunder, the party must bring himself strictly within the letter of the law. That in the case at bar there is no special agreement between the adjoining owners concerning the wall on the line between them; that plaintiff's rights, therefore, must be determined solely by our statute laws applicable to the facts established by the evidence.

In support of the second proposition, appellees cite 30 Cyc. 775; 22 Am. & Eng. Enc. Law, 2d ed. 240, 242; *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85. Under this proposition they also cite *List v. Hornbrook*, 2 W. Va. 340. To the point that where a wall has been erected by the owner of a lot upon the boundary line between his and the adjoining lot, resting partly upon each, in the absence of an agreement so to do the common law imposes no obligation upon the owner of the adjoining lot to contribute to the cost of its erection, and, as sustaining the point, they cite *Preiss v. Parker*, 67 Ala. 500; *Orman v. Day*, 5 Fla. 385. They also cite *Wachstein v. Christopher*, 128 Ga. 229, 11 L.R.A. (N.S.) 917, 119 Am. St. Rep. 381, 57 S. E. 511, as holding that in such a case the builder of the wall may be ejected, although only a few inches of the foundation of his wall projects upon the adjoining owner's lot, and even though to cut away this projection would cause great damage to the builder's property. It was held in *Hoffstot v. Voight*, 146 Pa. 632, 23 Atl. 351, that the right to enforce contribution to the cost of party walls is to be strictly limited to the terms of the statute.

3. We shall now take up the proposition which seems to us to be controlling and decisive of the case. Appellees contend that the new wall was erected under § 2999 of

the Code, and not under other sections of the Party Wall Statute, as contended by appellant. Defendants claim that, the wall having been erected under § 2999, plaintiff was bound to bear the expense thereof, and, the defendants having utilized no more of the new wall than the space occupied by their old wall, they cannot be forced to contribute to the cost of the new wall. We think, under the record, this must be so, at least so long as defendants do not use more of the new wall or in a different way than they or their tenants used the old wall and the new wall for a time after its construction. It would seem that under our Party Wall Statute there are three cases in which walls dividing adjoining lots may be made walls in common. First, under §§ 2994, 2995, and 2997. We shall not take the space to quote these at this point. These sections, or at least the first one, applies only where two adjoining building lots are vacant and unoccupied. Section 2995 authorizes the owner of the adjoining lot to pay one half the cost of the wall at the time of its construction, and thus make it a wall in common, but may not be required to pay until such time as he actually makes use of it. Section 2997 provides for the repairing and rebuilding of walls in common at the expense of all who have a right to them and in proportion to the interests of each therein. It will be remembered that in the instant case the plaintiff took it upon himself to destroy the old wall and replace it with a new one at his own expense, and to carry out his own purposes, and under arrangement with the tenants occupying defendants' lot.

Another way to make a dividing wall a party wall is under § 3000 of the statute, which reads as follows: "Paying for share of adjoining wall.—Every proprietor joining a wall has the right of making it a wall in common, in whole or in part, by repaying to the owner thereof one half of its value, or one half of the part which he wishes to hold in common, and one half of the value of the ground on which it is built, if the person who has built it has laid the foundation entirely upon his own ground."

It is contended by appellees that this section applies only to cases where the owner of a lot has already built a wall on or near his lot line, and the adjoining lot is vacant and unimproved; and they cite *Cornell v. Bickley*, 85 Iowa, 219, 52 N. W. 192. However this may be, this section does provide that the proprietor of the lot joining the wall may make the wall a wall in common by paying one half of the value of the part of it which he wishes to hold in common, in case the person who has built has laid the foundation entirely upon his own ground. L.R.A.1917B.

In such case the adjoining proprietor "has the right of making it a wall in common, in whole or in part, by repaying to the owner thereof one half of its value, or one half of the part which he wishes to hold in common, and one half of the value of the ground on which it is built." This section might have been of some avail to plaintiff if there had been no wall on the line between him and his neighbor at the time he built this wall, and under the circumstances under which the old wall was built, and if plaintiff had laid the foundation of the west wall of his building entirely upon his own ground. But as shown, neither of these conditions existed. As already stated, plaintiff removed the old wall and replaced it with the new one because the old wall was not sufficient to support the new building, and because he wanted a three-story wall instead of the old two-story wall with no basement wall under it.

A third method of creating a party wall is under § 2999, which reads: "Height of wall—rebuilding.—Every coproprietor may increase the height of a wall in common at his sole expense, and he shall repair and keep in repair that part of the same above the part held in common. If the wall so held in common cannot support the wall to be raised upon it, one who wishes to have it made higher must rebuild it anew and at his own expense, and the additional thickness of the wall must be placed entirely on his own land. The person who did not contribute to the heightening of a wall held in common may cause the raised part to become common by paying one half of the appraised value of raising it, and half the value of the ground occupied by the additional thickness thereof, if any ground was so occupied."

There is no way under our statute in which a wall in common can be created and a neighbor coerced to contribute to its cost, except some of the methods prescribed by these statutes. It is contended by appellees, and we think their contention must be sustained, that § 2999 applies to the situation here presented, and that plaintiff was proceeding under that section. As already shown, there was a wall in common, or party wall, before plaintiff built his new wall. This section applies where there is already in existence a wall in common between proprietors of adjoining lots, and one of these proprietors desires to heighten, strengthen, or rebuild. The section provides that, if the wall so held in common cannot support the wall to be raised upon it, one who wishes it made higher must rebuild it anew and at his own expense. If he makes the wall thicker, the additional thickness must be placed entirely upon his own ground. The

adjoining owner may cause the raised part to become common by paying one half the appraised value of raising it and one half the value of the ground occupied by the additional thickness, if any ground was so occupied. The plaintiff did remove the wall in common which had before existed and rebuilt it anew at his own expense, building it one story deeper and one story higher. It is undisputed that defendants had not used any portion of this rebuilt wall beyond the dimensions of their old wall and in no different way. Should they make use of plaintiff's new wall in a different manner, the circumstances might be such as to create a liability for contribution on their part. But this we do not now determine. But this seems to be clear, that there is no provision of the statute which compels them to pay before such time. We think the fact that the center of the old party wall did not coincide for its entire length with the dividing line established by the agreement of May 7, 1907, and that towards its north end it encroached upon plaintiff's lot several inches, did not change its character as a party wall. It has been held that party walls do not necessarily have to be located exactly upon the true dividing line, provided they are used for party wall purposes. *Molony v. Dixon*, 65 Iowa, 136, 54 Am. Rep. 1, 21 N. W. 488; *Zugenbuhler v. Gilliam*, 3 Iowa, 391. We said in *Howell v. Goss*, 128 Iowa, 569-574, 105 N. W. 63: "Defendant Goss had the right to increase the height of the wall at his own expense, and in so doing had the right to rebuild the old party wall anew and at his own expense. So long as his neighbor used no more of the reconstructed wall than he did of the old one, he was under no obligation to contribute to the expenses of the improvement. But the statute says that, when he wishes the raised part to become a wall in common, he must pay one half the appraised value of raising it, and one half the value of the ground occupied by the additional thickness of the wall. This statute evidently contemplates the rebuilding of an old wall, as part of the expense of raising it, which must be paid for in the first instance by the party making the improvement; and so long as his neighbor uses no more of the new wall than he did the old, he is under no obligation to contribute anything. But as soon as he desires to advantage himself of the new wall by carrying his building further up, he must pay his proportion of 'the appraised value of raising it.' This, as we have seen, includes in this case the expense of rebuilding the old wall of sufficient thickness and strength to carry the added height. This construction fulfils the letter of the statute L.R.A.1917B.

and comports with its spirit. It is fair and equitable to all parties and is in line with the objects and purposes of the act."

We think the fact that the insertion of joists in the new wall in substantially the same way as they were inserted in the old wall does not make defendants liable for contribution. As bearing upon this point, see *Shaw v. Hitchcock*, 119 Mass. 254; *Fox v. Mission Free School*, 120 Mo. 349, 25 S. W. 172. These cases arose under a contract between adjoining owners, and not under a statute, but the provisions of the contracts gave substantially the same right which our party wall statute gives to adjoining owners. For these reasons it is our conclusion that plaintiff has not shown himself entitled to recover. Other questions are argued, but, because the point last mentioned is decisive of the case, we ought not to prolong the opinion to discuss at any length the other questions.

4. We shall notice in a brief manner only, some of the other points. One is that the plumbing company was the first person who used the new wall erected by plaintiff as a wall in common, and that this is so whether the plumbing company was the owner of the building No. 716, or was only the holder of it as lessee of the defendants; and, being the first user, it, and it alone, if anyone, became liable for contribution to the plaintiff. This contention of appellees is presented subject to the proposition discussed in the preceding paragraph of the opinion. The argument is that there is no provision in the statute which makes any person liable for contributions to a party wall prior to the time he uses it; and that, under the circumstances here shown, according to the holdings of this court, the one half of a dividing wall, not exceeding 18 inches in thickness above the cellar, which rests upon adjoining lot, is not an encumbrance upon the adjoining lot. Neither is the duty to contribute to the cost of such a wall a lien or charge upon the adjoining lot. However, it is something which "runs with the land," and becomes a personal liability of the first person who uses the wall, in a substantial, permanent way, as a wall of an adjacent building. *Thomson v. Curtis*, 28 Iowa, 229; *Bertram v. Curtis*, 31 Iowa, 46; *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732; *Capital City Invest. Co. v. Burnham*, 143 Iowa, 147, 121 N. W. 708.

The liability to contribute to the cost of a party wall becomes enforceable against and is a personal liability of the first person who uses the wall, whether he be the original coproprietor of the adjoining lot or his grantee. But where the adjoining lot is held by a lessee of the original



owner or his grantee, who is the first person who uses the wall, there is no liability on the part of the lessor, who has made no use of it, either to pay to the one who erected the wall, or to reimburse his lessee, who first availed himself of it. The lessee, and he alone, is liable. *Percival v. Colonial Invest. Co.* 140 Iowa, 275, 24 L.R.A. (N.S.) 293, 115 N. W. 941, and they suggest: "Supposing the lessee of a long-time lease of a vacant city lot, on the side lines of which great party walls have already been erected, constructs a building on his lot, using his neighbors' walls in its construction; can anyone be found to say that his lessor must pay for the walls? The neighbors might by injunction prevent the lessee from building into their walls until payment has been made or secured (Code, § 3002, and *Crapo v. Cameron*, 61 Iowa, 447, 16 N. W. 523); but if once they permitted such a proceeding without payment or the giving of security, their only remedy would be a suit at law against the man who utilized their walls, and made them de facto walls in common. But we inquire by what principle, law, or authority could liability therefor be cast upon the landlord?"

We are inclined to this view, but deem it unnecessary to determine this point. We may observe here that while the old wall which was removed by plaintiff was in a sense permanent and the new wall is so, the use of the new wall by defendants' tenants for a time was not more or different than their use of the old wall, nor is defendants' use thereof more or different than was that of their tenants. It will be remembered that there is no basement under defendants' building on No. 716, and their building is an old one. They may, some

time in the future, desire to build a new building with a basement. When that time comes, and if defendants should make different use of the wall in question, a question may arise which manifestly ought not to be now determined.

We may add, too, that it is clear that up to the time the plumbing company's lease expired there was no liability to plaintiff from defendants for contribution. Suppose a lease of the plumbing company had run ten years longer, or say until 1920; it is clear that there would be no liability for contribution to plaintiff by defendants until then. So that, under the record in this case, the fact that the lease of the plumbing company expired in 1910 and they then vacated the building does not alter the situation.

5. It is also contended by appellees that all liability for contribution for that portion of the wall built by plaintiff and now used by defendants as their west wall, if any there was, was adjusted, settled, and discharged by the written contract of July 12, 1909, between plaintiff and defendants' lessee, the plumbing company, which contract was thereafter fully executed and performed, and that plaintiff is not entitled to be paid twice for the same thing. This involves a construction of that contract, and we do not feel warranted in consuming further time to discuss that proposition, because other points already decided determine the case, and this is true as to some other points argued. It is our conclusion that the judgment of the District Court is right, and it is therefore affirmed.

Evans, Ch. J., and Deemer and Weaver, JJ., concur.

### **Annotation—Utilization of party wall by lessee as affecting lessor's duty to contribute to cost thereof.**

For liability of landlord where a tenant's property is damaged through interference with party wall of adjoining owner under agreement with landlord, see the note to *Di Palma v. Weinman*, 24 L.R.A. (N.S.) 423.

It will be seen that it is the theory of the Iowa court that, under the Party Wall Statute, the utilization of a party wall by a lessee does not obligate his lessor to contribute to the cost thereof, and, further, that if, after the lessee vacates, the lessor makes only the same use of the wall that the lessee made, he is not liable to contribute, as it is only the first user that is liable to contribute.

In *Percival v. Colonial Invest. Co.* L.R.A.1917B.

(1908) 140 Iowa, 275, 24 L.R.A. (N.S.) 294, 115 N. W. 941, it was held, under this statute, that the lessee of property, the owner of which is entitled to the use of the party wall by contributing to the cost thereof, cannot, under a covenant for quiet enjoyment, hold his lessor liable for the amount which he contributes to the cost of the wall. The theory of this decision is that the lessee is in the position of a grantee, and that the wall is not an encumbrance for which a grantor would be liable under the covenants in a deed, the court distinguishing cases arising under agreements, and not under the statute.

The problem is not an easy one. It

may, for example, be urged, particularly in cases of walls built under agreement, and not under statute, that, so far as his neighbor is concerned, the lessor is supposed to have the benefit of the increased rent, and therefore should bear the expense; and that the neighbor ought not to be affected by the particular contracts of lease. Further, if only the first user is liable, the lessor might arrange with an impecunious lessee to build and vacate, leaving the lessor to use the wall without cost.

In Louisiana, from which state the Iowa statute was derived, the court seems to think the landlord the proper contributor. Thus, in *Auch v. Labouisse* (1868) 20 La. Ann. 553, where the landlord was sued under the Louisiana statute for one half the value of a partition wall, he was not allowed to call his lessees in warranty. The court said: "There is nothing in the contract of lease which makes the lessees responsible for this wall. It was standing when they leased the premises, and whether used by the express authority of the defendants or not, the latter knew that it was used, as shown, and did not object. By the contract of lease all the improvements made by the lessors are to belong, without compensation, to the lessors, at its termination. We think the right to the use of the wall passed with the property, as it was not excluded by the contract."

In the case of a wall built under contract, the lessor was held responsible.

Thus, one liable, by reason of a contract (by her predecessor), to pay one half the value of a party wall whenever the contractor or his assigns "shall use the same," uses the wall when her lessees use it with her consent. *Pillsbury v. Morris* (1893) 54 Minn. 492, 56 N. W. 170, where the court said: "Her lessees are in possession under her, and she is bound to protect them. The wall is embraced in their lease, which contains no covenant releasing her or binding them in respect to the obligations of the contract. She is, by her tenant, enjoying the possession of the wall and the rents accruing therefrom. *Scott v. McMillan* (1888) 16 N. Y. S. R. 795, 4 N. Y. Supp. 435 (City Ct. N. Y.). This was a sufficient 'user' of the wall, within the contract."

(In *Scott v. McMillan*, cited in the last case, it was held that one who entered into a contract that she or her legal representative might use a party wall, to be erected, on paying one half the cost thereof, and who afterward granted the land, was liable to contrib-

ute to the cost of the wall on its use by her grantee, who was not liable.)

### Statute, Geo. III.

Reference should be made in this connection to the Statute 14 Geo. III. chap. 78, § 41, which endeavored to deal with the matter by holding the owner of the "improved rent" liable to contribute. Thus it enacted: "That the person or persons at whose expense any party wall or party arch shall be built agreeably to the directions of this act shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building or ground, and who shall, at any time, make use of such party wall or party arch, a part of the expense of building the same, in the proportion after mentioned;" and on notice "it shall be lawful for the tenant or occupier of such adjoining building or ground to pay one moiety, or such proportional part, as aforesaid, to such first builder or builders for the same," etc., "and to deduct the same out of the rent which shall become due from him or her to such owner or owners, under whom he or she holds the same respectively, until he or she shall be reimbursed the same."

Considerable litigation arose under this statute as to who was the owner of an improved rent. In *Sangster v. Birkhead* (1798) 1 Bos. & P. 304, 126 Eng. Reprint, 918, Eyre, Ch. J., said: "I dare say that the leading object of the legislature was to make the owner of the improved rent liable, as opposed to the ground landlord. But though that may have been the leading object, yet the expressions of the act being such as they are, we must deal with them as well as we can, and find an owner of the improved rent in all cases, though there should be no ground rent reserved. . . . I think that it was intended by the legislature that the tenant should pay a moiety of the expense to the person building the wall, and reimburse himself by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on such other persons as he may think liable."

As illustrating various questions under the same statute, reference may be made to *Lambe v. Hemans* (1819) 2 Barn. & Ald. 467, 106 Eng. Reprint, 437; *Southall v. Leadbetter* (1789) 3 T. R. 458, 100 Eng. Reprint, 676; *Peck v. Wood* (1793) 5 T. R. 130, 101 Eng. Reprint, 75; *Moore v. Clark* (1813) 5 Taunt. 90, 128 Eng. Reprint, 620; *Taylor v. Reed* (1875) 6 Taunt. 249; 128 Eng. Reprint, 620; *Beardmore v. Fox* (1799) 8 T. R. 214, 101 Eng. Reprint, 1352.

**Miscellaneous.**

If a tenant uses a party wall, not under the agreement between the neighbor and the landlord, but under a new and special agreement, he will not be liable to his landlord for the value of the wall used, although the latter has, on demand, paid it to the neighbor. *Smith v. Kennard* (1898) 54 Neb. 523, 74 N. W. 859.

Under the Pennsylvania statute providing that "the first builder shall be reimbursed one moiety of the charge of such party wall or for so much thereof

as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the said wall," it is sufficient to aver, as to use, the ownership of the premises upon which the party wall was built, that the defendant was the owner or lessee of the adjoining premises, and that he was the next builder, having erected and built a messuage upon the adjoining premises, and having made use of the plaintiff's party wall therefor. *Fidelity Ins. Co. v. Hafner* (1897) 6 Pa. Super. Ct. 48.

B. B. B.

**WASHINGTON SUPREME COURT.**  
(In Banc.)

STATE OF WASHINGTON, Resp.,  
v.

ALVIN HEMRICH, Appt.

(— Wash. —, 161 Pac. 79.)

**Statute — construction — liberality.**

1. The rule that penal statutes must be strictly construed does not apply to a statute prohibiting the sale of intoxicating liquors which declares that it is to be liberally construed.

For other cases, see *Statutes*, II. b, in *Dig.* 1-52 N. S.

**Intoxicating liquors — prohibition of sale of nonintoxicating ones.**

2. The sale of nonintoxicating liquors may be prohibited when necessary to aid the prohibition of the sale of intoxicating ones.

For other cases, see *Intoxicating Liquors*, I. a, 1, in *Dig.* 1-52 N. S.

**Same — liquor — intoxicating.**

3. Prohibition of the sale of liquor is not limited to intoxicating liquors.

For other cases, see *Intoxicating Liquors*, III. a, in *Dig.* 1-52 N. S.

**Statutes — construction — limitation — ejusdem generis.**

4. The statutory prohibition of the sale of certain specified liquors is not limited to those that are intoxicating, by the addition of a clause, "and every other liquor containing intoxicating properties."

For other cases, see *Intoxicating Liquors*, III. a, in *Dig.* 1-52 N. S.

**Intoxicating liquor — malt — nonintoxicating properties.**

5. Prohibition of the sale of malt liquor does not include liquor produced from malt, but having no alcohol or intoxicating properties.

For other cases, see *Intoxicating Liquors*, III. a, in *Dig.* 1-52 N. S.

(November 22, 1916.)

Note. — As to whether statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor, see annotation following this case, post, 974. L.R.A.1917B.

**A**PPEAL by defendant from a judgment of the Superior Court for King County convicting him of violating the prohibition law. Reversed.

The facts are stated in the opinion.

Messrs. McClure & McClure and Greene, Henry, & Hemrich, for appellant:

The term "malt liquor" is restricted to liquids containing alcohol, and hence having intoxicating properties, which are capable of being used as a beverage.

The law is a penal law, and as such must be strictly construed.

36 Cyc. 1185-1187; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 531; State ex rel. Spriggs v. Robinson, 253 Mo. 271, 161 S. W. 1169; Ex parte De Vore, 18 N. M. 246, 136 Pac. 47; F. W. Brockman Commission Co. v. Western U. Teleg. Co. 180 Mo. App. 626, 163 S. W. 920; State v. Read, 162 Iowa, 572, 144 N. W. 310; Anderson v. Fant, 96 S. C. 5, 79 S. E. 641; State v. Coolidge, 72 Wash. 42, 129 Pac. 1088; McCarty v. State, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299; McCord v. State, 2 Okla. Crim. Rep. 214, 101 Pac. 280; State ex rel. Moose v. Frank, 114 Ark. 47, 52 L.R.A.(N.S.) 1149, 169 S. W. 333, Ann. Cas. 1916D, 983.

The word "liquor" means an alcoholic liquor.

Black, *Intoxicating Liquors*, § 7; Joyce, *Intoxicating Liquors*, § 2; Smith v. State, 17 Ga. App. 118, 86 S. E. 283; Kinnanne v. State, 106 Ark. 337, 153 S. W. 264; Ex parte Flake, 67 Tex. Crim. Rep. 216, 149 S. W. 146.

The term "malt liquor" means a malted liquor containing alcohol.

State v. Maroun, 128 La. 829, 55 So. 472; Shreveport v. Smith, 130 La. 126, 57 So. 652; Howard v. Aeme Brewing Co. 143 Ga. 1, 83 S. E. 1096; Roberts v. State, 4 Ga. App. 207, 60 S. E. 1082; Carroll v. Wright, 131 Ga. 728, 63 S. E. 261; People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121; Figueroa v. State, 71 Tex. Crim. Rep. 371, 159 S.

W. 1188; *Cannan v. State*, 71 Tex. Crim. Rep. 416, 169 S. W. 1186.

The word "other" in the clause, "and every other liquor or liquid containing intoxicating properties," ties together the two clauses, and limits their application to such liquors or liquids as contain intoxicating properties.

*Bowling Green v. McMullen*, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 823; *Com. v. Louisville & N. R. Co.* 140 Ky. 21, 130 S. W. 798; *Howard v. Acme Brewing Co.* 143 Ga. 1, 83 S. E. 1096; *People v. Strickler*, 25 Cal. App. 60, 142 Pac. 1121; *State v. Louisville & N. R. Co.* 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150; *State v. Fargo Bottling Works*, 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387.

If the term "malt liquor" may be thought broad enough to include a liquid which contains no alcohol and has no intoxicating properties, then an ambiguity arises as to the meaning of the statute, and it becomes the duty of the court to ascertain what was the intention of the lawmakers, and to construe the law according to its true meaning.

36 Cyc. 1102; *State ex rel. Abel v. Eggers*, 36 Nev. 372, 136 Pac. 100; *National Surety Co. v. Schafer*, 57 Colo. 56, 140 Pac. 199; *State ex rel. Rippee v. Forest*, 177 Mo. App. 245, 162 S. W. 706; *Re Meyer*, 209 N. Y. 386, L.R.A.1915C, 615, 103 N. E. 713, Ann. Cas. 1915A, 263; *Hoyne v. Danisch*, 264 Ill. 467, 106 N. E. 341; *Clough v. Boston & M. R. Co.* 77 N. H. 222, 90 Atl. 863, Ann. Cas. 1915B, 1196; *Hazzard v. Gallucci*, 89 Conn. 196, 93 Atl. 230; *St. Louis v. Christian Bros. College*, 257 Mo. 541, 165 S. W. 1057; *Krome v. Halbert*, 263 Ill. 172, 104 N. E. 1066; *Forrest v. Roper Furniture Co.* 267 Ill. 331, 108 N. E. 328; *Drew v. White Plains*, 157 App. Div. 304, 142 N. Y. Supp. 577; *People v. Merrill*, 24 Cal. App. 206, 140 Pac. 1075; *Dietz v. Big Muddy Coal & L. Co.* 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419; *State v. Read*, 162 Iowa, 572, 144 N. W. 310; *Hughes v. Indiana Union Traction Co.* 57 Ind. App. 202, 105 N. E. 537; *Burns v. Bay State Street R. Co.* 77 N. H. 112, 88 Atl. 710; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Austin v. State*, 22 Ind. App. 226, 53 N. E. 481; *Ex parte Peede*, — Tex. Crim. Rep. —, 170 S. W. 740; *State ex rel. Winnett v. Omaha & C. B. Street R. Co.* 96 Neb. 725, 148 N. W. 946; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *United States v. Tithing Yard*, 9 Utah, 273, 34 Pac. 55; *Wadsworth v. Boysen*, 78 C. C. A. 437, 148 Fed. 771; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *Mosle v. Biddell*, 65 C. C. A. L.R.A.1917B.

533, 130 Fed. 334; *People ex rel. Cohen v. Butler*, 125 App. Div. 384, 109 N. Y. Supp. 900; *Ross v. Erickson Constr. Co.* 80 Wash. 634, L.R.A.1916F, 319, 155 Pac. 153; *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523; *Tolliver v. Blizzard*, 143 Ky. 773, 34 L.R.A.(N.S.) 890, 137 S. W. 509; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Elder v. State*, 162 Ala. 41, 50 So. 373.

Messrs. Alfred H. Lundin, Frank P. Helsell, and Walter F. Meier, for respondent:

The term "malt liquor" means a "malt beverage" produced from malted grain, without reference to whether the beverage contains alcohol, and without regard to whether it is intoxicating in fact or not.

*Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 So. 316; *Fuller v. Jackson*, 97 Miss. 237, 30 L.R.A.(N.S.) 1078, 52 So. 873; *Re Lockman*, 18 Idaho, 465, 46 L.R.A.(N.S.) 759, 110 Pac. 253; *Brown v. State*, 17 Ariz. 314, 162 Pac. 578; *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238; *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38; *Sawyer v. Botti*, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787; *Luther v. State*, 83 Neb. 455, 20 L.R.A.(N.S.) 1146, 120 N. W. 125; *La Follette v. Murray*, 81 Ohio St. 474, 91 N. E. 294; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *Feibelman v. State*, 130 Ala. 122, 30 So. 384; *Com. v. Timothy*, 8 Gray, 480; *Com. v. Dean*, 14 Gray, 99; *Com. v. Anthes*, 12 Gray, 29; *State v. Frederickson*, 101 Me. 37, 6 L.R.A.(N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; *State v. Danenberg*, 151 N. C. 718, 26 L.R.A.(N.S.) 890, 66 S. E. 301; *State ex rel. Guilbert v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062; *Flanders v. Com.* 140 Ky. 38, 130 S. W. 809; *People v. Kinney*, 124 Mich. 486, 83 N. W. 147; *Com. v. Goodwin*, 109 Va. 828, 64 S. E. 54; *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844; *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531; *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113; *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815.

If the term "malt liquor" was adopted from the laws of other prohibition states, this court will be strongly inclined to follow the construction placed upon that term by the courts of those states.

*Lewis's Sutherland*, Stat. Constr. § 470; *Keyport & M. P. S. B. Co. v. Farmers Transp. Co.* 18 N. J. Eq. 13; *Richmond v. Henrico County*, 83 Va. 204, 2 S. E. 26; *Stewart v. Atlanta Beef Co.* 93 Ga. 12, 44 Am. St. Rep. 119, 18 S. E. 981; *State v. Burk*, 88 Iowa, 661, 56 N. W. 180; *Aldridge v. Williams*, 3 How. 1, 11 L. ed. 469; *Tenant v. Kuhlmeier*, 142 Iowa, 241, 120 N. W. 689, 19 Ann. Cas. 1026; *State v. Lancashire F. Ins. Co.* 66 Ark. 406, 45 L.R.A.

348, 51 S. W. 633; District of Columbia v. Washington Market Co. 108 U. S. 243, 27 L. ed. 714, 2 Sup. Ct. Rep. 543; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; United States v. Oregon & C. R. Co. 57 Fed. 426; Leese v. Clark, 20 Cal. 387; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 800; Ex parte Goodrich, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56; Bernier v. Bernier, 72 Mich. 43, 40 N. W. 50; Bayon v. Beckley, 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588.

Ellis, J., delivered the opinion of the court:

Defendant was accused of a violation of the state-wide prohibition law commonly known as Initiative Measure No. 3 (Laws 1915, p. 2; Rem. Code 1915, §§ 6262-1 et seq.). The information charged that "he, said Alvin Hemrich, in the county of King, state of Washington, on the 9th day of February, 1916, did then and there wilfully and unlawfully sell to one Fred M. Lathe certain intoxicating liquor, to wit, two bottles containing malt liquor, said malt liquor not then and there containing any alcohol, and being commonly known as 'Lifestaff,' receiving in payment therefor from said Fred M. Lathe the sum of 25 cents."

He demurred to the information, and it was stipulated that, in considering the demurrer, the court might consider as established certain agreed facts so far as they would be admissible as evidence if the cause were being tried on its merits after a plea of not guilty. These agreed facts were, in substance, as follows:

(1) That defendant was, and for a long time had been, president of a corporation which, prior to January 1, 1916, was engaged in the manufacture and sale of beer in the state of Washington; that immediately after that date it surrendered its government license, and remodeled its brewery and plant for the manufacture of Lifestaff, so that, on February 9, 1916, they were not adapted to the manufacture of beer without extensive alterations in equipment and the issuance of a new license from the United States government.

(2) "That the liquor in the information herein referred to as 'Lifestaff' is an unfermented liquid, and is entirely free from alcohol, preservatives, or other harmful substances, but contains between 6 and 7 per cent of extract of malt; that it is a health-

ful and nutritious liquid, capable of being drunk, but the character of the liquid itself is such that it is not intoxicating, does not in fact contain intoxicating properties, and is not capable of being imbibed in unusual quantities for merely social purposes."

(3) That the term "Lifestaff" has been copyrighted under the Federal laws, and appropriated as a trademark under the state law.

(4) That L. E. Kirkpatrick, president and attorney of the Antisaloon League for the state of Washington, and who prepared Initiative Measure No. 3 as submitted to and adopted by the people, would testify that, in the conferences held to prepare the act, there was, to his knowledge, no discussion of or expressed intention to prohibit by the act the manufacture or sale of any liquor not containing alcoholic properties; that he was then not aware that a process had been discovered for removing all alcohol from malt liquor, and that the question of prohibiting the manufacture and sale of malt liquor not containing alcohol was not considered by him, nor discussed by others in his presence; that in preparing the original draft of the act the definition of intoxicating liquors as given therein was prepared, using as a basis the definition as given in the laws of various states having prohibition laws, and that he did not consider, nor did others with whom he consulted discuss, the operation of the proposed law as affecting the manufacture and sale of malt liquors not containing alcohol; that, so far as his knowledge goes, the general policy of the Antisaloon League and those associated with it has been to abolish only the manufacture and sale of liquors containing alcohol.

(5) That George D. Conger, state superintendent of the Antisaloon League, would testify substantially to the same effect.

(6) That the title of the measure as originally drafted and filed in the office of the secretary of state was as follows: "An Act Relating to Intoxicating Liquors, Prohibiting the Manufacture, Keeping, Sale, and Disposition Thereof, Except in Certain Cases, the Soliciting and Taking of Orders Therefor, the Advertisement Thereof and the Making of False Statements for the Purpose of Obtaining the Same, Declaring Certain Places to be Nuisances and Providing for Their Abatement, Regulating the Keeping, Sale, and Disposition of Intoxicating Liquors by Druggists and Pharmacists, the Prescription Thereof by Physicians, the Transportation Thereof, and Providing for the Search for and Seizure and Destruction Thereof, Prescribing the Powers and Duties of Certain Officers, and the Forms of Procedure and the Rules of Evidence in Cases and Proceedings Hereunder, and Fixing Pen-

alties for Violations Hereof, and the Time When This Act Shall Take Effect." Laws 1915, p. 2.

(7) That the ballot title as proposed by the attorney general was as follows: "An act prohibiting the manufacture, sale, or other disposition of intoxicating liquors, except in certain cases; regulating the keeping, use, and transportation of the same; providing for the enforcement of this act; and fixing punishments and penalties for the violation thereof."

(8 and 9) That in the printed arguments for and against the measure distributed among the legal voters of the state a required by law, there was nothing advising the voters that the act was intended to prohibit the manufacture or sale of nonalcoholic malt liquors as a means to the more effective enforcement of the law as against alcoholic liquors. The two bottles of Lifestaff were submitted as exhibits. The trial court overruled the demurrer. Defendant, electing to stand upon his demurrer and the stipulated facts, was adjudged guilty as charged. From the judgment and sentence thereon he has appealed.

Appellant broadly contends that Lifestaff is not a liquor the manufacture and sale of which is intended to be prohibited by our statute, because it is admitted that it contains no alcohol, no intoxicating properties, and will not in fact intoxicate.

It is first argued that our prohibition law, Initiative Measure No. 3 (Laws of 1915, p. 2; Rem. Code 1915, §§ 6262-1 et seq.), is a penal statute, and hence, under the general rule, must be strictly construed, and that, so construed, it embraces only intoxicating liquors. We shall not review the many authorities cited, announcing the general rule that penal statutes must be strictly construed, since the 1st section of the law itself answers this argument. It imposes its own rule of construction. It says: "This entire act shall be deemed an exercise of the police power of the state, for the protection of the economic welfare, health, peace, and morals of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of that purpose." Rem. Code 1915, § 6262-1.

We must therefore construe the act liberally and inclusively, with a view to the accomplishment of its full purpose. It is true that the dominant purpose of the law is to prohibit the manufacture and sale of intoxicating liquors, to the end that the economic welfare, health, peace, and morals of the people may be promoted. Both the title of the act and the ballot title by which it was submitted to vote so show.

But in the exercise of the police power the legislature, or the people acting in a L.R.A.1917B.

legislative capacity, may, without impinging either the state or the Federal Constitution, prohibit the sale of beverages not intoxicating in fact and wholly innocuous, when separately considered, and may conclusively define such beverages as intoxicating liquors within the meaning of the prohibitory law, whenever that course has any reasonable relation to the accomplishment of the dominant purpose. "This is no longer a question for argument or even of doubt." State v. Frederickson, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44. If, therefore, any beverage of such composition and character as reasonably to include the stuff called "Lifestaff" is expressly prohibited or defined by our law as an intoxicating liquor, then Lifestaff is prohibited.

It is next argued that nothing except "liquor" is prohibited, and that the word "liquor" ex vi termini means an alcoholic or intoxicating liquid, and that therefore nothing but alcoholic or intoxicating liquids is prohibited. It is true that such is one of the meanings of the word "liquor," but all of the standard dictionaries agree that it also means a liquid of any sort. See Century Dict., Webster's New Int. Dict., and Standard Dict. The first two of these, the three leading dictionaries, give the meaning of the noun "liquor" as synonymous with the noun "liquid," and the third gives the same meaning as a secondary definition. It can hardly be said, therefore, that the word "liquor" has any such settled and exclusive meaning of an alcoholic or an intoxicating liquid as to make it the basis of a persuasive, much less of a conclusive, argument, for such a construction of the statute. Appellant's minor premise failing, his argument fails.

A further argument is based upon the statutory definition of the term "intoxicating liquor" as found in § 2 of our prohibitory law (Laws of 1915, p. 2; Rem. Code 1915, § 6262-2), which reads as follows: "The phrase 'intoxicating liquor,' wherever used in this act, shall be held and construed to include whisky, brandy, gin, rum, wine, ale, beer, and any spirituous, vinous, fermented, or malt liquor, and every other liquor or liquid containing intoxicating properties, which is capable of being used as a beverage, whether medicated or not, and all liquors, whether proprietary, patented, or not, which contain any alcohol, which are capable of being used as a beverage."

Respondent concedes that the only term in this definition which can reasonably include a nonalcoholic nonintoxicating liquor, such as Lifestaff is admitted to be, is the term

"malt liquor." Appellant urges that the clause, "and every other liquor or liquid containing intoxicating properties," limits and restricts the classes of liquor specifically enumerated and preceding it to such liquors or liquids as contain intoxicating properties, and that therefore the term "malt liquor" cannot include Lifestaff. It is insisted that such is the necessary significance of the word "other" as found in the alleged qualifying clause. Several decisions from other states are cited as sustaining this view. Typical and strongest of these are *Bowling Green v. McMullen*, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 823, and *People v. Strickler*, 25 Cal. App. 60, 142 Pac. 1121. In the *McMullen* Case the stipulated facts admitted that the liquor called "next-to-beer" was a malt liquor containing less than 2 per cent and more than one half of 1 per cent of alcohol, and was nonintoxicating; that is to say, in the largest quantities in which it might be drunk it would not intoxicate. The statute defined the inhibited liquors as "spirituous, vinous, malt, and other intoxicating liquors." The question was whether malt liquor which would not intoxicate was within this definition. It was held that the inhibition was only against intoxicating drinks. The court said: "If not, why use the words, 'or other intoxicating liquors?'" However conclusive this may seem to the court which announced it, it seems far from conclusive to us. The answer to the court's question seems plain. The general words, "or other intoxicating liquors," were intended to add to the things theretofore specifically enumerated, not to take away from or limit what had already been included. Moreover, even assuming the argument sound as applied to the statute there involved, that statute is palpably different from ours. It might be argued with some show of reason that the word "other" as there used qualifies the term "intoxicating liquors" as a whole. That statute says, "or other intoxicating liquors." In our statute the collocation of the words is different. It says, "every other liquor or liquid," the word "other" thus qualifying only the words, "liquor or liquid," which are subsequently qualified by the words, "containing intoxicating properties." *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

Our statutory definition was clearly intended to define as intoxicating liquors three distinct groups: (1) Whisky, brandy, gin, rum, wine, ale, beer, and any spirituous, vinous, fermented, or malt liquor; (2) every other liquor or liquid containing intoxicating properties which is capable of being used as a beverage, whether medicated or not; (3) all liquids, whether proprietary, L.R.A.1917B.

patented, or not, which contain any alcohol, which are capable of being used as a beverage. The first group defines, *eo nomine*, as intoxicating liquors, certain specific liquids without reference to their properties, because they are all liquors which are generally understood to contain alcohol in some quantity. The second group merely adds to the things prohibited another class of prohibited liquors, with no description save the intoxicating quality. The third group adds still another class to the things already prohibited, namely, liquids, whether proprietary or not, describing them by their alcoholic property. The words, "every other liquor or liquid containing intoxicating properties," qualify nothing else, but describe and add another class of the things the sale and manufacture of which are prohibited. The clause quoted was intended to add and include, not to limit or restrict.

In the case of *People v. Strickler*, *supra*, a demurrer to an information charging the sale of malt liquor containing less than 1 per cent of alcohol was sustained by the trial court, and the people appealed. The statute defined the term "alcoholic liquors" as follows: "The term 'alcoholic liquors' as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain 1 per cent by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage."

The supreme court affirmed the judgment on the ground that under the rule *eiusdem generis* the specific words, "spirituous, vinous, and malt liquors," were qualified and controlled by the succeeding clause, "any other liquor or mixture of liquors which contain 1 per cent by volume, or more, of alcohol." The decision is obviously unsound. It reverses the rule of *eiusdem generis* in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse.

"In statutory construction, the '*eiusdem generis* rule' is that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." *Black's Law Dict.* p. 415.

See also *Bouvier's Law Dict.* *Rawie's 3d Rev.* p. 979.

The fact is that the rule *eiusdem generis* has nothing to do with the case. The statute there under construction, as ours, defined one group by specific enumeration and a second group by quality. The *McMullen*

Case makes the same mistake in argument, though not labeling the process as an application of the rule ejusdem generis. In the following cases in which the same argument was advanced as that of appellant here the courts have ruled contrary to his contention. In each of these cases the general clause in the statute included the word "other" as here. *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; *Fuller v. Jackson*, 97 Miss. 237, 30 L.R.A.(N.S.) 1078, 52 So. 873; *La Follette v. Murray*, 81 Ohio St. 474, 91 N. E. 294; *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38. In the *Marks* Case the statute was much like ours. It prohibited "any alcoholic, spirituous, vinous, or malt liquors, intoxicating bitters or beverages, or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication. . . ."

In answer to the argument here advanced the court said: "While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcefully and ably insisted upon) to the effect that the clause, 'which if drunk to excess will produce intoxication,' qualifies and relates to each and all of the liquors or beverages which precede it; that is, to alcoholic, spirituous, vinous, or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, 'or other liquors or beverages by whatsoever name called,' which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion not alone by the composition and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms 'spirituous,' 'vinous,' 'malt,' and 'intoxicating' liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well-accepted judicial construction. They were severally treated as being well known and defined; but the phrase, 'or other liquors or beverages by whatsoever name called,' is clearly shown not to refer to every well known or defined class, but is intended to include any and all other classes or kinds not embraced in the foregoing five classes named, 'which if drunk to excess will produce intoxication.'"

The reasons given in the other decisions cited for holding the same way are equally cogent. It will not avail to use the argument of convenience to the effect that our construction will make the sale of "ginger

ale" and "root beer" criminal. These things have as distinctive a meaning in common parlance as ale or beer have when standing alone. They, like other unnamed beverages, will have to be tested by the fact whether they contain intoxicating properties, since they are not enumerated by name in the statutory definition of intoxicating liquors. *Sawyer v. Botti*, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787.

We hold, therefore, that the liquors enumerated by name in our statutory definition of intoxicating liquors are conclusively presumed to be intoxicating liquors without regard to their actual intoxicating properties, and whether in potable quantities they will in fact intoxicate or not; that as to such liquors it is only necessary to prove that the thing sold was one of the class named, but that as to other liquors or liquids capable of being used as a beverage it is necessary to prove their intoxicating properties. It is conceded that *Lifestaff* cannot belong to either the second or third class mentioned in the statutory definition. By this process of elimination the question here involved is finally reduced to this: Is the stuff called "*Lifestaff*" a malt liquor? If it is, it is prohibited whether it contains intoxicating properties or not, and whether it contains alcohol or not.

The first cardinal rule of construction is that words used in a statute, unless the context shows that they are used in a technical or particular sense, are to be given their ordinary meaning. 2 *Lewis's Sutherland, Stat. Const.* 2d ed. p. 749, § 390; *Endlich, Interpretation of Statutes*, p. 4, § 2.

It follows that the words, "malt liquor," which are evidently used in no technical sense, must be given the meaning accorded to them in the standard dictionaries of our language. The following are the definitions given by the three dictionaries universally recognized as authority: *Standard Dict.*: "Malt liquor. Any alcoholic beverage brewed from malt."

*Century Dict.* "Malt liquor. A general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by the distillation of malt or mash."

*Webster's New Int. Dict.*: "Malt liquor. An alcoholic liquor as beer, ale, porter, etc., prepared by fermenting an infusion of malt."

We have been unable to find any definition giving to the term "malt liquor" any other meaning than the above, whether technical or not. The text-books are equally in unison. *Joyce, Intoxicating Liquors*, p. 12, § 12, defines malt liquor as follows: "The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor as beer, ale, or porter, prepared by fermenting an in-



fusion of malt.' 'Malt liquors' embrace porter, ale, beer, and the like, which are the result or product of a process by which grain—usually barley—is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. In Alabama it has been decided that the court will take judicial notice of the meaning of the words, 'malt liquor,' as used in a penal statute, and may, in a proper case, give its definition in a charge to the jury."

Black's Law Dictionary, p. 752, defines the terms as follows: "Malt liquor. A general term including all alcoholic beverages prepared essentially by the fermentation of an infusion of malt (as distinguished from such liquors as are produced by the process of distillation), and particularly such beverages as are made from malt and hops, like beer, ale, and porter."

26 Cyc. 121, defines the term as follows: "Malt liquor. An alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt; a general term for alcoholic beverages produced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash."

19 Am. & Eng. Enc. Laws, 2d ed. p. 705, defines it as follows: "Malt liquor. Malt liquor is a general term for an alcoholic beverage produced merely by fermentation of malt, as opposed to those obtained by distillation of malt or mash."

Wherever any court has essayed a definition of the term "malt liquor," it is in strict accord with the foregoing definitions.

In *Pennell v. State*, 141 Wis. 35, 123 N. W. 115, the court defined the terms "spirituous liquor," "malt liquor," and "vinous liquor" as follows: "The word 'liquor' in a statute regulating or forbidding the sale of intoxicants should be taken to mean an alcoholic beverage. Century Dict.; Standard Dict.; *People v. Crilley*, 20 Barb. 246; *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38. The associated word 'drinks' in such statute means an alcoholic beverage. *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79. Alcohol is a product of fermentation. Malting is a process preliminary to fermentation. Alcohol is separated, not produced, by distillation, and the liquor thus separated containing a percentage of alcohol is called 'spirituous liquor.' Where there is no such separation, but the alcohol produced by fermentation remains in the liquid drawn off from the malt, the product is called 'malt liquor.' Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called 'vinous liquor.'"

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In *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 884, the court says: "Malt liquors' are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like."

Though in the last definition the term "fermentation" is not used, but "brewing" instead, the term "brewing" itself includes fermentation. See Standard Dict.; Webster's New Int. Dict.; Century Dict.

In *United States v. Ducournau* (C. C.) 54 Fed. 138, it was said: "The ordinary acceptance of the term 'malt liquor' imports a fermented liquor, made chiefly of malt."

In *Sarlls v. United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 420, Justice Shiras adopted the definition given in the Century Dictionary and above quoted.

In *State v. Gill*, 89 Minn. 502, 95 N. W. 449, the court said: "But the defendant claims that there are some malt liquors which are not intoxicating; hence the complaint should have alleged the sale of an intoxicating malt liquor. This is just what the complaint did do without any tautology, for the term 'malt liquors' is used in the charter of the city, in the ordinance in question, and in the complaint in accordance with the common and approved usage of the term, and not in any technical sense. Gen-Stat. 1894, § 255. The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt.' Webster's Int. Dict."

In *State v. Lynch*, 5 Boyce (Del.) 569, 96 Atl. 32, the court used the following language: "Malt liquor, or beer, as is commonly known, is a brewed liquor made of grain, especially barley, flavored with hops, and is a liquor which has undergone fermentation, and contains alcohol."

In *Ex parte Townsend*, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814, we find the following language: "This leads to the inquiry of what is malt liquor. Mr. Joyce, in his work on Intoxicating Liquors, § 12, defines it as follows: 'The common and approved usage of the term "malt liquor" is an alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt.' The Century Dictionary defines it as a 'general term for an alcohol [alcoholic] beverage, produced merely by the fermentation of malt.' So, then, it is clear that all malt liquor is an alcoholic liquor, and the legislature in this instance was dealing with a nonintoxicating alcoholic liquor. Intoxicating liquor is any liquor containing

alcohol which can be drunk as a beverage in such quantity as will produce intoxication."

We have set out the foregoing definitions in order to show the absolute unanimity of opinion that "malt liquor" is an alcoholic liquor and is a fermented liquor. Fermentation produces alcohol. Every malt liquor is fermented, and hence contains at least some percentage of alcohol. Unless the foregoing definitions are all wrong, such is the inevitable conclusion to which we are driven. The mere fact that a liquid contains malt does not bring it within any definition of the words, "malt liquor," which can be found in any recognized dictionary, text-book, or in any definition given by any court. Malt is neither fermented nor does it contain alcohol. It is defined in the Century Dictionary as follows: "Grain in which, by partial germination, arrested at the proper stage by heat, the starch is converted into saccharine matter (grape sugar), the unfermented solution of the latter being the sweetwort of the brewer. By the addition of hops, and the subsequent processes of cooling, fermentation, and clarification, the wort is converted into porter, ale, or beer. The alcoholic fermentation of the wort without the addition of hops, and distillation, yield crude whisky."

It is defined in Black's Law Dictionary as follows: "Malt, a substance produced from barley or other grain by a process of steeping in water until germination begins and then drying in a kiln, thus converting the starch into saccharine matter."

We have been cited to but one case, and have been unable after many days of search to find another, in which any liquor or liquid has been held to be a malt liquor merely because it contained some percentage of malt. That case is Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 So. 316. The liquid there involved was called "Poinsetta." It was admitted that it contained no alcohol, preservatives, or saccharine; that it was sold as a beverage; that it was composed of 90.45 per cent pure distilled water, 0.55 per cent of solids derived from cereals in an unfermented state; and that it contained 5.73 per cent of malt. It was admitted that the grain used was not fermented or steeped in such a way as to produce either saccharine matter or alcohol. On these facts the court said: "In the discussion of this case we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5.73 per cent of malt, and we unhesitatingly pronounce the beverage a malt liquor. It can be nothing else."

Had that court hesitated long enough to look at any standard dictionary, any law

dictionary, or the decision of any court in which the term "malt liquor" had been defined, it would have found that the mere fact that a liquid beverage contains malt does not make it a malt liquor, unless it be also fermented and is alcoholic. We are asked to proceed in the same unhesitating manner and pronounce the beverage here involved a malt liquor in the face of every other decision where the question has arisen. Malt liquor is both alcoholic and fermented. While the generic term "malt liquor" includes both intoxicating and nonintoxicating liquors, this is because some liquors which are both fermented and contain alcohol have too small a percentage of alcohol to produce intoxication in any quantity which a person may be able to take at one time. This is the distinction found in many of the cases between intoxicating and nonintoxicating malt liquors. Lifestaff, the liquid here involved, is concededly neither alcoholic nor fermented. It is therefore not a malt liquor. None of the decisions cited by either side, save the Lynch Case, sustains the other view. On the contrary, so far as they have any bearing at all on the meaning of the term "malt liquor," they impliedly sustain the conclusion which we have reached. The Lynch Case was appealed to the Supreme Court of the United States (Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44), but that court, holding itself bound by the decision of the state court as to the scope of the Mississippi statute, did not pass upon the question whether Poinsetta was or was not a malt liquor. On the contrary it held that it had no jurisdiction to pass upon that question.

In the following cases cited by respondent the sale of malt liquor was prohibited eo nomine by the statutes involved. It was held that it was neither necessary to allege nor prove that the malt liquor in question in the given case was capable of producing intoxication. But in each of these cases the liquor involved was either admitted to be a malt liquor, or admitted or proved to be a fermented liquor, containing both malt and alcohol,—hence was either admitted to be or proven to be such a liquor as is defined to be a "malt liquor" by the dictionaries. In Fuller v. Jackson, 97 Miss. 237, 30 L.R.A. (N.S.) 1078, 52 So. 873, same case on suggestion of error, 97 Miss. 253, 30 L.R.A. (N.S.) 1081, 52 So. 876, the liquor was malt ale. The agreed facts showed that it contained 2.71 per cent of alcohol by volume, and conceded that it was a malt liquor. The statute (Code 1906, § 1746, as amended by Laws 1908, chap. 115) prohibited: "Any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters,

or other drinks, which if drunk to excess will produce intoxication. . . ."

It was held that the liquor in question, being malt liquor was prohibited in terms, whether it would in fact intoxicate or not.

In *Re Lockman*, 18 Idaho, 465, 46 L.R.A. (N.S.) 759, 110 Pac. 253, the liquor was near beer. It was admitted that this near beer was a malt liquor. The undisputed evidence showed that it contained 1.28 per cent alcohol and 7.1 per cent malt extract, but did not contain enough alcohol to intoxicate in the largest quantity which could be consumed at one time. The statute (Laws 1909, p. 18, § 31) defined intoxicating liquors as follows: "The words, 'intoxicating liquors,' as used in this act, shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

The court said: "The legislature likewise recognized the fact that vinous, malt, and fermented liquors all contain, to some extent, the element of alcohol, although it may not be to such a degree as will produce intoxication. They therefore concluded when writing this statute defining the words, 'intoxicating liquors,' to declare as a matter of law that all 'spirituous, vinous, malt, and fermented liquors' are intoxicating, irrespective of the amount of alcohol they may contain, and whether or not the particular kind of drink will in fact produce intoxication."

Held, the liquor in question, being concededly a malt liquor was declared by the statute as a matter of law to be an intoxicating liquor, and prohibited.

In *Brown v. State*, 17 Ariz. 314, 152 Pac. 578, the liquor was called "Barette." It was conceded that it contained 1.96 per cent of alcohol by volume. It was conceded to have been made by the same process as beer, except that it was made from "barley, rice, and hops," while beer is made from "barley and hops." The undisputed evidence showed that it was nonintoxicating in the largest quantity which could be drunk. The Constitution of Arizona prohibits the manufacture or sale in that state of any "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind." The case was tried to the court without a jury. The court said: "We are forced to the conclusion that the word 'beer,' as used in the Constitution, does not mean an intoxicating liquid only, but also a nonintoxicating fermented malted liquor, even though it be not intoxicating; that is, if the liquor be 'beer' as defined and historically known by the standard lexicographers and by the courts, its traffic is forbidden by the Constitution. If the article L.R.A.1917B.

involved in this case falls within the well-known definition of 'beer,' whether it be intoxicating or not, the appellant's act was criminal and subjects him to punishment."

Then quoting various definitions of "beer" from Century Dict.; Webster's Dict.; Standard Dict.; Encyclopedia Britannica; Joyce, Intoxicating Liquors, and Woollen & T. Intoxicating Liquors, the court held that the liquor, being beer, was prohibited, eo nomine, by the Constitution, whether intoxicating or not.

In *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238, the stuff sold was called "hop ale." The indictment charged a sale of "beer." There was evidence tending to show that it was in fact beer. There was also evidence that it was not beer, and was not in fact intoxicating. There was no evidence that it was not of a malted and fermented quality. The statute declared: "The words, 'Intoxicating liquor,' shall apply to any spirituous, vinous, or malt liquor, or to any intoxicating liquor whatever which is used or may be used as a beverage."

The court instructed the jury that " 'beer,' in the estimation of the law, is fermented liquor, made from any malted grain, with hops or other bitter flavoring matter." He also instructed that only a sale of "beer," as charged in the indictment, could sustain a verdict of guilty, and that "it is claimed by the defendant that the liquor on the occasion referred to in the indictment was hop ale, which is not intoxicating. As heretofore stated, the question for you to determine is not whether hop ale was sold, or whether hop ale is intoxicating, or whether beer is intoxicating, but your attention must be directed to the fact whether the liquor called hop ale was in fact beer, and whether it was sold as charged in the indictment."

On appeal these instructions were approved. The court said: "If the court, as matter of law, must know that beer is a malt liquor, it is not necessary to a conviction for the jury, besides finding a sale of beer, to find also, as a matter of fact, that beer—that is, malt liquor—is intoxicating."

In *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38, the liquor sold was "Rochester tonic." The evidence showed that it was made in the same manner as beer, and was in fact the second draw or brew from the mash from which beer had previously been made, and that it was simply beer with a less percentage of alcohol than is contained in ordinary beer. It contained 3 per cent of malt extract and 1.73 per cent alcohol. It was admitted that Rochester tonic was a malt liquor. It was conceded in argument that the stuff contained 2 per cent and under of alcohol, and would not intoxicate. The statute prohibited the sale of "any

vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever." A prior statute had prohibited "ale and beer." The court said, at pages 500, 502, of 2 Ind. Terr.: "The evident object of Congress in making the change of phraseology in the statute from 'ale and beer' to 'any malt of fermented liquors' was not to exclude that which the old had included, but it was to include in the new law that which was excluded by the old, by using an expression broad enough to cover all forms and kinds of alcoholic drinks. . . . The law as it existed prior to the act of 1895 prohibited ale and beer in all of their forms. The first act passed afterwards, relating to the same conditions prohibits malt liquors, ale, and beer, in all of their forms. Did Congress intend to make an exception in the act of 1895? We think not, and therefore hold that malt and fermented liquors, when to be used as beverages or for drinks, are prohibited by the statute, in all of their forms, and the question as to whether or not they are intoxicating is immaterial."

In *Sawyer v. Botti*, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787, the action was to enjoin the sale of "justus beer," and was of course tried to the court. The evidence showed that in the manufacture of justus beer the same materials were used as in lager beer, and the process of malting and extracting was the same, except that the process of fermentation was arrested before any considerable amount of alcohol was produced, so that justus beer contained about one half of 1 per cent of alcohol by volume, while lager beer contains 3½ per cent of alcohol. The evidence further showed that justus beer was not intoxicating because no ordinary person could imbibe enough at one time to get sufficient alcohol to produce intoxication. The statute prohibited the sale of "intoxicating liquor," except as otherwise provided, and defined that term to mean "alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever." The injunction was granted. On appeal the supreme court affirmed the decree saying: "We reach the conclusion without the slightest doubt that the beverage in question, *being a liquor manufactured from malted grain by a process involving fermentation*, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited. It is conceded that the process of manufacture of justus beer is the same as that of lager beer, save that the fermentation is arrested at an earlier stage, and therefore less alco-

hol is contained in the product. We think that such liquor is 'beer' within the statutory definition, but, whether so or not, it is unquestionably a malt liquor." (Italics ours.)

The court thus clearly recognized the elements of fermentation of malt and at least some trace of alcohol as the essential and distinctive features of malt liquors, just as do all of the dictionaries, though the liquid in question was not intoxicating.

In *Luther v. State*, 83 Neb. 455, 20 L.R.A.(N.S.) 1146, 120 N. W. 125, the defendant was charged with selling, without a license, "a certain malt and intoxicating liquor; to wit, malt tonic." The undisputed evidence showed that the liquor contained 1.1 per cent of alcohol and was "in the class of beers." The manufacturer's label stated that it contained "less than 2 per cent of alcohol" and was "brewed." The statute prohibited the sale of "malt, spirituous, or vinous liquors, or any intoxicating drinks," without a license. The court held that, as to the character of the liquor, it was not necessary to prove more than that it was a "malt liquor." In answer to the claim that there was no proof that it would intoxicate the court said: "At any rate, the law prohibits the sale of 'malt liquors' without a license, and we must obey its plain mandate. Alcoholic beverages are under the ban of the law in some form or other, in most civilized countries. They are known to be the cause of crime, destitution, and pauperism. *Malt liquors used as beverages are known to contain that destructive ingredient.* It was proven upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is 'An Act to Regulate the License and Sale of Malt, Spirituous, and Vinous Liquors,' etc. Laws 1907, chap. 82, p. 297. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the legislature intended to provide for the regulation and license of intoxicating malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the legislature clearly intended should not be there. This is not the province of the courts." (Italics ours.)

While the court did not define "malt liquor," it recognized that all malt liquors contain alcohol, thus agreeing with the definitions of the lexicographers, all of which, as we have seen, include the alcoholic element.

In *La Follette v. Murray*, 81 Ohio St.

474, 91 N. E. 294, the liquor involved was "Friedon beer." Defendant was sued for an occupation tax laid by statute in the trafficking in "spirituous, vinuous, malt, or other intoxicating liquors." The case was tried on an agreed statement of facts, in which it was admitted that the stuff was "a malt liquor containing .47 of 1 per cent of alcohol, but not intoxicating." The court sustained a judgment for the tax, holding that the generic term "malt liquors" includes both nonintoxicating and intoxicating malt liquors. It did not attempt to define malt liquors, because the liquor in question was admitted to be a malt liquor and contained alcohol.

In *State v. O'Connell*, 99 Me. 61, 58 Atl. 59, the defendant was indicted for being a common seller of intoxicating liquors. While the statute then in force in Maine is not set out in the opinion, the court said: "Rev. Stat. 1883, chap. 27, § 33, amounts to a prohibition of the sale of malt liquor."

The evidence showed a sale of "Uno beer, brewed from malt, and containing 2.36 per cent of alcohol." On the trial the court refused to instruct that the jury must find the liquor was intoxicating, but did instruct that "if you find beyond a reasonable doubt that the beer in question was brewed from malt, it was a malt beer, and comes within the prohibition of the statute."

The supreme judicial court held that this was not error, saying: "The issue was whether the defendant sold malt liquor. If he did sell it, it was in violation of the statute, and it was not necessary, in order to establish his guilt, for the jury to go further, revise the judgment of the legislature, and determine whether malt liquor was or was not in fact intoxicating. . . . The presiding justice was not bound to define the term 'malt liquor.' *State v. Starr*, 67 Me. 242, 2 Am. Crim. Rep. 390; *State v. Wall*, 34 Me. 165. While the court should define to the jury legal terms to which the law has attached a specific meaning, it is not required to define words in common and ordinary use, the definition and meaning of which jurors are presumed to understand as well as the court."

If, as the court says the common meaning is the true meaning of the term "malt liquor," then where the question as here is presented as one of fact for the court, we can only take that definition on which the dictionaries in common use are unanimous; namely, an "alcoholic beverage brewed from malt" or "produced by fermentation from malt." See *Standard, Century, and Webster's International Dictionaries*, above quoted.

In *Feibelman v. State*, 130 Ala. 122, 30 So. 384, the cause was tried to the court L.R.A.1917B.

without a jury. The liquor sold was "hop jack." The evidence showed that it contained from 1.75 to 2 per cent alcohol, and "was produced by fermentation of malted barley, diluted with water, and was therefore a malt liquor," but in potable quantity was not capable of producing intoxication. The statute prohibited "the selling of spirituous, vinous, or malt liquors, or intoxicating bitters or beverages." The supreme court sustained a conviction on the ground that the statute expressly prohibited the sale of "malt liquor," and that the evidence showed that "hop jack" was a malt liquor. The court further said: "We may, for all the purposes of this case, concede, without indicating any opinion upon the question, that the legislature may not, in the exercise of the police power, prohibit the sale of a malt liquor which is not intoxicating, nor otherwise deleterious in any way, where the sole purpose and object is the prevention of the sale of that particular character or quality of malt liquor. But it is common knowledge that most malt liquors are intoxicating and harmful when used excessively, and are capable of excessive use as a beverage. The sale of all such, of course, the legislature has the power to prohibit."

Clearly the evidence there brought the hop jack within the exact terms of the *Century Dictionary* definition, "an alcoholic beverage produced merely by fermentation of malt," and within the specific meaning of the definitions found in the *Standard and Webster's International Dictionaries*.

*State ex rel. Guilbert v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062, was a suit in mandamus to compel the enforcement of a statute imposing a tax "on the business of trafficking in any intoxicating liquors, and also on the business of trafficking in spirituous, vinous, or malt liquors." The petition alleged that the liquor involved was "a malt liquor or beverage, commonly known as 'Bishop's beer,' . . . which malt liquor or beverage contains less than 2 per cent of alcohol, and is not intoxicating." The court overruled a demurrer to the petition on the ground that "the generic term 'malt liquors' includes both nonintoxicating and intoxicating malt liquors."

The court did not define the term "malt liquors," because the demurrer admitted the allegation of the petition that the stuff was a malt liquor and contained alcohol.

In *Flanders v. Com.* 140 Ky. 38, 130 S. W. 809, the liquor involved was called "temperance beer" or "Dr. Fizz." It was admitted to contain 1 per cent of alcohol. Witnesses who drank it testified that "the liquor looked like beer, smelt like beer, foamed like beer, and tasted like beer. Several of them testified that they drank beer

many times, one of them that he had been a barkeeper, selling beer for some years, and that in their opinion the liquor was beer somewhat diluted."

Defendant and the manufacturer testified that it was merely a carbonated water, with 1 per cent of alcohol added. The statute prohibited the sale of "spirituous, vinous, and malt liquors." The court took judicial notice that beer is a malt liquor, and instructed the jury that if it found that the concoction in question was "ordinary beer, a malt liquor," defendant should be found guilty. The appellate court approved this instruction, saying: "As, therefore, the statute in terms prohibits the sale of malt liquors in local option territory, it is enough to inquire whether the liquor sold is malt liquor; if it is, the guilt is fixed. Whether it intoxicates some people or not, or is only a mild intoxicant, or whether defendant believed that it was an innocent soft drink, is immaterial."

In *Com. v. Goodwin*, 109 Va. 828, 64 S. E. 54, a statute known as the "Byrd Law," a state revenue act, permitted the sale of "malt beverages," which it defined as "the product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of 2½ per cent in volume of alcohol."

Another statute prohibited licensing the sale of "ardent spirits, malt liquors, or any mixture thereof or any bitters containing alcohol," in any town except upon the written consent of the town council. The court held that "malt beverages" as defined in the first statute were "malt liquors" within the meaning of the second statute. Since "brewing" essentially involves fermentation, it is clear that the definition of "malt beverages" in the Byrd Law brings such beverages within the definition of "malt liquor" as found in all the dictionaries.

In *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531, the statute defined "intoxicating liquor" as including "any distilled, malt, vinous, or any intoxicating liquor whatever." The liquor sold was near beer. The accused testified that it was made as other beer, only weaker; that it was then boiled so as not to contain any alcohol; that "sugar, etc.," was then added, and the mixture was "carbonated;" that "if you keep it in a warm place, it would generate alcohol right away," but if kept cool "it might go two or three weeks . . . and never get alcohol." That this was why he did not ship it or sell it except on his own place; that in the beer he sold at the time in question there was probably .2 of 1 per cent of

alcohol. He admitted that if left standing it would become intoxicating. The court held that the concoction was a malt liquor, and was hence in law an intoxicating liquor because the legislature had defined it so. It is clear that it was brewed from malt and contained at least a trace of alcohol as admitted by the defendant, and would soon develop sufficient alcohol to become intoxicating. It plainly fell within the standard definition of malt liquor as an "alcoholic beverage brewed from malt." The facts showed a plain attempt to evade the statute by selling a potential beer.

The case of *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815, has no bearing upon the case before us. The court there defines "near beer" as "a term now of general currency in this state, and perhaps elsewhere, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk to excess. It includes all malt liquors which are not within the purview of the general prohibition law."

The case merely held that, because its sale was not prohibited by the general statute, it could not be prohibited by a city ordinance, but because it was an imitation and substitute for beer, and liable to be used as a cover for the sale of real beer, it was within the police power of the city to regulate its sale by ordinance. This is elementary. In fact it is admitted in the case before us that the sale of beverages containing no alcohol whatever may be by state statute absolutely prohibited in the exercise of the police power as an aid to the enforcement of the prohibition of alcoholic beverages. But our statute contains no such provision unless every liquid containing malt, whether fermented or not, and whether containing alcohol or not, is a malt liquor, which is the real question here involved.

In *People v. Kinney*, 124 Mich. 486, 83 N. W. 147, the court merely held that fermented cider was a "fermented liquor," and hence prohibited by the statute, whatever the degree of fermentation.

We shall not review in detail the other cases cited by respondent, involving statutes prohibiting the sale of "cider" eo nomine. They merely hold that, cider being in terms prohibited, the courts will not inquire whether the given cider is or is not "sweet" or "hard," fermented or unfermented, new or old, intoxicating or nonintoxicating. They throw no light on the question before us. *Com. v. Dean*, 14 Gray, 99; *State v. Frederickson*, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 295, 63 Atl.

535, 8 Ann. Cas. 48; *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844.

We want it distinctly understood we do not hold that the statute does not prohibit the manufacture and sale of a malt beverage of such composition that of itself under proper conditions it will generate alcohol. We hold just the contrary. Such a liquor would be potentially a malt liquor. In the language of the statutes it would contain "intoxicating properties." Its manufacture or sale would be a palpable evasion of the statute. *State v. Walder*, *supra*. But the liquid here involved, it is admitted, "is entirely free from alcohol," and "does not in fact contain intoxicating properties." The admission clearly negatives the idea that it will of itself generate any alcohol whatever. It is not even claimed by the state that it will. We have therefore neither allegation nor proof to bring the beverage here involved within any definition of malt liquor, actual or potential.

We further want it distinctly understood that we are not giving to the stuff called "Lifestaff" a certificate of character. We are merely passing on the admitted facts now before us. If in any future case it shall be either admitted or proved that Lifestaff, or any other beverage by whatever name called, is in fact a malt liquor, either actual or potential, as the dictionaries, text-books, and courts have defined the term "malt liquor," then in such a case it must be held an "intoxicating liquor" as defined in the statute, and hence prohibited.

Neither do we hold that liquids absolutely harmless, wholly free from alcohol and wholly free from intoxicating properties of any kind, might not be directly prohibited, or might not be conclusively defined as intoxicating liquors, and so prohibited, by a law so declaring in order to aid in the enforcement of the purpose of the prohibition law. The legislature, or the people in a legislative capacity, have the undoubted power to prohibit any liquid, however harm-

less in itself, but which might be used as a cover for the sale of the harmful liquors, or to prohibit all imitations or substitutes for intoxicating liquors, however harmless separately considered. But we have no such statute and this court cannot pass one. It cannot legislate. Experience in the enforcement of the law as it is now written may eventually show such a need, but this court cannot supply it. The law as it now is contains no such provision, either in terms or by any possible implication, however liberally construed.

Again we do not hold that the prohibition law as it now reads prohibits nothing but liquors or liquids capable of producing intoxication when taken to capacity. On the contrary, we hold that every malt liquor, though containing only a trace of alcohol, is in terms prohibited because it is a "malt liquor" under the common meaning of that term as defined by every standard dictionary and every court which has attempted to define it.

We merely hold that a liquid containing malt, if unfermented and containing no alcohol whatever, is not a "malt liquor," as defined by any standard dictionary of our language, or as defined by any text-book, or as defined by any court which has attempted to define the term, to which our attention has been directed, or which, after many days of careful search, we have been able to find. In this we are not merely following precedent. We are simply giving to the term "malt liquor" the only meaning that it has in our language. We are not even selecting between a primary and secondary meaning. We are taking the only meaning which the words have. It is admitted that the liquid here involved does not come within that meaning. We are bound by the admitted facts.

The judgment is reversed.

Morris, Ch. J., and Parker, Mount, Main, Holcomb, and Chadwick, JJ., concur.

### **Annotation—Do statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor.**

This note is supplemental to the notes to *Luther v. State*, 20 L.R.A.(N.S.) 1146; *Bowling Green v. McMullen*, 26 L.R.A.(N.S.) 895, and *Ex parte Lockman*, 46 L.R.A.(N.S.) 759.

The constitutional power to prohibit or regulate the sale of nonintoxicating alcoholic liquors is discussed in the note to *State v. Fargo Bottling Works Co.* 26 L.R.A.(N.S.) 872; and the power of the municipality to regulate the sale of such

liquors in the note to *State v. Dannenburg*, 26 L.R.A.(N.S.) 890. As to power to prohibit or regulate the sale of "soft" drinks, see the note to *Tolliver v. Blizard*, 34 L.R.A.(N.S.) 890.

Upon the question whether allegation or proof of the sale of beer is sufficient to sustain a conviction under statutes prohibiting sale of vinous, malt, fermented, or intoxicating liquors, see the notes to *People v. Anderson*, 25 L.R.A.

(N.S.) 446, and *State v. Billups*, 48 L.R.A.(N.S.) 308.

Other related questions are discussed in notes cited in the Indexes to L.R.A. Notes under the title, "Intoxicating liquors."

Cases under statutes prohibiting the sale of beverages containing alcohol in any quantity whatever are excluded from the question now under consideration, as are those under statutes relating in terms to nonintoxicating liquors.

As is shown in the earlier notes, the authorities upon this question are in direct conflict; the weight of authority taking the view that, where the statute expressly forbids the sale of a certain class of liquor, nonintoxicating as well as intoxicating liquors of that class are included within the prohibition. The same may be said of the more recent cases.

Thus, in *Bradley v. State* (1912) 3 Ala. App. 212, 58 So. 95, the defendant was held subject to conviction under the Alabama statute, where he sold a malt liquor, whether or not it was an intoxicant; the court following the Alabama cases in the note in 20 L.R.A.(N.S.) 1146.

So, in *Berner v. McHenry* (1915) 169 Iowa, 483, 151 N. W. 450, the court followed *Sawyer v. Botti* (1910) 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787, cited in the note in 26 L.R.A.(N.S.) 895, and held that a liquor containing malt and alcohol, which could be and was used as a beverage, was malt liquor prohibited by the statute.

So it was held that a fermented malt liquor containing alcohol, whether intoxicating or not, is within a statute prohibiting the sale of "any spirituous, malt, ardent, or intoxicating liquors or drinks." *Pennell v. State* (1909) 141 Wis. 35, 123 N. W. 115.

And in *Brown v. State* (1915) 17 Ariz. 314, 152 Pac. 578, referred to in *State v. Hemrich*, ante, 962, it was held that beer, whether intoxicating or not, is within a prohibition of "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind."

So, also, it has been held that a fermented liquor containing .55 of 1 per cent of alcohol at 60 Fahrenheit, though not intoxicating, is within a prohibiting statute declaring that, "by the words, 'spirit,' 'spirituous liquors,' or 'intoxicating liquor,' shall be intended all distilled liquors or rectified spirits, vinous, fermented, brewed, and malt liquors and wines, and any beverage, by whatever name called, containing more than 1 per L.R.A.1917B.

cent of alcohol by volume at 60 Fahrenheit." *State v. Lebreque* (1916) — N. H. —, 97 Atl. 747.

And an indictment charging the sale of "ardent, vinous, malt, fermented, spirituous, alcoholic, and intoxicating liquors" is supported by proof of sale of any of such liquors which contain any alcohol at all, whether they are intoxicating or not, under a statute prohibiting the sale of "alcohol or any spirituous, ardent, vinous, malt, or fermented liquors in this state, or any compound or preparation thereof, commonly called tonics, bitters, or medicated liquors, or intoxicating spirits of any character which are used and drank as a beverage in any quantity or for any purpose whatever," etc. *Seibert v. State* (1915) 121 Ark. 258, 180 S. W. 990.

It is not necessary for the prosecution to prove that the liquor sold would actually intoxicate a person or that anybody had become intoxicated; but simply that the accused has sold distilled, spirituous, vinous, fermented, or malt liquors, whether strong or weak, and whether in fact intoxicating or not, where the statute provides that the term "intoxicating liquors" in that statute shall include all distilled, spirituous, vinous, fermented, and malt liquors. *People v. Stone* (1910) 154 Ill. App. 7.

In *State v. Martin* (1910) 230 Mo. 1, 139 Am. St. Rep. 628, 129 S. W. 931, the Local Option Act prohibiting the selling of a beverage containing alcohol in any quantity whatever was attacked as unconstitutional in that this provision was not embraced in the subject of the title, "submitting the question of prohibiting the sale of intoxicating liquors." But the court held that the legislature must be deemed to have had in mind the definition of intoxicating liquors in the so-called Dramshop Law; viz., "The term 'intoxicating liquor,' as used in this chapter, shall be construed to mean fermented, vinous, or spirituous liquors, or any composition of which fermented, vinous, or spirituous liquors is a part, and all the foregoing provisions shall be liberally construed as remedial in their character."

On the other hand in Georgia it is held that a law prohibiting the sale of "any alcoholic, spirituous, malt, or intoxicating liquors, or other drinks which, if drunk to excess, will produce intoxication," comprehends only such beverages as, "if drunk to excess, will produce intoxication." *Abbott v. State* (1912) 11 Ga. App. 43, 74 S. E. 621,



holding that the expression "near beer" does not import an intoxicating liquor, and that evidence of the sale of such a beverage, without proof that, if drunk to excess, it will produce intoxication, will not support a conviction of violation of the statute, the court observing that "this court has defined 'near beer' as a malt liquor containing such a small percentage of alcohol that it will not produce intoxication if drunk to excess."

So, in *Howard v. Aeme Brewing Co.* (1914) 143 Ga. 1, 83 S. E. 1096, it was held that neither the statute aforesaid nor the Blind Tiger Statute was intended to apply to the sale of a nonintoxicating malt liquor, the latter statute providing for the abatement as a nuisance of a place "commonly known as a 'blind tiger,' where spirituous, malt, or intoxicating liquors are sold in violation of law."

In *Hoskins v. Com.* (1916) — Ky. —, 188 S. W. 348, where the indictment was for the offense of having in possession for the purpose of selling any spirituous, vinous, or malt liquors in local option territory, the court said: "Beer is a malt liquor, and, while it is essential to constitute guilt of the offense for which appellant was indicted, that the malt liquor should be also intoxicating, when it is proven to be beer, the court will presume or take judicial knowledge that it is intoxicating, without proof to that effect." But the conviction was reversed on another ground.

In South Carolina it is held that liquor which cannot intoxicate because sickness would intervene before intoxication is not within a statute prohibiting delivery of intoxicating liquors. *Geer Drug Co. v. Atlantic Coast Co.* (1916) — S. C. —, 88 S. E. 448.

Under the Texas Local Option Law, it is held that the expression "intoxicating liquors" means "a liquor intended for use as a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk." *Sandoloski v. State* (1912) 65 Tex. Crim. Rep. 33, 143 S. W. 151. See also *Cannan v. State* (1913) 71 Tex. Crim. Rep. 416, 159 S. W. 1186.

In *People v. Strickler* (1914) 25 Cal. App. 60, 142 Pac. 1121, disapproved in *State v. Hemrich*, ante, 962, it was held that a statute prohibiting the sale of "alcoholic liquors" does not include malt liquor containing less than 1 per cent of

alcohol, where the statute provides that "the term 'alcoholic liquors,' as used in this act, shall include spirituous, vinous, and malt liquors, and any other liquor or mixture of liquors which contains 1 per cent by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

It will be observed that the reversal in *State v. Hemrich* is upon the ground that the expression "malt liquor" imports a liquid containing alcohol.

The following miscellaneous cases are closely allied to the subject:

The words "imitation" and "substitute" are limited by the words, "containing as much as one half of 1 per centum of alcohol," in a statute prohibiting the sale, etc., of "any spirituous, vinous, fermented, or malt liquors, or any imitation thereof or substitute therefor; or to manufacture, sell, barter, give away, or otherwise furnish any liquor or compounds of any kind or description whatsoever, whether medicated or not, which contain as much as one half of 1 per centum of alcohol, measured by volume, and which is capable of being used as a beverage," etc. *Ex parte Hunnicutt* (1912) 7 Okla. Crim. Rep. 213, 123 Pac. 179, followed in *Wortman v. State* (1913) 9 Okla. Crim. Rep. 440, 132 Pac. 358.

In holding sufficient an affidavit charging that the defendant did unlawfully sell 1 pint of beer, he not being licensed under the laws of the state "to sell spirituous, vinous, and malt liquors," the court said: "If the beer sold by appellant was not intoxicating liquor within the meaning of the statute prohibiting the sale of such liquors as a beverage by an unlicensed dealer, he had the right to controvert that fact upon the trial." *Turner v. State* (1910) 175 Ind. 1, 93 N. E. 225. The court was perhaps referring to the following provision: "The words, 'intoxicating liquors,' shall apply to any spirituous, vinous, or malt liquor, or to any intoxicating liquor whatever which is used or may be used as a beverage, and which contains more than one half of 1 per cent of alcohol by volume."

In Louisiana the state may license and tax the sale of malt liquors containing less than 2 per cent of alcohol, even in districts where the local authorities permit no license for liquor containing any amount of alcohol, however small. *Hammond Ice, Light & Bottling Co. v. Ballard* (1914) 135 La. 201, 65 So. 108.

Under a statute prohibiting the sale of "any spirituous, malt, vinous, fer-

mented, or other intoxicating liquors," an information is insufficient which charges the sale of "certain liquids, to wit, 'Temp-Brew,' the said 'Temp-Brew' being an imitation of beer, having the color of beer, foaming like beer, having a slight smell like beer, and, . . .

when drawn from said cask or barrel into a glass, resembled beer." *Re McKenna* (1916) 97 Kan. 153, 154 Pac. 226, where, however, the court refused a release on habeas corpus on other grounds. B. B. B.

**OKLAHOMA SUPREME COURT.**

**WESTERN CASUALTY & GUARANTY INSURANCE COMPANY, Plff. in Err.,**

**v.**

**BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY et al.**

(— Okla. —, 159 Pac. 655.)

**Principal and surety — depository's bond — irregular appointment.**

1. One who guarantees by bond the payment of public funds deposited by a county treasurer in a bank designated as a county depository, under the provision of § 1540, Rev. Laws, 1910, may not defeat liability on the bond by showing that the designation of such bank as a county depository was irregular or illegal.

*For other cases, see Bonds, II. d, in Dig. 1-52 N. S.*

**Bonds — surplusage — effect.**

2. Where a depository bond executed pursuant to the provisions of said § 1540 contains the exact conditions imposed by the statute and, in addition, other conditions which are not provided by the statute, tending to limit or evade liability, the bond will be upheld as to the conditions imposed by statute, and the other provisions will be treated as surplusage.

*For other cases, see Bonds, II. d, in Dig. 1-52 N. S.*

(August 8, 1916.)

**ERROR** to the District Court for Muskogee County to review a judgment in plaintiffs' favor in an action on a depository bond given to secure the payment of public funds deposited by the county treasurer. Affirmed.

The facts are stated in the Commissioners' opinion.

Messrs. Zevely, Glvens, & Stoutz for plaintiff in error.

Messrs. Fred. P. Branson, W. E. Disney, B. B. Blakeney, and J. H. Maxey, for defendants in error:

Headnotes by EDWARDS, C.

**Note.** — As to effect of insertion of unauthorized provisions in a bond required by statute, see annotation following *UNITED STATES FIDELITY & G. Co. v. POETKEB*, post, 990. L.R.A.1917B.

The deposits were lawful.

*Hinton v. State*, — Okla. —, 156 Pac. 161.

The recital in the bond that the county commissioners, duly acting in accordance with law, have designated the First State Bank of Wainwright, Oklahoma, as a depository, estopped the surety from now denying that it was not duly done.

*State v. United States Fidelity & G. Co.* 81 Kan. 660, 26 L.R.A.(N.S.) 865, 106 Pac. 1040; *St. Louis County v. American Loan & T. Co.* 75 Minn. 499, 78 N. W. 113; *Henry County v. Salmon*, 201 Mo. 136, 100 S. W. 20; *Yellowstone County v. First Trust & Sav. Bank*, 46 Mont. 439, 128 Pac. 596; *Territory v. Mills*, 16 N. M. 555, 120 Pac. 325; *Powell v. Tunica County*, 107 Miss. 410, 65 So. 499, Ann. Cas. 1916B, 1262; *Buhrer v. Baldwin*, 137 Mich. 263, 100 N. W. 468; *People v. Bankers' Surety Co.* 158 Mich. 30, 122 N. W. 353.

The county commissioners could not impose the duty to give notice upon officers created by law with duties defined by law.

*Southwestern Surety Ins. Co. v. Davis*, — Okla. —, 156 Pac. 213; *Higdon v. Fields*, 6 Ala. App. 281, 60 So. 594; *United States Fidelity & G. Co. v. Union Trust & Sav. Co.* 142 Ala. 532, 38 So. 177; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *United States Fidelity & G. Co. v. Muir*, 53 C. C. A. 56, 115 Fed. 264; *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815.

Notice of default was timely given.

*Van Buren County v. American Surety Co.* 137 Iowa, 400, 126 Am. St. Rep. 200, 115 N. W. 24; *Peele v. Provident Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 545; *Ward v. Maryland Casualty Co.* 71 N. H. 262, 93 Am. St. Rep. 514, 51 Atl. 900; *Booth v. Irving Nat. Exch. Bank*, 116 Md. 668, 82 Atl. 652.

Edwards, C., filed the following opinion:

For convenience and brevity the board of county commissioners will be referred to as the board, the Western Casualty & Guaranty Insurance Company as the Western Company, and the First State Bank of Wainwright as the bank.

This is an action in which the board of

county commissioners of Muskogee county brought suit against the First State Bank of Wainwright and the Western Casualty & Guaranty Insurance Company upon a depository bond, the petition alleging that on December 1, 1912, W. H. Wainwright was the duly elected, qualified, and acting county treasurer of Muskogee county, and continued to act as such until the 31st day of October, 1913; that on or about said 1st day of December, 1912, the said bank was a corporation under the banking laws of the state of Oklahoma, engaged in the banking business, at Wainwright, Muskogee county; that the defendant the Western Casualty & Guaranty Insurance Company was a corporation under the laws of Oklahoma, authorized and empowered to write indemnity and depository bonds; that on or about the 1st day of December, 1912, the board of county commissioners of Muskogee county designated the said bank as a county depository for the deposit of county and other funds in the hands of the treasurer of said county, and that said board at the time of designating said bank required that said bank should execute a bond with good and sufficient surety, in the sum of \$10,000, to secure the deposit of the county funds and funds deposited with said bank by the said treasurer, and that on the 3d day of December, 1912, the bank tendered to the county treasurer a bond in said sum executed by it and the said Western Company as surety, the said bond containing conditions as follows: "Now, therefore, the condition of this obligation is such that if the said First State Bank of Wainwright, Oklahoma, shall safely keep the moneys constituting the county funds of Muskogee county, Oklahoma, and shall promptly pay all checks and drafts drawn by said treasurer against such county funds, including all interest to accrue thereon at the agreed upon rate per centum per annum on all monthly balances, then this obligation to be void; otherwise to remain in full force and virtue. Provided, however, and upon the following conditions: First. That in the event of any default on the part of the principal, written notice thereof, with a certified statement of the facts showing such default and the date thereof, shall, within thirty days after such default, be delivered to the surety at its office in the city of Oklahoma City, Oklahoma."

Then follow allegations of a conspiracy between the county treasurer and the president of said bank, and allegations of embezzlements and of the forging, altering, and mutilating the records of said bank. It is alleged further that the county treasurer was, in fact, the owner of the stock of said bank, and had secretly transferred

the same to other parties, and made the bank's records show that other parties were the owners of the stock of said bank; that the records of the county treasurer were falsified to show that no money belonging to said county was on deposit in said bank. Then it is alleged that on the 16th day of October, 1913, the said bank closed its doors and refused the payments of money on deposit in said bank, refused to pay checks and drafts drawn by the said county treasurer, and that on the 19th day of December, 1913, this plaintiff discovered that an amount in excess of \$10,000 of the funds of said county was actually on deposit in said bank, and had been continuously since the execution and approval of said bond; that plaintiff at once served written notice of said default upon the said Western Company at its office in Oklahoma City, and attached thereto a certified statement showing the facts so far as known by the plaintiff.

Plaintiff alleges that it did not discover that there was any money of said county on deposit in said bank prior to December 19, 1913, and sets out at length the concealment practised which prevented it from knowing of such deposit. Plaintiff alleges that it has done and performed all the conditions of the said bond, but that the said bank has refused to pay checks drawn by the treasurer on said deposit, and that there has accrued upon said deposit, at the agreed rate, interest in the sum of \$600. Judgment is prayed against the said bank for the sum of \$60,600, and against the Western Company for \$10,000, with interest. Motions to strike out certain portions of the answer were filed by the defendant Western Company, and, after being overruled, a demurrer was filed, which was overruled, and the said defendant then answered, setting up four separate defenses, the first being a general denial, except as to the execution of the bond sued upon and the corporate existence of the parties; second, the defendant alleges, in substance, that at the time the said bank was designated as a county depository, W. H. Wainwright, the county treasurer, owned a large amount of the stock of said bank, and that the designation of said bank was therefore in violation of the provisions of § 1540 of the Revised Laws of Oklahoma, and the bond, being in furtherance of said unlawful purpose, was without validity and not binding; third, that the said bond sued upon provided that in the event of default on the part of the principal, written notice, with a certified statement of the facts showing such default, should, within thirty days after such default, be delivered to the surety at Oklahoma City; that the said bank, on the 16th day of October, closed its doors

and refused all payments of money on deposit in said bank, and the plaintiff, not having within thirty days thereafter given notice as provided in said bond, is not entitled to recover; fourth, that the bond was procured by fraud, in that the county treasurer was the owner of a part of the capital stock of the said bank, and the designation thereof as a depository was illegal; that the defendant Western Company was not aware of the ownership of stock by the county treasurer, and, if such fact had been known, would not have executed said bond; that it was the duty of the county commissioners to know whether said county treasurer was interested in said bank, and whether said bank might be legally designated a depository; that by reason of the fraud as aforesaid the bond is null and void. The plaintiff filed a general denial by way of reply. Judgment was entered by default against the bank, express reservation being made of the cause of action upon the depository bond upon which the Western Company is here sued.

At the time of the rendering of the judgment against the bank, an amended petition was filed by the plaintiff, which amounts in effect to a severance of the causes of action against the bank and the defendant the Western Company. The cause as between the plaintiff and the Western Company was referred to and tried by a referee, who took the evidence and made findings of fact and conclusions of law, which were duly transcribed and filed in the superior court. Later, upon motion, the report was confirmed, and judgment entered for the plaintiff and against the defendants, the bank and the Western Company, jointly and severally, for the sum of \$10,000, with interest thereon at 2½ per cent per annum, from the 17th day of October, 1913. Proper motions for new trial were filed and overruled and exceptions saved, and within due time the cause was appealed to this court. The record is voluminous, containing about 800 pages.

The contentions of plaintiff in error may be summarized as follows: First, that the company is not bound except for legal deposits; second, that the bond is not valid; third, that the county failed to give notice as the bond provides.

These contentions will be noticed in the order presented. Upon the first proposition, that the company is not bound except for legal deposits, the plaintiff in error contends that the bond in question is one to guarantee the payment of deposits only, and, as it appears that there was no legal authority for making the deposits by the county treasurer in the bank, that the bond is not liable, whether such lack of legal

authority be based upon violation of law or lack of facts justifying the deposit; that the title to the funds never passed, and the relation of debtor and creditor never arose; that the funds illegally deposited can be followed as far as they can be traced, and if they are lost, the official bond of the treasurer is liable. The pertinent part of the law with reference to county depositories to be here considered is found in § 1540, Rev. Laws 1910, and is: "In all counties the county treasurer shall deposit daily all the funds and money of whatsoever kind that shall come into his possession by virtue of his office as such county treasurer in his name as such county treasurer, in one or more responsible banks located in the county and designated by the board of county commissioners as the county depositories: Provided, that there shall not be deposited of such funds in any one bank at any one time, a greater amount than the capital stock of said bank. Such bank shall receive all moneys, checks or drafts at par and pay interest on the average daily balances at the rate of 2½ per cent per annum, and shall credit the same monthly to the account of such treasurer. Before directing or authorizing the deposit of any such funds aforesaid the board of county commissioners shall take from each such bank a bond in a sum equal to the largest approximate amount that may be deposited in each respectively, at any one time; said bond may be that of some surety company empowered to do business in the state. . . . The condition of said bond shall be that such deposit shall be promptly paid on the check or draft of the treasurer of such county, and the bondsmen of said treasurer shall not be liable for such deposit. . . . Provided, that it shall be unlawful for the board of county commissioners of any county to deposit any funds of their county in any bank in which the county treasurer or any member of the board of county commissioners shall be the owner of any stock or otherwise pecuniarily interested."

Plaintiff in error cites the case of *Watts v. Cleveland County*, 21 Okla. 231, 16 L.R.A. (N.S.) 918, 95 Pac. 771, as authority for the proposition advanced; but that case is based upon the law as it existed prior to the passage of the present law authorizing the designation of depositories (§ 1540, supra), and the holding is virtually to the effect that it was unlawful for a county treasurer to make a general deposit of county funds, the court saying: "The deposit fund involved in this case was placed in the bank as a general deposit by Mr. Hughes as treasurer of Cleveland county. Under ordinary circumstances such a de-

posit would constitute a loan, and would create the relation of debtor and creditor between Cleveland county and the bank. We are convinced, though, that under the laws of the territory of Oklahoma, as they existed at the time of this transaction, such relation was not thereby created. 'A general deposit in a bank is a loan.' Bank of Blackwell v. Dean, 9 Okla. 626, 60 Pac. 226. Section 6062, Wilson's Revised & Annotated Statutes of Oklahoma of 1903, makes it a crime for a county treasurer to loan public funds. Section 1239, Wilson's Revised & Annotated Statutes of 1903, provides that 'the books, accounts, and vouchers of the county treasurer, and all moneys, warrants, or orders remaining in the treasury, shall at all times be subject to the inspection and examination of the board of county commissioners, and at the regular meetings of the board in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose he shall exhibit to them all his books, accounts, and money, and all the vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement; and if found correct the accounts shall be so certified; if not he shall be liable on his bond.' It would seem from this section and the section making it a crime to loan public funds that the statutes of Oklahoma, prior to the passage of the bill providing for the creation of public depositories did not permit county treasurers to make general deposits of public funds, but it was his duty to at all times have the funds of the county under his control so that, immediately upon being directed to do so by the board of county commissioners, he may exhibit such funds to said board."

Subsequently to that decision the present law was enacted, in 1905. Plaintiff in error also cites the case of Hinton v. State (No. 6125) — Okla. —, 156 Pac. 161, in which it is held: "The condition of said bond shall be that such deposit shall be promptly paid on the check or draft of the treasurer of such county, and the bondsmen of said treasurer shall not be liable for such deposit.' Held, that the sentence, 'the county commissioners shall take from each such bank (depository) a bond in a sum equal to the largest approximate amount that may be deposited in each respectively, at any one time,' was intended to, and does by implication, limit the amount that may be legally deposited in each bank, respectively, to the amount of the depository bond; and held, further, that if the county treasurer deposits the funds of the county in such depository, an amount L.R.A.1917B.

in excess of such bond, and the same is lost by the failure of the bank, the treasurer and his surety are liable for the amount so lost in excess of the depository bond."

We are unable to see how the holding in this case will avail plaintiff in error, for here the court simply holds that the bond of the county treasurer is not liable for the amount of a deposit covered by a depository bond, but is liable for a deposit in a designated bank in excess of the depository bond, —following the rule of limitations as expressed in Kay County v. Dunlop, 17 Okla. 53, 87 Pac. 590, where it is said: "When the depositories are designated, and their bonds approved, it becomes the duty of the county treasurer to use these bonds as depositories for the county money in his hands, but it is left to his discretion to fix the amount to be placed in any given bank, subject however, to the provisions that he shall not deposit an amount greater than the capital stock of such bank, nor greater than the bond given as security."

But the case at bar is not upon the treasurer's bond, but upon the depository bond, and it is not sought to hold the depository bond liable for any sum in excess of the amount expressed therein, but merely to the extent of such bond, while the Hinton Case, supra, holds that for deposits in excess of the depository bond, the treasurer's bond is liable. The referee, to whom this action was referred and whose findings have the force and effect of the verdict of a jury, has found that from the time of the execution of the bond in controversy until the closing of the bank by the bank commissioner, there was on deposit in said bank funds of Muskogee county in excess of the amount designated in the depository bond.

The mere fact that the treasurer had on deposit in the depository bank an amount in excess of the bond of such depository bank would not make the deposit unlawful. In Yellowstone County v. First Trust & Sav. Bank, 46 Mont. 439, 128 Pac. 596, the court had under consideration a statute making it a felony for a treasurer to deposit in a bank more money than he had received security for, and the court there held that neither the validity nor the sufficiency of the bond was impaired, and permitted the recovery to the extent of the penalty named in the bond, and permitted a trust to be imposed for the remainder of the deposit in excess of the bond. In the case at bar, neither an excessive deposit nor the fact that the books of the bank and of the county treasurer fail to show the true status of the account will affect the legality of the deposit.

Upon the second proposition argued, that the bond is not valid, it is urged that the

designation of the bank as a depository is illegal; that it is against the plain letter of the law (§ 1540, *supra*); that the board of commissioners must know that a bank is a proper depository before designating it, and that in this case the designation was wholly illegal and a fraud, and the bond sued upon, having been procured and given in furtherance of said fraud, is wholly void, and the depositing of money in the bank by the county treasurer, while owning stock therein, is an embezzlement by the treasurer, for which the depository bond is not liable. If the board, in making the designation, had knowledge of the ownership of stock in the bank by the county treasurer, there might be some force in the contention; but it is nowhere intimated that the board had any such knowledge or information. If the surety company which signed the bond was deceived, so also was the board deceived. The mere designation of the bank as a depository by the board is not, in contemplation of law, the reason for depositing the county funds in such bank. Such designation is but one of the necessary steps preceding a deposit. The giving of a depository bond is another step, and if the board must know before making the designation that the bank is a proper one to be designated, it would seem to follow that the bonding company also should know that the bank is a proper one to bond, and yet the bond sued upon contains this recital: "Whereas, the board of county commissioners of Muskogee county, state of Oklahoma, duly acting in accordance with law, has designated the First State Bank of Wainwright, Oklahoma, as a depository of the county funds of Muskogee county, state of Oklahoma, and has designated the sum of \$10,000 as the amount of the bond to be given by said bank, now, therefore," etc.

We are not at all sure that, had the board known at the time it designated said bank as a depository that stock was owned therein by the county treasurer, even this knowledge would have rendered the bond void. In the case of *Henry County v. Salmon*, 201 Mo. 136, 100 S. W. 20, the court, in discussing the case of *Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143, says: "In *Hennepin County v. State Bank*, *supra*, the board of county commissioners had designated the depository in the teeth of a statute requiring the board of auditors to make the designation. In a suit on the bond the sureties defended on the theory the designation was void. What was said in disposing of that contention is applicable in this case, viz.: 'In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, can-

not, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. *Mechem*, Pub. Off. § 341; 2 *Brandt*, *Suretyship & Guaranty* § 521; *State v. Bates*, 36 Vt. 387; *People v. Evans*, 29 Cal. 429; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79.'"

The case of *Buhrer v. Baldwin*, 137 Mich. 263, 100 N. W. 468, is very much in point, in which case it is held: "One who guarantees the payment of county funds to be deposited in an unincorporated bank is liable to the county therefor, although the contract to deposit in such bank was prohibited by statute and void."

In the body of the opinion the court says:

"It is insisted that no action can be maintained on the writing signed by defendants, because it was executed in violation of law. The law in question is Act No. 393 of the Local Acts of 1879, § 1. This act made it 'the duty of the county treasurer of the county of Wayne to deposit daily his entire receipts from all sources, and all moneys, drafts, or checks on hand, to the credit of the county of Wayne, in such bank or banks incorporated under the laws of this state or the United States, as may be designated by the treasurer and the board of auditors of said county as the depository of the funds of the county.' The act makes it a felony for the county treasurer to violate its provisions. It is contended that as *A. Ives & Sons* was a partnership, the deposit in question in its bank was prohibited and made a felony by this statute, and that, as a consequence, the undertaking of the defendants was an illegal contract which cannot be enforced. If this suit is to be regarded as the personal suit of the county treasurer, who has violated the statute, there would be great force in this contention. It is earnestly insisted that the court should so regard it; and it is said that, if this action should fail, the county will lose nothing, since it is fully indemnified by the bond of the county treasurer. We cannot regard this suit as the personal suit of the county treasurer. The form of the declaration, the prosecution of the suit by the prosecuting attorney, the objection already discussed and disposed of, all indicate that it is a suit by the county to recover its money. The fact, if it be a fact, that the people of the county of Wayne have double security for this money is a circumstance of no legal importance. If they are so secured, the officials of that county, and not this court, have the right to determine to which security they will first resort. They have determined to resort to the obligation of defendants. Nor does this record enable us to say with certainty that the

sureties on the treasurer's bond are now responsible. It cannot therefore be said that the county will not lose its money if defeated in the present action.

"Assuming this suit to be the suit of the county to recover the money illegally deposited with A. Ives & Sons, does the statute prevent the enforcement of the contract? Did the legislature, in enacting the statute of 1879, intend that those who agreed to make good a loss to the people, caused by a violation of that law, should be released from their contract? No such legislative intent is expressly declared in the statute. Shall it be inferred? The learned trial judge, in speaking of the statute, said: 'It simply means that this was a protection to the money of the people . . . against the county treasurer depositing it in a place that the lawmakers deemed insecure. . . . This statute was not enacted for the purpose of preventing the county getting back their money. . . . It seems to me it would be a very unreasonable interpretation of the statute' to hold, 'because a public officer violates the law, and does an act that he has no right to do, that therefore the people lose their money.' This reasoning, in our judgment, is sound, and is sustained by authority."

We believe that the surety on the bond cannot question the validity of the bond for this reason, and that the validity of the bond is not affected by any error on the part of the board in the designation of the bank as a depository.

Upon the third proposition argued, that the county failed to give notice as in the bond specified, it is urged by plaintiff in error that, as provided by § 1152, Rev. Laws 1910, a surety cannot be held beyond the express terms of his bond; that he has liberty of contract, and that a sensible construction of the contract (bond) must be that the surety is liable only on condition that notice of default be given within thirty days thereafter; that the default does not create the liability, but it is the default plus the compliance with the contract of suretyship, which creates the liability. In answer the board contends that the provision requiring notice is to indefinite, in that the bond does not designate by whom such notice should be given, and that if it is contemplated by the bond to impose additional duties on a county officer, whose duties are fixed by law, that such condition is for that reason void; that conditions and exceptions are to be strictly construed in favor of the insured, to avoid forfeiture and to afford indemnity (19 Cyc. 657); that the bond, being given for a public purpose and pursuant to the provisions of law, is to be construed as a statutory bond, and any con-

ditions, exceptions, or limitations in excess of the requirements of law are unauthorized and inoperative and are to be treated as surplusage. The board further contends that the proviso requiring notice is in conflict with § 9, art. 23, of the Constitution, and for that reason is void, and, lastly, contends, that, as the record disclosed that notice was given within thirty days from the time the board discovered the character of the default, the notice is timely given.

Numerous authorities are cited by both parties in support of their respective contentions. We are impressed with the importance of the questions raised, and have sought to give careful consideration to the authorities cited and the arguments advanced. We believe, however, that there is a distinction to be observed between bonds given to private concerns, where both parties have full liberty of contract, and bonds given pursuant to a statute, as in this case, for the public benefit. We believe that a bonding company, giving a bond under the provisions of a law and for a public purpose, is bound to know the law and to know the limitations fixed by the law upon the authority of the agents for the public, with whom it contracts. Here the statute fixes the conditions of the depository bond. § 1540, *supra*. This law, with all its terms, no more and no less, becomes a part of the bonding contract. The board has no authority to waive any part of the statute nor add anything to it. The bond in controversy, as executed, contains all the conditions required by the statute, with the addition of a condition requiring notice, which tends to modify the statute and to limit the liability. This additional condition, we think, may not be imposed. In the recent case of *Southwestern Surety Ins. Co. v. Davis*, — Okla. —, 156 Pac. 213, this court, speaking through Mr. Justice Hardy, held: "The bond sued on being a statutory one, and given in an attempt to comply with the statute, in order to avoid such a result, the court will read into the bond the statutory conditions and construe the same to guarantee the fulfilment of contracts entered into within the year."

In the case of *Henry County v. Salmon*, *supra*, it is said (syllabus): "To ascertain the liability of the sureties on the bond given by a banker as depository of county funds, Laws 1901, p. 101 [Anno. Stat. 1906, pp. 3344, 3345], providing for the selection of county depositaries, must be read into the bond, and the liability of the sureties must be determined by its provisions."

The supreme court of New York, in the case of *Bath v. McBride*, 81 Misc. 618, 142 N. Y. Supp. 1014, holds (syllabus): "Where

the form of an official bond differs from that prescribed in the statute, if founded upon a good consideration, the liability of the surety is measured by the provisions of the statute rather than the language of the obligation itself."

In the case of *Higdon v. Fields*, 6 Ala. App. 281, 60 So. 594, it is held that a bond intended by the obligors to be the official bond of a public officer is operative as such, though not conditioned as prescribed by the Code prescribing the condition of official bonds.

In the case of *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815, the surety had entered into an obligation conditioned that the bank "shall well and truly hold said funds, with accrued interest, subject to draft, and payable at all times on demand, and shall well and truly pay over on demand according to law all of said funds which shall be deposited in said bank pursuant to said designation."

The treasurer of the county had \$13,000 of sinking funds which were held to meet county bonds maturing in the future. He found that he could deposit this money on time deposit and take a time certificate of deposit and receive 3 per cent interest when moneys deposited subject to check only drew 2 per cent interest. The bank failed, and the bond company claimed this money had not been deposited subject to check, and was not within the obligations of the bond. The court said, referring to that defense: "This would undoubtedly be so if the county treasurer has authority to make a deposit on such terms, or the board of county commissioners had the power to authorize him to do so; for the bond clearly refers to and covers only deposits subject to draft, payable on demand, and on which the bank was to pay interest on monthly balances at 2 per cent in accordance with its proposal to the county commissioners pursuant to Gen. Stat. 1894, § 731. The only authority of either the county treasurer or the board of county commissioners to lend county funds (for that is what it amounts to) is that given by Laws 1881, chap. 124, as amended (Gen. Stat. 1894, §§ 729-735, inclusive). They have no authority to deposit county funds in any other place or on any other terms than those prescribed by the statute. This applies to all county funds, whatever the purpose for which they were raised. It is apparent from various provisions of the statute that it neither contemplates nor authorizes time deposits, and § 729 expressly provides that all deposits are to be on condition that they 'shall be held subject to draft and payment at all times, on demand,' and everyone is bound to know the law. The Security Bank

was bound to receive on deposit, up to the statutory limit, all county funds offered in accordance with the provisions of the statute, and on the terms of its proposal."

We think that this case squarely strikes down the provision of the bond requiring any notice to be given. As said by the court, the bonding company was bound to know the law, and to know that the bank obligated itself to pay upon demand, and therefore secured the performance of that duty. It could not restrict its obligation in any form because the county officers were without power to consent to such restriction. In the same case (*St. Louis County v. Security Bank*, *supra*) the court said, in discussing whether or not this bond should be measured as public bonds, as follows: "While the bank may not have been a 'public officer,' in the popular sense of that term, yet in the matter of the county money deposited with it, it was performing public duties, or duties to the public, and *pro hac vice* was a public officer. Its duty was to the public, and its bond to secure the performance of that duty was for the benefit and protection of the public. The case falls within all the reasons of the rule, founded on public policy, which makes certain distinctions between the rights and liabilities of sureties on private bonds and sureties on bonds given to secure the performance by public officers of their official duties to the public. The case must be determined by the rules applicable to the latter."

It is true, of course, that if a bond omitted the statutory obligations, it could not be held to be a statutory bond. In such case it would be a common-law bond, and would be measured, of course, by the terms of its obligations; but when the bond contains the exact language of the statute, and follows with other provisions which are not required by statute, it is generally held that such a bond is a statutory bond, and the other provisions will be treated as surplusage. Being then a statutory bond under the terms of the statute, the liabilities imposed by the statute become a part of the bond. In other words, the statute defines the duties of the public officer, to wit, the county depository, and a bond conditioned in the language of the statute will be held to protect the county against the nonperformance of these duties, and clauses attempting to limit and restrict that right will be ineffective and inoperative.

We are further of the opinion that if the provisions in regard to notice were sustained, that notice given within thirty days after the discovery that the county had money on deposit in the bank, with a certified statement of the facts, would be timely; that the condition of the bond requiring no-



tice, if it were upheld, would not require the performance of impossible conditions, nor the performance of conditions which would render the insurance of the bond practically worthless, but calls only for a reasonable construction. Having held, however, that the board is without power to barter away the benefits of the statute, and that the

conditions in excess of the statute sought to be imposed are inoperative, it is not necessary to pursue the latter proposition further.

The judgment is affirmed.

Per Curiam:

Adopted in whole.

#### INDIANA SUPREME COURT.

UNITED STATES FIDELITY & GUARANTY COMPANY, Impleaded, etc., et al.,  
Appts.,

v.

FRED H. POETKER, Receiver of People's State Bank.

(180 Ind. 255, 102 N. E. 372.)

#### Bond — of cashier — extent of obligation.

1. A paid surety of a bank cashier upon a bond required by statute cannot avoid the statutory obligation that the cashier will honestly and faithfully discharge the duties of his office, by the insertion in the bond and application of conditions making the enforcement of the undertaking difficult. *For other cases, see Bonds, II. b, in Dig. 1-52 N. S.*

#### Appeal — setting aside defaults — abuse of discretion.

2. The appellate court will interfere with the exercise of discretion by the trial court in setting aside a default and reinstating a case only in case of abuse. *For other cases, see Appeal and Error, VII. i, 7, in Dig. 1-52 N. S.*

#### Same — opening remarks of counsel.

3. A case will not be reversed because of remarks in the opening statement of counsel to the jury, if, so far as they were improper and harmful, the trial court instructed the jury to give them no consideration. *For other cases, see Appeal and Error, VII. m, 5, in Dig. 1-52 N. S.*

(June 24, 1913.)

**A** PPEAL by the defendant surety company from a judgment of the Circuit Court for Pike County in plaintiff's favor in an action brought to recover damages for breach of the official bond of defendant Behrens, as cashier of the People's State Bank. Affirmed.

The facts are stated in the opinion.

Mr. Charles Martindale, for appellant:

Where it is distinctly stipulated both in the bond and in the application therefor that answers to questions in the applica-

tion for such bonds are to be taken as conditions precedent and as the basis of the bond applied for, and one of the questions is as to whether the employee is indebted to the insurer and answer is made thereto in the negative, which answer is untrue, no recovery can be had upon the bond even though it was not known to the applicant to be untrue and even though there is no bad faith on the part of such applicant.

*Model Mill Co. v. Fidelity & D. Co. 1 Tenn. Ch. App. 365.*

Where a fidelity guaranty bond indemnifying a proprietor against loss by reason of the fraud of the employee amounting to embezzlement or larceny provides that it is entered into on the condition that the statements in writing which the employer has delivered to the insurer relate to the duties and checks to be used on the employer, and the statements and answers therein constitute the basis of the bond, and one of the statements so made is to the effect that the employee's accounts are to be checked up and verified at stipulated times, the failure of the employer to comply with the stipulations precludes recovery on the bond.

*Young v. Pacific Surety Co. 137 Cal. 596, 70 Pac. 660; Livingston v. Fidelity & D. Co. 76 Ohio St. 253, 81 N. E. 330; Knapp v. Bailey, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 122; Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; T. M. Sinclair & Co. v. National Surety Co. 132 Iowa, 549, 107 N. W. 184; Wieder v. Union Surety & G. Co. 42 Misc. 499, 86 N. Y. Supp. 105; Fohs v. Rain, 39 Misc. 316, 79 N. Y. Supp. 872.*

Where, upon the expiration of the first bond, a renewal certificate was signed by an officer of the company certifying that the employee's books and accounts were examined and found to be correct in every respect and all moneys handled by him accounted for, and it is shown that such certificates were false, and that the employer did not, at any time during the employee's incumbency in office, check or compare the cash on hand with the figures of the cash book, or investigate the vouchers credited

**Note.**—As to effect of insertion of unauthorized provisions in a bond required by statute, see annotation following this case, post, 990.  
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on the cash book to ascertain whether they had, in fact, been paid, there is a breach of warranty and the guarantee cannot recover.

*Indiana & O. Live Stock Ins. Co. v. Bender*, 32 Ind. App. 287, 69 N. E. 691; *Glidden v. United States Fidelity & G. Co.* 108 Mass. 109, 84 N. E. 143; *Warren Deposit Bank v. Fidelity & D. Co.* 116 Ky. 38, 74 S. W. 1111; *Carstairs v. American Bonding & T. Co.* 54 C. C. A. 85, 116 Fed. 449; *Issaquah Coal Co. v. United States Fidelity & G. Co.* 61 C. C. A. 145, 126 Fed. 89; *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.* 52 C. C. A. 671, 115 Fed. 77; *Smith v. Bank of Scotland*, 1 Dow, P. C. 272, 3 Eng. Reprint, 697; *Railton v. Mathews*, 10 Clark. & F. 934, 8 Eng. Reprint, 993; *Lee v. Jones*, 17 C. B. N. S. 482, 144 Eng. Reprint, 194, 34 L. J. C. P. N. S. 131, 11 Jur. N. S. 81, 12 L. T. N. S. 122, 13 Week. Rep. 318; *Franklin Bank v. Cooper*, 36 Me. 179, 39 Me. 542; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Model Mill Co. v. Fidelity & D. Co.* 1 Tenn. Ch. App. 365; *American Bonding & T. Co. v. Burke*, 36 Colo. 40, 85 Pac. 602; *Fidelity & C. Co. v. Bank of Timmonsville*, 71 C. C. A. 299, 139 Fed. 101; *Young v. Pacific Surety Co.* 137 Cal. 596, 70 Pac. 660; *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 23 C. C. A. 65, 40 U. S. App. 710, 77 Fed. 120.

In the absence of fraud in making the loans, there is no ground for recovery under this bond.

*Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 40 C. C. A. 542, 100 Fed. 559; *Pryse v. Farmers Bank*, 17 Ky. L. Rep. 1056, 33 S. W. 532; *First Nat. Bank v. Reese*, 25 Ky. L. Rep. 778, 76 S. W. 384; *Exchange Bank v. Gardner*, 104 Iowa, 176, 73 N. W. 591; *Knapp v. Edwards*, 57 Wis. 196, 15 N. W. 140; *Monongahela Coal Co. v. Fidelity & D. Co.* 36 C. C. A. 444, 94 Fed. 732; *Milwaukee Theater Co. v. Fidelity & C. Co.* 92 Wis. 412, 66 N. W. 360; *Reed v. Fidelity & C. Co.* 189 Pa. 596, 42 Atl. 294.

Rediscounting and borrowing are the fiscal functions of a bank, and the cashier has power to discount paper.

*Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628; *Bank of State v. Wheeler*, 21 Ind. 90; *Allison v. Hubbell*, 17 Ind. 559; *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025.

Messrs. Leo H. Fisher, R. W. Armstrong, and E. A. Ely, for appellee:

The cashier of a bank may be liable on his bond for making improper loans, although the by-laws of the bank provide for the ap-  
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pointment of a committee to control the making of a loan.

*Wallace v. Exchange Bank*, 126 Ind. 265, 26 N. E. 175.

A cashier sometimes may borrow money for the bank, but he cannot borrow simply for the purpose of increasing the available funds of the bank, so that in effect its disposable working capital shall be increased; neither in any case can he borrow money to be used for other than strictly banking purposes.

1 Morse, Banks & Bkg. §§ 160, 161; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.* 95 Cal. 1; 29 Am. St. Rep. 96, 30 Pac. 90.

The cashier cannot pledge the assets of the bank for payment of an antecedent debt.

1 Morse, Banks & Bkg. § 169, p. 358.

The cashier cannot indorse the bank's name to his own paper.

1 Morse, Banks & Bkg. § 169, p. 359.

The opening statement of what counsel intends to prove is ground for reversal only when the trial court abuses its discretion. He will need to be satisfied that counsel's offer to prove was not made in good faith.

2 Enc. Pl. & Pr. 706, and footnote; *Epps v. State*, 102 Ind. 539, 1 N. E. 491, 5 Am. Crim. Rep. 517; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. Crim. Rep. 601; *Zimmerman v. State*, 4 Ind. App. 583, 31 N. E. 550.

The case must be rare in which counsel would be justified in interrupting the opening of his antagonist to raise a question of competency; the question ought to be disposed of summarily and without argument.

*People v. Wilson*, 55 Mich. 513, 21 N. W. 905; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174; *People v. Van Zile*, 73 Hun, 534, 26 N. Y. Supp. 390.

It should appear that misconduct in argument probably influenced the jury, before a new trial could be granted for that cause.

*Consumers' Paper Co. v. Eyer*, 160 Ind. 424, 66 N. E. 994; *Humbarger v. Carey*, 145 Ind. 324, 42 N. E. 749; *Roose v. Roose*, 145 Ind. 162, 44 N. E. 1; *Buscher v. Scully*, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37.

The injured party must first make objection to the improper argument and move the court to instruct the jury not to consider the same, before moving the court to withdraw the submission and discharge the jury.

*Cox v. Cohn*, 29 Ind. App. 559, 64 N. E. 889; *Southern Indiana R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589, 17 Am. Neg. Rep. 221; *Magnuson v. State*, 13 Ind. App. 303, 41 N. E. 545; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196.

In order to warrant the granting of a new

trial on account of misconduct of counsel in argument to the jury, objections must be made to the argument and exceptions taken to the action of the court, and such action assigned as a cause for a new trial.

*Evansville v. Thacker*, 2 Ind. App. 370, 28 N. E. 559; *Chicago, St. L. & P. R. Co. v. Champion*, 9 Ind. App. 510, 53 Am. St. Rep. 358, 36 N. E. 221, 37 N. E. 21; *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146; *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78.

Messrs. Roby & Watson, and Salsbury & Esarey also for appellee.

Cox, J., delivered the opinion of the court:

Appellee, as receiver of the People's State Bank of Huntingburg, Indiana, sued Charles Behrens, as principal, and the United Fidelity & Guaranty Company of Baltimore, Maryland, as surety, to recover for a breach of the official bond of Behrens, as cashier of the bank. A trial by jury resulted in a verdict against both defendants for the full penalty of the bond, together with interest for delay in payment after demand, amounting in all to \$28,500. From a judgment on this verdict the surety company appeals, and presents numerous specifications of alleged errors in support of its claim that the judgment as to it is erroneous.

The People's State Bank was a banking corporation organized under the laws of this state, and appellant was a foreign surety company which qualified and had been authorized to transact business in this state. It appears from the application for the bond that Behrens at that time was and had been cashier of the bank; that he had theretofore given a personal bond; that he had been ordered by the board of directors to procure a surety company bond; that his application was for a surety bond of \$25,000 as cashier of the People's State Bank of Huntingburg, Indiana. The president of the bank was required in the application to answer numerous questions, which answers the application stated were to be the basis of the bond applied for and renewals thereof. The bond was issued for a premium of \$62.50 from March 1, 1902, to March 1, 1903, and provided that the representations and promises relative to the duties and accounts of the employee and other matters contained in the application, and any subsequent representations or promises of the employer thereafter required or lodged with the company, should constitute part of the basis and consideration of the contract. It was then provided: "That for the consideration of the premises the company shall, during the term above mentioned or any substantial renewal

of such term, and subject to the conditions and provisions herein contained, at the expiration of three months next after proofs satisfactory to the company, as hereinafter mentioned, make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employee from the service of the employer within the period of this bond, whichever of these events shall first happen; the company's total liability on account of said employee under this bond or any renewal thereof not to exceed the sum of \$25,000." Following this, the prime condition of the bond, there follow many provisos tending to limit and guard the liability of the surety, requiring the employer to give notice to the surety "at the earliest practicable moment" of the "discovery of any act capable of giving rise to a claim hereunder;" requiring the claim for loss to be in writing; providing that any wilful misstatement or suppression of fact in any claim should render the bond void from the beginning; that it should have a right to ratable contribution with cosureties; that it should have a right to rescind under certain conditions and escape liability for subsequent acts of the cashier; that no suit should be brought on the bond for any loss after twelve months from the discovery of the loss; and numerous other provisions for the purpose of qualifying and avoiding liability. Following these there is a provision that none of the conditions or provisions of the bond shall be deemed waived unless such waiver is clearly expressed in writing, and a covenant on the part of the principal to save the surety harmless. The bond was signed by the principal and surety and accepted and approved in writing by the directors of the bank, and was subsequently filed in the office of the secretary of state as required by law. Behrens continued as cashier, and the bond was renewed annually for the years 1903, 1904, 1905, and 1906, and during this period of time there was lost to the bank, through the unfaithfulness of Behrens in the discharge of his duties as cashier, a sum far in excess of the penalty of the bond, and this resulted in its insolvency.

In the main the questions raised by appellant surety company are based upon the assumption that the bond which it executed for Behrens to secure to the bank the faith-

ful discharge of his duties as its cashier is a common-law undertaking, and that a recovery on it can be sustained only according to the numerous and intricate provisions and conditions contained in it and the written application for it. In behalf of appellee it is claimed that the bond must be held to be a statutory official bond legally of a character and with such conditions only as the statute provides. It must fairly follow, therefore, that, if this underlying question is determined favorably to the contention of appellee, most of the questions presented by appellant become immaterial and require no consideration.

It has been held by this court that "the quasi public nature of the banking business, and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the state, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion, and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency and of protecting their interests in case of insolvency, justify inspection and control by the state." *State v. Richcreek* (1906) 167 Ind. 217, 222, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 1086, 10 Ann. Cas. 1899.

In the exercise of this governmental power the general assembly has enacted the following provision affecting banks organized under the laws of the state: "The directors shall elect one of their number president, and shall also elect or appoint a cashier. The president and cashier shall each take an oath or affirmation that he will faithfully and honestly discharge his duties. And the board of directors shall require of the president and cashier to execute separate bonds, with sureties, in such sums as they may deem proper, conditioned that they will honestly and faithfully discharge their several duties as such officers (which said bond shall be filed in the office of secretary of state for the benefit of stockholders and creditors of such bank) during their continuance in office . . . ." *Burns's Anno. Stat. 1908*, § 3331; *Rev. Stat. 1881*, § 2686, *Acts 1873*, p. 21, § 3. It will be noted that, while this statute leaves the amount of the bond to be fixed at the discretion of the board of directors, it is mandatory upon them to exact a bond from each of the officers named, and by its terms states the simple condition upon which it must be

given in clear and unmistakable words; namely, that the officer will honestly and faithfully discharge his duties as such officer during his continuance in office. Such a plain and simple obligation with the broad and comprehensive condition the statute requires, and one less direct and less burdensome for the surety does not satisfy it. A bond such as the one given in this instance, which is manifestly prepared with studied care to avoid all liability on the part of the surety, except such as might grow out of a loss that might occur to the one to whom the bond was given, even after he had exercised that close and relentless vigilance which makes stealing well-nigh impossible, certainly does not fulfil the requirements of the statute.

A bond of the character of the first named, appellant was authorized, by the provisions of our laws relating to surety companies, to execute in compliance with § 3331, *supra*, but not so one of the latter class. It is provided by § 1 of the Act of 1897 (*Acts 1897*, p. 192; *Burns's Anno. Stat. 1908*, § 5728): "That whenever any bond, undertaking, recognizance, or other obligation is by any law of the state of Indiana, or the charter, ordinances, rules or regulations of any municipality, city government, common council, board of county commissioners, any savings bank, state bank or private bank, . . . required or permitted to be made, given, tendered or filed with surety or sureties, . . . such bond, undertaking, obligation, recognizance or guaranty may be executed by a company qualified to act as such surety or guarantor; . . . and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law . . . that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety, or by one or more sureties, or that such sureties shall be residents or householders, or freeholders, or either or both, or possess any other qualification."

The statute fixes upon surety companies the character of lawful sureties upon statutory bonds, but it gives them no authority to change the character or legal effect of the bonds which the statute exacts. Such a company could not enter into a recognizance bond and, by adding to the ordinary condition for the appearance of the defendant the proviso that it would not answer for the default of the principal, if the sheriff failed to keep him under constant surveillance, thereby escape liability by showing the defendant's failure to appear was due to the sheriff's neglect. When appellant was requested to furnish a bond to the bank

for its cashier, it was bound to know the nature of the condition it would become liable upon if broken. It is, of course, to be conceded that a surety company may, in dealing with a private citizen, with a free hand unhampered by statutory restrictions, make such a contract of suretyship as it chooses, and guard and limit its liability by as many provisions as it pleases, and, if the one for whose benefit it is given accepts it in good faith, the surety is bound only according to the terms of the bond. But even in such a case the rule of strictissimi juris, which has been invoked for the benefit of private individual sureties who sign for accommodation, and not for compensation, and which requires a strict construction of the contract in their favor, and a resolution of all doubts in their favor, does not apply to the involved contract of a surety company which becomes surety for profit. In the latter case the rule is reversed and the contract, when there is room for construction, is to be construed most strongly against the surety and in favor of the indemnity which the obligee had reasonable ground to expect. *Bank of Tarboro v. Fidelity & D. Co.* (1901) 126 N. C. 320, 83 Am. St. Rep. 682, 35 S. E. 588; *Geo. A. Hormel & Co. v. American Bonding Co.* (1910) 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513, and many cases cited in note; *Philadelphia v. Fidelity & D. Co.* (1911) 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085, note; *Brown v. Title Guaranty & S. Co.* (1911) 232 Pa. 337, 38 L.R.A.(N.S.) 698, 51 Atl. 410; 32 Cyc. 306.

No other bond was taken in this case than the one in suit, and it is not denied that it was taken by the directors and given by Behrens and appellant in compliance with the statute, and pursuant to the statute it was filed in the office of the secretary of state. It has long been the rule in this state that, when a bond is given in obedience to a command of the statute, a construction shall be given it which binds the obligors to the performance of the conditions which the statute declares it shall contain, even though the bond does not specifically so provide. The rule has been applied to personal sureties who have obligated themselves for accommodation without pecuniary reward. The reason for its application to corporations or others who engage in the business of becoming sureties or guarantors for profit, and who offer themselves as common sureties or guarantors for hire, is greater.

That it is the settled policy of the state to fix the conditions of bonds required by statute, and to hold sureties thereon to the performance of the conditions named, clearly appears from statutory provisions. In the L.R.A.1917B.

statute relating to the bonds of public officers, it is provided that such bonds shall be obligatory for the faithful discharge of all duties required of the officer by law, and that no such bond shall be void because of defects in form or substance, but upon the suggestion of such defects such bond shall be obligatory as if properly executed. *Burns's Anno. Stat.* 1908, §§ 9111, 9113, Rev. Stat. 1881, §§ 5528, 5530. As we have seen, the law prescribes the conditions which the bonds of the president and cashier of banks incorporated under the laws of the state shall contain. And such is the policy in relation to many other bonds required by law which will easily suggest themselves. See also *Burns's Anno. Stat.* 1908, § 2024, Acts 1905, p. 584, § 153, relating to bonds in criminal actions.

Again it is provided in relation to other bonds required by law, generally, in addition to the above provision relating to the official bonds of public officers: "No official bond entered into by any officer, nor any bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance, or written undertaking to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all respects." *Burns's Anno. Stat.* 1908, § 1278, Rev. Stat. 1881, § 1221.

It has been frequently decided in this state that bonds taken pursuant to a requirement of a public statute are official bonds within the meaning of this section of the statute. *Faurote v. State* (1887) 110 Ind. 463, 467, 11 N. E. 472; *Robling v. Pike County* (1895) 141 Ind. 522, 40 N. E. 1079; *State ex rel. Red Key Tile, Brick & Bldg. Co. v. Rowles* (1912) 177 Ind. 682, 98 N. E. 722; *State ex rel. Thornburg v. Fletcher* (1891) 1 Ind. App. 681, 586, 28 N. E. 111; *Herod v. State* (1896) 15 Ind. App. 648, 43 N. E. 144, 44 N. E. 378; *Holt-house v. State*, 49 Ind. App. 178, 97 N. E. 130. See also *Murfree, Official Bonds*, §§ 36, 37.

It has also been held that the provisions of the statute requiring the bond enter into and become a part of the bond, whether written in it or not, and constitute the contract upon which both the rights and the liabilities of the surety are to be determined.

See the cases just cited and *State ex rel. Jackson Twp. v. Berg* (1875) 50 Ind. 496; *Graham v. State* (1879) 66 Ind. 386, 389; *Opp v. Ten Eyck* (1885) 99 Ind. 345. In *State ex rel. Thornburg v. Fletcher*, supra, it was said at page 586 of 1 Ind. App. "The wording of the bond neither adds to nor takes from the recognizer any liability created by statute. Where a bond contains more or less than is required by statute, it operates and has the force and effect of the statute authorizing it. If the bond contains less than required by statute, the bondsman will be held to what it should have contained; and if it contains more than required by statute, the measure of liability would be to the extent defined by statute." In *Opp v. Ten Eyck*, supra, it was said on page 348 of 99 Ind.: "The force and effect of this section is to cure defects and to supply omissions in the class of bonds named, whether the defects and omissions be of form or substance, and to hold the obligors, both principals and sureties, to the full extent of the law requiring the bond."

It has been held that, where the bond sued upon shows upon its face the defect or failure to meet the statutory requirements, the complaint need not further suggest it. *Cook v. State* (1859) 13 Ind. 154; *Boden v. Dill* (1877) 58 Ind. 273.

It is said in *Childs on Suretyship & Guaranty*, § 91, p. 122, that the general rule is that, where a contract of suretyship is entered into pursuant to a statute or to a by-law, the statute or by-law forms a part of the contract of the surety. If the law has made the instrument necessary, the parties are deemed to have had the law in contemplation when the contract was executed. See also *Adams v. Williams*, 97 Miss. 113, 30 L.R.A.(N.S.) 855, 52 So. 865, Ann. Cas. 1912C, 1129; *Growbarger v. United States Fidelity & G. Co.* (1907) 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. Rep. 274, 102 S. W. 873; *Ihrig v. Scott* (1893) 5 Wash. 584, 32 Pac. 406; *Slocumb v. Robert* (1840) 16 La. 173; *Boaswell v. Lainhart* (1880) 2 La. 397; *United States Fidelity & G. Co. v. McLaughlin* (1906) 78 Neb. 307, 107 N. W. 577, 109 N. W. 390; *United States Fidelity & G. Co. v. Union Trust & Sav. Co.* (1904) 142 Ala. 532, 38 So. 177.

In the case last cited the bond was almost identical in its terms with the one in suit. It was given pursuant to a statute as the bond of a register in chancery and he acted under it. It was said by the court: "It is therefore of no consequence that the condition of the bond is different from that which the statute prescribes for official bonds, nor of any consequence that the con-

dition expressed in the bond may not have been broken by the officer. The condition which, though not written into this paper, is as essentially a part of it for all the purposes of this action as if it, and it alone, were written into it, is that the officer, William H. Parks, will faithfully discharge the duties of the office of register in chancery during the time he continues therein, or discharges any of the duties thereof (Code 1896, § 3070), and the obligors thereon are liable for any breach of this condition for the use and benefit of every person sustaining damages by such breach (Code 1896, § 3087). It would be immaterial whether such bond is in terms payable to the state. The law makes it so payable. It would be immaterial to the surety's liability whether Parks executed it. The surety is liable whether he did or not. And it is immaterial that the instrument, though signed by Parks, yet on its face imports no obligation on his part to the state. The law imports that obligation into the bond. On the other hand, no account is to be taken of, and no operation is to be given to, the several stipulations and conditions set down in this paper which tend to limit the liability which an official bond imports, or to clog or impeach the remedy for the enforcement of such liability. The right of recovery is the same in the abstract and as to amount as if the bond had expressed the statutory conditions, and those only; and action upon it is maintainable under the same conditions. It is altogether inapt and inaccurate to say that the city court in its ruling on the demurrer in line with the foregoing views made a bond for the parties, or even that the law has made a bond which the parties have not made. The law known of all men (and even of all corporations) said to these parties, 'If you put forward a paper writing as and for the official bond of this officer, and the officer acts under it, that paper writing imports and involves certain liability upon you in certain contingencies.' The parties make and exploit this writing for this purpose, knowing the legal consequences of their action, and they thereby take those consequences upon themselves. The law, as it was competent for the law to do, merely gave a certain character and attached certain liabilities to certain acts. The officer performed those acts, and it is not only no legal wrong, but not even a legal hardship, for the law, through its ministers, to enforce such liability."

It fairly follows from what has been said that the bond in suit must be held to be an official bond within the meaning of § 1278, supra, and that appellant's liability on it must be measured by the breach, which is

plainly shown, of the simple condition that Behrens would honestly and faithfully discharge his duty as cashier of the bank during his continuance in office.

In addition to the many questions not necessary to decide by reason of the conclusion just stated, it is contended that the court below erred in setting aside a default of appellee and dismissal of his action, and reinstating it upon the application of appellee. The cause was set for trial on December 9, 1907. Appellee's counsel resided 30 miles from Petersburg, the county seat, and failed to reach there until 2:15 o'clock P. M. of that day. Prior to their arrival the cause was, about 11 o'clock A. M., dismissed on motion of appellant. Upon the arrival of appellee's counsel, they moved to set aside the default and reinstate the action, which motion the court subsequently granted. Affidavits were filed by the respective parties in support of and against this motion. The statute (Burns's Anno. Stat. 1908, § 405, Rev. Stat. 1881, § 396) expressly and properly vests in trial courts a discretion in the matter of relieving a party from a judgment taken against him by default, which this court will review only when that discretion has been abused. Moreover, the discretionary authority to relieve a party in default is inherent in all courts of record exercising a general jurisdiction, independent of the statute. *Hoag v. Old People's Mut. Ben. Soc.* (1891) 1 Ind. App. 28, 27 N. E. 438; *Masten v. Indiana*

*Car & Foundry Co.* (1900) 25 Ind. App. 175, 57 N. E. 148; 6 Enc. Pl. & Pr. 149.

Complaint is presented of the misconduct of counsel for appellee in making improper statements in the opening statement of the plaintiff to the jury prior to the introduction of testimony. So far as these statements were improper and harmful to appellant, the court sustained its objection and instructed the jury to give them no consideration. The character, as well as the extent of the statement of a case to the jury, is left much to the discretion of the trial court. *Aylesworth v. Brown* (1869) 31 Ind. 270; *Elliott, Gen. Pr.* § 559.

During the argument of the cause to the jury one of appellee's counsel discussed the difference between the terms and conditions of the bond as given and as the statute required it to be. In view of the conclusion reached as to the character of the bond, we find nothing in the statements of counsel to which objections were made that would amount to improper argument.

As it appears that a just result was reached in the trial court, the judgment is affirmed.

Petition for rehearing denied October 15, 1913.

Dismissed October 26, 1914, by the Supreme Court of the United States, 235 U. S. 683, 59 L. ed. 423, 35 Sup. Ct. Rep. 201.

### **Annotation—Effect of insertion of unauthorized provisions in a bond required by statute.**

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**I. Rejecting surplusage:**

**a. Treasurers', collectors', cashiers', and paymasters' bonds.**

The general rule seems to be that, where the superadded condition can be separated from the statutory conditions, the bond will be held valid to the extent of the statutory conditions. This was held in *WESTERN CASUALTY & G. INS. CO. v. MUSKOGEE COUNTY*, ante, 984. The superadded condition will be treated as surplusage.

The same rule was applied in the following cases:

The bond of a state treasurer differing from that required by statute was held valid to the extent of the statutory conditions. *Lee v. Waring* (1809) 3 Desauss. Eq. (S. C.) 57.

A township treasurer's bond was conditioned that the treasurer pay over all money coming into his hands "on the order of the board of education," instead of, as the statute required, that he disburse all such money "according to law." This was held to be a good statutory bond. *Creswell v. Nesbitt* (1864) 16 Ohio St. 35. "On the order of the board of education" was rejected as surplusage.

And a county treasurer's bond that was more comprehensive than the law required was held binding to the extent of the statutory conditions, in *State use of Guernsey County v. Findley* (1840) 10 Ohio, 51. The court said: "That part which is legal is marked out in the statute book itself, and is therefore as completely severable from the rest as if the two parts were separated in the condition in the bond."

And a county treasurer's bond containing an additional condition, "or to the comptroller of the state when thereto required," was held valid, as the condition could be rejected as surplusage. This bond was not taken by a sheriff or other "officer" *colore officii*. *Schoharie County v. Pindar* (1870) 3 Lans. (N. Y.) 8. L.R.A.1917B.

In a suit on the bond of a collector of tolls, it was held that, so far as the act of assembly prescribed the form of the condition and specified the nature of the acts and duties, it would be considered directory. Although it designated acts or things to be done beyond those specified in the act, it would be held to be good for everything mentioned in the act, in the absence of a statute declaring it void if not taken as prescribed. *Speck v. Com.* (1842) 3 Watts & S. (Pa.) 324.

A collector of taxes gave a bond containing a condition for accounting and paying to the commissioners. It was held that this condition might be rejected as surplusage and the bond enforced, as it contained the statutory conditions. *Collins v. Gwynne* (1831) 7 Bing. 423, 131 Eng. Reprint, 163, 5 Moore & P. 276, 9 L. J. C. P. 130.

And where the bond of a collector contained a provision that he had truly and faithfully discharged the duties of his said office, and also the provision that he "shall continue truly and faithfully to discharge the duties of said office, and shall faithfully collect and pay," it was held that the retrospective provision, not being required by statute, could be rejected and the rest enforced. *United States v. Brown* (1830) Gilpin, 155, Fed. Cas. No. 14,663. This was on the ground that a bond at common law, partly valid, could be enforced as to valid provisions. And it was incumbent on the defendant to show that a different rule applied to statutory bonds.

A bond given by a collector of revenue provided that he "had" faithfully executed the duties of a collector, and "would" thereafter faithfully execute the same. It was held that the retrospective provision was not within the statute and was void. The other provision was valid. *Armstrong v. United States* (1811) Pet. C. C. 46, Fed. Cas. No. 549.

In *Philadelphia v. Shallcross* (1880) 14 Phila. (Pa.) 135, it was said that *Armstrong v. United States* (Fed.) supra, was overruled by *United States v. Hodson* (1870) 10 Wall (U. S.) 395, 19 L. ed. 937.

And a recital in a tax collector's bond superadded to the statutory condition was held to be surplusage. *Walker v. Chapman* (1853) 22 Ala. 116. The statute required an annual election, while the bond contained the words, "to collect the county and state tax for the years 1845 and 1846."

The bond of a cashier of a state bank was conditioned that he indemnify the



Bank of Tennessee for all sums of money that might become due, and all losses or damages sustained by default, neglect, or fraud of the cashier. The statute did not authorize imposing any responsibility on the cashier to the Bank of Tennessee. The bond should have been in penalty of \$100,000, conditioned for the faithful performance of duties. It was claimed that the bond was without any definite penalty and in violation of the statute. This bond also provided that there could be more than one recovery thereon, and that absence of the cashier from the bank would not affect the liability. It was held that the conditions superadded and not required by the statute could be rejected as surplusage. *Polk v. Plummer* (1841) 2 *Humph. (Tenn.)* 500, 37 *Am. Dec.* 575.

And the bond of a paymaster provided that he "shall account" "for all moneys received by him from time to time; as paymaster aforesaid, with such person as shall be duly authorized and qualified on the part of the United States for that purpose." Act April 24, 1816, chap. 69, provides that paymasters shall "give good and sufficient bonds to the United States fully to account for all moneys and public property which they may receive, in such sums as the Secretary of War shall direct." It was held that the breach assigned was part of the condition, "to account for public money," which was valid, and that, if there was any condition in excess of the statute, the bond would be void as to that condition; but this point was not decided. *United States v. Bradley* (1836) 10 *Pet. (U. S.)* 343, 9 *L. ed.* 448.

***b. Administrators', executors', and guardians', bonds.***

Where unauthorized provisions have been inserted in these bonds, and the conditions are severable, the improper conditions will be held to be surplusage.

The bond of an administrator containing stipulations in addition to the statutory provisions was held to be a good statutory bond. The provisions in excess of the statutory requirements were held surplusage. *Woods v. State* (1847) 10 *Mo.* 698.

A guardian's bond contained the additional stipulation, "also to keep harmless the said recorder, his and every one of his heirs, executors, and administrators, from all trouble and damage that shall or may arise about the said estate." This was held not to avoid the bond or affect the statutory conditions. *Reed v. Hedges* (1879) 16 *W. Va.* 167. *L.R.A.* 1917B.

*New Jersey Rev. Laws* 1795, 176, required the bond of an administrator to be conditioned that he exhibit an inventory "into the registry of the prerogative court in the secretary's office of this state." A bond with the condition "into the surrogate's office of the county" was held not void. The surplusage was rejected. *Vroom v. Smith* (1834) 14 *N. J. L.* 479.

An appeal bond by an administrator was conditioned that he "perform the judgment of the court." An administrator on appeal was held not required to give security for the debt. This bond was construed to mean "costs and damages" only, as the illegal condition would be rejected as surplusage. *Banks v. McDowel* (1860) 1 *Coldw. (Tenn.)* 84.

And an appeal bond by an administrator conditioned for the payment of the debt was held not binding on the surety except for costs. *Patterson v. Gordon* (1875) 3 *Tenn. Ch.* 18.

And an unnecessary condition in an executor's bond was held not to render it invalid, where the good conditions could be separated from the illegal or surplus clauses. *Probate Ct. v. Adams* (1905) 27 *E. L.* 97, 60 *Atl.* 769, 8 *Ann. Cas.* 1028.

And under *Tenn. Code*, § 3163, providing that in certain cases the appeal bond shall be for damages and costs only, an appeal bond given by an executor *de son tort* was conditioned that the surety would "comply with and perform the judgment of the circuit court." It was held that the only judgment that could be rendered would be a judgment for costs and damages. *Hutchinson v. Fulghum* (1871) 4 *Heisk. (Tenn.)* 550.

And where an executor's bond waived the privilege to discharge liability in any currency other than legal tender currency of the United States, it was held to be a valid bond as to the other and statutory conditions. *Yost v. Ramsey* (1904) 103 *Va.* 117, 48 *S. E.* 862.

A superadded condition in a guardian's bond was held to be void and the sureties to be liable only so far as the condition imposed by law had been violated. *Bomar v. Wilson* (1830) 1 *Bail L. (S. C.)* 461.

***c. Appeal bonds.***

Conditions inserted in appeal bonds beyond the requirement of the statutes will be held invalid, and the valid provisions enforced.

An appeal bond in forcible entry and detainer contained a clause for the payment of damages. This was not re-

quired by the statute. It was held that the bond, being taken as a condition of the right of appeal, could not go beyond the requirements of the statute, and any obligation beyond that was void, and damages could not be recovered. *Tomlin v. Green* (1866) 39 Ill. 225.

An appeal bond was slightly excessive and the condition varied from the statute. It was held that the error in the formal penalty might be corrected or disregarded when the recitals in the bond, in connection with the law, showed the proper penalty ascertainable by a mere calculation. *Bentley v. Dorcas* (1860) 11 Ohio St. 398.

And where an appeal bond contained conditions in addition to the statutory requirements, it was held that the bond was valid, and the surplusage was rejected. *Aultman, M. & Co. v. Nelson* (1898) 11 S. D. 338, 77 N. W. 584.

In an action for trespass the judgment was for \$1,500, the appeal bond was for \$3,000, and the condition was to prosecute the appeal or to pay and satisfy the judgment of this court. *Tenn. Code*, § 3163, provided that in such cases the bond should be for damages and costs. It was held that only the costs and damages incident to the appeal constituted the legal liability of the surety, and the bond did not cover the costs of the circuit court or the judgment of that court. *Sharp v. Pickens* (1867) 4 Coldw. (Tenn.) 268.

A bond in unlawful detainer, given on appeal to the circuit court, was conditioned to pay "rents." A bond given on appeal to the supreme court was to prosecute the appeal and to abide by and perform the judgment of the court. It was held that this referred only to such a judgment as the court could lawfully render, and it could not give a judgment for the rents. *Ladd v. Riggle* (1871) 6 Heisk. (Tenn.) 620.

And an appeal bond from a justice's court, having more onerous conditions than required by the statute, was held valid to the extent of statutory conditions. *Landa v. Heerman* (1892) 85 Tex. 1, 19 S. W. 885.

A bond on appeal to the county court was conditioned that appellant shall satisfy the judgment which may be rendered against him on such appeal "in the county court." These superadded words were held not to prejudice. *Heidenheimer Bros. v. Bledsoe* (1883) 1 Tex. App. Civ. Cas. (White & W.) 134.

And the addition of the words in an appeal bond, "on the trial of this case in the county court aforesaid, if the de-

cision of said court shall be against said Kerr," was held to be only surplusage, and not to affect its validity. *Kerr v. Clegg* (1881) 1 Tex. App. Civ. Cas. (White & W.) 435.

So the addition in an appeal bond of the words, "in case they shall fail to obtain a reversal of the decision of the judge," was held not to render the bond invalid. *Kasson v. Brocker* (1879) 47 Wis. 79, 1 N. W. 418.

An undertaking containing provisions beyond what was required by the New York Code of Procedure for the perfecting of an appeal was held to be without a consideration to support it, and the liability on the bond was only the costs incurred by or arising upon the appeal to the court of appeals. *Post v. Doremus* (1875) 60 N. Y. 371, modifying (1874) 1 Hun, 520, distinguished in *Goodwin v. Bunzl* (1886) 102 N. Y. 224, 6 N. E. 399.

#### *d. Attachment bonds.*

Attachment bonds have been held good to the extent of the statutory requirement, and superadded words have been rejected as surplusage.

A bond in attachment reading, "shall, moreover, abide by and perform such orders and decrees as the court may make in the cause," while the statute provided for costs and "all such damages as he (the obligee) may sustain by the wrongfully suing out of the attachment," was held not obligatory beyond the requirement of the law in attachment. *Ranning v. Reeves* (1875) 2 Tenn. Ch. 263. The court said: "Where the statute provides the conditions of a bond in any given case, the surety will not be liable beyond the statutory requirements, although the conditions may be broader and express."

An attachment bond provided that defendants "shall produce said goods in satisfaction of (the) judgment in said action, or pay such judgment as may be rendered against them in said action." The statute provided for a bond conditioned "that such property or its estimated value shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in the suit, within twenty days after the rendition thereof." It was held that the words superadded might be rejected as surplusage and the bond still be good. *Sheppard v. Collins* (1861) 12 Iowa, 570.

And the addition of the word "costs" in an attachment bond was held mere surplusage. *Leach v. Thomas* (1819) 2 Nott & M'C. (S. C.) 110. Costs would

follow as a matter of course the recovery of damages.

*e. Bail and recognizance.*

Bail bonds are held valid only to the extent of statutory conditions, and surplusage conditions are not enforced.

So, where conditions were added in a bail bond, and there was no attempt to enforce such conditions, it was held that the bond was valid only to the extent of the statutory conditions. *Ainsworth v. Territory* (1882) 3 Wash. Terr. 277, 14 Pac. 490.

And a prison bond was held valid only to the statutory extent and superadded conditions were held void. *Anderson v. Foster* (1831) 2 Bail. L. (S. C.) 500.

A poor debtor's bond contained a provision requiring the debtor to take the oath prescribed by statute. It was held that this provision was invalid, and that only the statutory provisions incorporated in the bond would be required of the debtor, and that, as he had followed those, he would be discharged. *Bell v. Furbush* (1868) 56 Me. 178.

A poor debtor's bond containing conditions unauthorized by statute was held a good common-law bond as to the valid conditions, and the debtor was subject to assessment of actual damages in chancery. *Ware v. Jackson* (1844) 24 Me. 166. The conditions were that the oath should be taken before two justices quorum unus, that the debtor should tender his property, the value to be appraised by two men designated by the justices, and that the debtor should give priority to this demand. These provisions were not authorized by statute.

A bond given by a debtor held in *mesne* process contained a condition that he "surrender himself to the jail keeper and go into close confinement as is required by law." It was held that this condition was surplusage, and could be rejected as not required by statute, without affecting the validity of the bond. *Kavanagh v. Saunders* (1832) 8 Me. 422.

And on a bail bond it was held that added conditions would be rejected as surplusage, that the sheriff had no power to take any other bond but that which he was authorized by law to take, that the surety could exonerate himself by surrendering the defendant notwithstanding the provisions of the bond. *Slocomb v. Robert* (1840) 16 La. 173.

And in *State v. Cobb* (1880) 71 Me. 198, a recognizance "to appear," "answer," and "abide the decision and order of said court," although Me. Stat. chap. 132, § 5, required only a recognizance to L.R.A.1917B.

"appear," was held valid. The surplusage was rejected.

In *Durein v. State* (1888) 38 Kan. 485, 17 Pac. 49, it was said: "We are referred to *State v. Cobb* (Me.) supra, as holding that superadded words of condition beyond what are authorized do not invalidate a bond, but may be treated as surplusage only. The decision in that case rests upon *State v. Brown* (1856) 41 Me. 535. In the latter case, three of the judges filed a vigorous dissent." The report of the latter case does not say so. Tenney, Ch. J., wrote the opinion, Appleton, J., concurred, and Rice, J., concurred in the result. In *State v. Cobb* (Me.) supra, the case of *State v. Brown* (Me.) supra, was not cited, but the case of *State v. Hatch* (1871) 59 Me. 410, was, and this is the case where the three judges dissented.

Alabama Act 1814, Aikin's Dig. 115, provides that a recognizance shall require the accused "to appear at the next term of the circuit court and answer the charge exhibited against them." In this case there was a superadded condition, "to abide by any order, judgment, or decree of the circuit court." It was held that this last condition was merely inoperative, and the legal effect was the same as if this clause had been omitted. *Howie v. State* (1840) 1 Ala. 113.

Alabama Act 1834 provides that, where questions are certified as novel and difficult, the defendant shall be recognized to "appear and abide the judgment." A recognizance provided in such a case that defendant "fully pay, satisfy, and abide" by it. This was held to be a void recognizance as to the surplusage, but not as to the legal condition. *Whitted v. The Governor* (1838) 6 Port. (Ala.) 335. The court said: "In thus adding to their undertaking a stipulation not enjoined by the statute, the circuit court went beyond its legitimate authority."

In *Howie v. State* (Ala.) supra, the case of *Whitted v. The Governor* (Ala.) supra, was distinguished on the ground that "the statutory condition was entirely inoperative from the circumstance that a mere money judgment was rendered, and if the principal had been produced in court at a subsequent term, no proceedings could then have been had against him. As no end could be attained by his appearance in court, it was held unnecessary to require his appearance."

*f. Bastardy bonds.*

The statute required a bastardy bond to require the appearance of the accused

at the next county court. A bond was taken for accused to appear "from day to day and from term to term." *State v. Castleberry* (1853) 23 Ala. 85. The court said: "If the superadded condition creates any additional obligation, it is void, but the recognizance is valid as to the remaining obligation;" it was well taken for appearance "from term to term."

And the use of the words, "superior court of the county of Suffolk," in a bastardy bond, was held immaterial when the words, "county of Suffolk," were omitted from the act establishing the superior court. These words in the bond were held surplusage. *Locke v. Johnson* (1861) 3 Allen (Mass.) 153.

#### *g. Clerks' and recorders' bonds.*

Stipulations inserted in an official bond of a city clerk in excess of the statute were held to be surplusage. *Lowe v. Guthrie* (1896) 4 Okla. 287, 44 Pac. 198. Sureties were not liable for fees collected by the city clerk without authority.

The clerk of a municipal court gave bond conditioned "for the due performance of all the duties of the clerk," one of which duties was to pay over to the city treasurer all sums due to the city, as well as sums due to the county and to witnesses. The statutory condition was to pay to the city treasurer the sums last mentioned. The bond covered all the clerk's duties. It was held that the surplusage would be rejected and the bond sustained. *Milwaukee v. United States Fidelity & G. Co.* (1911) 144 Wis. 603, 129 N. W. 786.

And where the penalty in a recorder's bond was in excess of that required by statute, it was held valid to the statutory extent. *M'Caraher v. Com.* (1842) 5 Watts & S. (Pa.) 21, 39 Am. Dec. 106. In *State v. Taylor* (1897) 10 S. D. 182, 66 Am. St. Rep. 707, 72 N. W. 407, it was said referring to *M'Caraher v. Com.* (1842) (Pa.) supra: "The opinion of the court upon this point is brief, and the question does not seem to have very full consideration."

#### *h. Constables' and sheriffs' bonds.*

A constable's bond containing unnecessary recitals was held good. These were held surplusage. *Skellinger v. Yendes* (1834) 12 Wend. (N. Y.) 306.

Maine Rev. Stat. chap. 92, § 9, provides that a constable shall give bond "for the faithful performance of his duties and trust as to all processes by him served and executed." It was held that L.R.A.1917B.

a bond conditioned that the constable "shall faithfully discharge his duty [as collector of taxes and] as constable as aforesaid, and all agreeable to the true intent and meaning of the above obligation," was valid. The part in brackets could be rejected as surplusage. *Quimby v. Adams* (1834) 11 Me. 332.

In *Mauleverer v. Hawxby* (1669) 2 Wms' Saund. 78, 85 Eng. Reprint, 746, which was an action on a bond given to the sheriff, the bond provided, "Then the condition of this obligation to be void," when it should have been the "obligation" to be void. It was held that the words, "then the condition," were void for absurdity and repugnancy, and were surplusage, and that the balance of the bond was good. By 23 Hen. VI. chap. 9, it was provided that no sheriffs shall take any obligation of persons in their custody, but only to themselves, by the name of their office, and upon condition written, that the said prisoner shall appear, etc.; if they take any obligation "in other form, it shall be void." This statute was pleaded as a defense, and it was also pleaded in *Maleverer v. Redshaw* (1668) 1 Mod. 35, 86 Eng. Reprint, 712, which the note says was the same case. That was the case in which Twisden, J., said he had heard Lord Hobart say, referring to the last quotation supra: "The statute is like a tryant; where he comes he makes all void; but the common law is like a nursing father,—makes void only that part where the fault is, and preserves the rest."

And the words in a sheriff's bond, "for the year 1893," were held to be a surplusage, as without sanction of law and contrary to law. The statute was held to mean that the bond should cover any school money received by the sheriff during his term. *State use of United States School-Furniture Co. v. McGuire* (1899) 46 W. Va. 328, 76 Am. St. Rep. 822, 33 S. E. 313.

The penalty in a sheriff's bond was \$12,000, while the S. C. Act of 1795 directed a bond to be taken for no more than \$7,000. It was held that the bond was valid to the extent of the statutory penalty. *The Treasurers v. Bates* (1831) 2 Bail. L. (S. C.) 362.

#### *i. Distillers' bonds.*

Where a bond contained conditions some of which were legal and some illegal, and they were severable and separable, it was held that the latter could be disregarded and the former enforced. *United States v. Hodson* (1870) 10 Wall.

(U. S.) 395, 19 L. ed. 937. In this case the statute in regard to a distiller's bond provided that it should contain some five conditions, naming them. The bond provided that the distiller should "conform to all the provisions of an act entitled, 'An Act to Provide Internal Revenue, . . . approved June 30, 1864, . . . and such other acts as are now or may hereafter be in this behalf enacted.'"

A distiller's bond provided that he shall truly and faithfully conform to all the provisions of the Act of July 1, 1862 (being the act which authorizes the license to distill), and of such other act or acts as were then "or might thereafter be" in that behalf enacted. The statute did not provide for a bond to comply with future enactments. The words, "or might thereafter be," were held surplusage and did not affect the validity of the bond. The duty of making monthly statements was not in the statute, but was in the bond. This also was held not to vitiate the bond. The bond was not extorted under duress. *United States v. Mynderse* (1870) 11 Blatchf. 1, Fed. Cas. No. 15,851, affirmed in (1871) 154 U. S. 580, and 20 L. ed. 241, 14 Sup. Ct. Rep. 1213.

#### *j. Embargo bonds.*

A statutory bond containing provisions not authorized by statute was held not void, but the excessive condition was treated as surplusage. *Dixon v. United States* (1811) 1 Brock. 177, Fed. Cas. No. 3,934. The bond was taken under the Embargo Act and the condition inserted in the bond was that the vessel "should not proceed to any foreign port or place." This condition was not required by the statute. Referring to this case, Marshall, Ch. J., in *United States v. —* (1811) 1 Brock. 195, Fed. Cas. No. 14,413, said: "The court supposed itself competent to say on a bond containing everything required by law, and something more, that the surplusage might be considered as an absolute nullity, and the bond construed as if such surplus and void matter were not contained in it."

In *United States v. —* (Fed.) supra, it was said that a condition superadded in a statutory bond, and not required by the statute, would be held to be surplusage. This bond was taken under the Embargo Act and was held void because not containing the exception, "danger of the seas excepted."

Act of Congress May 20, 1862, authorized the Secretary of the Treasury to refuse a clearance to a vessel where

he had reasonable grounds to believe that the cargo was intended for places under the control of insurgents; § 2 provided that, in granting a clearance, a bond could be required that the cargo should be delivered at its destination, and should not be used by persons in insurrection; § 3 provided that the Secretary could prevent the transportation of goods to any place in possession of insurgents, and could require reasonable security to that effect, and also security that they should not be used to give aid or comfort to the insurgents. The first condition of the bond taken required that the goods should be consumed in Mexico. It was held that, if this condition was not sustainable, the latter condition, that no part of the cargo was to be used to give aid or comfort to parties in rebellion, would be valid. *United States v. Mora* (1878) 97 U. S. 413, 24 L. ed. 1013.

#### *k. Injunction bonds.*

An injunction bond containing stipulations not embraced by the statute was held not to avoid the statutory stipulations, which would be enforced. *Holli-day v. Myers* (1877) 11 W. Va. 276.

A stipulation in an injunction bond, "shall pay all damages that may be occasioned by said restraining order or injunction," was not found in Mo. Rev. Stat. § 2710, providing for injunction bonds. It was held that the stipulation in excess of the statutory requirement would not be enforced. *Rubelman Hardware Co. v. Greve* (1885) 18 Mo. App. 6.

And where a bond was given in a legal proceeding conditioned for more than the law provided, it was held that no recovery could be had beyond what could have been recovered if the bond conformed to the law. *Menken v. Frank* (1880) 57 Miss. 732. The bond was given in injunction under the wrong statute, and the condition to pay a debt secured by the deed of trust, sale under which was enjoined, was held beyond the requirement of the law.

Maine Rev. Stat. 1841, chap. 96, § 11, provided for an injunction bond "to respond to all damages and costs." A bond to pay "all such damages and costs (if any) as shall be sustained and awarded against" the applicant was held to be construed as if the words "and awarded" were omitted as surplusage. *Union Wharf v. Mussey* (1861) 48 Me. 307.

And the imposition of a condition in an injunction bond, to pay "damages," which was not in the statutory requirements, was held not to vitiate the bond.

Jameson v. Kelly (1809) 1 Bibb (Ky.) 479.

*1. Other bonds.*

Where the court or officer has authority or capacity to take a bond, and makes a mistake by omitting some condition prescribed, or by inserting a condition not authorized or legal, unless the statute by express words or necessary implication makes it wholly void, the bond will not be held void; the good is not vitiated by the bad, and the bond may be sued on so far as the conditions are good as a statutory bond.

Minnesota Laws 1907, chap. 448, requires an engineer for a ditch proceeding to give bond. A bond containing the statutory conditions also had added the clause, "and shall not be guilty of any negligence or malfeasance in acting as such engineer in making such survey and reporting thereon to said court." It was held surplusage, and the remainder of the bond held a statutory bond. Fairmont Cement Stone Mfg. Co. v. Davison (1913) 122 Minn. 504, 142 N. W. 899, Ann. Cas. 1914D, 945.

A bond given by contractor for convict's labor provided that the convict "should be entitled to a credit of 25 cents a day." This provision was held mere surplusage and not to affect the validity of the bond. Gonzales County v. Houston (1904) — Tex. Civ. App. —, 81 S. W. 117.

And the inclusion in a bond for the protection of materialmen, of conditions not authorized by the statute, was held not to vitiate the bond where the conditions were severable. Stephenson v. Monmouth Min. & Mfg. Co. (1897) 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 114. This bond contained a condition for the fulfillment of the contract with the city by the contractor, in addition to the condition for the protection of materialmen.

A replevin bond provided that the action should be prosecuted with effect, and that the surety should further keep harmless the sheriff. The statute required the condition to be that the surety prosecute the suit with effect, and fully and without delay satisfy any judgment which shall be given. It was held that the bond was valid, as any surplus provision could be disregarded. Lambden v. Conoway (1848) 5 Harr. (Del.) 1.

An insurance company brought suit to determine who was entitled to a fund, and paid the money into court. In order to stay the judgment a bond was given under Kan. Code, § 591, providing that

the bond shall be conditioned to pay the condemnation money and costs in case of affirmance. The bond given provided for interest on \$1,500 from the date of judgment. It was held that the payment of interest could not be imposed as a condition in the bond where the judgment bore no interest. Derrington v. Conrad (1898) 7 Kan. App. 295, 53 Pac. 881.

An ordinance required a bond to be given by a telephone company that it would restore the street after laying a conduit. The bond given required also the maintenance of the street. It was held in an action by the bond company for the premiums on the bond, that liability on the bond did not extend beyond the requirements of the ordinance; i. e., the completion of the work. United States Fidelity & G. Co. v. Iowa Teleph. Co. (1916) — Iowa, —, 156 N. W. 727. Conditions beyond the statutory requirements will be treated as surplusage.

And where a license board of a city imposed a condition in the bond that liquor should not be sold on the premises, it was held that such a provision was not authorized by statute and would not be enforced. Crosby v. Snow (1839) 16 Me. 121.

And conditions in a merchant's bond other than those required by Mo. Rev. Stat. 1889, chap. 111, for the payment of taxes, were held to be surplusage and not to affect the validity of the bond. State ex rel. Fisher v. Rodecker (1898) 145 Mo. 450, 46 S. W. 1083.

In Board of Education v. Grant (1895) 107 Mich. 151, 64 N. W. 1050, it was said: "It has been frequently held that, in the absence of a prescribed statutory form, and of a declaration that bonds not in accordance therewith shall be void, if a bond be taken under a statute, with a condition in part prescribed by statute, and in part not so prescribed, yet, if it be clearly divisible, a recovery may be had upon it for a breach of the part prescribed by statute."

In State use of Hazzard v. Layton (1847) 4 Harr. (Del.) 512, it was said: "The correct rule is that, if the condition of the bond is for the performance of a matter contrary to the statute, the bond is void. But if part of the condition is for the performance of the things required by the statute, and another clause or part is for the performance of a thing contrary to the statute, the illegal part does not vitiate that which is legal, but may be rejected as surplusage, unless the statute expressly enacts that the bond shall be void if the

condition does not conform to the statute, or contains matters contrary to it."

In *United States v. Howell* (1826) 4 Wash. C. C. 620, Fed. Cas. No. 15,405, it was said: "My opinion upon this point is that, where a statute requires an official bond to be taken, and prescribes substantially the terms of it, it must conform to the requisitions of the statute, and if it go beyond them it is void, so far at least as it exceeds those requisitions."

## II. Curative statutes.

Where the statute cures all bonds defective in form or substance, it will be held that the superadded conditions do not invalidate a bond. This was held to be the rule in *UNITED STATES FIDELITY & G. Co. v. POETKER*, ante, 984.

Alabama Code, 3089, provides that a bond executed by an official as an official bond will be binding. A bond which was not in the penalty payable and conditioned as prescribed, given by a register in chancery, was held valid where he acted thereunder, and it was no consequence that the condition expressed was different from the statutory condition. *United States Fidelity & G. Co. v. Union Trust & Sav. Co.* (1904) 142 Ala. 532, 38 So. 177; *Higdon v. Fields* (1912) 6 Ala. App. 281, 60 So. 594.

And the addition of a provision, "and the said road finally not opened," in a bond for condemnation of a road, was held not to affect its validity. *Santa Barbara County v. Yates* (1910) 13 Cal. App. 44, 108 Pac. 727. California Pol. Code, § 2690, provides that "no informality in the proceedings of the board shall vitiate said suit." The court said: "The words neither add to nor detract from the liability of the bondsmen."

In *Smith v. Taylor* (1876) 56 Ga. 292, the only bond required of the ordinary was a bond in the sum of \$1,000 for the faithful discharge of his duties as clerk of the ordinary. A bond was given conditioned that, if said Taylor "should well and truly discharge all and singular the duties required of him in virtue of his said office of ordinary, according to law and the trust reposed in him, then said obligation to be void." It was held that while this bond was not in strict conformity with the statute, it was valid under Ga. Code, § 167, providing that, whenever an officer required by law to give an official bond acts under a bond which is not conditioned as required by

law, it stands in place of the official bond.

Indiana Rev. Stat. 1876, p. 154, provides that the county auditor shall give bond in the sum of \$2,000. 2 Rev. Stat. 1876, p. 311, § 790, provides that no official bond shall be void for want of substance or condition, but the principal and surety shall be bound to the full extent contemplated by the law requiring the same. It was held that the bond taken for \$5,000 was valid to the extent of \$2,000. *Graham v. State* (1879) 66 Ind. 386.

And the bond of a guardian conditioned only "for the faithful discharge of his duties" was held valid although not conditioned for "the faithful payment, and accounting for, of all moneys arising from such sale according to law." *Stevenson v. State* (1880) 71 Ind. 52, 2 Ind. Rev. Stat. 1876, p. 588, provided that such guardian's bond shall not be void on account of any informality, illegality, or defect, but shall have the same effect as if such bond had been legally executed.

In *State v. Taylor* (1897) 10 S. D. 182, 66 Am. St. Rep. 707, 72 N. W. 407, it was said: "An examination of this case [*Graham v. State* (Ind.) supra] discloses the fact that the decision was based largely, if not entirely, upon the Indiana statutes" providing that such bonds shall not be invalid.

An appeal bond in an action for the recovery of real estate did not provide for rents. It was held that this omission was remedied by § 802 of the Indiana Code of 1852, 2 Rev. Stat. 1876, p. 314, providing that the laws and usages relative to pleading and practice, as far as they operate in aid hereof and to supply any omitted case, are hereby continued in force. This section was held to continue in force Rev. Stat. 1843, chap. 37, § 44, p. 633, providing that in an action for the recovery of land the appeal bond shall provide for all the damages. *Opp v. Ten Eyck* (1885) 99 Ind. 345.

And where a bond was taken from the contractors on a road by the county commissioners, it was held to be subject to Ind. Rev. Stat. 1881, § 1221, and it was proper to allege in the complaint defects in the bond and omissions of conditions to pay materialmen, and then a recovery could be had as if it had been a perfect statutory bond. *Faurote v. State* (1887) 110 Ind. 463, 11 N. E. 472.

In *Hart v. State* (1889) 120 Ind. 83, 21 N. E. 654, 24 N. E. 151, where the wrong party was made the payee of a

bond and the payment of laborers was not provided for, it was said: "The bond was given pursuant to a public statute, and, under the provisions of § 1221, Rev. Stat. 1881, the parties in interest had a right to have mistakes corrected so as to give the bond the effect the law intended it should have."

In *Herod v. State* (1896) 15 Ind. App. 648, 43 N. E. 144, 44 N. E. 378, the cases of *Faurote v. State* and *Hart v. State* (Ind.) supra, were distinguished.

In *Title Guaranty & S. Co. v. State* (1915) — Ind. App. —, 109 N. E. 237, it was said: "It may be said also that *Hart v. State* (Ind.) supra, does not seem to be in entire accord with *Faurote v. State* (Ind.) supra, and *Robling v. Pike County* (1895) 141 Ind. 522, 40 N. E. 1079, in certain particulars." The road in those cases was built under the Act of March 3, 1877.

In *State ex rel. Thornburg v. Fletcher* (1891) 1 Ind. App. 581, 28 N. E. 111, it was said: "Where a bond contains more or less than is required by statute, it operates and has the force and effect of the statute authorizing it. If the bond contains less than required by statute, the bondsmen will be held to what it should have contained; and if it contains more than required by statute, the measure of liability would be to the extent defined by statute. Rev. Stat. 1881, § 1221."

And a contractor's bond given under Ind. Rev. Stat. 1894, § 6859, providing that the contractor on a free gravel road shall give reasonable security for the proper performance of his contract, was held subject to Rev. Stat. 1881, § 1221, providing that no bond taken by an officer in the discharge of his duty shall be void for want of form or substance. *Herod v. State* (Ind.) supra.

A poor debtor's bond which included dollarage in doubling the amount was held valid, if the officer could tax dollarage. If he could not, it would be held to be a misapprehension, and the bond would be protested under Me. Rev. Stat. chap. 148, § 43. Either way the bond was valid as a statutory bond. *Lambard v. Rogers* (1850) 31 Me. 350. Maine Rev. Stat. chap. 148, § 43, provided that if, by mistake or accident, the penalty of a bond taken by an officer under this chapter varies from the sum required by law, it shall still be valid, and the officer shall not be responsible to either party beyond the actual damage.

In *Ross v. Berry* (1862) 49 Me. 434, it was said that in *Lambard v. Rogers* (Me.) supra, a bond was held to be a

statutory bond where "dollarage" had been charged. "That, however, was an oral opinion, and, according to the report, the court intimates a doubt whether dollarage might not be legally charged, and as that, if not, it might be considered a 'misapprehension.' This case is imperfectly reported, and, at best, rests upon the word which has been intentionally omitted in the revision."

And the addition in a recognizance, "to answer to such matters and things as may be objected against him," was held to be surplusage under Me. Rev. Stat. 1857, chap. 133, § 20, providing no action on a recognizance shall be defeated for any defect in form if it can be understood at what court the party was to appear, and from the description of the offense that the magistrate was authorized to require the same. *State v. Hatch* (1871) 59 Me. 410.

And a recognizance with a clause, "to further do and receive that which the said court shall then consider," was held valid and the clause mere surplusage. *State v. Russ* (1905) 100 Me. 76, 60 Atl. 704. Maine Rev. Stat. chap. 134, § 27, provides that no action on any recognizance shall be defeated for any defect in the form if it can be understood at what court appearance was required and that the magistrate was authorized to take the same.

And a surplusage condition in the bond of the treasurer of a levee board was held not to render the statutory conditions void. *Adams v. Williams* (1910) 97 Miss. 113, 30 L.R.A. (N.S.) 855, 52 So. 865, Ann. Cas. 1912C, 1129. Mississippi Rev. Code 1880, § 403, provided the conditions of official bonds and added that a failure to observe the prescribed form, or an irregularity in any other respect, would not vitiate the same.

A penal bond of a state treasurer was \$350,000 instead of \$250,000, as required by the statute. *South Dakota Comp. Laws*, § 1382, provides: "No official bond shall be void for want of compliance with the statute, but it shall be valid in law for the matter contained therein." It was held that the bond was voluntarily executed and was valid to its full extent. *State v. Taylor* (1897) 10 S. D. 182, 66 Am. St. Rep. 707, 72 N. W. 407.

The statutory bond provided that the executor "shall perform the duties required by law as executor." A bond provided that the executors shall perform all the duties "required by the will and the law." Tennessee Code, § 2224, provides that the bond now in use,



or any other bond executed not strictly in accord with the Code, because the condition is more extensive or less extensive, shall be valid to the extent of the conditions, as if the bond had been drawn in strict conformity to law. It was held that bond was valid. *Walker v. Potilla* (1881) 7 Lea (Tenn.) 449.

### III. Prohibitory statutes.

Where a statute prescribing the conditions of a bond declares all bonds not taken pursuant to it void, the statute is generally strictly pursued, and added stipulations are held to render the bond void.

Under a statute requiring a bond that defendant "will render himself amenable to the process of the court thereupon," an additional stipulation inserted that he "will perform the judgment of the court in the action," was held to render the bond void. *Shuttleworth v. Levi* (1877) 13 Bush (Ky.) 195. Kentucky Stat. chap. 100, § 14, after prohibiting any obligations except such as are specifically directed by law, provides that every obligation taken by any such officer, by color of his office, in any other manner or form, shall be void.

And a bond given to the sheriff that defendant shall not leave the commonwealth "and shall well and truly abide by and perform such decree or order" was held void. *Baskett v. Scott* (1824) 5 Litt. (Ky.) 208. 2 Digest of Laws (Ky.) 1136, § 10, provides that a bond be taken for the appearance of a party in custody, and that every obligation taken in any other manner or form, by color of office, shall be void.

Kentucky Rev. Stat. p. 615, § 14, provides that no officer shall take any obligation of or from any person in his custody for or concerning any matter relating to his office otherwise than such as is specially directed by law; every obligation taken in any other manner or form shall be void. A bond to perform the judgment, taken under an order of arrest, was held void where no provision was made in law for such a condition. *Lexington & D. R. Co. v. Barbee* (1858) 1 Met. (Ky.) 384.

The additional condition "that the prisoner should at the request of the sheriff again surrender himself to the prison," inserted in a bond to be at large, was held to avoid the same. *Sullivan v. Alexander* (1821) 19 Johns. (N. Y.) 233. 1 N. R. L. 418, 423, sess. 36, chap. 67, § 13, renders void any obligation taken by a sheriff by color of his office in any other form than is prescribed by statute. L.R.A.1917B.

A bail bond conforming to a statute which had been repealed, and not conforming to the present statute relating to release from arrest, was held void, as taken *colore officii*. *Barnard v. Viele* (1839) 21 Wend. (N. Y.) 88, 34 Am. Dec. 218. 2 N. Y. Rev. Stat. 286, § 59, provides that no officer shall take any bond by color of his office in any other manner than such as provided by law; if he does the bond shall be void.

And a bond taken by a sheriff in the assumed exercise of his official authority and duty, from a person under arrest, containing conditions not embraced in the statute, was held void. *Cook v. Freudenthal* (1880) 80 N. Y. 202. The court said: "The object of the statute prohibiting sheriffs and other officers from taking securities not authorized by law, and of the statutes prescribing the form of undertakings in particular cases, was to make the duty of the officer and the rights of parties certain and plain, and to prevent oppression or abuse of authority."

2 N. Y. Rev. Stat. 286, § 59, provides that no sheriff or officer shall take any bond, by color of his office, in any other case or manner than such as provided by law. It was held that, if the undertaking in this case was to be regarded as taken by the sheriff in his official character and in exercise of his official authority, it would be void, as it was double the amount required by law. *Toles v. Adees* (1881) 84 N. Y. 222. Acceptance of the bond by the attorney for plaintiff made it good at common law.

In *Shunk v. Miller* (1847) 5 Pa. 250, it was said: "When a statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than the condition is added to it, the bond may be allowed to cover the authorized part of the condition. *United States v. Brown* (1830) Gilpin, 179, Fed. Cas. No. 14,663. But it is otherwise where a statute authorizes a bond to be taken in a prescribed manner or for certain expressed purposes, and declares, if it be not so taken, the bond shall be void."

### IV. Bonds extorted *colore officii*.

It is generally held that bonds extorted *colore officii*, that are excessive or contain conditions not in the statute, are void.

So, where the statute provided that a bond in double the value of the vessel and cargo should be given, and the obligors were compelled to give a bond largely in excess of the statutory penalty, it

was held that the bond was void. *United States v. Gordon* (1811) 1 Brock. 190, Fed. Cas. No. 15,232, writ of error dismissed in (1813) 7 Cranch (U. S.) 287, 3 L. ed. 347.

A bond taken from a purser was not in the terms prescribed by the Act of Congress 1812, chap. 47, and was not limited to his duties or disbursements as purser, but created a liability for all moneys received by him and for all public property committed to his care, whether officially or otherwise. It was held that a plea that this bond was required before he would be permitted to remain in the office as purser, and was extorted, was good, and that the bond was an illegal bond. *United States v. Tingey* (1831) 5 Pet. (U. S.) 115, 8 L. ed. 66.

Act of Congress June 30, 1834, provided that Indiana agents shall give bond in the penal sum of \$2,000 for the faithful execution of the office. Two bonds were taken, one for \$25,000, and one for \$20,000, both conditioned that the agent "carefully discharge the duties" and "faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands, without fraud or delay." It was held that a plea that the bond was void and was extorted *colore officii* was a good plea. *United States v. Humason* (1879) 6 Sawy. 199, Fed. Cas. No. 15,421.

Bail was demanded by the sheriff in an amount exceeding that ordered by the court. The recognizance was held to be a nullity. *Waugh v. People* (1856) 17 Ill. 561.

The district court directed bail to be given in the penalty of \$1,200. The sheriff required bail in the sum of \$1,250. It was held that the bond was void. *Roberts v. State* (1885) 34 Kan. 151, 8 Pac. 246, 6 Am. Crim. Rep. 61. The court said that § 154, Kan. Crim. Code, providing that no action on a recognizance shall be defeated on account of any defect of form, omission of recital, condition of undertaking therein, or of any other irregularity, so that it appears that the defendant is discharged from legal custody by reason of the recognizance, did not apply, as the recognizance was not defective on account of form, omission of recital, condition of undertaking, or the neglect of any clerk or magistrate, or any other irregularity. "It is more than defective or irregular; it is utterly void."

Conditions inserted in a bond beyond the statutory requirements were held L.R.A.1917B.

nugatory where the bond was extorted under color of office. *District of Columbia v. Wagman* (1886) 4 Mackey (D. C.) 328. This was a bond given by a real estate agent in the District of Columbia. The court said: "So much of the condition of the bond as required the defendant to account and pay to any other person than the District 'all sums which may be due and owing by him by reason of said license and the business authorized thereby' was unauthorized by the statute."

In *State ex rel. Griffith v. Purcell* (1888) 31 W. Va. 44, 5 S. E. 301, it was said: "Where a superior officer exacts from his inferior a bond more onerous in its conditions than the law authorizes, the bond is void so far as it purports to exact illegal or extra official duties, or impose unlawful liabilities." But if the bond is voluntary, the sureties "are bound thereby to the full extent of the condition."

Act of Congress February 22, 1875, requires the clerk of the United States circuit court to give a bond to faithfully discharge the duties of his office. A bond provided for this and added, "and shall properly account for all moneys that may come into his possession, as required by law." It was held that this clause was only a specific statement of the duties in the statutory clause, and did not invalidate the bond. *United States v. Ambrose* (1880) 2 Fed. 552. The defense was that this bond was extorted under color of office, and was void.

A tax collector's bond exceeding in amount that required by a statute fixing the minimum amount at law was held valid. *Matthews v. Lee* (1853) 25 Miss. 417. The court said: "If the bond was not given voluntarily, the plea should have so averred."

*Colore officii*, see *Barnard v. Viele* (1839) 21 Wend. (N. Y.) 88, 34 Am. Dec. 218, note, III.

#### V. Beneficial bonds; estoppel.

In some cases where bonds were voluntarily given, it was held, after the parties have had the benefit of the same, that superadded conditions that secured the benefit did not invalidate the bond.

So, where the statute allowed a boat which had been libeled to be replevied by giving a bond conditioned only to pay such judgment as shall be rendered, and the stipulation in the bond provided an alternative condition, that is, the return of the boat upon the day appointed, it was held that the term in the condition,

being beneficial, did not affect the character of the obligation. *Rouse v. Jayne* (1848) 14 Ala. 727.

And an indemnifying bond containing no condition for the indemnification of the officer, but containing one for the claimant as required by statute, was held good. *Flint v. Young* (1879) 70 Mo. 221. The obligor should not be permitted to complain if he was held liable after the bond had answered all his purposes.

The court of common pleas was abolished and the county court substituted, and a bond on appeal should have been to the county court under N. Y. Laws 1847, p. 329. It was held that a bond to the wrong court, which was acted upon, giving the parties the benefit of an appeal, was held valid, and rendered the defendant liable. *Teall v. Van Wyck* (1851) 10 Barb. (N. Y.) 376.

A bond to release a ship taken in summary proceedings was conditioned for the payment of "all such demands as shall be established to have been subsisting liens. 2 N. Y. Rev. Stat. 404, prescribe the condition, "at the time of exhibiting the same respectively." The bond was held good. *Ring v. Gibbs* (1841) 26 Wend. (N. Y.) 502. The court said: "It was not a bond taken *colore officii*. . . . It was voluntarily executed by the obligors, and though broader in its terms than could have been required by the obligees, the latter had no right on that account to object to it; nor can the former, having had the full benefit of the proceeding, complain that they had bound themselves to do what could not have been required of them."

In *Speake v. United States* (1815) 9 Cranch (U. S.) 28, 3 L. ed. 645, it was held that a plea that an embargo bond was required in a sum more than double the value of the vessel and cargo was bad. There was no allegation that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression, or circumvention. The parties were estopped to deny that the value agreed upon was the true value.

## **VI. Indivisible, insufficient, and invalid bonds.**

### **a. Generally.**

The bonds which have been held invalid were generally those in which the good and bad conditions could not be separated, and in which the condition was to do something which the statute did not require, or those which contained a provision not authorized by statute or L.R.A.1917B.

in violation of a statute. So, where the condition was more onerous than the statutory bond, the bond was held invalid. Bonds given under a wrong statute; bonds to appear at the wrong court, and bonds in which the penalty was largely excessive, were held invalid. Some bonds were held insufficient where "and" was used for "or," and vice versa. Bonds in which the condition was absurd, and bonds not binding heirs, executors, and administrators, were held invalid.

### **b. Administrators' bonds.**

A bond given by an administrator with the will annexed made no reference to the will, and was in the form of a bond given by an administrator; it was held that the bond was not a good statutory bond, and that the surety was not liable to a legatee. *Walker v. Crosland* (1850) 3 Rich. Eq. (S. C.) 23.

A bond in the form required from an administrator was given by an administrator with the will annexed. It was held invalid as a statutory bond. *Frazier v. Frazier* (1831) 2 Leigh (Va.) 642. In *Gibson v. Beekham* (1862) 16 Gratt. (Va.) 321, it was said that the bond in the above case was not for the benefit of legatees, and that the court did not decide that it would have been invalid if suit had been by a creditor.

And a bond in the form for an administrator *de bonis non*, and not in the form for an administrator with the will annexed, was held void. *Morrow v. Peyton* (1837) 8 Leigh (Va.) 54.

### **c. Appeal; supersedeas; certiorari.**

Wisconsin Laws 1889, chap. 184, provide for an appeal bond "for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant by the court." A bond recited an appeal to the circuit court of Eau Claire county and was conditioned for the payment of all costs that should be adjudged against appellant "by the court aforesaid." It was held void, as the surety would not be liable if a change of venue was had. (There was no change of venue.) *Drinkwine v. Eau Claire* (1892) 83 Wis. 428, 53 N. W. 673.

And an appeal bond reading, "will pay or satisfy the judgment against the that may be obligators on the bond," was held to have no meaning. *Carter v. Grisby* (1879) 1 Tex. App. Civ. Cas. (White & W.) 148.

And a condition in an appeal bond requiring defendant to appear "before the next regular term of the county court"

"from day to day thereafter, and not depart from said county court," was held to be more onerous than the statutory condition, and a nullity; and the appeal was dismissed. *Watson v. State* (1886) 20 *Tex. App.* 382.

And where the bond on appeal was not double the amount of the judgment, and was otherwise defective in the conditions required by the statute, it was held that the appeal should be dismissed. *Fletcher v. State* (1880) 9 *Tex. App.* 674.

And a recognizance that appellant "shall continue from day to day, and term to term, until his appeal has been decided by said court of appeals," was held void. It should have been that he appear before the proper court at the proper time, and there remain, "to abide judgment of the court of appeals." The appeal was dismissed. *Taylor v. State* (1877) 1 *Tex. App.* 663.

And an appeal was dismissed where the bond executed under a prior law was conditioned to perform the decree of "the supreme court" instead of the "court of appeals." *Lawrence v. State* (1876) 1 *Tex. App.* 392.

A bond on appeal from a justice's court, conditioned defendant "make his personal appearance before the county court of said county at its next regular term, beginning on the third Monday in May, A. D. 1905, and there remain from day to day and term to term, and answer in said cause on trial in said court," was held to be fatally defective. It should have been that he "prosecute his appeal with effect and pay such fine and costs as shall be adjudged against him by the county court, as well as other costs that may have been adjudged against him in the court below. *Tex. Code. Crim. Proc.* 1895, art. 889." *Bunton v. State* (1908) 52 *Tex. Crim. Rep.* 618, 108 S. W. 373.

A recognizance on appeal to abide the judgment of the "court of appeals" instead of the "court of criminal appeals" was held fatally defective. *McRay v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 161; *Starr v. State* (1897) — *Tex. Crim. Rep.* —, 40 S. W. 790; *Dun v. State* (1897) — *Tex. Crim. Rep.* —, 40 S. W. 287; *Nix v. State* (1893) — *Tex. Crim. Rep.* —, 44 S. W. 161; *Fincher v. State* (1896) — *Tex. Crim. Rep.* —, 37 S. W. 732; *Adams v. State* (1903) 44 *Tex. Crim. Rep.* 534, 72 S. W. 588.

And a recognizance on appeal reading, "who has been convicted of said offense in this court, from day to day, and from term to term thereof, and not depart without leave of this court," was held L.R.A.1917B.

fatally defective. *Henry v. State* (1897) — *Tex. Crim. Rep.* —, 38 S. W. 609.

And an appeal bond conditioned that defendant will prosecute "this trial" to effect, and will pay off and satisfy the judgment which may be rendered on "said trial," instead of "this appeal" was held a nullity. *S. A. Pace Grocery Co. v. Savage* (1908) — *Tex. Civ. App.* —, 114 S. W. 866; *Wood Grocery Co. v. S. A. Pace Grocery Co.* (1906) — *Tex. Civ. App.* —, 99 S. W. 180.

A bond on appeal from a justice's court, conditioned to appear in the "county court," was held to be fatally defective as more onerous than the statute required. *Scarborough v. State* (1892) — *Tex. Crim. Rep.* —, 20 S. W. 584. *Paschal's Dig. (Tex.) art. 1491*, provides for an appeal bond to be double the debt or damages, and for defendant to perform the judgment. *Art. 1493* provides for an appeal by giving security for costs and damages. This security does not operate as a supersedeas. A bond was given, conforming to art. 1491, but was insufficient in amount. It was held that it could not be treated as a bond under art. 1493, as it contained more than was necessary and could not be divided and no part could be rejected. The appeal was dismissed. *Janes v. Langham* (1867) 29 *Tex.* 413.

And a bond on appeal from a justice, conditioned to prosecute or "pay the debt," was held void. It should have been a recognizance in the nature of special bail and the justice had no authority to take any other. *King v. Culbertson* (1823) 10 *Serg. & R. (Pa.)* 325.

And a recognizance "to prosecute this appeal with effect," on appeal from a justice, was held void, as it did not comply with the Act of 1842, but the Act of 1810. It should have been conditioned that "no part of the defendant's property should be removed, secreted, assigned, or disposed of so as to baffle an execution." *Donley v. Brownlee* (1847) 7 *Pa.* 109.

And a recognizance exacted from the defendant in the sum of \$50,000, to prosecute his appeal and to pay all costs and damages, was held void, as the orphans' court had no power to impose such terms. *Com. v. Wister* (1891) 142 *Pa.* 373, 21 *Atl.* 871, 872. In this case the money had been paid into court and the appellant by the appeal was denied the use of the money and suffered the same loss as the other distributees.

The failure to stipulate in an appeal bond "that the appellant will prosecute

his appeal to effect and without unnecessary delay" was held sufficient to require a dismissal of the appeal. *Job v. Harlan* (1862) 13 Ohio St. 485. This additional stipulation was made a separate section by the Ohio Act March 14, 1853.

An undertaking on appeal in a creditor's suit to uncover property provided, "and satisfy said judgment and decree so far as affirmed by the appellate court." It was held that in this case the plaintiff was not entitled to have judgment for the debt, and the mandate was recalled and modified, *Stubling v. Wilson* (1907) 50 Or. 282, 92 Pac. 810. The court said: "The undertaking in this suit created a liability against the surety only for the costs of the lower court and of this court."

An appeal was held properly dismissed where the bond was not conditioned "to abide the judgment of said court," to which the appeal was taken, as required by Minn. Rev. Laws 1905, § 4018. *State v. Mattson* (1908) 105 Minn. 64, 117 N. W. 227; *State v. Mattson* (1908) 105 Minn. 164, 117 N. W. 503. This bond was conditioned to prosecute the appeal with effect at a named term of the district court, to answer said appeal, and in the meantime to keep the peace, and not to depart thence without leave.

And a condition in a recognizance on appeal, to pay also all intervening damages, was held to render the bond void. *Massachusetts Gen. Stat. chap. 120, § 26*, required a bond to prosecute the appeal with effect and pay all costs which should afterwards arise thereon. *Newcomb v. Worster* (1863) 7 Allen (Mass.) 198.

So a recognizance on appeal to pay "all intervening damages and costs," under Me. Stat. 1841, requiring a recognizance to pay the "costs" only, was held void. *Jordan v. McKenney* (1858) 45 Me. 306. The court said: "The magistrate had no right to require it."

A recognizance on appeal from a justice was required a condition to "personally appear" at the appellate court and pay "all intervening damages and costs." *Maine Rev. Stat. chap. 116, § 10*, required a condition "to prosecute his appeal with effect, and pay all costs arising after the appeal." It was held that the bond was invalid, and the appeal was not perfected. *French v. Snell* (1854) 37 Me. 100; *Lane v. Crosby* (1856) 42 Me. 327.

And a bond given for appeal formulated under the wrong section of the Code was held invalid and the appeal L.R.A.1917B.

was dismissed. *Calhoun's Succession* (1883) 35 La. Ann. 363. The bond should have been that prescribed by art. 579, C. P., and not that prescribed by C. P. 214, 276, 304.

Under Iowa Acts Jan. 28, 1857, 303, providing that in criminal cases the appellant shall give bond under condition that he will appear and will not depart without leave, and will abide the judgment, it was held that a condition in a bond that he would pay whatever amount should be legally adjudged was erroneously required, and should not have been demanded. *State v. Beneke* (1859) 9 Iowa, 203.

And a supersedeas bond was held insufficient where the conditions were not such as were required by the statute. *Ranney-Alton Mercantile Co. v. Mineral Belt Constr. Co.* (1899) 2 Ind. Terr. 134. *Mansfield's Dig. (Ark.) § 1295*, provided for a bond by appellant to satisfy the judgment in case it was affirmed, and any judgment the supreme court may render or order to be rendered by the inferior court. The bond given was for appellant to have its property forthcoming to satisfy the judgment.

An appeal bond omitted the statutory condition to prosecute the appeal with effect, and, instead of binding themselves to pay whatever judgment might be rendered by the court upon dismissal or trial of the appeal, the obligors limited their liability to the payment of the judgment to be rendered in Hancock county, from which county a change of venue was had. It was held that the sureties were not liable. *Sharp v. Bedell* (1848) 10 Ill. 88.

In *Smith v. Whitaker* (1849) 11 Ill. 417, the cases of *Young v. Mason* (1846) 8 Ill. 55, and *Sharp v. Bedell* (Ill.) supra, were distinguished.

On certiorari from conviction in a municipal court, the bond was "for the appearance of the defendant to abide the final judgment and sentence of the superior court of — in said case." This was held not to be a compliance with the bond required by statute to "appear and abide the final judgment, order, or sentence of said court, or of the superior court in said case." *Scott v. Camilla* (1910) 7 Ga. App. 689, 67 S. E. 846.

On certiorari from a judgment for violating a city ordinance, the bond was in the sum of \$300, conditioned to pay the eventual condemnation money. *Georgia Acts 1902, p. 105*, require that the bond in such cases as this shall be made conditioned to abide the judgment of the superior or mayor's court. It was held

that the certiorari should be dismissed for failure to give the proper bond. *Simon v. Savannah* (1908) 4 Ga. App. 171, 60 S. E. 1036.

And an appeal bond was held invalid where it provided that "in case said judgment be affirmed or modified, or the appeal be dismissed by said superior court, Barrett will pay the fine and render himself to said justice," and the Cal. Penal Code, § 1273, provided, first, that if the appeal was from a fine "he will pay the same," or such part as the appellate court may direct; second, that if judgment of imprisonment has been given "he will surrender himself in execution of the judgment" upon affirmation or modification, or on the appeal being dismissed. The provision of the bond was held more onerous than the statute prescribed. *People v. Barrett* (1907) 6 Cal. App. 578, 92 Pac. 647.

Alabama Code, § 3041, required the appellant to give security for the costs of the appeal. A bond was conditioned to pay the costs of the appeal in the supreme court only in case the judgment of the court below was affirmed. It was held that the appeal should be dismissed. *Hinson v. Preslor* (1855) 27 Ala. 643.

And a bond "for all costs and damages as may be sustained by the defendant by reason of the appeal" was held not equivalent to a bond "to pay such judgment as may be rendered," and would not authorize a summary judgment. *Reynolds v. Cox* (1895) 108 Ala. 276, 19 So. 395.

And when the appeal bond did not conform to the statute, it was held that the appeal should be dismissed. *Reilly v. Crowley* (1891) 3 Ariz. 286, 29 Pac. 14; *Hill v. Herrick* (1891) 3 Ariz. 313, 73 Pac. 399. There was no obligee named the bond was not in a sum at least double the probable costs in the appellate and lower courts, and was not conditioned that the appellant should prosecute the appeal.

#### *d. Attachment.*

Where a statutory bond to release property would become effective if the attachment should be "sustained," it was held that a bond to become effective if the attachment was "discharged" was inoperative, and no recovery could be had on it even as a common-law obligation. *Edwards v. Pomeroy* (1885) 8 Colo. 254, 6 Pac. 829.

An attachment bond provided that the plaintiff "would prove his demand on a trial at law." It was held that this was not such a bond as was required by the L.R.A.1917B.

statute, and the defendant, who had given bond to retain the property, could plead in abatement the want of a sufficient attachment bond. *Delano v. Kennedy* (1844) 5 Ark. 459.

A bond in attachment provided that "they" would perform the judgment, and was not conditioned as required by the statute, that the defendant in the attachment suit would perform the judgment of the court. It was held that the bond could not be enforced as a statutory bond. *Lowenstein v. McCadden* (1890) 54 Ark. 13, 14 S. W. 1095.

A bond by defendant in attachment, on appeal from a justice, provided that the surety would satisfy the judgment of the circuit court "to the extent of the value of said cotton." This was held not to be a statutory bond, requiring a condition "to perform the judgment appealed from in the event it was affirmed on appeal, or if, on a trial anew in the circuit court, judgment was given against appellant, that he would pay such judgment," and would not support a summary judgment against the surety. *Martin v. Tennison* (1892) 56 Ark. 291, 19 S. W. 922.

California Practice Act, § 553, requires an undertaking in attachment to pay all damages without any limitations as to amount. An attachment was held illegal where the bond limited the damages to "not exceeding \$100." *Hisler v. Carr* (1868) 34 Cal. 641.

The condition required by statute in an attachment bond was, "If the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all damages." It was held that a bond using a form under a prior statute, "If the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay . . . all damages he may sustain by the wrongful suing out of the attachment," was invalid. *Pierse v. Miles* (1885) 5 Mont. 549, 6 Pac. 347. The court said: "Under the amended section, the sureties are liable in any event, if it is finally held that the plaintiff was not entitled to an attachment; while under the original section they are not liable unless the plaintiff wrongfully procured the attachment to issue." The same was held in *Langstaff v. Miles* (1885) 5 Mont. 554, 6 Pac. 356.

#### *e. Bail and recognizance.*

A bail bond conditioned "to abide the final judgment of court," when it should have been conditioned that the defendant "will appear before the proper court or magistrate to answer the accusation

against him," was held invalid, and the suit thereon was dismissed. *Turner v. State* (1883) 14 *Tex. App.* 168.

And a recognizance requiring the defendant to make his "personal" appearance, and stating "until discharged by due course of law," instead of "not depart without leave of the court," was held defective, and the appeal was dismissed. *Robertson v. State* (1904) 45 *Tex. Crim. Rep.* 516, 78 S. W. 517.

And a recognizance to appear before the trial court "from day to day and from time to time of the same, and not depart," was held invalid. *Texas Code Crim. Proc. art. 887*, requires the appearance "from term to term." *Samamiego v. State* (1904) — *Tex. Crim. Rep.* —, 80 S. W. 996; *Fulton v. State* (1904) — *Tex. Crim. Rep.* —, 78 S. W. 227.

And a recognizance "to appear at the next term," instead of "from day to day and from term to term," was held to be invalid, and the appeal was dismissed. *Anderson v. State* (1903) — *Tex. Crim. Rep.* —, 76 S. W. 470.

And a recognizance that "binds the principal only to stand trial in the county court of Eastland county" was held to be fatally defective, when it should have been "to abide the judgment of the court of criminal appeals." *Satterwhite v. State* (1899) — *Tex. Crim. Rep.* —, 49 S. W. 396.

And where the penalty in a bail bond was \$1,000 instead of \$500, as it should have been, it was held that the bond should be quashed. *Barringer v. State* (1864) 27 *Tex.* 553; *Neblett v. State* (1879) 6 *Tex. App.* 316.

*Texas Crim. Code, art. 722*, provides for a recognizance "to appear before the district court to abide the judgment of supreme court." A recognizance for appearance "at the honorable district court in obedience to law, to answer said indictment in case the judgment of the district court be reversed," was held void. *Little v. State* (1861) 26 *Tex.* 110.

And where the obligation of an insolvent bond was for the creditor "and all and singular the rest of the creditors," it was held void. It was held oppressive and compulsory. *Beacom v. Holmes* (1825) 13 *Serg. & R. (Pa.)* 190. The court said: "The bond is to be given only to the arresting creditor and to secure his debt, provided the debtor fails to apply for the benefit of the insolvent laws. No other creditor has any concern with it."

And where the statute in regard to an insolvent debtor required a bond with a L.R.A.1917B.

double aspect, "the procurement of a discharge or a surrender to jail in lieu of it," it was held that a bond not in the alternative was void. *Hutton v. Helme* (1836) 5 *Watts (Pa.)* 346.

A bond given by an insolvent debtor was held void where the statutory condition, "to surrender himself to the jail of the said county, if he fail to comply with all things required by law to entitle him to be discharged," was not in the bond. It was held not a voluntary bond, but a bond binding the debtor to harder conditions, and the plaintiff had no right to exact them. The failure to use this condition deprived the debtor of the benefit of a surrender. *M'Kee v. Stannard* (1826) 14 *Serg. & R. (Pa.)* 380. The debtor appeared and the case was adjourned, and he then did not give notice to his creditors nor appear.

And where the sureties on a recognizance contracted that the defendant would appear generally, for which there was no warrant in law, it was held that the bond was void. *Malheur County v. Carter* (1908) 52 *Or.* 616, 98 *Pac.* 489. It should have been conditioned to answer a stated charge.

And a statutory recognizance containing an unwarranted condition was held void. The statute required bail in the nature of special bail. The bail taken was absolute for payment of the debt that might be eventually recovered in the action. *Bolton v. Robinson* (1825) 13 *Serg. & R. (Pa.)* 193.

In *Power v. Graydon* (1866) 53 *Pa.* 198, the court, referring to an insolvent debtor's bond, said: "It must be admitted that, being a statutory bond having for its object the release of Barron from arrest and confinement, and being therefore compulsory, if it exacts more than the statute requires, it cannot be enforced."

A bond to a constable, conditioned to deliver a prisoner, was held void. There was nothing in the bond to indicate that the arrest was a "civil arrest." *Churchill v. Perkins* (1809) 5 *Mass.* 541.

A debtor's bond to obtain release from arrest on execution, which was not taken for the exact amount required by statute, was held not a statutory bond. A forfeiture was denied where the debtor had complied with the bond, although the proceedings before the justice did not conform to the statute. *Merchants' Bank v. Lord* (1861) 49 *Me.* 99. So where the bond included an illegal charge. *Ross v. Berry* (1862) 49 *Me.* 434.

A recognizance required in forcible

entry and detainee, to prosecute with effect an appeal, to pay all costs after the appeal, and the intervening rent. These were not the conditions required by statute, and the recognizance was held void. *Dennison v. Mason* (1853) 36 Me. 431.

A recognizance was conditioned, "to prosecute with effect an appeal, made by him at the court of common pleas." *Maine Stat.* 1829, chap. 444, provided, "to prosecute his appeal, and to pay all such costs as may arise in such suit after such appeal." It was held that the recognizance was not according to the statute, and a declaration in sci. fa. set out no legal cause of action. *Owen v. Daniels* (1842) 21 Me. 180.

And where conditions not authorized by the statute were superadded to a recognizance, one of which prohibited the defendant for a term of two years from obtaining a liquor permit even if he complied with the statute, the recognizance was held to be invalid. *Dur-ein v. State* (1888) 38 Kan. 485, 17 Pac. 49.

A bail bond contained a stipulation, "Now if the said Goodman and Jerome, in case they are cast in their said suit, shall render their bodies to prison in execution of the law, in terms of the law, in such case made and provided, and upon failure thereof, the said securities will do it for them." This was held prejudicial, as not required by statute, and rendered the instrument void. *Tucker v. Davis* (1854) 15 Ga. 573. The court said: "If a bond contains a condition not required by the law, but which is beneficial to the security, it does not vitiate the bond; but if a condition is inserted, not warranted by the law, and which is onerous to the security, or omits one for his benefit, the instrument is void."

And where bail in the sum of \$500 was required in one charge, and \$200 bail was required in another charge, and the commissioner took bail in \$700 in one bond, it was held that the bond taken was a substantial departure and was not binding on the sureties. *United States v. Goldstein* (1871) 1 Dill. 413, Fed. Cas. No. 15,226.

And a debtor's bond to appear at an adjourned hearing, and also at such other times and places as the hearings may from time to time be adjourned to, was held void under 2 N. Y. Rev. Stat. 214, 2d ed. § 60, as the statute did not require this condition. *People ex rel. Norton v. Locke* (1850) 3 Sandf. (N. Y.) L.R.A.1917B.

443. The statute fixed a bond for an adjourned hearing, not "hearings."

#### *f. Bastardy and nonsupport.*

A bastardy bond imposing conditions on the obligor in addition to the statutory conditions was held void. *People v. Meighan* (1841) 1 Hill (N. Y.) 298, 2 N. Y. Rev. Stat. 2d ed. 214, § 60, was held to destroy every bond taken by any officer by color of his office in any other case or manner than such as provided by law.

A filiation bond provided that defendant "shall well and truly observe all the conditions of said order of affiliation." It should have provided "that he will pay weekly or otherwise, as may have been ordered, the sum directed . . . for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the court of sessions of the county." This bond was held void. *Lester v. Worden* (1896) 8 App. Div. 216, 40 N. Y. Supp. 436.

South Carolina Act 1795 (2 Faust, 74) requires a bastardy recognizance "conditioned for the annual payment of £5 for the maintenance of the child." A bond was in a penalty of £60 payable by twelve annual instalments of £5 every year. The penalty was for "the citizens of the aforesaid district." The act required it to be for the "maintenance of the child." The bond was held to be void, and, as it was taken under color of legal authority, it was not good at common law. *Laurens Dist. v. Gains* (1814) 1 Treadway, Const. (S. C.) 459.

In *Erlinger v. People* (1865) 36 Ill. 458, it was said that the case of *Laurens Dist. v. Gains*, supra, was exceptional. "It is very brief, the court merely holding the bond before them invalid without reference to any authorities, or devoting more than a few lines to the consideration of the case." A directly contrary doctrine is held in the same state in a later and very maturely considered case. *Anderson v. Foster* (1831) 2 Bail. L. (S. C.) 501.

A bastardy bond of \$75 per year for the support of three children was held invalid, as it provided, "until each of said children becomes twelve years of age," and if two were dead the obligation would be to pay \$75 annually until the remaining one reached twelve years of age, while under the statute the liability would be only \$25 a year for each. The bond was also made to the wrong payee. *State ex rel. Bright v. Bright* (1880) 14 S. C. 7.



1 N. Y. Rev. Stat. 645, requires a bastardy bond to contain either of the conditions in the alternative. It was held that a bond embracing conjointly the two conditions was a nullity. One condition was to be enforced by overseers and the other by the district attorney. *Hoogland v. Hudson* (1853) 8 How. Pr. (N. Y.) 343.

In *Standring v. Moore* (1896) 16 Misc. 106, 38 N. Y. Supp. 813, the court said: "If, therefore, the holding of the court in the case above referred to is correct, and I think it is, then the undertaking upon which this action is based is a nullity, by reason of its alternative provisions."

And a bastardy bond conditioned for appearance after the birth of the child, not naming any day, was held void. *N. J. P. L.* 1898, p. 961, § 51, authorizes an adjournment for six weeks. *Bennett v. Briggs* (1907) — *N. J. L.* —, 65 *Atl.* 717.

And a condition in a bastardy bond, "to abide by and perform the order of the county court," was held invalid, and the sci. fa. was quashed. *Young v. Com.* (1819) 2 *A. K. Marsh.* (Ky.) 63.

And a judgment order requiring that the condition in a bastardy bond for support should make the instalments payable to the county judge as formerly, and not to the clerk as now required by statute, was held error. *Moore v. People* (1883) 13 *Ill. App.* 248.

A bastardy bond required the accused to appear at the next probate court, on the second Monday in July next. The statute required the bond to be given for accused to appear before the next county court, and a later statute substituted "probate" for county. This bond should have read, to appear at the term of the probate court next after it was executed. As some terms had been held in the interim, it was held that the bond was void. *Seale v. McClanahan* (1852) 21 *Ala.* 345.

A bond for nonsupport of wife, that defendant shall be of good behavior towards the people for one year and that he pay \$7 weekly for the support of his wife one year, was held void. *Charities & C. Comrs. v. Hammill* (1884) 33 *Hun* (N. Y.) 348, 2 *Rev. Stat.* 286, § 59, provides that obligations taken in any other case or manner than such as are provided by law are void. This bond was also in excess of the amount ordered. *New York Code Crim. Proc.* §§ 899-901, required a bond "that he will support his wife and children and will indemnify the county, city, village, or town against

their becoming within one year chargeable upon the public."

#### *g. Collectors' and treasurers' bonds.*

A condition in the bond of a collector of militia fines, for fines and demands which might thereafter be assessed by the regiment, was held not to be included in the statutory provision, and the condition was inoperative. *Com. v. Pearce* (1828) 7 *T. B. Mon.* (Ky.) 317.

The bond of a deputy treasurer provided, "and discovered during said continuance or within six months thereafter." It was held that such a provision in violation of the statute, placing a limitation on the right of action given by statute, was against public policy and void. *United States Fidelity & T. Co. v. McLaughlin* (1906) 76 *Neb.* 307, 107 *N. W.* 577, 109 *N. W.* 390.

#### *h. Constables' bonds.*

A constable's bond was held void where the good and bad conditions in the bond could not be separated. *Nottingham v. Giles* (1806) 2 *N. J. L.* 120.

And a constable's bond was held void where the condition was broader than the statute required. *Middletown v. M'Cormick* (1809) 3 *N. J. L.* 500. This bond contained a condition "that in all respects whatsoever he shall do and execute all services, acts, and duties appertaining to his office to the best of his judgment and ability." This was held absurd.

#### *i. Cost bonds.*

A bond given for costs was conditioned to be void if the "plaintiff should pay on demand" all costs. 2 *N. Y. Rev. Stat.* 620, § 4, provided, "on demand of the obligors." It was held that the bond was invalid, as the defendant should not be compelled to travel out of the state to make a demand. *Montague v. Bassett* (1864) 18 *Abb. Pr.* (N. Y.) 13.

So a bond for costs "that plaintiff shall pay on demand" was held invalid where plaintiff was a nonresident. It should have required the "obligors" to pay on demand. *Tallmadge v. Wallis* (1845) 1 *How. Pr.* (N. Y.) 100.

And a security for the payment of costs on the affirmance, and not for the original judgment, which was affirmed at general term, was held insufficient. *Morss v. Hasbrouck* (1882) 10 *Abb. N. C.* (N. Y.) 407, reversed in (1882) 15 *N. Y. Week. Dig.* 308. *New York Code Civ. Proc.* § 1332, required the bond to be in the same form as if the judgment ap-

pealed from did itself render a judgment similar to the one it affirmed.

And a bond for costs not obligating "heirs, executors, and administrators" was held insufficient. *Schenke v. Rowell* (1876) 1 Abb. N. C. (N. Y.) 295.

The statute required a bond for costs in suits commenced by a nonresident, "for the payment of all costs that may accrue in consequence thereof, either to the opposite party or to the officers of the court." A bond to pay costs "provided judgment be given against said Hunt" was held insufficient and was properly rejected. *Hunt v. Butcher* (1840) 5 Blackf. (Ind.) 341.

Arkansas Rev. Stat. 211, provided that a nonresident shall give bond "to pay all costs which may accrue in such action." A bond was held invalid and the action was dismissed, where the bond provided that he "shall maintain his said action, or if judgment shall be given against him, he shall well and truly pay all costs of suit which he shall be liable to pay." There was a material difference between the bonds. *Owings v. Finley* (1840) 3 Ark. 136.

#### *j. Embargo bonds.*

An embargo bond was held void where the conditions were more than required by statute. *United States v. Morgan* (1811) 3 Wash. C. C. 10, Fed. Cas. No. 15,809. The court said: "If it be taken in a greater sum than the law directs; if the condition stipulate a relanding elsewhere than in the United States, if it stipulate a relanding absolutely, when the law requires it to be done on a certain condition; or if it bind the obligors to do more than the law requires, it is not the bond which the officer was authorized to take, and all is void."

In *United States v. Brown* (1830) Gilpin, 155, Fed. Cas. No. 14,663, in referring to this case, it was said: "The bond was declared to be void by the judge, (1) because the condition required the obligors to reland the cargo in the United States, although they might have been prevented by a peril of the sea; (2) because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time. . . . The condition of that bond was not, as ours is, in its nature or terms divisible."

In *United States v. Morgan* (Fed.) supra, where an embargo bond failed to include the exception, "dangers of the sea excepted," and contained a provision L.R.A.1917B.

that a certificate of the landing of the cargo should be delivered to the collector at Philadelphia, it was held to be void, as this last clause was not required by the statute, and omitting the other clause made a condition different from that required by the statute.

*United States v. Brown* (Fed.) supra. This ruling was qualified so as to apply, "at least so far as it exceeds the requisitions of the law."

#### *k. Liquor bonds.*

A liquor bond was made to the city of Lincoln and contained no condition for the payment of all damages, but only of fines, forfeitures, and penalties, and for compliance with the statutes and ordinances "so far as relates to the matters in the bond." It was held that there was no provision in the statute for such a bond, and it was nullity. The bond should be to the county and should provide against keeping a disorderly house. *Saxon v. Kelley* (1873) 3 Neb. 104. See also *Ulrich v. Gilmore* (1892) 35 Neb. 288, 53 N. W. 135.

#### *l. Other bonds.*

A bond given under a city ordinance was in violation of the statute. It was held that no recovery could be had thereon. *Tuskaloosa v. Lacy* (1842) 3 Ala. 618. The statute prohibited the use of scrip for money, and the ordinance required the city treasurer to give bond to account for the city script used as money.

And under La. Act 1894, No. 180, requiring a contractor's bond for the payment of all material and labor, it was held that a bond in which such amount was made divisible between the owner and the statutory beneficiaries did not meet the requirement of the law. *Hughes v. Smith* (1905) 114 La. 297, 38 So. 175.

And a bond in detinue, not naming the parties defendant nor stating the kind of suit, was held too indefinite and was void. *Eason v. Clark* (1829) 2 Yerg. (Tenn.) 522.

Louisiana Code of Practice, art. 280, provides that the party giving bond should faithfully present the property after definite judgment. A bond taken by a sheriff in lieu of property sequestered provided that the obligors shall pay the amount of the judgment to be rendered. It was held that the casual insertion in a bond of an additional condition not contemplated by the legislature would not bind the surety. The failure to proceed against the property by execution before proceeding on the bond re-

quired a nonsuit. *Welsh v. Barrow* (1845) 9 Rob. (La.) 535.

And in *Grantville v. Fidelity & D. Co.* (1912) 139 Ga. 53, 76 S. E. 575, it was held that a bond to protect materialmen was neither literally nor in substance in accord with the provision of Ga. Act Aug. 12, 1910, p. 86.

In *Johnson v. Erskine* (1852) 9 Tex. 1, it was held that a ferry license bond conditioned "to perform and discharge all the duties required of them as ferryman" was void under the statute and also at common law. This bond would cover \$10 damages for neglect in performing a duty required by the Ferry Law, and \$10 penalty for exacting illegal toll. These are not covered by a statutory bond, which relates to keeping the banks in repair. The opinion says: "Believing that the bond sued on was neither void under the statute nor at common law, we adhere to the opinion that the judgment must be reversed and the cause dismissed." The word "void" must mean valid in this sentence.

In *Farmers' Bank v. Boyer* (1827) 16 Serg. & R. (Pa.) 48, it was said: "It is admitted that a bond whose terms are not in accordance with the provisions of a statute by which it is required is void; but this is to be restrained to cases where the condition is to do something which the statute does not require, or where it contains a provision which the statute does not authorize."

In *Haines v. Levin* (1865) 51 Pa. 412, it was said: "When a statutory condition is expressed, limiting the terms upon which a legal remedy is given, and harder terms are exacted than the statute requires, the recognizance or bond is void as a departure to the prejudice of the rights of the party entitled to his redress, and the surety is discharged. It is different where the statutory obligation is given to secure the performance of a duty; then, if the vicious portion of the condition is severable from the remainder, the bond is valid as to the part which is good."

In *Com. v. Wistar* (1891) 142 Pa. 373, 21 Atl. 872, it was said: "As a general rule, where a statute prescribes the condition of a bond or recognizance upon which a legal remedy is given, and terms harder than the statute requires are exacted, the obligation is void. . . . If, however, the stronger obligation is voluntarily assumed, it is otherwise."

In *Winter v. Kinney* (1848) 1 N. Y. 365, it was said: "An agreement made with a sheriff or other public officer, to obtain an indulgence not authorized by L.R.A.1917B.

law, . . . or the taking by such officer, from a party in custody, an obligation or security not sanctioned by statute, for the ease and favor of the prisoner, and as an indemnity for a breach of duty on the part of such officer, has uniformly been held void."

In *Mittnacht v. Kellermann* (1887) 105 N. Y. 461, 12 N. E. 28, it was said: "The general rule that bonds taken by public officers purporting to be taken under statutory authority, but which are not actually authorized by the statute, and do not conform in all material respects with its provisions, are void, is too well established by authority to be questioned or disputed."

## VII. Substantial compliance with the statute.

### a. Generally.

Bonds containing slight changes in the form of the statutory bond and the substitution of synonymous phrases, bonds slightly excessive of statutory requirements, and bonds enumerating in detail the duties covered, have been held valid. The rule seems to be that, if the statute does not render the bond void, or if the bond is not a fraud on the obligors by color of law, or any evasion of the statute, it will generally be held valid.

### b. Administrators', executors', and guardians' bonds.

An administrator's bond was held to be good notwithstanding it specified in detail the obligations of the administrator in administering on partnership property. *Carr v. Catlin* (1874) 13 Kan. 393, Comp. Laws, 520, § 50, provided that the bond shall be conditioned that the administrator will faithfully execute the trust with no unnecessary waste or expense.

The statute fixing bond at \$500 for contestants of wills was held to be directory only, and a bond for \$1,000 was held valid. *Parks v. Allen* (1859) 2 Head (Tenn.) 523. The court said: "The courts may exercise proper discretion in view of the magnitude of the suit and the probate cost, in regulating the amount."

South Carolina P. L. 1789, 496, provide the condition of an administrator's bond, that the administrator shall "pay unto such persons, respectively, as are entitled to the same by law." A bond provided that he shall "pay unto such person or persons, respectively, as the said ordinary, by his decree or sentence, pursuant to the true intent and meaning

of the statutes and acts of the intestate estates, shall limit and appoint." It was held to be a good bond. *Kershaw Dist. v. Blanchard* (1813) 3 Brev. (S. C.) 136.

Missouri Rev. Stat. §§ 235-252, provide the condition of an executor's bond, to faithfully administer said estate, and perform all other things touching said administration required by law "or the order or decree of any court having jurisdiction." A bond used the word "executorship" for "administration" and omitted the words quoted. It was held that the bond was valid. *Newton v. Cox* (1882) 76 Mo. 352.

Massachusetts Stat. 1783, chap. 36, provide that executors shall give bonds in the same manner as administrators. Administrators were required to administer according to law. It was held that an executor's bond, "to administer according to the will," was valid. *Hall v. Cushing* (1830) 9 Pick. (Mass.) 395. It was said that "the forms of their bonds may and ought to vary."

The statutory form was conditioned for the executors "administering the estate according to the law and the will." A bond contained the additional provision, "that the executor shall pay the debts and legacies of the estate." The bond was held valid, and it was the same as though two bonds had been executed. *Gandolfo v. Walker* (1864) 15 Ohio St. 251.

And a provision in the bond of a guardian that he should put out and secure the proceeds of sale on interest, was held not to affect the bond, although the statute did not require that condition. "The law did require it." *McFadden v. Hewett* (1885) 78 Mo. 24, 1 Atl. 893.

A condition added in a bond, "that the guardian shall keep harmless the justices from all trouble and damages that shall or may arise about the said estate," was held not to render the bond invalid. *Pratt v. Wright* (1855) 13 Gratt. (Va.) 175, 67 Am. Dec. 767.

And the fact that a bond contained more or less recitals than in the statute was held not to affect its validity. *State ex rel. McKown v. Williams* (1883) 77 Mo. 463. This was a guardian's bond, but the form used was that required by Tennessee, that before any nonresident guardian could remove the estate into another jurisdiction, his bond should be conditioned as required by the laws of the guardian's domicile, but also conditioned, "to account for and pay over to the minor, according to the law of his domicile, the money received in Tennessee."

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### c. Appeal and error.

A bond to prosecute the appeal "with" effect, instead of "to" effect, was held not invalid. *Laird v. Frieberg* (1883) 2 Tex. App. Civ. Cas. (Willson) 99; *Horton v. McKeehan Bros.* (1883) 1 Tex. App. Civ. Cas. (White & W.) 216.

And a bond that appellant shall prosecute his appeal to effect "or" shall pay, instead of "and" shall pay was held valid. *Sullivan v. McFarland* (1881) 1 Tex. App. Civ. Cas. (White & W.) 684; *Robinson v. Brinson* (1857) 20 Tex. 438; *Mills v. Hackett* (1882) 1 Tex. App. Civ. Cas. (White & W.) 487.

A bond on appeal from a justice's court was conditioned that appellants "shall prosecute their appeal with effect and shall pay all the costs which have accrued in this court, together with that which may accrue in the county court, should they be cast in this suit." It was held to be sufficient. *Moore v. Alston* (1890) 4 Tex. App. Civ. Cas. (Willson) 290, 15 S. W. 47. Texas Rev. Stat. art. 1639, provided "that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." The only judgment that could be rendered in the county court on appeal from the dismissal of the action would be a judgment for costs, and the bond covers that. But under this statute a bond on appeal from a justice's court conditioned that appellant "shall prosecute his appeal with effect, and shall pay all the costs which may have accrued in the court below, or which may accrue in the appellate court," was held insufficient. *Allison v. Gregory* (1890) 4 Tex. App. Civ. Cas. (Willson) 97, 15 S. W. 416.

In addition to the conditions of an appeal bond the words, "and will pay off and satisfy all costs that have accrued in the court below together with all costs in the county court," were held to neither add to nor take from the bond any obligation which would exist, had they not been inserted. *Jordan v. Moore* (1886) 65 Tex. 363.

And where the condition of an appeal bond substantially complied with the statute, although it did not follow the terms, it was held to be a good bond. *Gardener v. Woodyear* (1821) 1 Ohio, 170. This bond followed the terms required by the earlier statutes, and was construed to subject the obligors to the same liability.

And a substantial compliance with the statutory conditions in an appeal bond

was held to be sufficient. *Creighton v. Harden* (1859) 10 Ohio St. 579.

An appeal bond read, "shall prosecute her appeal with due diligence to a final determination, and pay all costs adjudged against her in the district court." It was held that this bond substantially covered the provisions of the statute. *Riley v. Mitchell* (1887) 38 Minn. 9, 35 N. W. 472. The statute read "with effect," and "costs" was considered synonymous with "damages."

And an appeal bond conditioned, to prosecute the appeal with effect and abide the order of the court therein, was held to be a valid bond. *Anderson v. Meeker County* (1891) 46 Minn. 237, 48 N. W. 1022. Laws 1887, chap. 97, § 11, provide that appellant "will duly prosecute such appeal and pay all costs that may be adjudged against him in the district court." This bond evidently was given under Gen. Stat. 1878, chap. 65, § 114, which provided for appeal from a justice.

1 Kentucky Dig. Stat. Laws, 381, provided for an appeal bond "for the due prosecution of the appeal." A bond so provided, and also provided, "or on their failure to do so, shall pay to the said Moore the amount of the judgment aforesaid, and all damages and costs which may be adjudged against them in consequence of said appeal." This was held to be a valid bond. *Moore v. Gorin* (1822) 2 Litt. (Ky.) 186.

A defendant in the police court executed a recognizance on appeal containing conditions prescribed by the statute which were more onerous than could under the Constitution be required, and he was discharged; it was held error to dismiss the appeal on the application of the city, because of the added conditions. *Kansas City v. Hescher* (1896) 4 Kan. App. 782, 46 Pac. 1005.

The statutory recognizance provided was, We acknowledge ourselves bound to the state of Indiana in the sum of — dollars each, if the said A B—shall not appear at the first day of the next term of (here specify the court), to answer a charge of (here state the offense) at the county of — and state of Indiana, and abide the judgment of such court. A bond on appeal to prosecute with effect and pay the judgment that shall be rendered against him on appeal was held valid where the appeal was from a fine. *Vierling v. State* (1870) 33 Ind. 218.

An appeal bond was for "all costs that have or shall accrue in said suit." The use of "or" instead of "and" was held not L.R.A.1917B.

to invalidate the bond. *McCall v. Trevor* (1837) 4 Blackf. (Ind.) 496.

An appeal bond conditioned for "the eventual condemnation money in said case," instead of "such further costs as may accrue by the reason of such appeal," was held not void. *Maloy v. Maloy* (1908) 131 Ga. 579, 62 S. E. 991.

An appeal bond was conditioned "that the said appeal shall be prosecuted with effect and that any judgment which shall be rendered against the said defendant or his executors or administrators upon said judgment shall be satisfied." The bond was held valid although it should have read, "and that any judgment rendered against the said David Miller, his executors or administrators, upon said appeal, shall be satisfied." *Miller v. Holding* (1877) 5 Houst. (Del.) 494.

And where a writ of error bond contained conditions not in the statute, but giving the details of the conditions to be performed more minutely, it was held that the conditions were substantially to the effect of those required by statute. *Sanders v. Rives* (1830) 3 Stew. (Ala.) 109. The court said that if conditions were imposed not binding, "in such a case, it would seem, that the bond would be valid, so far as the conditions correspond with the law, and that those which are superadded should be treated as surplusage."

Appeal, see *Banks v. McDowel* (1860) 1 Coldw. (Tenn.) 84, note, I. b; *Patterson v. Gordon* (1875) 3 Tenn. Ch. 18, note, I. b; *Hutchinson v. Fulghum* (1871) 4 Heisk. (Tenn.) 550, note I. b.

#### *d. Attachment and forthcoming bonds.*

An attachment bond contained a provision not required by statute, "should prosecute said attachment with effect at the court" to which it is returnable. This was held to be in effect a bond in conformity with statute. *Kahn v. Herman* (1847) 3 Ga. 266.

Hill's Anno. Laws (Or.) 1892), § 160, provides for a discharge of an attachment on the execution of a bond "to pay to the plaintiff the amount of the judgment that may be recovered against the defendant." A bond provided that the defendant would, on demand, pay the judgment, if one was recovered in the action. This was held to be substantially in accord with the statute. *Ebner v. Heid* (1903) 60 C. C. A. 370, 125 Fed. 680.

A forthcoming bond in attachment was conditioned, "shall produce said goods in satisfaction of the judgment or pay such

judgment." Iowa Code, § 1896, provided for a bond conditioned that such property or its value shall be delivered to the sheriff to satisfy any judgment which may be obtained. It was held that the condition inserted was no substantial departure from that of the statutory bond. *Sheppard v. Collins* (1861) 12 Iowa, 570.

A bond required by the statute was "to pay such judgment as shall be rendered." A bond was given to pay the judgment or to "have forthcoming, and well and truly deliver, said steamboat to answer such decree, sentence, and judgment as may be rendered against her." It was held that the bond was valid. *Murphy v. Roberts* (1857) 30 Ala. 232.

A forthcoming bond in attachment provided, in addition to the statutory form, that the obligors may substantiate their claim to the property. This was held valid. *Purcell v. Steele* (1850) 12 Ill. 93. The court said: "But the insertion of the clause does not vitiate the bond, or change its legal effect."

And where the condition of a bond given to a sheriff for the forthcoming of property levied on was to pay the amount of the execution, instead of the value of the property, it was held that the obligors were bound. *Slutter v. Kirkendall* (1882) 100 Pa. 367. The court said: "The obligors appear to have voluntarily assumed a stronger obligation, and they are bound thereby."

#### *e. Auctioneers' bonds.*

Louisiana Act, Feb. 16, 1825, p. 130, §§ 1, 4, provides for an auctioneer's bond conditioned for the faithful performance of his duty as auctioneer, towards all persons who shall employ him as such, and also for the payment of duties on articles sold. A bond "that he shall well and truly observe and discharge the duties of his office according to law" was held to differ from the statutory conditions, and if it were to rest solely on the statutory provisions would be considered void. It was not taken by a judge. But it was held that the bond was good and valid in law, as the act did not prohibit taking a bond different from the one required by its provisions. *Claiborne v. Debon* (1814) 3 Mart. (La.) 565.

And where the bond uses words of the legal import as the statute, it will be held binding. *Tripp v. Barton* (1880) 13 B. L. 130. The bond read, "well and faithfully perform all the duties of said office." The statutory provision was, "faithfully to execute the duties of his office according to law, to pay all moneys

received by him for goods sold at auction to the owners thereof."

#### *f. Bail and recognizance.*

A recognizance was held binding where the condition was to abide the judgment of "the appellate court" instead of the court of appeals, there being no court known as the appellate court. *Allen v. State* (1876) 1 Tex. App. 514. This court is called the appellate court in Tex. Const. art. 5, § 11, and the words were held to mean the same.

And a recognizance used the word "or" instead of "and" (or perform the judgment). Such use was held not to invalidate the bond. *Robinson v. Brinson* (1857) 20 Tex. 438.

And a recognizance omitting the word "next" (term) was held valid. Persons entering into such obligations were presumed to do so with knowledge of the statute relating to courts and the commencement of terms. *Proseck v. State* (1883) 38 Ohio St. 606.

New Jersey Rev. Laws 1799, 426, provided that a prisoner in a civil action shall give bond "that he will keep within the said bounds." A bond "and not walk out or depart the same until he be discharged by due course of law" was held good. *Smith v. Allen* (1830) 1 N. J. Eq. 43, 21 Am. Dec. 33.

And the failure to specify the date in a recognizance for examination of a poor debtor was held not to avoid the same. *Gilmore v. Edmunds* (1863) 7 Allen (Mass.) 360. The court said: "It is not necessary that the time fixed for the debtor's examination should be stated in the recognizance. That is a fact within his own knowledge."

#### *g. Bastardy bonds.*

A bastardy bond having a condition to "educate" the child was held valid, and more onerous than required. *Hellings v. Bucks County* (1850) 15 Pa. 409.

A bastardy bond provided, "shall personally be and appear before the said circuit court, held as aforesaid, on the first day thereof, and from day to day thereafter until discharged by order of said circuit court, then and there to answer to the people of the state of Illinois on said charge of bastardy aforesaid, and abide the order and judgment of said circuit court." The statute provided, "to appear at the next circuit court, to be holden for said county, to answer to such charge." It was held that the bond was valid. *Erlinger v. People* (1865) 36 Ill. 458.

New Jersey Rev. p. 72, § 12, requires a

bastardy bond to indemnify townships against costs and expenses for support of the child. The provision in a bond for costs of education was held to be included in "expenses" and "support." *State v. Such* (1891) 53 N. J. L. 351, 21 Atl. 852.

A bastardy bond was held not void because of a superadded condition, and shall "indemnify the city of New York, and every other town, county, or city which may have incurred any expense, or may be put to any expense, for the support" "during her confinement and recovery therefrom." The bond followed the statute, although the child had been born some years prior to the bond. *People v. Mitchell* (1851) 4 Sandf. (N. Y.) 466.

#### *h. Collectors', treasurers', and cashiers' bonds.*

The insertion in a treasurer's bond made May 12, of the words, "from and after the 11th day of May, 1885," in the condition, was held not to affect the liability of the sureties, and the obligation was held to be the same as though such words had been omitted. They would be liable for all money received by the treasurer after May 11th. *Kempner v. Galveston County* (1889) 73 Tex. 216, 11 S. W. 188.

And where the condition of a county treasurer's bond limited the accountability of the officer to moneys receivable by him before a particular day, it was held that a variance between a statutory bond and the statute would be fatal only when the condition imposed a greater burden than the law allowed. *Com. v. Laub* (1841) 1 Watts & S. (Pa.) 261.

*Philadelphia v. Shallcross* (1880) 14 Phila. (Pa.) 135. The statute required a bond of a tax receiver in \$10,000, and did not provide for any liability beyond the term. A bond provided for any subsequent term. It was held that the obligation could be enforced to the full extent of its terms, where the intention to assume was plain.

2 New York Rev. Laws, 139, § 5, required a bond, "that he shall well and faithfully execute the office of treasurer of such county, and pay all moneys which shall come to his hands as treasurer according to law, and render a just and true account thereof to the said supervisors, or to the comptroller of the state, when required." A bond to "well, truly, and faithfully execute and perform the duties of said county treasurer according to law," was held good. *Allegany County v. Van Campen* (1829) 3 Wend. L.R.A.1917B.

(N. Y.) 48. This act was not like the sheriff's act, prohibiting a bond in any other form.

The statute required a bond from the state treasurer in the sum of \$100,000. He voluntarily gave bond for \$102,500. It was held that the bond was valid. *State v. Rhoades* (1870) 6 Nev. 352.

In *Clay County v. Simonsen* (1877) 1 Dak. 403, 46 N. W. 592, the statute authorized the board to require the probate judge to give bond in the sum of \$4,000. The judge was ex officio county treasurer. It was held that when a bond of \$8,000 was taken, it was valid under the statute authorizing the board to require an additional bond from the county treasurer.

And where a county treasurer was required to give a bond in the sum of \$60,000, and gave a bond in the sum of \$65,000 it was held to be a good bond and a sufficient compliance with the order. *Re Read* (1879) 34 Ark. 239.

A collector's bond contained a provision in addition to that of the statute, "that the obligors shall not be liable, if each and every deputy appointed by the collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law." It was held that such provision was justified, considering the duties of the collector, and the provision did not vitiate the bond. *Chadwick v. United States* (1880) 3 Fed. 750.

Maine Rev. Stat. chap. 77, § 24, provides that cashiers, before they enter upon the duties of their office, shall give bond conditioned for the faithful performance of the duties of the office. It was held that a bond covering past receipts as well as future property was binding because voluntarily given. *Franklin Bank v. Cooper* (1853) 36 Me. 179.

#### *i. Constables' and sheriffs' bonds.*

A constable's bond was conditioned: "of all the duties enjoined upon him as constable, agreeable to law." N. J. act constituting courts for the trial of small causes, § 52, required the bond to be for the true and faithful performance of all the duties enjoined upon him by that act. It was held to be a voluntary bond and valid. *Woolwich v. Forrest* (1806) 2 N. J. L. 115.

A sheriff's bond was given for \$10,000, when the statute require a bond for \$5,000. The *Stevens v. Treasurers* (1822) 2 M'Cord L. (S. C.) 107. The court said: "When we reflect that the bond and security, the approval, the cer-

tificate and recording, are all proved and done by the sheriff after his election, and before he shall enter upon his office; that these are all acts required strictly of him in order to insure his fidelity, we cannot but foresee the great danger of permitting him or his security deriving advantage from any error or omission, either in the bond or in the manner of giving or recording it."

In *Young v. State* (1834) 7 Gill. & J. (Md.) 253, it was said: "The commencement of the condition of the bond provides 'that if the above bounden Thomas Bruce, as sheriff of Prince George's county, do and shall well and faithfully execute the same office in all things appertaining thereto.' Under this provision, we think the sheriff is bound to the discharge of every duty which the omitted words, if inserted in the condition of the bond, would have imposed upon him."

#### *J. Contractors' bonds.*

A city authorized to contract for public work was held to have the power to require from the contractor a bond to protect materialmen and laborers.

And a city authorized to contract for improvement of streets was held to have the implied power to require a bond conditioned to pay for labor and material. *St. Louis use of Glencoe Lime & Cement Co. v. Von Phul* (1896) 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843. This case overrules *Kansas City Sewer Pipe Co. v. Thompson* (1894) 120 Mo. 221, 25 S. W. 522.

And a bond given a railroad to protect materialmen under Kan. Laws 1872, chap. 136, containing a stipulation to save the company harmless from all damages, which condition was not in the statute, was held valid. *Atchison T. & S. F. R. Co. v. Cuthbert* (1875) 14 Kan. 212. The court said: "There is nothing in this inconsistent or in conflict with the other conditions; nothing limiting, restricting or in anywise modifying or affecting the obligations assumed by those conditions, so far, at least, as those dealing with the contractors are concerned."

A contractor building a schoolhouse gave a bond to pay all materialmen. The statute required a bond to be given, but did not prescribe the conditions. It was held to be valid. *Baker v. Bryan* (1884) 64 Iowa, 561, 21 N. W. 83. It was said: "It therefore cannot be doubted that the law . . . intended that covenants to pay the claims of subcontractors, which would protect the in-

terest of the district, could be incorporated therein."

And a provision in a contractor's bond to secure materialmen was held not to invalidate the bond, although this condition was not imposed by statute. *Williams v. Markland* (1896) 15 Ind. App. 669, 44 N. E. 562. The court said: "The taking of such an obligation, under the circumstances under which this was given, is within the scope of the ordinary administrative duties of the trustee, although he may not be by law absolutely required so to do."

*Burns's Anno. Stat. (Ind.)* 1908, § 7723, provided that a road contractor shall submit his bond, conditioned for the faithful performance of the work. It was held that a bond conditioned, "shall promptly pay all debts incurred by them in the prosecution of said work, including labor, material, and board," was valid, although this condition was not in the statute. *Title Guaranty & S. Co. v. State* (1915) — Ind. App. —, 109 N. E. 237 (Rehearing denied in (1916) — Ind. App. —, 111 N. E. 19). This was on the ground that county boards had the power to insert such a provision.

In *Philadelphia use of Webster v. Harry C. Nichols Co.* (1906) 214 Pa. 265, 63 Atl. 886, which was an action on a bond to enforce a lien for labor and material, it was said: "The bond having been voluntarily given, it may be enforced according to its terms, although it exceeds the requirements of the ordinance."

In an action on a contractor's bond to secure debts incurred in a public improvement, it was held that the fact that the bonds in connection with the contracts were farther reaching than the strict statutory conditions of such bonds did not render them void. *Puget Sound State Bank v. Gallucci* (1914) 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767. The court said: "The law seems to be well settled that bonds of this nature may be required by, and given to, a public corporation in excess of or without any statutory authority, and the beneficiaries thereunder be none the less entitled to recover thereon."

In *Hines v. Consolidated Coal & Lime Co.* (1902) 29 Ind. App. 563, 64 N. E. 886, it was said: "With or without special statutory authority, the city could thus effectively make provision for the security of those who, by their labor done or materials furnished by them, aided the contractors, and through them, the city, in the making of an improvement beneficial to the public."



*k. Injunction bonds.*

An injunction bond to pay all damages, "if said injunction is finally dissolved," was held binding, although not in statutory form. *Barrett v. Bowers* (1895) 87 Me. 185, 32 Atl. 871, Me. Rev. Stat. chap. 77, § 32, provides for a bond "to pay all damages and costs caused thereby, if he is finally not entitled to such injunction, unless a single justice, on motion to dissolve the same, and hearing on the merits thereof, refuses to dissolve it."

Kentucky Act 1796 (1 Stat. Law, 809), providing for injunctions to stay a suit at law, required a bond "for paying all money and tobacco and costs due or to become due" in the action at law. A bond with a condition to pay the sum of \$110, with costs and interest or damages, and to abide by and perform the decree, was held valid. *Johnson v. Vaughan* (1848) 9 B. Mon. (Ky.) 217. The court said: "That the insertion of damages in the condition, even if it had been 'and damages' instead of 'or damages' is wholly inoperative to impose any obligation, because there can be no damages, and the declaration lays no foundation for claiming them."

*l. Liquor bonds.*

A liquor bond provided, "shall pay all damages, fines, costs, and penalties." The act provided, "shall pay all fines and forfeitures." It was held to be a good bond under this act, but did not relate to judgments for penalties under the Act of 1855, as the Act of 1872, under which it was given, limits proceedings on the bond to violations of the Act of 1872 and its supplements. *Crawley v. Com.* (1889) 123 Pa. 275, 16 Atl. 416.

A liquor license required one bond for \$2,000 and one bond for \$500. It was held that a single bond for \$2,500 would be enforced. *Greene County use of Sims v. Wilhite* (1888) 29 Mo. App. 459. It was said: "It has been the tendency of the decisions in this state to uphold bonds as statutory bonds even when they departed from the terms of the statute, provided no substantial rights of the obligors were violated, and no burden imposed upon them in excess of the obligation required by law."

And a liquor bond providing, "shall not violate any of the provisions of said laws," was held valid under a statute requiring a bond conditioned that the obligor "will not violate any of the provisions of this act." *Providence v. Bligh* (1872) 10 B. L. 208. The condition was L.R.A.1917B.

construed with reference to the laws under which the board of aldermen were acting, "those laws relating to the subject."

*m. Replevin bonds.*

A replevin bond reading, "shall prosecute his said replevin to final judgment, and recover the said goods on final judgment, then this obligation to be null and void," was held binding. The statute provided, "that the plaintiff in replevin prosecute, and also make return and pay the damages, if judgment be against him." *Morse v. Hodsdon* (1809) 5 Mass. 314. In this case the court said: "True it is that the condition in this case is variant from the form there directed; but that statute does not prohibit the taking a bond of any other form, or declare a bond of any other form void."

A replevin bond was conditioned for an appearance at the next county court (describing the court of common pleas). It was held that the words "county court" were intended to mean the "court of common pleas." *Arnold v. Allen* (1811) 8 Mass. 147.

Kirby's Dig. (Ark.) § 6863, prescribed a bond containing the following condition: "shall perform the judgment of the court." A bond in replevin provided, "shall abide the order and judgment of the court." It was held to contain all the conditions sufficient to meet the requirements of the statutory bond. *O'Brien v. Alford* (1914) 114 Ark. 257, 169 S. W. 774.

*n. Other bonds.*

By an act granting a lottery, a bond for the drawing and application of proceeds was required. The bond given contained a further provision that prizes would be paid. It was held that the bond was intended only for the security of the state, to insure the drawing and application of proceeds as intended. *Boswell v. Lainhart* (1831) 2 La. 397.

A bond, the penalty of which was more than double the amount of the judgment, was held valid. *Smith v. Whitaker* (1849) 11 Ill. 417. The statute provides, in the form for such a bond, "here insert double the amount of the judgment and costs."

A bond more favorable to the defendant than the statute required was held enforceable. *Smith v. Norval* (1849) 2 N. Y. Code Rep. 14. This was a bond as security for costs.

Courts of sessions were held to be the same as courts of general sessions of

the peace. *People v. Hawkins* (1850) 3 N. Y. Code Rep. 42.

### VIII. Common-law bonds.

In some cases where the bond is not sufficient to enforce statutory remedies, by reason of the conditions in the bond differing from those set out in the statute, it is held that the bond will be sustained as a common-law obligation unless the statute is so prohibitory as to render the bond void.

A guardian's bond was given in joint form instead of a separate form for each minor, and it was an obligation in a crude, awkward, and inefficient mode, particularizing the duties to be performed. It was held that the deviation from the statute did not impose any additional duty, and the bond was valid. *Ordinary v. Heishon* (1880) 42 N. J. L. 15. The court said: "The strong leaning of the courts has been to hold such instruments valid, to the full extent of their terms, so far as they embody the statutory policy, as voluntary obligations."

And where the statute required a bond on supersedeas "conditioned to pay and satisfy to the said plaintiff or plaintiffs, the sum . . . in case the supersedeas shall be set aside or annulled," and the bond was conditioned, "shall well and truly pay and satisfy such judgment as shall be rendered by the county court," it was held to be a good common-law obligation, as the defendants have been delayed. *Hester v. Keith* (1840) 1 Ala. 316.

An appeal bond in a suit for possession of land did not comply with statutory requirements because the judge did not impose conditions. It was held to be a good common-law obligation, and founded on a valuable consideration, and rendered the obligors liable for rent. *Miller v. Vaughan* (1884) 78 Ala. 323. The bond provided for "whatever damages" should be caused by the appeal.

New York Code Civ. Proc. § 1326, provided that the appeal bond should obligate appellant to "pay all costs and damages against him on the appeal, not exceeding \$500." A bond provided that appellant will pay all damages, and, if the case is affirmed or dismissed, will pay the sum directed by the judgment of special term that he pay the notes held by the defendant, which were declared by special term to be cash notes, not exceeding \$3,500. It was held to be a good common-law bond. *Gein v. Little* (1904) 43 Misc. 421, 89 N. Y. Supp. 488, L.R.A.1917B.

affirmed in (1905) 102 App. Div. 614, 92 N. Y. Supp. 1125.

And a bond reading, "should well and faithfully perform all the duties as such assignee, and pay such damages as may accrue from his failure to do so," was held to be a good common-law bond. *Andrews v. Ford* (1894) 106 Ala. 173, 17 So. 446. The statute required a bond "for the faithful administration of the trust." This bond was made in advance of an order of court, and was payable to the corporation instead of to the register.

A bond given by an executrix contained conditions not required by statute. It was held that the statute authorizing an action by a judge of probate on bonds given to his predecessor applied only to bonds with statutory provisions. *Cleaves v. Dockray* (1877) 67 Me. 118. The court said: "It imposes burdens upon the executrix more onerous than the statute provides, and if the additional matter is rejected as surplusage, there is not enough left to meet the requirements of the statute. The bond, therefore, cannot be enforced as a statute bond;" it might be enforced as a common-law bond.

In *State v. Bartlett* (1855) 30 Miss. 624, it was said: "That if there was any statutory provision, requiring such bond to be given as a condition precedent to entering upon the discharge of the duties of the office, and in the execution of the bond there had been some departure from the statute, or failure to comply with its provisions, the bond might be sustained as a valid common-law obligation, because the giving of it was a condition precedent to taking possession of the office."

A sheriff's bond in a penalty in excess of that required by law was held binding as a common-law bond. But one judgment thereon was held to extinguish the same. *Branch v. Elliot* (1831) 14 N. C. (3 Dev. L.) 86.

And a sheriff was held to be liable on his bond, though not by a summary remedy, where the bond was in a penalty greater than that required by law. *State Bank v. Twitty* (1822) 9 N. C. (2 Hawks) 5; *The Governor v. Matlock* (1823) 9 N. C. (2 Hawks) 366; *The Governor v. Witherspoon* (1824) 10 N. C. (3 Hawks) 42.

And where an officer's bond was voluntarily executed by a guaranty company, and contained conditions not in the statute, it was held to be a good common-law bond, and the surety would be liable according to his undertaking.

United States Fidelity & G. Co. v. Rainey (1908) 120 Tenn. 357, 113 S. W. 397. The court said: "The bond executed by Rainey was voluntarily executed upon sufficient consideration, and is clearly enforceable as a common-law bond, to the full amount of the penalty prescribed."

Conceding that a county clerk's bond was not good as a statutory bond, it was held to be voluntary and good as a common-law bond, and the parties bound by all its conditions. *State ex rel. Lafayette County v. O'Gorman* (1882) 75 Mo. 370.

Alabama Code 1886, § 3341, provides that when personal property attached is replevied, the bond shall read, "must be delivered to the constable within ten days after judgment against the defendant unless an appeal should be prosecuted." A bond was given to return the attached property to the constable within twenty days after judgment in the attachment suit. It was held that this was a material variance, and the bond was not a good statutory bond, but was a good common-law bond. *Cobb v. Thompson* (1888) 87 Ala. 381, 6 So. 373.

A forthcoming attachment bond provided, "shall be produced and delivered subject to the judgment of said court, when and where the court shall direct." Mo. Act Feb. 6, 1837, provided, "shall be forthcoming, in good order and condition, when and where the court shall direct, and shall abide the judgment of the court." It was held to be a good bond at common law. *Grant v. Brotherton* (1842) 7 Mo. 458.

And a replevin bond given by a defendant in attachment, containing conditions more onerous than the statutory bond, was held to be a good common-law bond. It was held invalid as a statutory bond, as it required payment of the value of the goods in money, \$1,045, if the property was not forthcoming, when the judgment was for only \$606.74. *Colorado City Nat. Bank v. Lester* (1889) 73 Tex. 542, 11 S. W. 626.

A bond was taken from the sheriff in a penalty exceeding that required by statute. Without deciding whether the bond was good as a statutory bond or not, it was held that an action at common law could be maintained upon it. *Johnson v. Gwathney* (1810) 2 Bibb. (Ky.) 186, 4 Am. Dec. 694.

A forthcoming bond fixing the day of sale at a wrong date was held not to be a good statutory bond, but it was held valid as a common-law bond. *Adler v. Green* (1881) 18 W. Va. 201. L.R.A.1917B.

And a substantial variance in form was held not to render void as a statutory obligation a bond to deliver goods for execution. It was held to be good at common law. *Claassen v. Shaw* (1836) 5 Watts. (Pa.) 468, 30 Am. Dec. 338.

And where the statute required a nine-months bond, and one was given for six months, it was held not to be a statute bond, but to be good at common law. *Hathaway v. Crosby* (1840) 17 Me. 448.

A bond to obtain discharge from arrest contained a condition to "pay any judgment that might be recovered." This was not in the statute. The bond was held to be a good common-law obligation. It was further held that a surrender to the sheriff would be no exoneration. *Paddock v. Hume* (1876) 6 Or. 82.

A bond to enjoin a judgment provided that it should be void on the judgment being set aside, or be valid and have full effect in case "the court should award the judgment for the whole amount or more, and confirm the former judgment." By the statute the obligors should covenant that, on the dissolution of the injunction, they will pay the sum complained of and all costs. It was held that a summary judgment could not be rendered against the sureties, but a judgment could be rendered against the principal. *Janes v. Reynolds* (1847) 2 Tex. 250.

An undertaking given on appeal was in the form to stay an execution on a money judgment. It was treated by both sides as a valid bond. It was held to be on a good consideration and valid as a common-law obligation. *Goodwin v. Bunzl* (1886) 102 N. Y. 224, 6 N. E. 399.

And an undertaking given under the wrong section of the statute, whereby a stay of proceedings was had pending an appeal, was held to be binding as a common-law obligation. *Ryan v. Webb* (1886) 39 Hun (N. Y.) 435.

In *Bank of Northern Liberties v. Cresson* (1825) 12 Serg. & R. (Pa.) 306, it was said: "The inclination of my mind is, that where a statute gives a particular form, makes it the duty of officers to take a bond in that form, and there is another form which is to produce the same effect, this changes not the obligation required, though it differ in circumstances, in sum, in the number of sureties, and the nature of the security, and there is no provision in the act declaring it to be void unless the prescribed form is pursued. It is a valid obligation at the common law." Common law,

see: *United States v. Brown* (1830) Gilpin, 155, Fed. Cas. No. 14,663, 1. a; *Ware v. Jackson* (1844) 24 Me. 166, 1. e; *Edwards v. Pomeroy* (1885) 8 Colo. 254, 6 Pac. 829, VI.

See *Kuhl v. Chamberlain*, 21 L.R.A. (N.S.) 766, note, "May a bond of a public official, intended as a statutory bond, but not binding as such, be enforced as a common-law bond."

See *Denver v. Hindry*, 11 L.R.A. (N.S.) 1028, note, "Implied power to incorporate in contract for public work,

or in contractor's bond, a requirement that the contractor shall pay laborers and materialmen."

See *Smith v. Bowman*, 9 L.R.A. (N.S.) 889, note, "Liability of sureties on contractor's bonds to laborers or materialmen not entitled to a lien, when bond conditioned against liens or claims."

Bonds to wrong payee, bonds for less than statutory requirement, are not intended to be included in this note.

I. T.

# UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

TOWN OF NEWBERN et al., Plffs. in Err.,  
v.

NATIONAL BANK OF BARNESVILLE,  
OHIO.

(234 Fed. 209.)

Courts — state decision — effect in Federal court.

1. Upon the question whether or not municipal bonds are invalid in the hands of bona fide holders because of a mistake as to the proper official to hold the election authorizing them, the Federal courts are

Note. — The questions of state law as to which the decisions of the highest state court must be followed in actions originating in, or removed to, the Federal courts, are treated generally in the note to *Snare & T. Co. v. Friedman*, 40 L.R.A. (N.S.) 380; and see generally pages 407 et seq., as to questions relating to municipal or county bonds.

The question as to the estoppel of a public corporation to deny the validity of bonds is discussed in the note appended to *Aurora v. Gates*, L.R.A.1915A, 916; and the question as to the ratification by a public corporation of an invalid contract, in the note appended to *Weil v. Newbern*, L.R.A.1915A, 1023; and in a note in the same volume, page 990, appended to *First Nat. Bank v. Emmetsburg*, the question is dealt with as to the estoppel of a public corporation to deny the validity of a contract. Upon the general question as to the rights and remedies where contracts, bonds, or other instruments of a public corporation are invalid, see note in the same volume, page 904, appended to *Hagerman v. Hagerman*.

In the note appended to *Aurora v. Gates*, it is stated that "in order that the general rule of estoppel of public corporations by recital shall apply, not only must the holder of the bonds be a purchaser without actual or constructive notice of the untruthfulness of the recitals, but the recitals must relate to facts with reference to which the officers making them are expressly or impliedly authorized to pass upon. There L.R.A.1917B.

not bound by a decision of the state court rendered after the bonds passed into the hands of such holders.

For other cases, see *Courts, V. f, in Dig. 1-52 N. S.*

Bonds — municipal — duty of purchaser to consult ordinances.

2. Purchasers of municipal bonds signed by the mayor and clerk under the corporate seal, which recite that they are issued in accordance with a certain ordinance from which the mayor and clerk derived their authority to sign them, whereas the statute authorizes their issuance by the mayor and aldermen, are not bound to consult the ordinance to ascertain the authority of the mayor and clerk so as to be charged with

must be authority vested in the officers issuing the bonds to determine each fact necessary to the existence of the power, whether enumerated or not, and to guarantee to those dealing with them the truth and conclusiveness of their admission." p. 938.

While this doctrine is sustained in *Weil v. Newbern*, it is not departed from in *NEWBERN v. NATIONAL BANK*. The point of cleavage between these two cases, one of which holds the municipality estopped, and the other that it is not estopped, to assert the invalidity of the bonds, is as to the effect of an ordinance delegating power to the mayor to sign the bonds as notice of the fact therein disclosed that the election authorizing the bonds had not been held according to law. The state court held on this point that since the authority of the mayor to issue the bonds depended upon an ordinance, a purchaser was obliged to have recourse to this ordinance, and hence he was chargeable with knowledge of the fact therein disclosed that the election had not been held in the manner required by law. The Federal court, on the other hand, held that a bona fide purchaser without actual notice of this defect in the bond was not chargeable with knowledge of the facts disclosed by the ordinance, and that the municipality was estopped by the recitals contained in the bonds to the effect that the election was properly held.

A. G. S.

a recital therein showing that the election by which their issuance was authorized was held by an unauthorized official.

*For other cases, see Bonds, III. b, 5, in Dig. 1-52 N. S.*

**Same — change of prescribed form — effect.**

3. The addition to the form fixed by ordinance for municipal bonds, of a statement of the bank at which they will be paid, and of a recital that they do not exceed the debt limit of the municipality and that provision has been made for the levying of a tax to pay them, is not such a material change as to destroy their validity.

*For other cases, see Bonds, III. b, 4, in Dig. 1-52 N. S.*

**Same — want of delivery — effect.**

4. Lack of authority for the delivery of the bonds of a municipal corporation to persons who subsequently place them on the market is no defense to their enforcement under the provisions of the negotiable instrument act that in the hands of a bona fide holder valid delivery by all prior parties is conclusively presumed.

*For other cases, see Bonds, III. b, 8, in Dig. 1-52 N. S.*

**Estoppel — to deny validity of bond.**

5. A municipal corporation is estopped to deny the recitals of its bonds issued under its seal and signed by its mayor and clerk.

*For other cases, see Bonds, III. b, 6, in Dig. 1-52 N. S.*

(June 30, 1916.)

**E**RROR to the District Court of the United States for the Western District of Tennessee, McCall, District Judge, to review a judgment in plaintiff's favor in an action brought to recover interest alleged to have accrued on certain bonds of the defendant town. Affirmed.

Statement by Warrington, Circuit Judge:

The suit below was to recover judgment for interest alleged to have accrued on certain bonds of the town of Newbern, a municipal corporation located in Dyer county, Tennessee. The town was empowered in 1907 to issue \$50,000 of coupon bonds for municipal improvements, as follows, \$25,000 par value to erect and furnish school buildings, \$10,000 to improve and extend water and light system, and \$15,000 to improve streets. The bonds are all outstanding, and the town received the money arising from the sale of the water and light and street bonds, though it has received no money for the school bonds. The town pays the interest as it accrues on the water, light, and street bonds, but it declines to pay anything on account of school bonds. The interest now sought to be recovered is L.R.A.1917B.

represented by 131 past-due coupons, for \$30 each, which have been cut from certain of the school bonds. The declaration sets out the statute investing the town with power to issue the bonds, alleges the steps taken, including the adoption of certain ordinances by the town, and also the vote of a majority of the qualified voters of the town, authorizing the issue and sale of the bonds, plaintiff's possession as bona fide owner and holder for value of the coupons sued on, which are specifically described by this numbers and by the numbers of the bonds from which they were detached, and prays judgment upon such coupons with interest from their respective dates of maturity. To this declaration the defendants interpose three pleas: (1) That they did not "promise, undertake, or agree in the manner and form as the plaintiff in its declaration has complained;" (2) that they do not "owe the said sums of money demanded, or any part thereof, in manner and form as the plaintiff in its declaration has complained;" (3) that the coupons and writings obligatory mentioned in the declaration are not defendants' "act or deed, . . . and were not executed for or in their behalf by any person authorized to bind them or either of them in the premises," and that they demand a jury to try the issues joined. Upon these pleas plaintiff joined issue. At the close of all the evidence the parties each moved for a peremptory instruction in its favor. The court treated such joint submission as a withdrawal of the case from the jury, and, upon consideration, found all the issues in favor of the plaintiff, distinctly finding that plaintiff is the owner of the coupons "for value in due course," and judgment was accordingly entered for plaintiff. Defendants prosecute error upon twelve assignments, and these assignments are considered in the opinion as far as necessary.

Argued before Warrington and Denison, Circuit Judges, and Cochran, District Judge.

Messrs. John M. Drane and Gates & Martin, for plaintiffs in error:

No general authority or power existed in the mayor and aldermen of Newbern, or in the mayor and the clerk, to execute, issue, and deliver negotiable bonds.

Weil v. Newbern, 126 Tenn. 223, L.R.A. 1915A, 1009, 148 S. W. 680, Ann. Cas. 1913E, 25; Simkins, Fed. Eq. Suit, 229; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 29, 26 L. ed. 61, 67; Norton v. Shelby County, 118 U. S. 425, 30

L. ed. 178, 6 Sup. Ct. Rep. 1121; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 406, 140 Fed. 385, 5 Ann. Cas. 314; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 280; Zeiger v. Pennsylvania R. Co. 86 C. C. A. 69, 158 Fed. 809; Cheatham v. Evans, 87 C. C. A. 576, 160 Fed. 802; Brown v. Grand Rapids Parlor Furniture Co. 22 L.R.A. 817, 7 C. C. A. 225, 16 U. S. App. 221, 58 Fed. 286.

Plaintiff and those who purchased the bonds, even though purchasers thereof in good faith and for value, nevertheless took with notice of the fact that there had been no valid election, which was a condition precedent to the right of the mayor and aldermen to proceed under the statute to issue bonds or of the mayor and clerk to sign same, and, therefore, that the supposed bonds are not valid obligations of the town of Newbern.

Weil v. Newbern, 126 Tenn. 223, L.R.A. 1915A, 1009, 148 S. W. 680, Ann. Cas. 1913E, 25; Rondot v. Rogers Twp. 30 C. C. A. 462, 99 Fed. 202; Andes v. Ely, 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954; Dill. Mun. Corp. § 926; McQuillin, Mun. Corp. § 2288; Coler v. Cleburne, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720; Anthony v. Jasper County, 101 U. S. 693, 25 L. ed. 1005; Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 19 L. ed. 169; Dixon County v. Field, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; Northern Nat. Bank v. Porter Twp. 110 U. S. 608, 28 L. ed. 258, 4 Sup. Ct. Rep. 254; Bernard Twp. v. Morrison, 133 U. S. 523, 527, 528, 33 L. ed. 726, 729, 730, 10 Sup. Ct. Rep. 338; Montclair Twp. v. Ramsdell, 107 U. S. 147, 158, 27 L. ed. 431, 434, 2 Sup. Ct. Rep. 391; Wade, Notice, §§ 308, 309, 313; Guion v. Knapp, 6 Paige, 35, 29 Am. Dec. 741; Stidham v. Matthews, 29 Ark. 650; Baker v. Mather, 25 Mich. 51; Burrus v. Roullhae, 2 Bush, 39; Payne v. Abercrombie, 10 Heisk. 161; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328; Blaisdell v. Stevens, 16 Vt. 179; White v. Foster, 102 Mass. 375; Johnson v. Thweatt, 18 Ala. 741; Boggs v. Varner, 6 Watts & S. 469; French v. Loyal Co. 5 Leigh, 627; Sergeant v. Ingersoll, 15 Pa. 343; Corbitt v. Clenny, 52 Ala. 480; Honore v. Blakewell, 6 B. Mon. 67, 43 Am. Dec. 147; Thornton v. Knox, 6 B. Mon. 74; Deason v. Taylor, 53 Miss. 697; Gress v. L.R.A.1917B.

Evans, 1 Dak. 387, 46 N. W. 1132; Wood v. Krebs, 30 Gratt. 708.

Municipal bonds, signed and sealed by proper authority, but issued and delivered without the authority of the municipality, are void even in the hands of a bona fide holder.

2 Dill. Mun. Corp. § 933; Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S. 390, 29 L. ed. 431, 6 Sup. Ct. Rep. 88; Portsmouth Sav. Bank v. Ashley, 91 Mich. 670, 30 Am. St. Rep. 511, 52 N. W. 74.

The acts of any of the aldermen individually, though such individuals may constitute a majority of the board, are not the act and deed of the corporation.

Bernard v. Lea, 127 C. C. A. 219, 210 Fed. 583; Cook, Corp. 6th ed. 2254; Tradesmen Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 934, 32 S. W. 1097.

In the bond as executed by Harris and Swindler there were material departures from the conditions prescribed in the ordinance of April 19, 1907, which will prevent recovery.

Holmes v. Bank of Ft. Gaines, 120 Ala. 493, 24 So. 959; Fahlman v. Taylor, 75 Ill. 629; Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Horton v. Horton, 71 Iowa, 448, 32 N. W. 452; Charlton v. Reed, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; Diamond Distilleries Co. v. Gott, 137 Ky. 585, 31 L.R.A.(N.S.) 643, 126 S. W. 181; Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239, reversing 18 Johns. 315; Nazro v. Fuller, 24 Wend. 374; Sturges v. Williams, 9 Ohio St. 444, 75 Am. Dec. 473; Simpson v. Stackhouse, 9 Pa. 186, 49 Am. Dec. 554; Southwark Bank v. Gross, 35 Pa. 80; Mitchell v. Reed, 32 Ky. L. Rep. 683, 106 S. W. 833; Melton v. Pensacola Bank & T. Co. 111 C. C. A. 166, 190 Fed. 126.

Ratification of the issuance of the supposed school bonds cannot be implied or inferred from the payment by the town of Newbern of interest on the water and light bonds and street bonds.

Weil v. Newbern, 126 Tenn. 223, L.R.A. 1915A, 1009, 148 S. W. 680, Ann. Cas. 1913E, 25; State v. Knoxville, 115 Tenn. 175, 90 S. W. 289; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Morville v. American Tract Soc. 123 Mass. 129, 25 Am. Rep. 40; Marsh v. Fulton County, 10 Wall. 676, 683, 19 L. ed. 1040, 1042; Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; Daviess County v. Dickinson, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; Norton v.

Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

Mr. William R. Collins for defendant in error.

Warrington, Circuit Judge delivered the opinion of the court:

We are called upon to determine which of two innocent parties shall suffer a material loss, and their rights must depend upon the application of principles which in effect may engender more serious losses than are presently involved; the performance of such a duty is, to say the least, perplexing; and this is emphasized by the fact that our conclusion is not in harmony with that reached by the supreme court of Tennessee concerning interest coupons similar to those in issue here. *Weil v. Newbern*, 126 Tenn. 223, L.R.A.1915A, 1009, 148 S. W. 680, Ann. Cas. 1913E, 25.

What considerations must enter into the question whether the coupons in suit are binding obligations of the town of Newbern? It is manifest that the binding effect of the bonds to which the coupons in dispute belong must be considered, although the bonds themselves are not in suit. Concededly, the statutes incorporating the town in question under the name of "Mayor and Aldermen of Newbern," and enabling the corporation to issue these bonds, are constitutionally valid enactments; and, apart from a question made upon the election at which the electors of Newbern voted upon the issuing of such bonds, the ordinances relating to the issue and sale of the bonds are admittedly valid. The facts that the bonds comprised in the entire authorized issue (\$50,000 par value) are outstanding, that the interest accruing on one half of such issue (though not including the school bonds) is regularly paid by the town, that all the bonds (thirteen in number) with the coupons in suit attached thereto were acquired by the plaintiff bank and others through loans and purchases made before maturity of any of such coupons, in good faith and for value, without notice of any defect in respect either of issue or delivery thereof, and that plaintiff subsequently obtained the rights of these former holders in such of these coupons as it had not previously acquired, are not under the evidence open to substantial denial. The school bonds mentioned each bears date September 1, 1907, and contains a promise "to pay to bearer the sum of 1,000 . . . on the first day of September, A. D. 1927, together with interest on said sum from the date hereof, until paid, at the rate of 6 per centum per annum, payable semiannually on the first days of March and September in each year, upon L.R.A.1917B.

presentation and surrender of the interest coupons hereto attached, as they severally become due. Both principal and interest are payable at the Hanover National Bank, in the city of New York, . . . and for the prompt payment of this bond . . . the full faith, credit, and revenues of said town are hereby irrevocably pledged."

And each bond also contains recitals which state that it "is one of a series of twenty-five bonds, of like date and tenor, aggregating \$25,000 issued by the mayor and aldermen of Newbern for the purpose of erecting and furnishing a school building in and for the town of Newbern, pursuant to and in full compliance with the provisions of an act of the general assembly of the state of Tennessee," giving its title and date, "and as ordered by a vote of a majority of all the qualified voters of the town of Newbern, at an election duly and legally held by order of the board of mayor and aldermen of said town," on a date named, "and under and in accordance with an ordinance duly passed" by that board "at a meeting thereof, duly and regularly called and held" on a named date.

It is also certified and recited: "That all acts, conditions, and things required to be done precedent to and in the issue of this bond have been properly done, happened, and been performed in regular and due form as required by law."

Each bond is signed by the mayor, countersigned by the clerk, and attested by the seal of the town of Newbern, and such execution purports to have been directed by the board of mayor and aldermen.

It is practically admitted that if the bonds had been signed by the mayor and aldermen, the recitals mentioned would have estopped the town of Newbern from denying the validity of either the bonds or coupons. It is insisted, however, that since only the mayor and the clerk signed the bonds, while the mayor and aldermen were the officers authorized to issue them, every purchaser was bound at his peril to examine into the authority of the mayor and clerk to execute the bonds; and that this would have led to the discovery of an infirmity which justifies the pleas of non assumpsit, nil debet, and non est factum, relied on. The mayor and clerk appear to have been empowered by two different ordinances to execute the bonds. The first one was passed April 19, 1907, "to provide for the issuance of \$50,000 in coupon bonds." The third paragraph of the ordinance provides that "the bonds so to be issued shall be signed by the mayor and clerk of said board of mayor and aldermen." The second ordinance was passed August 17, 1907, to fix "the form and date of the \$25,000 school

bonds, \$15,000 street bonds, and \$10,000 water and light bonds." The form of the school bonds and that of the school coupons are set out, and the testament clause of the former is as follows: "In testimony whereof, the said mayor and aldermen of Newbern have caused this bond to be signed by the mayor and countersigned by the clerk of said board of mayor and aldermen, with the corporate seal attached, this third day of September, A. D. 1907."

And the name and official title of the mayor, and similarly of the clerk as countersigning, are printed immediately under the testament clause and also at the end of the form of the coupon. The first of these ordinances, however, is the one containing the provision which it is claimed would inform an intending purchaser, not alone of the authority of the mayor and clerk to execute the bonds, but also of the facts relied on to invalidate the bonds. It is stated in the preamble of that ordinance: "The election heretofore ordered by the mayor and aldermen of Newbern to be held to ascertain the will of the qualified voters of the town of Newbern . . . as to whether or not the mayor and aldermen should issue the fifty thousand dollar (s) in coupon bonds as provided for in the acts of the general assembly . . . passed March 13, 1907 . . . was held on the 16th day of April, and resulted in showing that a majority of all qualified voters in said town favored the issuance of bonds as provided for in said acts of the general assembly, the result of said election having been duly and regularly certified by the sheriff of Dyer county . . . under whose supervision the said election was held. . . ."

It is claimed that the sheriff was not the authorized official to supervise and certify to the result of this election, and that the presence of the names of the mayor and clerk on the bonds put intending purchasers upon inquiry as to the validity alike of the election and the bonds. This view is sustained in *Weil v. Newbern*, supra, 126 Tenn., at pages 257, 265, and indeed it was there held that the statement contained in the ordinance that the election was held by the sheriff "gave plenary information that it was a void election, and that the board of mayor and aldermen of Newbern had no power to issue the bonds. There could therefore be no innocent purchaser or holder of such bonds." This was the result of the court's construction of certain statutes of Tennessee which appear in the record. One was passed February 10, 1897 (Tenn. Acts 1897, p. 131), and its purpose is indicated by its title:

"An Act to Secure Pure Elections by L.R.A.1917B.

Creating Boards of Commissioners of Election in Counties Having a Population of Less Than 50,000 Inhabitants, Computed by the Federal Census of 1890, and any Subsequent Federal Census, and Defining the Duties and Powers Thereof."

While the operation of this statute was limited to a particular class of counties, it is clear that it was applicable to all counties of the state, regardless of the number, falling within the class specified, and so was in that sense a general rather than a special law. Commissioners were to be appointed by the governor for every county, and were to comprise in each county "a board of three persons to be known as the commissioners of election." The commissioners of each county were required "within sixty days prior to every election to be held in their county, and in due time therefor, to appoint three judges for each and every voting place in their county, to superintend the election at the precinct or voting place for which said judges shall be appointed," and also within such time to appoint two clerks of election for each of such voting places. The commissioners were further authorized to appoint "the officer or officers of election at each voting place to the exclusion of the sheriff" theretofore "possessing said power of appointment." Further, "the county courts, mayor, boards of mayor and aldermen, and sheriffs of and in the said counties within the provisions of this act" were "devested of the authority to appoint judges or inspectors and clerks of elections," and all statutes vesting such officials with such power of appointment, which were inconsistent with this provision, were repealed. The officer holding an election was required to deliver the returns to the commissioners, who were to compile the returns at the courthouse, and certify the result and also "to deliver to each person elected a certificate of his election." It is agreed that the census population of Dyer county was at the time now in question less than 50,000.

Now, conceding that this statute, considered alone, would in terms embrace an election, not merely for the selection of local officers, but also for ascertaining the will of the electors concerning any question arising in a political subdivision of any county of the class erected by this statute, still (in view of the Newbern charter subsequently enacted), the concession is not determinative of the question whether the statute was exclusively applicable, or even applicable at all, to the election here in dispute. It was more than four years after that statute was enacted that the town of Newbern was incorporated.



The charter was granted on April 11, 1901, and was entitled, "A bill to Incorporate the Town of Newbern, in Dyer County, and to Define its Powers and Provide for the Election of Officers." (Tenn. Acts 1901, p. 1076), the corporate name being, as we have seen, the "Mayor and Aldermen of Newbern." The act describes the boundaries of the corporation, provides for succession, and invests the corporate body with the usual attributes and powers of a municipality. Section 6 of the act is in material part as follows (id. p. 1081): "Sec. 6, Be it further enacted, that the sheriff of Dyer county, after giving ten days' notice, shall by himself or one of his deputies hold an election in the town of Newbern on the third Tuesday of November, 1901, and said election shall be held for the purpose of electing mayor, aldermen, recorder, marshal, and the mayor, aldermen, recorder, and marshal elected at said time shall serve for two years. And thereafter, on the third Tuesday of November, there shall be an election held for the purpose of electing a mayor, aldermen, recorder, and marshal for said town to serve for the ensuing two years, it being the intention of this act to provide for the election of a mayor, aldermen, recorder, and marshal of said town one in every two years. The polls shall be open at 10 o'clock A. M., and closed at 4 o'clock P. M., of that day. The board of mayor and aldermen may, by ordinance, make any additional provisions that may be found necessary to prepare for and conduct said election, if the sheriff fail to hold said election at the time herein mentioned. It shall be his duty to hold it as soon thereafter as possible, giving the required notice. If there be no sheriff, or if no notice has been posted by him on the tenth day before the regular election, or if notices have been posted by him but he is not present himself or deputy on the day of said election, then, in either of said events, the coroner, or some person who may be appointed by the board of mayor and aldermen, shall perform all the duties in and about said election required of the sheriff, . . . and the officers holding said election shall make out and deliver, within three days, to each a certificate of their election; and the judges and clerks, after being sworn as provided by the election laws of this state, shall perform similar duties of judges and clerks in state and county elections. And after the votes are counted and the results ascertained, the officers holding said election shall file poll lists and other papers showing the results of said election, properly certified, with the recorder, who shall preserve them."

Claim was made in *Weil v. Newbern*, L.R.A.1917B.

supra, that this section conferred upon the sheriff of Dyer county the power to conduct all corporate elections; but it was held (126 Tenn. 250, L.R.A.1915A, 1009, 148 S. W. 680, Ann. Cas. 1913E, 25) that while the section does purport to confer such power, it does so "only in a special and limited way; that is, for the purpose of electing a 'mayor, alderman, recorder, and marshal.'" It would seem that the result of this is to place all elections in which the town of Newbern is alone interested under the control of the sheriff, except such as call for an expression of the town electors upon questions involving their own indebtedness and ultimate taxation, like the issue of municipal bonds, to defray the cost of purely local improvements.

It is insisted both that this construction, and that the conclusion drawn from it that the bonds are void in the hands of bona fide purchasers, are binding upon the Federal courts. It is to be observed that the infirmity thus claimed to inhere in the bonds as a result of such a construction of the statute does not show that the electors did not in truth vote, and favorably, upon the question of issuing the bonds; nor does it show that the election in fact held was not officially supervised and reported under apparent color of law; indeed, the contention is reducible to a claim of mistake made in officials, that is, in having the sheriff instead of the commissioners of election, to supervise the election and report its result. We say the claim is simply one of mistake, because there is not a suggestion of fraud or even unfairness in so obtaining the expression, and the "order," of the voters respecting the issue and use of the bonds. Tenn. Acts 1907, p. 343, § 3.

How far then are the Federal courts bound by the decision in *Weil v. Newbern*? It is observable that the decision in that case was not rendered until after the presently contested bonds with their coupons had passed into the hands of bona fide holders for value, without notice of the defect in the election now asserted; and this court has held with reference to an analogous situation, that "the courts of the United States exercise an independent judgment." *Rondot v. Rogers Twp.* 39 C. C. A. 462, 470, 99 Fed. 202, 210, 211. This was an apparent recognition of one of the settled exceptions to the general rule that the Federal courts accept the interpretation of a state statute by the highest court of the state as settling the validity and meaning of the statute. It is manifest that the exception in that instance proceeded upon the principle that where a contract has been entered into in virtue of a state statute, a Federal court obtaining jurisdiction of a

question concerning the validity, effect, or obligation of the contract, will exercise an independent judgment, although "leaning to an agreement with the state court," where it appears that the decision of the state court was rendered after the rights involved in the controversy originated. *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296, 301 (C. C. A. 6th C.). The present case need not, however, be rested alone upon those decisions or the class they represent, for a question of general commercial law arises here which of itself calls for the independent judgment of the Federal courts. It is, of course, thoroughly settled and understood that upon questions of general law the decisions of the state courts are not controlling. *Swift v. Tyson*, 16 Pet. 1, 17, 10 L. ed. 865, 871; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 370, 37 L. ed. 772, 773, et seq., 13 Sup. Ct. Rep. 914; *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10. As Mr. Justice Harlan said in *Presidio County v. Noel-Young Bond & Stock Co.* 212 U. S. 58 at page 73, 53 L. ed. 402, 408, 29 Sup. Ct. Rep. 242: "In respect of the doctrines of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment, and in respect to such doctrines will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, 'will lean to an agreement of views with the state courts.'"

It might therefore be conceded for present purposes that the Federal courts must, regardless of their own opinions, yield to the ruling of the learned supreme court of Tennessee in *Weil v. Newbern* that the commissioners of election, and not the sheriff of the county, were the proper officials to conduct and report upon the election in question; but this concession would not require us to adopt the conclusion drawn from the ruling that the bonds are void in the hands of bona fide holders. Such a question as this was directly involved and decided in *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704. It was there claimed that the township bonds in dispute had been sanctioned at an election conducted by a moderator chosen by the electors present, when it should have been presided over and the returns made by the supervisor, assessor, and collector of the township (107 U. S. 539); and it appears that the supreme court of Illinois had held that this defect in the proceeding rendered the bonds absolutely void. In the course of the opinion in the *Pana Case* it was said L.R.A.1917B.

(107 U. S. 540): "It is insisted that this court is bound to follow this decision of the supreme court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a state Constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present was irregular and therefore void. But we are not bound to accept the inference drawn by the supreme court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."

See also *Marshall County v. Schenck*, 5 Wall. 772, 774, 784, 18 L. ed. 556, 559; *Oregon v. Jennings*, 119 U. S. 74, 94, 30 L. ed. 323, 330, 7 Sup. Ct. Rep. 124.

It results that the Federal courts must exercise an independent judgment upon the question whether the town of Newbern is estopped to deny, as against the plaintiff, that these bonds were issued conformably, in all respects, with the recitals therein contained. It is admitted, and is to be borne in mind, that the town of Newbern was clothed with power to issue just such bonds as these upon the approval of a majority of its electors; that the town, through steps in fact taken by its board of mayor and aldermen and its electors, sought to exercise the power and to issue the bonds; and that the plaintiff is an innocent holder of the securities sued on, for value and without actual notice of any defect in the proceedings in virtue of which the bonds were put into circulation. We are therefore not concerned with a question that might arise in a case such as has in substance been suggested for illustrative purposes, where, either in the presence or in the absence of power to issue bonds, no steps are in fact taken by the appropriate municipal agencies to exercise such a power, the executive officers fraudulently, though formally, execute bonds and dispose of them

in the name and under the pretended promise and recitals of the municipality. In the present case it is admitted, as we have seen, that estoppel could not be escaped if the bonds had been signed by the mayor and aldermen of Newbern; this admission was rightly made. *Presidio County v. Noel-Young Bond & Stock Co.* supra, 212 U. S. at pages 64, 65, 67, 53 L. ed. 404-406, 29 Sup. Ct. Rep. 237. The efforts made here to avoid estoppel are bottomed upon the fact that the authority of the mayor and clerk to execute the bonds does not appear in the statutes, but only in the ordinances, and consequently, that intending purchasers were bound at their peril to examine these ordinances. This does not question the genuineness of the signature of either of these officials; nor does it question the genuineness of the corporate seal which appears on the face of the bonds; indeed, it is not claimed that the bonds were not in truth signed and sealed by these officials; and, further, the record contains an admission "that the lithograph signatures on the coupons are lithographic facsimiles of the signatures" of the mayor and clerk. The natural inference arising from the presence of these virtually admitted official signatures and seal is that the officers acted with due authority; this is moreover the *prima facie* effect in an evidential sense; and in such cases the uniform course of decision in the Supreme Court of the United States has been to treat the signatures of the executive officers and the seal of a municipal corporation as importing authority so to execute the bonds, and this, too, where the authority of the signatory officers has not appeared in the statutes. Thus in *Van Hostrup v. Madison*, 1 Wall. 291, 297, 17 L. ed. 538, 539, Mr. Justice Nelson said: "Another objection taken is that the proviso requiring a petition of two thirds of the citizens who were freeholders of the city was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court."

In *Hackett v. Ottawa*, 99 U. S. 86, 95, 25 L. ed. 363, 365, it appears that the bonds in question contained recitals of their issue in virtue of the charter and certain specified ordinances of the city, but that the bonds had been executed by the mayor and the clerk and authenticated by the corporate seal; and in the course of the opinion Mr. L.R.A.1917B.

Justice Harlan said: "Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. . . . It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued."

The ruling in that decision was followed, in respect of bonds similarly signed in *Evansville v. Dennett*, 161 U. S. 434, 435, 444, 40 L. ed. 760, 761, 764, 16 Sup. Ct. Rep. 613, and this is likewise true of the ruling made in *Waite v. Santa Cruz*, 184 U. S. 302, 304, 315 to 319, 46 L. ed. 552, 559, 563, 564, 22 Sup. Ct. Rep. 327. See also *Meyer v. Muscatine*, 1 Wall. 384, 388, 17 L. ed. 564; *Lexington v. Butler*, 14 Wall. 282, 295, 20 L. ed. 809, 812; *Grand Chute v. Winegar*, 15 Wall. 355, 358, 373, 21 L. ed. 170, 174; *Johnson County v. Thayer*, 94 U. S. 631, 632, 642, 24 L. ed. 133, 135, et seq.

Furthermore, *Fairfield v. Royal Independent School Dist.* 54 C. C. A. 342, 116 Fed. 838 (C. C. A. 8th C.), reviews and reverses the decision below, which is reported in (C. C.) 11 Fed. 453, 455, and where it appears that the president and secretary of the board of directors of the school district were authorized by resolution of the board to issue and deliver the bonds in dispute, and we do not discover that such authority otherwise existed. Judge Sanborn, in announcing the opinion of the circuit court of appeals, stated the question thus (54 C. C. A. 344, 116 Fed. 840): "Is a bona fide purchaser of municipal bonds which recite that they were issued in pursuance of a statute authorizing the municipality to issue them for a lawful purpose, and in conformity with an ordinance or a resolution of a specified date, which discloses the fact that they were issued for an unlawful purpose, charged with notice of the terms and contents of the ordinance or resolution?"

After stating that the question was not

new, and commenting upon decisions there cited, the learned judge said (54 C. C. A. 347): "These decisions and opinions of the Supreme Court conclusively answer the question presented in this case, and render any independent discussion of it unnecessary and useless. They demonstrate the fact that, so far at least as the Federal courts are concerned, it is now the settled law of this country that a bona fide purchaser of municipal bonds which recite that they were issued in pursuance of a statute which authorize the municipality to send them forth for a lawful purpose, and which, also recite that they were issued in conformity with an ordinance or resolution whose date or title is specified in the recital, which, if read, would disclose the fact that they were issued for an unlawful purpose, is not charged with notice of the terms or contents of the ordinance or resolution, and the municipality cannot avail itself of the facts there disclosed to defeat its bonds."

It must be said that these decisions do not distinctly discuss the question whether the presence of the official signatures of corporate executive officers, accompanied by the corporate seal, puts purchasers on inquiry as to the authority of those officers; but if the decisions mean what they say, it is certain that an intending purchaser of the bonds now in dispute might safely have relied upon the bonds themselves both as to the verity of their recitals and the authority of the executing officers. To be specific, the intending purchaser was not required to look into the ordinance which is referred to in the recitals of the bonds in order to gain protection under a good faith purchase, without actual notice of the infirmity claimed in respect of the election. This, it may be remarked, would undoubtedly be true as to purchases of bonds of a private corporation, bearing the guaranty of a railway company whose president and secretary, under its seal, had executed the guaranty (*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 574, 575, 43 L. ed. 1081, 1001, 1002, 19 Sup. Ct. Rep. 817); though it is to be noted that while considering the rule applicable to private corporations and the decision in *Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327, 110 Eng. Reprint, 886, 25 L. J. Q. B. N. S. 317, Mr. Justice Gray said: "And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank v. Turquand* as well decided upon its facts"—citing among others the familiar case of *Knox County v. Aspinwall*, 21 How. 539, 545, 16 L. ed. 208, 210.

It is true that this would indicate that

the learned justices had not always been in harmony as respects the application of the principle to municipal bonds; yet we do not find anything to modify the Supreme Court decisions before cited in that behalf.

We are not unmindful of what was said by this court in *Rondot v. Rogers Twp.* supra, 39 C. C. A. 462, 99 Fed. 212, to the effect that a purchaser accepting a township bond signed by the supervisor and treasurer of the township "ran the risk of the actual existence" of authority in such officers to execute the bonds; but it does not seem to have been claimed by the defendant in that case that an intending purchaser was required to examine any of the proceedings of the board for the purpose of ascertaining the existence or not of authority in the signing officers; on the contrary, evidence was offered on the question of whether a resolution vesting such authority was ever adopted. The precise question then with which we are now concerned does not seem to have arisen in that case; indeed, in view of the decisions of the Supreme Court above cited, we cannot think that it was intended in the *Rondot* Case to decide that if a resolution vesting authority had existed, it was necessary that it should have been examined prior to the purchase of a bond. It cannot be forgotten that one of the peculiar features of the instant case is that the defendant in effect admits the existence of authority in the mayor and clerk to execute the bonds, since it insists that if a purchaser had examined the ordinance he would have discovered this authority, as well as the fact that the vote was supervised by an officer subsequently held to have been without authority. Surely the Federal rule of decision pointed out shows that such a defense as this is not sufficient to discredit the present bonds.

It is claimed that the bonds are invalid because of certain changes that were made in their form, as fixed by ordinance. The form so fixed made the bonds payable in New York city, and before the bonds were executed the place of payment was made definite by the insertion of the name of the Hanover National Bank of that city. The other alteration complained of is an addition that was made at the end of the recitals before execution of the bonds, to the effect that the total debt of the town including the bonds in question did not exceed any limit of indebtedness prescribed by the laws of the state, and that provision for the levy of an annual tax sufficient to pay the principal and interest upon the bonds as they fall due had been made and would be duly levied upon all the taxable property in the town. We are not impressed with the contention that these changes amount to

material alterations; neither could affect the identity of the contract or otherwise operate to the prejudice of the town. The first operated to the benefit and convenience of the maker of the bonds; and the other in no way changed the nature or the amount of the maker's obligation, and, moreover, the bond in its original form otherwise distinctly pledges "the full faith, credit, and revenues" of the town. These matters seem to us too plain to require citation of decisions, though we call attention to the following: As to the first insertion, *Major v. Hansen*, 2 Biss. 195, Fed. Cas. No. 8,982 by Judge Drummond; *Shuler v. Gillette*, 12 Hun, 278, 281; as to the second, *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 16, 17, 93 Am. Dec. 126; *Crawford v. Dexter*, 5 Sawy. 201, 204, Fed. Cas. No. 3,368.

It is contended that the board of mayor and aldermen never authorized the mayor and clerk, or any one else, to deliver the bonds. It is fairly to be deduced from the evidence concerning the disposition made of the entire issue of bonds (\$50,000), that they were sold and delivered through proper representatives of the town to Hays & Sons of Cleveland, Ohio; that Hays & Sons paid for eleven of the street, light, and water bonds, and returned to the town the remaining fourteen bonds of that issue, which were then sold to others, but that the school bonds were neither paid for nor returned. It is plain enough that the representatives of the town dealt with Hays & Sons on the theory that they were solvent; this was the mistake and the misfortune alike. So far as the record discloses, there is no suggestion of fraud in the transactions save only through charges made against Hays & Sons after discovery of the fact of their insolvency. The decisive point, however, is that the validity of the plaintiff's title to the securities here involved does not depend upon the transactions with Hays & Sons. We think the finding made by Judge McCall, to the effect that the plaintiff became the owner of the coupons in suit for value and in due course, is sustained by the evidence; every coupon sued on passed from the hands of Hays & Sons to bona fide holders, before maturity and for value, in transactions conducted in due course and without notice on the part of such holders of any of the defects now claimed and relied on respecting the issue and sale of the bonds. This alone brings the case well within the rule laid down in *Cromwell v. Sac County*, 96 U. S. 51, 52, 57, 59, 24 L. ed. 681, 686, 687, and it is to be observed that the bonds there in controversy were issued for the erection of a courthouse and were delivered to the contractor, but that "a courthouse was never constructed by L.R.A.1917B.

the contractor or any other person pursuant to the contract." Further, the uniform Negotiable Instruments Act existed as a law of Tennessee when these bonds were authorized and issued (*Tenn. Acts 1899*, p. 140), and § 16, p. 144, provides that where a negotiable instrument "is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." *Buzzell v. Tobin*, 201 Mass. 1, 2, 86 N. E. 923; *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 163, 164, 72 N. E. 959; *Madden v. Gaston*, 137 App. Div. 294, 296, 121 N. Y. Supp. 951; 1 *Dan. Neg. Inst.* 6th ed. § 838.

We do not understand, in view of the motions made respectively by plaintiff and defendants for a directed verdict, that the action of the trial judge in treating the case as withdrawn from the jury and submitted to the court on both the facts and law is questioned; but if any of the assignments of error were so intended, they have not been argued and so must be regarded as waived.

Upon all these considerations, and with great deference to the learned Supreme Court of Tennessee, we hold that the defendant is estopped to deny the recitals contained in the bonds from which the coupons in issue were detached. An order will therefore be entered affirming the judgment, with costs.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 23, 1916, 242 U. S. 634, 61 L. ed. —, 37 Sup. Ct. Rep. 18.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

MABEL WINTER PERKINS

v.

GEORGE EDWARD PERKINS.

(— Mass. —, 113 N. E. 841.)

#### Domicil — of deserted wife.

1. The domicil of an innocent wife does not follow her husband, who deserts her and removes to another state. *For other cases, see Domicil, in Dig. 1-52 N. 8.*

#### Divorce — jurisdiction — matrimonial domicil.

2. The marriage status for jurisdictional purposes in divorce proceedings remains in the state of its origin, where the husband

Note. — As to extraterritorial effect of decree of divorce rendered upon constructive service, see annotation following this case, post, 1032.

deserts a wife innocent of matrimonial wrong in that state and goes into another state, where he establishes a domicile.

*For other cases, see Divorce and Separation, II. in Dig. 1-52 N. S.*

**Judgment — full faith and credit — absence of jurisdiction.**

3. A decree of divorce entered by the courts of a state other than that of the matrimonial domicile, in which plaintiff had established a domicile for himself without notice to the defendant, is not within the operation of the full faith and credit clause of the Federal Constitution.

*For other cases see, Judgment, IV. b, 2, in Dig. 1-52 N. S.*

**Divorce — foreign — comity.**

4. The courts of the matrimonial domicile, which is retained by a wife innocent of matrimonial wrong, who was deserted by her husband, will not recognize on the ground of comity a divorce secured by him in another state without notice to her.

*For other cases see, Judgment, IV. b, 2, in Dig. 1-52 N. S.*

**Same — statutory requirement.**

5. A statute asserting jurisdiction to adjudicate upon the marriage status of those domiciled within the state for a specified time, even as to causes occurring outside its limits and against absent defendants, unless it appears that libellant came into the state for the purpose of securing a divorce, does not imply, as matter of comity, due recognition of a foreign decree against an innocent wife, which, without opportunity for her to be heard, destroyed her marriage status, although she continued to reside in the state which is the only matrimonial domicile of both parties.

*For other cases see, Judgment, IV. b, 2, in Dig. 1-52 N. S.*

(October 17, 1916.)

**EXCEPTIONS** by libellee to rulings of the Superior Court for Middlesex County made during the trial of a libel filed for a divorce for desertion. Overruled.

The facts are stated in the opinion.

Mr. Elbridge R. Anderson, for libellee:

A divorce proceeding is an action in rem. Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Pennoyer v. Neff, 95 U. S. 735, 24 L. ed. 573; Atherton v. Atherton, 181 U. S. 160, 45 L. ed. 797, 21 Sup. Ct. Rep. 544.

The domicile of the wife follows that of the husband, and his removal to the state of Georgia was a removal of the libellant to that state, and she was within its jurisdiction at the time of the institution of his proceedings in that court to obtain the divorce and at the time of the granting of the decree.

Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709; Burtis v. Burtis, 161 Mass. 508, L.R.A.1917B.

37 N. E. 740; Greene v. Greene, 11 Pick. 409; Loker v. Gerald, 157 Mass. 43, 16 L.R.A. 497, 34 Am. St. Rep. 252, 31 N. E. 709.

The living apart, even with that intention, for less than three years, does not make a cause for divorce. So the fact whether libellee left intending not to return, or whether there was any reason on account of his act in leaving which made it obligatory upon libellant to live separate and apart from him, does not give her a domicile of her own in this commonwealth, he having removed to Georgia.

Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709; Kendrick v. Kendrick, 188 Mass. 560, 74 N. E. 598; Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372.

There was no delictum or cause of divorce as against libellee until after he was divorced from the libellant by the Georgia decree, and there was existing between them no marriage relation at the time of her attempted proceeding for a divorce in this commonwealth.

Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Franklin v. Franklin, 154 Mass. 516, 13 L.R.A. 843, 26 Am. St. Rep. 266, 28 N. E. 681.

Where one has complied with all the laws in the state where his proceeding is brought, and has given the notice required by the court and exercised the best care that he can in the giving of the notice, such divorce decree is binding.

Joyner v. Joyner, 131 Ga. 217, 18 L.R.A. (N.S.) 647, 127 Am. St. Rep. 220, 62 S. E. 182; Loker v. Gerald, 157 Mass. 43, 16 L.R.A. 497, 34 Am. St. Rep. 252, 31 N. E. 709; Burtis v. Shannon, 115 Mass. 438.

Messrs. Fletcher Ranney and D. P. Ranney, for libellant:

The policy of Massachusetts as to divorces granted in other states is fixed by statute.

Atherton v. Atherton, 181 U. S. 155, 167, 45 L. ed. 794, 801, 21 Sup. Ct. Rep. 544; Haddock v. Haddock, 201 U. S. 562, 588, 50 L. ed. 867, 877, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

Where the husband abandons or deserts the wife, leaves the matrimonial domicile, and goes to some other state, the wife acquires a separate domicile.

Haddock v. Haddock, 201 U. S. 562, 565, 570, 571, 50 L. ed. 867, 868, 870, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; Barber v. Barber, 21 How. 582, 595, 16 L. ed. 226, 230; Cheever v. Wilson, 9 Wall. 108, 123, 19 L. ed. 604, 608.

The desertion of the libellant by the libelles and his leaving this commonwealth constitute a delictum entitling the libellant to obtain a separate domicile in Massachusetts;

and therefore the state of Georgia never obtained jurisdiction over her.

Cumington v. Belchertown, 149 Mass. 223, 4 L.R.A. 131, 21 N. E. 435; Kendrick v. Kendrick, 188 Mass. 550, 74 N. E. 598; Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Haddock v. Haddock, 201 U. S. 562, 572, 50 L. ed. 867, 870, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

Ruggs, Ch. J., delivered the opinion of the court:

This is a libel filed in November, 1915, praying for divorce on the ground of desertion continued for three consecutive next preceding years. The libellee set up in answer a decree for divorce obtained by him in Georgia on October 5, 1914. The pertinent facts as found by the judge are that the libellant and libellee were married and lived in this commonwealth as their domicile until the summer of 1912, when he deserted the libellant without letting her know his place of abode, and she remained in ignorance on that point until his return to this state late in 1914. He left this commonwealth in good faith, and not for the purpose of obtaining a divorce, and became a citizen of Georgia. In that state, in conformity with its laws, he obtained a divorce on the ground of cruel and abusive treatment alleged to have been committed by the libellant. Although he complied with the Georgia laws in giving notice to his wife, she never received notice of the proceedings. He returned from Georgia to Massachusetts in October, 1914, and it may be assumed that personal service of the present libel was made upon him here. The judge found that the charge of desertion was proved, and ruled that the libellant was entitled to a divorce. The question presented is whether the Georgia divorce is a bar to the present libel.

The case is not within the terms of Rev. Laws, chap. 152, § 35.<sup>1</sup> The jurisdiction of any foreign court over the cause and the parties is open to investigation and decision by the court of the forum. Andrews v. Andrews, 176 Mass. 92, 94, 57 N. E. 333, s. c. 188 U. S. 14, 47 L. ed. 366, 23 Sup.

Ct. Rep. 237. The Georgia court did not have "jurisdiction of . . . both the parties." The wife was innocent of any marital wrong in 1912, when the husband deserted her without justifiable cause. Therefore her domicile did not follow that of the husband when he went to Georgia, but she legally was enabled to retain as her own, by reason of her continued residence here, the matrimonial domicile in this commonwealth. His desertion was a wrong against her marital rights and enabled her to keep the old domicile regardless of the fiction that the domicile of the wife commonly follows that of the husband. Shaw v. Shaw, 98 Mass. 158; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Bradford v. Worcester, 184 Mass. 557, 69 N. E. 310.

It has been held, also, that the Georgia court did not have jurisdiction of the cause. The marriage status was not "within the sweep of the judicial power of that court." Where the parties are married in one state and there establish a matrimonial domicile, a domicile which is retained by one spouse, who is innocent of any marital wrong, and which is abandoned by the other, who is guilty of marital wrong, then the courts of the state of the matrimonial domicile have "jurisdiction over the marriage relation, and the proper courts of that state" can "proceed to adjudicate respecting it upon grounds recognized by the laws of that state, although" the other spouse has left that jurisdiction, and can "not be reached by formal process." This proposition is declared in Thompson v. Thompson, 226 U. S. 551, 562, 57 L. ed. 347, 351, 33 Sup. Ct. Rep. 131, to be "clear . . . under the decision in the Atherton Case, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, and the principles upon which it rests." Thus courts of the state of the matrimonial domicile, at the petition of one spouse retaining that domicile, and innocent of any marital wrong, stand upon firmer ground than the courts of any other state in respect of jurisdiction over the marriage status. See also Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709, and Burlen v. Shannon, 115 Mass. 438.

As the libellee did not go to Georgia for the purpose of obtaining a divorce, and as cruel and abusive treatment on which the divorce was granted is recognized as a cause by Rev. Laws, chap. 152, § 1, the Georgia divorce is not pronounced by said § 35 as of no force or effect in this commonwealth.

Since the case at bar is not within the terms of our statute requiring recognition or declaring the invalidity of foreign divorces, it must be decided on general principles.

The decree of the Georgia court is not en-

<sup>1</sup> "A divorce decreed in another state or country according to the laws thereof by a court having jurisdiction of the cause and of both parties, shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." L.R.A.1917B.

titled to recognition here under the full faith and credit clause of the Federal Constitution. *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. Whether recognition and effect shall be given to it by courts of this commonwealth depends upon principles of interstate comity. Such comity has been defined by Mr. Justice Gray in *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 40 L. ed. 95, 108, 109, 16 Sup. Ct. Rep. 143, as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

The principle upon which judgments of foreign courts are accorded their full effect is that, where parties have once litigated fairly a dispute in the courts of any civilized country, the same question ought not to be tried anew by the courts of another jurisdiction. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, 213, 40 L.R.A. (N.S.) 314, 89 N. E. 193. That principle applies with diminishing force where the essential elements of valid litigation are not all present, and reaches almost a vanishing point where the hearing is ex parte and the subject matter of the litigation is not in an international sense within the jurisdiction of the foreign court. On the other hand, it is highly desirable that, as to a subject of such vital and far-reaching importance as the dissolution of the marriage relation, there should be uniformity of practice between the several states of the Union in the recognition of judgments of sister states. Assertions of jurisdiction by one state should so far as possible be the correlative of recognition of jurisdiction in other states.

The Federal Supreme Court, although without jurisdiction over the subject of divorce, is vested with power to declare with reference to it the principles by which interstate rights and obligations exist and will be enforced. If the principles so declared as to divorce are made a common basis for the exercise of interstate comity, there may be a closer approach to unity of decision among the several states. Two rules have been established. First: A decree of divorce by a court not having actual jurisdiction of both parties and of the subject does not come within the full faith and credit clause of the Constitution of the United States. *Haddock v. Haddock*, supra. Second: The state having jurisdiction of

the matrimonial domicile and of one spouse, innocent according to the decision of the courts of that state of matrimonial wrong, has jurisdiction of the matrimonial status, and is clothed with power, after reasonable ex re notice, to enter judgments concerning it, which must be recognized by courts of the jurisdiction of the domicile of the other spouse. *Atherton v. Atherton*, supra; *Thompson v. Thompson*, 226 U. S. 551, 562, 57 L. ed. 347, 351, 33 Sup. Ct. Rep. 129. It follows from these Federal decisions that the courts of this commonwealth under the circumstances of this case have jurisdiction of the matrimonial status and of the parties. The libellant has remained domiciled in this commonwealth. She has been found, by the granting of the prayer of the libel, guilty of marital wrong. The libellee committed a wrong against her when he deserted her here. The act of desertion was the initiation of a course of conduct which ripened into a cause for divorce under our law after the lapse of three years. *Rev. Laws* chap. 152, § 1. Although the husband might have broken that course of conduct at any time by return to the full performance of his marriage obligation, he did not do so, but pursued it to the end. He gave to the libellant no actual notice of the pendency of the proceedings instituted by him in Georgia. She was ignorant of them and had in fact no opportunity to defend against them. If effect should be given to the Georgia divorce, the result would be that a marriage status established and maintained by wedding and cohabitation wholly in this commonwealth will be severed at the instance of a husband faithless to his marriage vows, he having removed from our jurisdiction and sought the interposition of the courts of another state without actual notice to or knowledge by his wife, and she, innocent of any wrong on her own part, having continued to be domiciled in this commonwealth. The libellant would find her marriage status destroyed and be without remedy for the wrongs committed against her. It would be an unseemly result if, under the conditions here disclosed, the husband could return to Massachusetts and establish here a new and lawful marriage relation directly in the face of a faithful wife whom he had deserted. Yet that result well might follow a recognition of the Georgia divorce. Due regard to the rights of our own citizens forbids the giving of such effect to a judgment of a court of a sister state, which, as we understand the decision of *Thompson v. Thompson*, 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. Rep. 129, did not have jurisdiction of the marriage status, and which certainly acquired



no jurisdiction over this libellant. In this connection the circumstance that the decree of divorce in the Georgia courts was granted before the present libel was filed is of no consequence.

This commonwealth, by the act of its legislative department, in Rev. Laws chap. 152, § 5, has asserted jurisdiction to adjudicate upon the marriage status of those domiciled here for five years, or for three years if both the parties were inhabitants here at the time of the marriage, even as to causes occurring outside this commonwealth and as against absent defendants, unless it appears that the libellant has removed here for the purpose of obtaining a divorce. This statute implied, as matter of comity, due recognition of similar assertion and exercise of jurisdiction by other states in the ordinary case, as far as they affect our citizens. But that does not extend to a case like the present, where, without actual chance for her to be heard, the foreign divorce destroys the marriage status of an innocent spouse faithful to her marriage obligations and continuously resident in this commonwealth, which is the only matrimonial domicile of both parties. In *Joyner v. Joyner*, 131 Ga. 217, 18 L.R.A. (N.S.) 647, 127 Am. St. Rep. 220, 62 S. E. 182; *Gildersleeve v. Gildersleeve*, 88 Conn.

689, 92 Atl. 684, Ann. Cas. 1916B, 920, and *Felt v. Felt*, 59 N. J. Eq. 606, 47 L.R.A. 546, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, which went far in giving effect as against their own citizens to divorces of other states on grounds of comity, it appeared that there was actual, as distinguished from constructive, notice to such residents of the pendency of the foreign divorce proceedings. That point is not now before us. So far as *Toncray v. Toncray*, 123 Tenn. 476, 483, 34 L.R.A.(N.S.) 1106, 131 S. W. 977, Ann. Cas. 1912C, 284, and *Howard v. Strode*, 242 Mo. 210, 225, 146 S. W. 792, Ann. Cas. 1913C, 1057, are inconsistent with the result here reached, they do not state the law of this commonwealth. The decision of *Miller v. Miller*, 89 Kan. 151, 130 Pac. 681, depended upon the express terms of a statute.

The conclusion here reached is in harmony with the greater number of cases in this country as reviewed and interpreted at length in *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. See also *Parker v. Parker*, 137 C. C. 628, 222 Fed. 186. It follows that the libellee's requests for rulings all were denied rightly, and that the rulings made were correct.

Exceptions overruled.

### **Annotation—Extraterritorial effect of decree of divorce rendered upon constructive service.**

This question is treated in the notes to *Benton's Succession*, 59 L.R.A. 162 et seq., and *Joyner v. Joyner*, 18 L.R.A. (N.S.) 647, to which the present note is merely supplementary.

The question under annotation presupposes that the statutory requirements as to constructive service were complied with, and that the service was sufficient if jurisdiction to grant a divorce entitled to recognition in other states can rest upon such character of service.

The question also presupposes that the plaintiff in the divorce suit had a bona fide domicile at the divorce forum. Lack of such a domicile is of itself, apart from the question of estoppel, fatal to the recognition of the decree in other states regardless of the mode of service (see notes in 59 L.R.A. 135, and 23 L.R.A.(N.S.) 1254).

The note is, moreover, confined to the extraterritorial effect of the divorce upon the marital status of the parties, and does not assume to deal distinctively with the practical consequences involved in the recognition or refusal to recognize the foreign decree. If the court L.R.A.1917B.

assumes that the particular ultimate question involved in the case necessarily depends upon the marital status of the parties as affected by the divorce decree, the point under discussion will be practically decisive of the case; but it is to be observed that an ultimate question which some courts will regard as necessarily dependent upon the marital status of the parties, other courts may regard as not necessarily dependent upon that status (see, for example, the notes in 34 L.R.A.(N.S.) 1106, and L.R.A.1915E, 421, on the effect of a divorce in one state upon an independent suit for alimony in another; and notes in 59 L.R.A. 181, and 41 L.R.A.(N.S.) 219, on the effect of a foreign divorce upon dower). Nor is the present note concerned with the validity or effect of a judgment for alimony on constructive service (on that point, see note in 9 L.R.A.(N.S.) 593).

#### **Full faith and credit—in general.**

The intolerable conditions which, as pointed out in the previous notes and in many other discussions of the subject, are necessarily inherent in any theory

or doctrine which, without any difference of findings as to jurisdictional facts, concedes that a decree of divorce upon constructive service of process may be valid to dissolve the marital relation of the parties in the state where it was rendered and yet not come within the operation of the full faith and credit provision of the Federal Constitution, but will be dependent for its recognition, as affecting the status of the parties in other states, upon principles of comity, are recognized and vigorously reprobated in a concurring opinion by Laughlin, J., in *Ransom v. Ransom* (1908) 125 App. Div. 915, 109 N. Y. Supp. 1143, which affirmed a decree of divorce granted in New York, apparently not the matrimonial domicile of the parties, upon constructive service of process against a nonresident. He said: "It is high time that a movement was initiated in the legislatures or by the trial courts by which divorces shall not be granted excepting in those cases where the court can obtain such jurisdiction over the defendant that it must be recognized by every other state and territory in the land."

It would seem that there could be no doubt as to the propriety of this suggestion, although, as pointed out in the earlier notes, there does not appear to be any insuperable difficulty to the adoption by the United States Supreme Court, without the aid of a constitutional amendment, of a position that would remedy the condition which the learned justice deplures, and give to a decree of divorce rendered upon constructive service, upon a given state of facts, the same validity and effect as regards the status of the parties in all states that it has in the state in which it is rendered. This position, of course, would not interfere with the doctrine adopted by that court in *Atherton v. Atherton* (1901) 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, and *Haddock v. Haddock* (1906) 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1, under which a decree of divorce rendered upon constructive service of process at the matrimonial domicile is entitled to recognition in other states under the full faith and credit provision, while decrees rendered in such circumstances in a state other than the matrimonial domicile, although the domicile of the plaintiff in the divorce suit, are not entitled to recognition under that constitutional provision. The adoption of this position would, however, involve the consequence that a divorce rendered upon constructive service of process un-

der a state of facts which do not entitle it to recognition in other states under the "full faith and credit" provision would be invalid, even as affecting the status of the parties in the state where rendered; and, conversely, if rendered in such circumstances as validly to dissolve the marital relation in the state where rendered, it would, under the full faith and credit provision, have the same effect upon that relation in all other states. Apparently the only thing necessary to bring about such a result is for the United States Supreme Court to apply the same ultimate test of jurisdiction, viz., due process of law, whether the effect of the decree upon the status in the state where rendered or in another state is concerned, and whether the case comes before that court from the state in which the decree was granted or from another state in which it has been refused recognition.

Judge Laughlin's position is strongly approved in the opinion in *Barber v. Barber* (1915) 89 Misc. 519, 151 N. Y. Supp. 1064, also a domestic suit for divorce upon constructive service of process against a nonresident defendant. The court said in effect that, even upon the assumption that the plaintiff was domiciled in New York, the decree, if rendered, would be the same sort of a decree which the courts of New York have steadily and consistently refused to recognize in that state when granted in a foreign jurisdiction; and, in illustration of the unfortunate consequence inherent in such a decree, the court observed: "Should the plaintiff marry again in the state of New York, relying upon such a decree, she would be the wife of one man here; but once across the state line into Pennsylvania she would become the wife of another man. The children, if any, born of such second marriage, would be legitimate in New York, but they would become bastards as soon as they went out of the state and into Pennsylvania. She might still have children by her Pennsylvania husband, who would be legitimate everywhere except in the state of New York, but who would become bastards here. The wretched consequences of such a decree are infinite."

Upon the other hand, the Utah supreme court in *State ex rel. Aldrich v. Morse* (1906) 31 Utah, 213, 7 L.R.A. (N.S.) 1127, 87 Pac. 705, having apparently disposed of the question of jurisdiction of a local court on constructive service of process in a divorce suit, upon the tacit assumption that it must be

determined upon the principles laid down in the Haddock Case as to the conditions essential to entitle such a decree to recognition in other states under the full faith and credit provision,—has, in the recent case of *Schafer v. District Ct.* (1916) — *Utah*, —, 162 Pac. 618, apparently taken the position that the local court may take jurisdiction on constructive service regardless of the question whether the decree would be within that provision or not; and in this case it upheld the jurisdiction of the court of Utah to grant a divorce in favor of the husband, who had acquired a bona fide domicile in that state, upon service by publication and personal service out of the state upon the wife, who did not appear, although the parties were not married in Utah and apparently never lived together in that state.

That the conception that a divorce may be valid and effective to dissolve the marital relation in the state where granted, and still, because of the mode of service, have no effect upon that status in other states, is not, either from a practical or a theoretical point of view, abhorrent to all judicial minds, is also indicated by obiter dicta in the opinion of the vice chancellor in *Lister v. Lister* (1916) — *N. J. Eq.* —, 97 Atl. 170, where, after observing that the confusion of thought and consequent error on the subject had arisen from a failure to recognize the fact that each state absolutely controls the status of its domiciled citizens, he said: "There is nothing strange in the notion that a man may be a married man in one state and an unmarried man in another state. A woman in New Jersey may be recognized by all the governmental agents of that state as married to a man in Illinois, while the man in Illinois may be recognized by all the governmental agents of that state as not married to the woman in New Jersey, but as unmarried or as married to some other woman. Each state enforces its own view within its own territory with regard to the status of its residents who are permanently subject to its power."

This is a frank recognition and apparent justification of the existing condition in which the law on this subject has been left by the decisions of the United States Supreme Court. It is to be hoped, however, that that court will eventually, by the adoption of a uniform test of jurisdiction upon any given state of jurisdictional facts, remove this reproach from the law, and extend to de-

crees of divorce upon constructive service of process the same principles by which a judgment for money or a judgment directly affecting property rights, so far as it depends upon the sufficiency or insufficiency of constructive service of process, is either held valid in all states or invalid in all states, including the state in which it is rendered. The idea that a money judgment rendered upon a form of service that is not sufficient to bring it within the protection of the full faith and credit provision may yet be valid in the state where it is rendered has been again repudiated by the United States Supreme Court in *Riverside & D. River Cotton Mills v. Menfee* (1915) 237 U. S. 189, 59 L. ed. 910, 35 Sup. Ct. Rep. 579. It seems at least as important that one's marital status shall not change as one crosses state lines as that a judgment for money or a judgment affecting the title to a horse shall enjoy a uniform operation, or lack of operation, as the case may be, in all states.

There may be a practical as well as a theoretical justification for distinguishing between a decree of divorce upon constructive service rendered in the state of the matrimonial domicile and one rendered upon such service in a state other than the matrimonial domicile; but there is no practical justification in either case for holding that the same decree dissolves the marital relation in one state and not in another, and that, too, without any difference of finding as to jurisdictional facts.

Some theoretical justification for such a result may perhaps be found in the conception that the matrimonial status of the parties within the limits of a particular state, and within those limits only, may be a proper subject of jurisdiction; but this conception, doubtful even from a narrow theoretical point of view, is utterly impracticable and essentially immoral in view of the close relation between the states and the constant crossing and recrossing of state lines. There is no other decree which calls so loudly for uniform operation and effect, or lack of operation and effect, in all states, as does a decree of divorce, which, with the possible exception of a few other decrees affecting status, is the only one now beyond the operation of the principle that constructive service of process, if sufficient to sustain the validity of a decree in the state where rendered, is also sufficient to entitle it to recognition under the full faith and credit provision, and, conversely, if in-

sufficient to bring a decree within the protection of that provision, is insufficient, under the due process of law provision, to sustain the validity of the decree even in the state where rendered.

The cases, however, must be considered from the point of view that has been actually adopted by the Federal supreme court, especially in the *Atherton* and *Haddock* Cases.

There are four distinct situations presented by the cases dealing with the recognition, under the full faith and credit provision, of a decree of divorce rendered in another state upon constructive service of process against one who was in fact a nonresident of the divorce forum:

(1) Where the decree was rendered in favor of the husband in the state where the parties were last living together in the marital relation;

(2) Where the decree was rendered in favor of the wife in the state where the parties were last living together in the marital relation;

(3) Where the decree was rendered in favor of the husband in a state to which he removed after the separation;

(4) Where the decree was rendered in favor of the wife in a state to which she removed after the separation.

In the first situation it is settled by the decision in the *Atherton* Case, and confirmed by the argument of the opinion in the *Haddock* Case, that the decree is entitled to recognition under the full faith and credit provision as affecting the status of the parties in other states, at least if it was rendered for a cause which negated the right of the wife to acquire a separate domicile. Indeed, upon this hypothesis, unless the fiction that a wife takes and retains the husband's domicile is to be disregarded where the parties have assumed an antagonistic attitude, as in a divorce suit, it may be questioned whether this result may not be reached upon principles applicable to suits strictly in personam, and without invoking the principles applicable to decrees in rem or quasi in rem, since, *ex hypothesi*, the wife not being justified in separating from the husband, the fiction applies, and, as pointed out in the note to *Raher v. Raher*, 35 L.R.A. (N.S.) 292, there is considerable authority, if not the weight of authority, for the view that a judgment strictly in personam, a money judgment even, may rest upon constructive service of process upon a defendant who is domiciled in, and legally a resident of, the state, notwithstanding the absence

of such party from the state. But whatever may be the case where the cause of the divorce, or other circumstances negated the right of the wife to acquire a separate domicile, it is apparent that the principles applicable to decrees in personam will not suffice to sustain the jurisdiction if the wife was originally justified in separating from the husband so that she was entitled to acquire a separate domicile elsewhere and the divorce was rendered for her subsequent misconduct. Upon this hypothesis it seems necessary to invoke the principles applicable to decrees in rem or quasi in rem and also to adopt the broader of the two interpretations of the *Atherton* Case referred to in the note in 18 L.R.A. (N.S.) 647, by which the "matrimonial domicile" may be regarded as remaining in the state where the parties were last living together in the marital relation and in which the plaintiff still retains a domicile, regardless of whether or not the defendant has procured a separate domicile elsewhere.

In the second situation, also, in order to bring the decree within the protection of the full faith and credit provision, it seems necessary to adopt the broader view of the *Atherton* Case just referred to, whether the wife was originally justified in separating from the husband or not, since there is no fiction by which the husband takes or retains the personal domicile of the wife even if the circumstances are such as to justify her in retaining a separating domicile.

In the third situation, it is clear under the doctrine of *Haddock* Case, that the decree is not within the full faith and credit provision if the separation was due to the husband's fault; but upon the assumption that the separation was due to the fault of the wife, there may be a question whether a court of the state in which the husband acquired a bona fide domicile after the separation may not, upon principles applicable to actions in personam, obtain jurisdiction to grant a divorce on constructive service of process against the absent wife, which will be entitled to recognition under the full faith and credit provision, since, *ex hypothesi*, by virtue of the fiction, the wife's domicile follows the husband's; and even if the jurisdiction cannot be sustained on principles applicable to judgments in personam, there may be a question whether, on this hypothesis the husband, not being at fault, may not carry the "matrimonial domicile" with him into the new state so as to confer jurisdiction upon a court of

that state upon principles applicable to decrees in rem or quasi in rem. This view, however, extends the doctrine of the Atherton Case considerably beyond the actual facts in that case.

In the fourth situation, it is obvious that the wife is under a disadvantage compared with the husband in the third situation, if the jurisdiction is viewed from the point of view of the principles applicable to judgments in personam; but in the broadest view of the doctrine of the Atherton Case, the decree in favor of the wife may perhaps even in this situation, be entitled to recognition in other states under the full faith and credit provision, if she was not at fault respecting the separation, upon the theory that the spouse not at fault, whether husband or wife, may carry into the new state the matrimonial domicile, enabling a court of that state to take jurisdiction on constructive service by virtue of the principles applicable to proceedings in rem or quasi in rem. This view, however, as suggested in connection with the discussion of the third situation, extends the doctrine of the Atherton Case beyond the facts of that case. And some of the New York cases have refused to recognize the decree in favor of the wife, upon this hypothesis (see *Ransom v. Ransom* (1907) 54 Misc. 410, 104 N. Y. Supp. 198, affirmed in (1908) 125 App. Div. 915, 109 N. Y. Supp. 1143, set out in the note in 18 L.R.A.(N.S.) at page 652; and see also *Berney v. Adriance* (1913) 157 App. Div. 628, 142 N. Y. Supp. 748, *infra*). In some of the other cases the wife was at fault respecting the separation, so that, under the doctrine of the Haddock Case, it was clear that the decree in her favor was not entitled to recognition under the full faith and credit provision.

**—divorce granted to husband in the state where parties were last living together in the marital relation.**

Cases dealing with this situation, in addition to those cited herein, will be found in the earlier notes referred to at the beginning of this annotation.

The courts of the state which is the domicile of the husband and the only matrimonial domicile have jurisdiction to render a decree of divorce in his favor entitled, under the full faith and credit clause, to full faith and credit in the courts of the District of Columbia, although the wife has left the jurisdiction. L.R.A.1917B.

tion and can be served only by publication. *Thompson v. Thompson* (1913) 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. Rep. 129. In this case a judgment of divorce on the ground of abandonment was granted to the husband in Virginia, which was the matrimonial domicile and the actual domicile of the husband. The wife had left Virginia and was served by publication only. The decision is upon the general ground that Virginia was the matrimonial domicile, and as such her courts had jurisdiction to grant the divorce in a proceeding in rem or quasi in rem. It does not appear whether or not the wife had actual knowledge of the pendency of the action, but that was obviously immaterial, as the decision that the court of the District of Columbia was bound to recognize and give effect to the judgment did not rest upon comity, but upon the full faith and credit provision.

In *Benham v. Benham* (1910) 69 Misc. 442, 125 N. Y. Supp. 923, a divorce granted to the husband in Vermont upon constructive service upon the wife, who abandoned him in that state and came to New York, where she was temporarily sojourning, was recognized as valid and binding on the parties, and as a bar to a subsequent action by the wife in New York for an absolute divorce after the husband had married again.

In *Callahan v. Callahan* (1909) 65 Misc. 172, 121 N. Y. Supp. 39, the court held that a divorce rendered in Ohio in favor of a husband upon constructive service upon the wife, who did not appear, was entitled to recognition in New York, it appearing that at the time of the separation the parties were domiciled in Ohio. The court interprets the Atherton Case to hold that the court of the matrimonial domicile, i. e., the state where the parties were last living together as husband and wife, has jurisdiction upon constructive service to grant a divorce that will be entitled to recognition in other states under the full faith and credit, even if the defendant has rightfully acquired a domicile in another state. There is no discussion in the Callahan Case as to whether or not the wife was justified in leaving the husband; and it would seem, in view of the position taken by the courts, that that matter was immaterial.

In *Post v. Post* (1911) 149 App. Div. 452, 133 N. Y. Supp. 1057, affirming (1911) 71 Misc. 44, 129 N. Y. Supp. 754, the court, while apparently interpreting the Atherton Case to make the power of a court of the state where the parties were domiciled at the time the wife left

her husband, to grant a divorce to the husband upon constructive service, dependent, theoretically at least, upon whether or not she has acquired a separate domicile, declares that the determination by that court that the wife was not justified in leaving the husband is binding under the "full faith and credit" clause, and therefore negatives a separate domicile of the wife. Upon this theory it was held in this case that a divorce upon the ground of abandonment, obtained by the husband in Texas upon personal service upon the wife in Louisiana, who did not appear, was valid and binding in New York. The parties were married in Louisiana and after living in that state for some time moved to Texas and continued to live together there as husband and wife until the wife—"for a sufficient cause" according to a statement of facts at the beginning of the opinion—left the husband and returned to Louisiana. The court said in effect that it made no difference whether she intended to return to Texas or not; and continued: "It logically follows, therefore, that where a husband and wife have separated, and he sues for divorce in the state where he resides without personal service and without her appearing in the action, then the question whether the court obtains jurisdiction or not depends upon whether she has acquired a separate domicile, that is, whether she was or was not justified in separating from him. That in turn presents the further question whether without personal service upon her voluntary appearance the courts, of the state of his domicile can make a determination that she was not justified in leaving him, which will be binding upon her and entitled to recognition in all other states under the full faith and credit clause of the Federal Constitution. . . . That question was settled by the Supreme Court of the United States (*Atherton v. Atherton* (1901) 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544) when it held that where the husband remained in the state of the matrimonial domicile, the courts of that state had the power to determine under reasonable requirements as to notice, whether or not her absence was justifiable, and that such a determination is entitled to full faith and credit in other states." The action in the Post Case was to annul a marriage contracted in New York by the wife after the Texas divorce.

In *Solomon v. Solomon* (1913) 140 Ga. 379, 78 S. E. 1079, it is declared generally that a judgment of divorce based on L.R.A.1917B.

constructive service is not within the provisions of the Federal Constitution, and the statutes passed thereunder, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; that such judgment based entirely on constructive notice, without actual notice or provision for the same to the nonresident defendant, may be collaterally attacked for fraud, citing *Matthews v. Matthews* (1912) 139 Ga. 123, 76 S. E. 855. This case is reported by syllabus only, and the facts do not appear. It is obvious that this statement is too broad, at least as applied to a case where the divorce is granted to the husband at the matrimonial domicile.

**—divorce granted to wife in the state where parties were last living together in the marital relation.**

See also cases cited in notes in 59 L.R.A. 162, and 18 L.R.A.(N.S.) 647.

In *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056, reversing (1910) 67 Misc. 267, 122 N. Y. Supp. 401, it was held to be the duty of the courts of New York, under the full faith and credit provision, to give effect to a decree of divorce on the ground of desertion, obtained by the wife in Colorado the only matrimonial domicile of the parties, upon constructive service of process upon the husband, who had become a nonresident. This decision clearly rests upon the broader view of the doctrine of the *Atherton* Case, and bases the right of the Colorado court to proceed in rem, and upon constructive service, and not upon any fiction that the defendant's domicile was in Colorado, but upon the principle that the matrimonial domicile in the sense of the last domicile of the parties while living together in the marital relation, was in Colorado.

In *Parker v. Parker* (1915) 137 C. C. A. 626, 222 Fed. 186, the court declares that it is well settled by Federal authorities that, when the wife is deserted by the husband without justification, the matrimonial domicile stays with her, the innocent party, and that she may in consequence acquire a new domicile, which may become, indeed, the matrimonial domicile. The divorce here, however, was obtained by the husband, who had deserted the wife, and not by the wife, who had been deserted. The case, therefore, did not present the question whether a wife who has been wrongfully abandoned and deserted by the husband may, either in the state of the last com-

mon matrimonial domicile or in another state where she may subsequently remove and acquire a domicile, obtain a divorce upon constructive service of process against the husband, which will be entitled to recognition in other states under the full faith and credit provision.

**—divorce granted to husband in a state to which he removed after the separation.**

See also cases cited in notes in 59 L.R.A. 162, and 18 L.R.A.(N.S.) 647.

In *Parker v. Parker* (Fed.) supra, an action originating in a Federal court sitting in Texas, it was held that a decree of divorce on the ground of desertion, in favor of a husband in Missouri, where he had acquired a domicile, upon constructive service of process upon the wife, whom he had abandoned in California, the matrimonial domicile, was not within the full faith and credit clause, and would not be recognized in Texas as affecting the status of the wife. It appears in this case that the wife did not know of the pendency of the Missouri action until some time after the decree was rendered, although this is not commented upon in the opinion.

And the court in *PERKINS v. PERKINS* ante, 1028, refused to recognize a divorce in similar circumstances.

So, the New York rule refusing to recognize, either under the full faith and credit provision or upon principles of comity, a divorce rendered upon constructive service of process against a nonresident who did not appear, has been applied by refusing to recognize a decree rendered in favor of the husband in a state to which he went after abandoning the wife in New York, the last common matrimonial domicile. *Gouch v. Gouch* (1910) 69 Misc. 436, 127 N. Y. Supp. 476 (divorce granted upon the ground of desertion; wife had no knowledge of divorce; New York court granted a decree of divorce to the wife because of the husband's relation to a woman with whom he went through a marriage ceremony after the foreign divorce); *Halter v. Van Camp* (1909) 64 Misc. 366, 118 N. Y. Supp. 545 (divorce granted on the ground of adultery after husband had abandoned wife; held by the New York court that the wife and daughter of the second marriage of the husband had no interest in the real estate left by him in New York upon his death, and that the first wife had dower rights as his widow therein); *Sterry v. Sterry* (1913) 79 Misc. 355, 140 N. Y. Supp. 716 (ground of divorce and circumstances of separa-

tion do not appear; wife had no knowledge of the pendency of the divorce suit; the New York suit was by the wife for a separation from a man whom she subsequently married in New York; relief denied upon the ground that, the Illinois decree being void for want of jurisdiction, there was no legal marriage of the parties to the present action); *Re Akin* (1915) 89 Misc. 690, 152 N. Y. Supp. 310 (husband abandoned wife in New York; ground of divorce does not appear).

In *Harry v. Dodge* (1910) 66 Misc. 302, 123 N. Y. Supp. 37, *Andrews, J.*, declared that in the absence of evidence to the contrary, the domicile of the wife will be presumed to be the domicile of the husband, so as to entitle a decree of divorce upon service, obtained by the husband in a state in which he was domiciled, but in which the parties had never lived together as husband and wife, to recognition. In this case, however, the court was of the opinion that evidence that the parties separated in New York implied the right of the wife to retain her domicile in New York, and therefore the divorce upon constructive service upon her was of no effect in New York.

And in *Licht v. Licht* (1914) 88 Misc. 107, 150 N. Y. Supp. 643, also, there having been a separation agreement before the removal of the husband to Nevada, where he procured the divorce, the court said that, by virtue of this agreement, the wife had a right to establish a domicile separate and apart from the husband; and that in such circumstances there can be no matrimonial domicile established by the husband alone.

The decision in *Ackerman v. Ackerman* (1908) 123 App. Div. 750, 108 N. Y. Supp. 534, cited in the note in 18 L.R.A.(N.S.) 650, was affirmed by the court of appeals in (1910) 200 N. Y. 72, 93 N. E. 192, which observed that the conclusion that the Florida divorce was void as to the plaintiff in the New York suit was uncontested by defendant and was indubitable.

In *People v. Shaw* (1913) 259 Ill. 544, L.R.A.1915E, 87, 102 N. E. 1031, the Illinois court gave effect to the New York rule which refuses to recognize a divorce upon the ground of desertion, granted upon constructive service of process against a nonresident, by holding that a ceremonial marriage in New York of a woman against whom, while residing in New York, a divorce had been previously granted in California upon service by publication, without appearance, was invalid and would not support a prosecution in Illinois for bigamy against

a party to the ceremony, who afterwards married another woman. The last common domicile of the parties to the divorce suit seems to have been in Illinois. The matrimonial domicile was never established in California where the divorce was granted.

In *Bruguiere v. Bruguiere* (1916) 172 Cal. 199, 155 Pac. 988, it was held that a divorce obtained by a husband in Nevada upon constructive service of process upon the wife who received no actual notice of the proceedings, was not binding upon the courts of California where the parties were domiciled up to the time that the husband went to Nevada, even assuming that he obtained a bona fide residence in Nevada. As a matter of fact the court was of the opinion that his residence in Nevada was not bona fide. In this case, however, it was held that the wife had estopped herself to deny the validity of the Nevada divorce as affecting her status in California by reason of her acquiescence therein and her remarriage to another man in reliance thereon, notwithstanding that she subsequently procured a decree in New York declaring that marriage annulled on the ground that she had not been legally divorced from the first husband.

In *Walker v. Walker* (1915) 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934, a decree of divorce in favor of the husband, rendered in Nevada, was refused recognition because the husband had not obtained a bona fide domicile in Nevada, the court expressly declaring that the conclusion was reached without reference to the service of the summons issued by the Nevada court.

In *Gooch v. Gooch* (1913) 38 Okla. 300, 47 L.R.A.(N.S.) 480, 133 Pac. 242, where a husband abandoned his wife in Oklahoma, and maintained a residence in Missouri for the statutory time required for divorce, and procured a decree on constructive service upon the wife, who did not appear and had no knowledge of the action, the court held that, whatever effect the decree might have on the marital relation, the court which rendered it was without jurisdiction to affect the right that the wife and the children had acquired as members of the family in a homestead in Oklahoma.

The question in *Toneray v. Toneray* (1910) 123 Tenn. 476, 34 L.R.A.(N.S.) 1106, 131 S. W. 977, Ann. Cas. 1912C, 284, was whether a divorce in favor of the husband in Virginia, where he had a bona fide domicile, rendered upon publication without service upon the wife or any actual notice to her, the matrimonial

domicil of the parties being in Tennessee, had the effect to deprive her of her right to sue for alimony in Tennessee; and the court expressly said that the validity of the Virginia decree, so far as it served to dissolve the bonds of matrimony existing between the parties, must be assumed for the purposes of the appeal, since neither party appealed from that part of the decree of the Tennessee chancellor which upheld the Virginia judgment to that extent. (The note appended to this case in 34 L.R.A.(N.S.) 1106, deals with the effect of a valid divorce granted in one state upon an independent suit for alimony in another, and that note is supplemented by the note to *Bodie v. Bates*, L.R.A.1915E, 421.)

**— divorce granted to wife in a state to which she removed after separation.**

See also cases cited in note 59 L.R.A. 162, and 18 L.R.A.(N.S.) 647.

In *Matthews v. Matthews* (1912) 139 Ga. 123, 76 S. E. 855, the court refused to recognize either under the full faith and credit clause or on principles of comity a decree of divorce rendered by a court of Alabama in favor of a wife upon constructive service of the husband, who apparently had no actual notice of the pendency of the suit. The court also said in this case that the judge was authorized to find that the wife had no actual domicile in Alabama, and that she commenced her suit there on arrival and returned to Georgia within fifty or sixty days and before the grant of the divorce decree.

In *Baylis v. Baylis* (1913) 207 N. Y. 446, 101 N. E. 176, affirming (1911) 146 App. Div. 517, 131 N. Y. Supp. 671, refusing under the doctrine of the *Haddock Case*, to recognize a divorce granted to the wife in Connecticut without personal service upon her husband in that state, the matrimonial domicile having been in New York, neither the ground of the divorce nor the circumstances of the separation appear. The New York action involved the custody and legitimacy of a child of a subsequent marriage contracted by the wife.

In *Tysen v. Tysen* (1910) 140 App. Div. 370, 125 N. Y. Supp. 479, refusing to recognize a divorce granted in Michigan on the ground of cruelty, in favor of the wife upon constructive service upon the husband, the last common matrimonial domicile was apparently in New York, but the husband seems to have been domiciled in California at the time of the decree. The New York suit was



by a man with whom the wife, after the Michigan divorce, entered into a ceremonial marriage in Connecticut, to annul the same.

In *Berney v. Adriance* (1913) 159 App. Div. 628, 142 N. Y. Supp. 748, the New York doctrine was applied by refusing to recognize a divorce obtained by the wife in South Dakota upon constructive service of process after she had been abandoned by the husband in New York, which was the last common matrimonial domicile. The husband in this case was personally served in New York, but did not appear. The case is rather an extraordinary one, as the New York action was for criminal conversation brought by the husband against a man with whom, after the South Dakota divorce, the wife entered into a ceremonial marriage in New Jersey, where she was then residing, and was based on their relations after the divorce and before and after the New Jersey marriage. The New York court expressly held that the New Jersey marriage was no defense to the action, even though the courts of that state might have recognized the South Dakota decree as binding upon a citizen of that state.

In *People ex rel. Catlin v. Catlin* (1910) 69 Misc. 191, 126 N. Y. Supp. 350, the court refused to recognize a Nevada divorce, even upon the assumption that the wife, who obtained it, had acquired a domicile in Nevada, the husband having been served constructively only. The court said that the divorce was of no effect in New York whether or not the separation was due to the fault of the defendant (the husband). The decision was upon the assumption that the matrimonial domicile was in New York, notwithstanding that the parties last lived together in New Jersey, it appearing that both parties moved to New York and while there amicably discussed the subject of setting up housekeeping together. There is an implication that if the matrimonial domicile had remained in New Jersey, the court might have recognized the Nevada divorce, even as affecting the status of the parties in New York. This implied concession however, apparently rests upon principles of comity, and not on the full faith and credit provision.

In *Re Higgins* (1909) 65 Misc. 415, 121 N. Y. Supp. 907, the court refusing to recognize a divorce obtained by the wife in Ohio upon constructive service of process, discussed chiefly an alleged appearance. The facts as to the matrimonial domicile did not appear except that the court stated that there was

nothing in the pretense that the decree was obtained in the state of the matrimonial domicile.

In *Gibson v. Gibson* (1913) 81 Misc. 508, 143 N. Y. Supp. 37, however, a wife who, after obtaining a decree of separation in New York, procured a divorce in Ohio upon constructive service of process on the husband, was held estopped to deny the validity of that decree, on a motion by the husband to modify the New York decree so as to relieve him from the payment of alimony.

In *Blondin v. Brooks* (1910) 83 Vt. 476, 76 Atl. 184, where an attack on the divorce was made by a stranger in a suit involving title to real property, the court held that a decree of divorce in favor of the wife in New Mexico, upon personal service upon the husband in Vermont, where the parties had been living together prior to the separation, would not be recognized as affecting the status of the parties in Vermont, even assuming that it was valid in New Mexico. From the discussion and citation of cases it would seem that the result would have been the same even upon the assumption that the wife had acquired a bona fide domicile in New Mexico; but as a matter of fact, the decision rested in part at least upon the idea that she had not acquired a bona fide domicile and had practised a fraud on the court in New Mexico. Upon that assumption, of course, the divorce would not be entitled to recognition, at least when attacked by a stranger, although apart from the objection arising from the constructive service of process.

In *Cass v. Cass* (1910) 102 L. T. N. S. (Eng.) 397, 54 Sol. Jo. 328, 26 Times L. R. 305, where a wife who had been living with her husband in Massachusetts took up her abode in Dakota and procured a divorce upon service by publication upon the husband who did not appear, the court held that such divorce was not entitled to recognition in a suit for nullity of a marriage subsequently contracted by her in New York, it being found on the evidence that the divorce in the circumstances would not have been recognized either in Massachusetts, the domicile of the first husband, or in New York, where the marriage ceremony took place. It is not clear whether or not the decision was rendered upon the assumption that the wife procured a bona fide domicile in Dakota.

In *Montmorency v. Montmorency* (1911) — Tex. Civ. App. —, 139 S. W. 1168, the court upheld the jurisdiction of a court of Texas to grant a divorce in

favor of the wife upon constructive service of process upon the husband where, after being abandoned by the husband she removed to Texas and acquired a domicile there. Although, as stated, the question in this case was as to the jurisdiction of a local court, and therefore not strictly in point, the opinion takes the position that where a husband abandons his wife the marital domicile remains with her until a new domicile be acquired by her elsewhere, and that a court of the marital domicile has jurisdiction to grant a divorce upon constructive service which will be entitled to recognition in other states under the full faith and credit provision. This decision was apparently rendered upon the assumption that the parties had never lived together as husband and wife in Texas.

**—effect of appearance by defendant.**

See also cases cited in notes in 59 L.R.A. 162, and 18 L.R.A.(N.S.) 647.

A general appearance, or what amounts to such an appearance, by a defendant in any one of the four situations above referred to, removes any objection to the jurisdiction as affected by the mode of service, and, in the absence of other objections, entitles the decree to recognition under the full faith and credit provisions as affecting the status of the parties in other states, whatever might be the case in the absence of such an appearance. The effect of an appearance to waive the objection that neither of the parties was bona fide domiciled in the state where the divorce was granted presents another question which is not within the scope of this note.

Because of the appearance by the defendant in the divorce suit, a decree rendered in another state upon constructive service or personal service out of the state was recognized and given effect in *Rupp v. Rupp* (1913) 156 App. Div. 389, 141 N. Y. Supp. 484; *French v. French* (1911) 74 Misc. 628, 131 N. Y. Supp. 1053; *Richards v. Richards* (1914) 87 Misc. 134, 149 N. Y. Supp. 1028.

And in *Com. v. Parker* (1915) 59 Pa. Super. Ct. 74, the appearance of the wife who was served through the mail in a Nevada suit for divorce, was held to entitle the decree in favor of the husband to recognition under the full faith and credit provision, although Pennsylvania was the only common domicile the parties had ever had; and the court assumed that but for her appearance the Nevada decree could not have had the L.R.A.1917B.

extraterritorial effect of impairing or destroying her status in Pennsylvania, since no service on her in that state could import her into the jurisdiction of Nevada. The appearance in this case was by an answer which not only traversed the averments of the libel, but craved the protection afforded to the wife under the laws of Nevada.

In *Weaver v. Weaver* (1916) 160 N. Y. Supp. 642, however, it was held that a motion in the foreign jurisdiction by a nonresident who had been served constructively only to vacate the decree for irregularities and defects and want of jurisdiction, which motion was finally denied, did not give the decree the effect of one rendered on personal service or appearance before judgment, nor extend its territorial effect; and the court therefore held that the decree was not available in New York state as a ground for vacating an order for alimony in a separation suit in that state.

And in *Re Higgins* (1909) 65 Misc. 415, 121 N. Y. Supp. 907, where an attempt was made to take an Ohio decree out of the New York rule on the ground that there was an appearance by virtue of an instrument signed by the husband acknowledging service and waiving proof of the official character of the officer before whom certain depositions were to be taken, it was held that this instrument could not be regarded as an appearance in view of the recital in the decree that there had been no appearance. The proceeding in this case, however, having been subsequently reopened, and it then appearing that the decree in the other state had been amended *nunc pro tunc* by striking therefrom the recital that the defendant (husband) had not appeared, and substituting a recital that he had appeared, the decree was recognized and given effect by holding that the plaintiff (wife) in that decree was entitled to letters of administration upon the estate of a man whom she subsequently married. *Re Higgins* (1910) 68 Misc. 259, 124 N. Y. Supp. 1005.

In *Gillig v. Gillig*, L. R. [1906] P. (Eng.) 135, 75 L. J. Prob. N. S. 42, 94 L. T. N. S. 614, 22 Times L. R. 306, a divorce rendered in South Dakota in favor of a wife, upon service in England upon the husband, who, however, was domiciled in New York, he having appeared in the Dakota suit and entered an action by cross claim, was recognized in England, the court having found on the evidence that it would have been recognized by the courts of New York, the domicile of the husband, because of his

appearance in the suit. There seems to be an implication in the opinion that, had the husband been domiciled in England, the court would not have recognized the Dakota divorce notwithstanding the appearance.

#### Comity.

See also cases cited in notes in 59 L.R.A. 162, and 18 L.R.A.(N.S.) 647.

As shown in the earlier notes, the unfortunate consequences involved in the apparent implication of the majority opinion in the Haddock Case, and express declarations in other cases, that a decree of divorce rendered in a state other than the matrimonial domicile, upon constructive service of process against a nonresident who does not appear, may be valid in the state where rendered, in connection with the holding that it is not entitled to recognition under the full faith and credit provision in other states, are in a measure mitigated by the disposition of some courts to recognize divorces granted in such circumstances, upon principles of comity, though not constrained to do so by the full faith and credit provision.

Indeed, as pointed out in the earlier note, the courts which prior to the decision in the Haddock Case were accustomed to recognize and give effect to decrees of divorce rendered in other states on constructive service of process, upon the assumption that such decrees were within the full faith and credit provision, continue to recognize them on principles of comity, even though rendered under conditions which according to the doctrine of that case do not entitle them to the protection of that provision as affecting the status of the parties in other states.

In *Gildersleeve v. Gildersleeve* (1914) 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920, the court conceded that it was not bound under the full faith and credit clause to recognize or give effect to a judgment procured by a husband in South Dakota upon constructive service upon the wife, a nonresident of South Dakota and a resident of Connecticut; but held that the divorce was entitled to recognition upon principles of comity, although the wife was only served in Connecticut and did not appear in the South Dakota suit, it having been found by the court, although it was claimed otherwise, that the husband had acquired a bona fide domicile in South Dakota. In this case the matrimonial domicile prior to the husband's going to South Dakota was apparently in Con-

necticut and the wife had never been a resident of South Dakota. The South Dakota decree was rendered upon the ground of desertion and the court held that, considered from the point of view of comity, neither the fact that the period of desertion required by the South Dakota statute was less than that required by Connecticut, nor the fact that the service was constructive only, prevented the recognition of the decree by the Connecticut court.

In reply to the argument that the practice of going to remote jurisdictions to secure a divorce not obtainable at home by reason of stricter requirements ought to be discouraged, the court said: "Unfortunately for this appeal, the reverse side of the picture presenting the consequences of the course advocated is very far from an attractive one. It is no light matter as affecting individual, social, or civic interests, and good morals, that, through the attitude of the courts in refusing recognition to the judicial action of sister states, a condition should be created where legitimacy becomes dependent upon state lines, where wives in one state become concubines when they pass into another, where husband or wife living in lawful wedlock in one jurisdiction is converted into a bigamist by change of location, where persons capable of inheritance in one part of our country are incapable in another, where certainty of status may readily give place to uncertainty and property rights be thrown into confusion."

In *Kaufman v. Kaufman* (1916) 160 N. Y. Supp. 19, a decree of divorce rendered in Nevada in favor of the wife, upon constructive service of process upon the husband, who did not appear, but who was not a resident of New York, was recognized and given effect so as to defeat a suit for annulment brought in New York by a man whom the wife subsequently married. The opinion declares that, while the courts of New York had uniformly protected its citizens against the decrees obtained by a constructive process in foreign jurisdictions, they had not gone so far as to protect a nonresident and declare void a decree granted in a foreign jurisdiction against a nonresident of the state (citing *Percival v. Percival* (1905) 106 App. Div. 111, 94 N. Y. Supp. 909, which is set out in the note in 18 L.R.A.(N.S.) at page 652). The court also expressed the opinion in this case, that, it appearing that the husband had deserted the wife in New York, the matrimonial domicile there was

broken, and she was then free to select any other domicile which she desired, and, after establishing her own matrimonial domicile, was entitled to institute an action for divorce in that forum.

Following the decision in the Haddock Case, the legislature of Kansas placed decrees of divorce on constructive service of process upon the same basis as judgments of the courts of Kansas, and by virtue of its statute any judgment or decree in one of the United States in conformity to the laws thereof has the same force, and must be given the same faith and credit, as if rendered by a court of Kansas. *Miller v. Miller* (1913) 89 Kan. 151, 130 Pac. 681. It was also held in this case that the finding of the court of the other state as to the jurisdictional requisite of residence was binding and conclusive upon the Kansas court in a collateral attack upon the decree. That question, however, is not within the scope of this note.

So, the decision of the United States Supreme Court that the full faith and credit clause of the Federal Constitution cannot be invoked to compel a state to recognize as valid a divorce granted by a sister state upon constructive service by publication, where the defendant in the suit has never had a matrimonial domicile in the state granting the divorce, does not prevent the recognition of such decree by the courts of Missouri upon the principles of comity. *Howard v. Strode* (1912) 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057.

And such decrees have been recognized on principles of comity in other cases which are cited in the note in 18 L.R.A. (N.S.) 647. As there pointed out, however, the courts, when they consider the question from the point of view of comity, are inclined to take into consideration factors, especially the fact whether or not defendant had actual notice of the divorce suit imparted by pub-

lication or personal service out of the state, which would not be important if the question were controlled by the full faith and credit provision.

In *Douglas v. Teller* (1909) 53 Wash. 695, 102 Pac. 761, the court, while recognizing that it would not be bound under the full faith and credit provision to recognize a divorce on the ground of abandonment in favor of the husband, granted in Illinois upon constructive service of process upon the wife, the last matrimonial domicile having apparently been in Michigan, and the wife not having appeared in the Illinois suit, nevertheless held that that decree would be recognized as a matter of comity in a suit by the wife in Washington for the removal of one appointed administrator of the estate of the husband, who came to Washington after the divorce. The court observed that the divorce was granted more than forty years before the action in question was begun, and while the divorced wife testified that she did not know of the divorce until long after the death of the husband, and only a few months prior to the bringing of the action, the statement was contradicted by the daughter, and that under the circumstances the decree at this late date ought to import verity, especially in view of the fact that it is a valid decree where rendered.

So, in *Hicks v. Hicks* (1912) 69 Wash. 627, 125 Pac. 945, a decree of divorce rendered in Alaska in favor of the husband upon constructive service of process upon the wife, the parties apparently living together in California at the time of the separation, was recognized in a subsequent suit in Washington by the wife against the husband for a divorce; it being further held that an attack in such suit upon the Alaska decree upon the ground of fraud was a collateral attack and therefore could not be heard. G. H. P.

#### KANSAS SUPREME COURT.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appt.,

v.

CARRIE SARBACH, Admr., etc., of Albert Sarbach, Deceased.

(99 Kan. 29, 160 Pac. 990.)

Partnership — accounting — creditor of partner.

1. Where the individual estate of a de-

cedent is insolvent, having no assets except what may accrue to it from the decedent's share of a partnership estate after the partnership debts are paid, a creditor of the individual estate has such interest in the accounting and settlement of the partnership estate as will entitle him to appear in the probate court and resist the allowance of questionable claims against the partnership

Note. — As to right of creditor of individual partner or of his estate to appear in proceedings for the settlement of affairs of partnership, see annotation following this case, post, 1047.

estate, and to appeal from the decision of the probate court thereon.

*For other cases, see Appeal and Error, III. a, in Dig. 1-52 N. S.*

**Executor and administrator — accounting — credit.**

2. In an accounting and settlement in the probate court, an administratrix is not absolutely entitled to credit for a judgment rendered against her as administratrix which she has paid; and the court may inquire whether the lawsuit on which the judgment was founded was diligently defended, whether it was prudently compromised, or whether she subjected herself to the judgment by negligence, fraud, or collusion.

*For other cases, see Executors and Administrators, IV. c, in Dig. 1-52 N. S.*

**Appeal — review of facts.**

3. Rule followed on appeal that the trial court's findings of fact based upon tangible and sufficient evidence cannot be disturbed.

*For other cases, see Appeal and Error, VII. l, 3, in Dig. 1-52 N. S.*

(November 11, 1916.)

**A** PPEAL by a creditor of the individual estate of decedent from a judgment of the District Court for Jackson County affirming a judgment of the Probate Court allowing a claim against the partnership estate in a proceeding for the settlement of decedent's estate. Affirmed.

The facts are stated in the opinion.

Messrs. T. F. Garver and R. D. Garver, for appellant:

A creditor has the right to proceed against an executor or administrator for relief because of unfaithful administration or failure to act.

18 Cyc. 1209.

The claim was not a legal claim against the estate.

Hinnen v. Newman, 35 Kan. 709, 12 Pac. 144; Hawley v. Kansas & T. Coal Co. 48 Kan. 593, 30 Pac. 14; Sheldon v. Pruessner, 52 Kan. 579, 22 L.R.A. 709, 35 Pac. 201; Alexander v. Barker, 64 Kan. 396, 67 Pac. 829; Patterson v. Imperial Window Glass Co. 91 Kan. 201, 137 Pac. 955; United States v. The Amistad, 15 Pet. 518, 10 L. ed. 926.

The administrator will not be given credit for moneys paid on claims which are not shown to be legal and valid claims against the estate.

Carr v. Catlin, 13 Kan. 393; Re Corrington, 124 Ill. 363, 16 N. E. 252; Marshall v. Coleman, 187 Ill. 556, 58 N. E. 628; Turner v. Turner, 21 Ill. App. 427; Phillips v. Frye, 14 Allen, 36; Re Van Buren, 19 Misc. 373, 44 N. Y. Supp. 357; Re Millenovich, 5 Nev. 161; Jones v. Ward, 10 Yerg. 160; Ryan v. Williams, 92 Minn. 506, 100 L.R.A.1917B.

N. W. 380; Dawson v. Hemelrick, 33 W. Va. 675, 11 S. E. 31; Gafford v. Dickinson, 37 Kan. 287, 15 Pac. 175; Re Yetter, 44 App. Div. 404, 61 N. Y. Supp. 175, affirmed in 162 N. Y. 615, 57 N. E. 1129; Garr v. Harding, 37 Mo. App. 24; Dullard v. Hardy, 47 Mo. 403; Gwynn v. Hamilton, 29 Ala. 233; Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15; Tucker v. Tucker, 29 N. J. Eq. 286; Hurlbut v. Hutton, 44 N. J. Eq. 302, 15 Atl. 417.

Messrs. Charles Hayden, I. T. Price, A. E. Crane, E. D. Woodburn, and F. T. Woodburn, for appellee:

The Fidelity & Deposit Company of Maryland had no appealable interest, or right to appeal from the order and judgment of the probate court made upon the accounting of the administratrix and trustee of the estate of L. Sarbach's Sons.

Re Crooks, 125 Cal. 459, 58 Pac. 89; Craft v. Bent, 8 Kan. 323; Gille v. Emmons, 58 Kan. 118, 62 Am. St. Rep. 609, 48 Pac. 569; Wolfley v. McPherson, 61 Kan. 492, 59 Pac. 1054; Commercial State Bank v. Ross, 90 Kan. 425, 133 Pac. 538; Cooper v. Rhea, 82 Kan. 109, 29 L.R.A.(N.S.) 930, 136 Am. St. Rep. 100, 107 Pac. 799, 20 Ann. Cas. 42; Kothman v. Markson, 34 Kan. 542, 9 Pac. 218; Phillips v. Faherty, 9 Kan. App. 383, 58 Pac. 801.

Appellant's pleading presented no issue of fraud or illegality.

Re Johnson, 92 Kan. 59, 139 Pac. 1161; Ladd v. Nystol, 63 Kan. 23, 64 Pac. 985; Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698; Kingman, P. & W. R. Co. v. Quinn, 45 Kan. 477, 25 Pac. 1068; Gille v. Emmons, 58 Kan. 118, 62 Am. St. Rep. 609, 48 Pac. 569; Brookover v. Esterly, 12 Kan. 152; 9 Enc. Pl. & Pr. 684, 685; Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532, 44 Pac. 3; Topeka Capital Co. v. March, 10 Kan. App. 40, 61 Pac. 876.

The judgment of the district court was conclusive.

Freeman v. Thompson, 53 Mo. 183; Lenox v. Clarke, 52 Mo. 116; Mason v. Messenger, 17 Iowa, 261; Krekeler v. Ritter, 62 N. Y. 372; Morris v. Sadler, 74 Kan. 892, 88 Pac. 60; De Graw v. De Graw, 7 Mo. App. 121; Hansford v. Hansford, 34 Mo. App. 271; Lathrop v. American Emigrant Co. 41 Iowa, 547; Johns v. Pattee, 55 Iowa, 665, 8 N. W. 663; Hardin v. Lee, 51 Mo. 241; Phillips v. Faherty, 9 Kan. App. 383, 58 Pac. 801; Simpson v. Kimberlin, 12 Kan. 579.

Dawson, J., delivered the opinion of the court:

This is one of a long series of lawsuits which have reached this court arising out of the financial troubles of Albert Sarbach,

of Holton, deceased, and also of the partnership L. Sarbach's Sons, of which he was a member. On his death in 1909 Carrie Sarbach was appointed administratrix of Albert's personal estate, and also of his partnership's estate. Some time later an action was commenced by the Linscott State Bank against the surviving partner of L. Sarbach's Sons, and against Carrie both as administratrix of Albert's estate and of the partnership estate, founded on certain more or less meritorious claims amounting to \$7,596.75, for which the bank prayed judgment. A separate answer was filed by Carrie as administratrix of both estates. Judgment by compromise was rendered for \$5,000 against her as administratrix of the partnership estate. She paid this judgment, and over the objection of the Fidelity & Deposit Company, a creditor of Albert's personal estate, the probate court allowed this item. This objecting creditor appealed to the district court, and the controversy there ranged about two main propositions, the right of this creditor of the personal estate to appeal from an allowance of the \$5,000 item against the partnership estate, and whether the original judgment for \$5,000 was rendered in good faith or through collusion between the Linscott State Bank and certain attorneys for the administratrix.

The trial court made certain findings of fact and conclusions of law:

"VIII. . . . Under the circumstances of the case, and with the knowledge which could be produced by said bank proving liability of L. Sarbach's Sons for the payment of each of said two notes for \$3,000, and the fact that the trial court, in overruling defendants' motion to exclude evidence, had, after full argument of the question, decided that the amended petition in the case stated a cause of action against the defendants, the said attorneys acted for what they believed to be for the best interests of the estate of L. Sarbach's Sons in advising the compromise that was then made. They were not attorneys for said bank, and did not act for or in the interest of said bank in advising said compromise, nor were they or either of them guilty of any fraud, collusion, negligence, or other misconduct whatsoever.

"XII. The estate of Albert Sarbach is insolvent, and probably little more will be paid creditors of the fifth class. There is a small balance in the partnership estate, after paying all partnership liabilities.

"XIII. The appellant, the Fidelity & Deposit Company of Maryland, is not a creditor of the estate of L. Sarbach's Sons, but is a creditor of the estate of Albert Sarbach, deceased. . . .

"Second. Each and all of the payments L.R.A.1917B.

made by said Carrie Sarbach as administratrix and trustee of the estate of L. Sarbach's Sons pursuant to the said compromises mentioned in the foregoing findings of fact, and including the payment of five thousand dollars (\$5,000) made by her in satisfaction of the judgment recovered by the Linscott State Bank, were lawfully made by her, and she should be allowed credit therefor.

"Third. The Fidelity & Deposit Company of Maryland, not being a creditor of L. Sarbach's Sons, had no appealable interest or right to appeal from the order and judgment of the probate court made upon the accounting of said Carrie Sarbach, as administratrix and trustee of the estate of L. Sarbach's Sons."

Error is assigned (a) on the decision that the \$5,000 paid to the bank in accordance with the judgment was a legal claim against the partnership estate; and (b) on the ruling that the appellant, not being a creditor of the partnership estate, had no appealable interest in the probate court's allowance of this judgment item.

Considering the latter question first, we have no doubt that the appellant had an interest in the proceedings in the probate court and an appealable interest from an adverse decision. Its interest in the probate court's action was simple and easily understood. It was a creditor of Albert's personal estate. That estate was insolvent. Whatever was left of the partnership estate after its lawful debts were paid would inure to the partners individually, and Albert's estate would get his proper share as partner. When that share was distributed, the personal creditors could reach it. If personal creditors are compelled to stand aside without right to be heard while partnership assets are frittered away on trumped-up claims, there is a discrepancy in the law which is highly discreditable to the administration of justice, and one which we would be reluctant to admit.

Authorities on this subject are not numerous, but the statute is plain. Section 3522 of the General Statutes of 1909 provides: "The probate court shall have jurisdiction to hear and determine all demands against any estate; and a concise entry of the order of allowance shall be made on the record of the court, which shall have the force and effect of a judgment."

How is the court to hear and determine such demands? By hearing only those who advocate the demands? Shall the court limit the hearing of objections to those who have direct claims against the estate? Or in fairness and justice should not the court hear also the protest of those who are vitally interested, although indirectly, in the dis-

position of the assets? More broadly expressed, should not the court make the sifting of the truth, the merit of the claim, its principal concern, and hear all who may be able to throw light on the subject regardless of their interest?

Section 3587 of the General Statutes of 1909 provides that, when an administrator desires to make final settlement of an estate, he shall give four weeks' notice "to all creditors and all others interested in the estate." See also Gen. Stat. 1909, § 3490. Who can possibly be meant by the words "all others interested in the estate" if not those having claims on the residue after direct creditors are satisfied? 11 R. C. L. 185. Such claimants may not inaptly be designated and considered as interveners by an analogy to the practice in equity. Certainly the statute is not using empty and futile words when it speaks of "all others interested in the estate." One highly pertinent reason why creditors of the personal estate should be heard in the determination of claims against the partnership estate rests on the proposition that the probate court's decision thereon will go for review to the district court charged with a presumption in favor of its regularity. 18 Cyc. 1213. It will be noted also that the statute relating to appeals from the probate court (Gen. Stat. 1909, §§ 3624 et seq.) is very liberal, and it does not define who may be appellants. The same liberality as to appellants should be inferred as on the subject matter of such appeals. In 18 Cyc. 1209, it is said: "The general rule that any party aggrieved by a judgment or decree may appeal therefrom, and that in a legal sense a party is aggrieved by a judgment or decree whenever it operates on his rights of property or bears directly upon his interest, is applicable in proceedings for the settlement of administration accounts; and it follows as the converse of this general rule that it is not the privilege of a party to appeal from a judgment or order rendered in such a proceeding unless he is, either as an individual or in a representative capacity, aggrieved thereby, and that no one is in a legal sense aggrieved by such a judgment or order unless it prejudicially affects his rights of property or pecuniary interests, or those of others for whom he is, with relation to such proceeding, the duly constituted representative. Legatees, distributees, or creditors of the decedent, when aggrieved by such a judgment or decree, may appeal therefrom."

It seems clear, therefore, that a creditor of the personal estate who is dependent upon the personal estate's share of the residue of a partnership estate for the satisfaction of his claim has such interest in the partnership estate as will entitle him to

resist the allowance of a questionable claim in the settlement of the partnership estate in the probate court, and to appeal from the decision of that court. *Davenport v. Hervey*, 30 Tex. 309.

Turning next to what appears to be the controlling feature of this lawsuit, the appellant's objections to the item in controversy and many others were heard by the probate court. That court rendered its judgment. Appeal was taken, and while the district court erroneously held that the appellant creditor had no appealable interest from the allowance of claims against the partnership estate, yet appellant's grievance at its allowance was heard and determined. The district court heard the evidence touching the compromise judgment entered in the bank's case against the partnership estate, heard the evidence as to the alleged collusion between the bank and certain of the attorneys for the administratrix, and made findings of fact, quoted in part above, fully exonerating counsel from any unprofessional or collusive conduct. These findings based on sufficient oral testimony conclude that phase of the case on appeal. We would not say that the judgment in the bank case was conclusive before the probate court nor in the district court on appeal from the decision of the probate court. *Pearson v. Darrington*, 32 Ala. 227 (syl. ¶ 14); *Re Yetter*, 44 App. Div. 404, 61 N. Y. Supp. 176. Doubtless, this judgment was not subject to collateral attack by the parties to that judgment. But the probate court might have disallowed the item therefor in the account of the administratrix if it considered that the judgment was brought about by the fraud, collusion, or negligence of the administratrix and her attorneys. A prudent course would have prompted the administratrix to have secured the approval of the probate court before consenting to a compromise judgment. We realize, however, that situations sometimes develop rapidly in a lawsuit, and it is necessary for litigants and their counsel to act quickly, and to trust that their course will later meet the approval of those entitled to review their conduct. We are constrained to hold, however, that the judgment made a prima facie claim for allowance in the probate court. Gen. Stat. 1909, §§ 3518, 3519. Here, then, was an item founded on a judgment presented to the probate court freighted with the presumption of its regularity and validity, further strengthened by its approval and allowance by the probate court, and still later its merits investigated and approved by the district court.

In such a situation the judgment must be affirmed.

**Annotation—Right of creditor of individual partner or of his estate to appear in proceedings for the settlement of affairs of partnership.**

A careful search discloses but few cases which have involved the question stated in the title to this annotation. However, the question is one which in each instance depends largely upon the construction to be placed upon the particular statutes under consideration, so that precedents are of little value unless similar statutes are involved. As a consequence of this we may have conclusions which are diametrically opposed, but which at the same time do not conflict. This is illustrated by the following decisions:

Under the Kansas statutes it has recently been held (*FIDELITY & D. Co. v. SARBACH*, ante, 1043, wherein the pertinent provisions of the statute are quoted) that a creditor of the estate of a deceased individual partner, who is dependent upon the individual estate's share of the residue of the partnership assets for the satisfaction of his claim, has such an interest in the accounting and settlement of the partnership estate as entitles him to appear in the probate court and resist the allowance of questionable claims against the partnership estate, and to appeal from the decision of that court thereon.

But a contrary conclusion has been reached by the supreme court of California in *Isaacs v. Jones* (1898) 121 Cal. 257, 53 Pac. 793, it having been held under a statute allowing any person to intervene in an action "who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both," that a creditor of an individual partner had no such interest as would entitle him to intervene in an action to wind up the affairs of the partnership, although he had attached the interest of the individual partner in the partnership assets; and that his right to intervene was not enlarged by the action of the court in appointing a receiver for the partnership or by the conduct of the receiver after his appointment. In so holding the court reasoned as follows: "There have been many decisions upon the right of intervention which is given by this section, but in none of them has there been any attempt to define the right in any clearer terms than those of the section itself. Whether any particular case is within the terms of the premises is best determined by a consideration of the facts of that case; and the consideration of the effect of any particular con-

struction to be given to a statute is of advantage in determining the construction to be given to it, and is frequently decisive of the question. To avail himself of the right given by this section, the applicant must have either an interest in the matter in litigation, or in the success of one of the parties to the action, or an interest against both of them. The interest here referred to must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought. . . . The second sentence of the section above quoted itself defines the circumstances under which an intervention may be had, and is to that extent a limitation upon the terms used in the first sentence. The third person must have an interest in claiming what is sought by the complaint, or in resisting the claim of the plaintiff, or must demand something which is involved in the litigation adversely to both of the parties. The object of the present action is a distribution under the direction of the court of the assets of the partnership, including the determination of the amount thereof to which each partner will be entitled after the payment of all the partnership claims. Although the individual partners are entitled to the surplus according to their interests as the same shall be ascertained by the court, a litigation in the action of disputed claims against the individual partners is not appropriate. If every claim against each of the partners could be made the subject of a distinct issue and determination in such an action, it is easily seen that the litigation might be indefinitely prolonged. When the partnership affairs have been adjusted, the court should enter its judgment in accordance with such adjustment. Its authority to appoint a receiver rests upon its right to retain in its possession the property of the partnership until the rights of the several claimants thereto have been satisfied, and when this has been accomplished the receiver is to be discharged. The court is not authorized to retain in its possession thereafter the property adjudged to belong to the individual partners, for distribution among their respective creditors, any more than it would have been authorized to appoint a receiver for that purpose in the first instance. So far as the rights of these creditors are legal rights, they are to be



enforced in the ordinary mode for enforcing legal obligations. In the present case, the appellant alleges that it has secured its claim against Bernhard Isaacs by the lien of an attachment, and it appears from the record that the court refused the motion of the plaintiff to dissolve the attachment. This lien of the appellant is upon the entire share of his debtor in the surplus assets of the partnership, and such lien will be available to him when he shall have obtained a judgment in the action in Yolo county.

He has not yet established any claim against this surplus, and, as it is possible that he may not obtain a judgment in that action until long after the partnership affairs shall have been adjusted in the present action, it would be unjust to permit an intervention here, the only effect of which would be to tie up the property until the determination of the suit in Yolo county. If he shall obtain judgment in that action prior to the entry of judgment herein, a sale under that judgment of the interest of Bernhard Isaacs in the real estate upon which

his attachment has been levied, as well as in the partnership property, will make the purchaser its owner and entitled to receive from the court whatever may be found to belong to Bernhard." But Beatty, Ch. J., dissented from this decision, saying that the matter in litigation was the amount of the surplus assets of the firm, that the creditor had a lien upon an individual partner's share, that the lien was a valuable interest, that the property and its value which the lien attached not only could be, but must be, determined in the action, and that a plain case for intervention was established.

And in connection with the decision in *Isaacs v. Jones* (1898) 121 Cal. 257, 53 Pac. 793, see *New Orleans v. Gauthreaux* (1880) 32 La. Ann. 1126, wherein it was said that a creditor of an individual partner was not, by reason of an attachment of partnership assets, a necessary party to a suit to liquidate the partnership, as only partners and partnership creditors have a direct interest in such a proceeding. G. J. C.

#### MISSISSIPPI SUPREME COURT. (Division A.)

L. D. HUGHES et al., Appts.,  
v.  
MRS. LELIA M. McEWEN.

(— Miss. —, 72 So. 848.)

#### Bills and notes — when payable.

1. A note payable one year after date, but containing a clause that it is to be paid whenever certain land is sold and paid for, secured by a mortgage reciting that the note is not to be paid until the land is sold, is payable not in a year, but when the land is sold.

*For other cases, see Bills and Notes, VI. b, in Dig. 1-52 N. S.*

#### Same — reasonable time.

2. A note payable when certain land is sold is payable at the expiration of a reasonable time for effecting the sale.

*For other cases, see Bills and Notes, VI. b, in Dig. 1-52 N. S.*

(November 6, 1916.)

**A** PPEAL by defendants from a judgment of the Chancery Court for Pike County in complainant's favor in a suit to enjoin

**Note.**—As to time of payment of obligation purporting to be payable on specified event, the happening of which is wholly or partially within the control of the promisor, see annotation following this case, post, 1050. L.R.A.1917B.

the sale of certain land to satisfy a note. Reversed.

The facts are stated in the opinion.

Mr. F. D. Hewitt for appellants.

Messrs. Price & Price for appellee.

Sykes, J., delivered the opinion of the court:

The appellant L. D. Hughes, one of the defendants in the court below, on January 29, 1911, sold to Mrs. Lelia M. McEwen, the appellee in this court, a certain tract of land for a certain consideration, a part of which was paid in cash, the assumption of a deed of trust due the Union Bank, and a balance of \$150, for which a note was given by Mrs. McEwen, secured by a deed of trust on certain of the lands. The note reads as follows:

\$150. Summit, Miss., Jan. 29th, 1911.

One year after date I, we, or either of us, promise to pay to L. D. Hughes or bearer one hundred fifty dollars, for value received, with interest at the rate of 10 per cent per annum after date until paid. And in the event default is made in the payment of this note at maturity, and it is placed in the hands of an attorney for collection, an additional amount of 10 per cent shall be added to the same as attorneys' fees. The drawers and indorsers severally waive presentation for payment, protest, and notice of protest for nonpayment of this note.

Negotiable and payable at Union Bank of Pike, Summit, Miss. It is understood and agreed that this note is to be paid whenever 80 acres of land described in deed of trust to secure this paper is sold and paid for.

Mrs. L. M. McEwen.

It will be noted that the note in its beginning says that it is due one year after date, but that the last sentence in said note reads as follows: "It is understood and agreed that this note is to be paid whenever 80 acres of land described in the deed of trust to secure this paper is sold and paid for."

The deed of trust contains this statement: "This is a second mortgage to one held by Union Bank of Pike, and payment of note is not to be made until Mrs. McEwen has sold and collected for 80 acres or more of the land."

This note of \$150 had not been satisfied on the 2d day of February, 1915, at which time Fred J. Martin, the trustee in the deed of trust, advertised the land for sale to satisfy this indebtedness. Mrs. McEwen filed a bill in the chancery court of Pike county seeking to enjoin the sale of the land to satisfy the note. In her bill she contends that the note is not due and will not become due until she has sold and collected the purchase money for 80 acres of this land. The chancellor issued a temporary injunction, and on the final hearing made the same perpetual, from which judgment this appeal is prosecuted.

It is the contention of the appellant that the note is due one year after date, and that the last clause in the note simply means that if the land is sold and paid for before the expiration of one year, then the note will fall due at that time; that the certain date of payment, viz., one year after date, should control any ambiguous or uncertain clause either in the note or in the deed of trust as to the payment. The note and the deed of trust were executed at the same time, and should be considered together. While a consideration of the clause in the note alone might lead to the conclusion of the appellant, yet, when considered in connection with the clause in the deed of trust above quoted, it is quite plain that it was the intention of both parties to make the note payable after 80 acres of land had been sold and the purchase price of same paid.

The question then before the court is simply this: Construing the note and deed of trust together, there is a debt of \$150 owing by the appellee to the appellant, but the payment of which is postponed to a future time and depends upon the happening of a future event, resting entirely within the discretion of the appellee, and which event the

appellee may never cause to happen. In other words, taken literally, the appellee can defeat the payment of the debt due by her to the appellant by never selling the land. The debt is an absolute one, and is admitted by the appellee.

While there are some authorities to the contrary, the great weight of authority and the best-reasoned cases hold that in cases of this kind the debt becomes due absolutely within a reasonable time. In the case of *De Wolfe v. French*, 51 Me. 420, it was held that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In *Sears v. Wright*, 24 Me. 278, where a note was payable "from the avails of the logs bought of M. M., when there is a sale made," it was held "not payable upon a contingency, but absolutely, and when a reasonable time had elapsed to make sale of the logs," and that it was the duty of the maker to sell them. But whether it be logs to be sold or a farm can make no difference. The maker of the note is to make sale within a reasonable time to enable him to discharge his indebtedness.

The case of *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687, is a case where there was a promise to pay \$200 when a farm was sold. In that case the court held that the debt was due absolutely within a reasonable time. In the case at bar it will be noted that there was no provision to pay the \$150 out of any particular fund, but it was a promise to pay absolutely when the land was sold and the proceeds of sale collected. The case of *Noland v. Bull*, 24 Or. 479, 33 Pac. 983, is one where the plaintiff sold and conveyed to the defendant certain real property known as the Stephens ranch for an agreed price of \$2,000, of which \$1,500 was paid in cash, and the balance of \$500 was to be paid when the defendant sold the said ranch. After waiting seven years the plaintiff brought suit, and that court held that the agreement was in effect to pay the \$500 within a reasonable time, and that the seven years which had elapsed prior to the commencement of the suit constituted a reasonable time. The court in part says: "The \$500 was an existing indebtedness at the time the agreement was executed by the defendant and accepted by the plaintiff, the effect of which agreement was to postpone or defer the time of payment of an already due and existing debt to an uncertain date dependent upon the accomplishment of a specified transaction, viz., the sale of the Stephens ranch at the price mentioned. Where there is a present debt then due,

constituting the basis of an agreement, which merely postpones the time of its payment to an uncertain future date, when a certain specified transaction shall be accomplished, the agreement is to pay within a reasonable time, whether such transaction is accomplished or not."

In the case of *Nunez v. Dautel*, 19 Wall. 562, 22 L. ed. 161, there was an agreement "to pay as soon as the crop can be sold or the money raised from any other source." It was there held payable within a reasonable time. The court says in its opinion: "It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

In the case of *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365, the note provided for its payment ninety days after the first return trip of the schooner *Mary Bloom*. The schooner was lost at sea. The court held that the money became payable ninety days after the expiration of the period of time usually required for a return trip of the schooner. In conclusion this opinion says: "It would be 'a mockery of justice' to hold that, because the schooner was lost at sea,

and therefore had not made her first return trip, the appellee lost his debt."

It would be inequitable and unjust to hold that the appellee has it within her power to defeat the payment of this note by failing to make a sale of the land. It was her duty to have sold the same within a reasonable time.

The only question which remains is whether or not she had had a reasonable time to make this sale before the trustee advertised the land under the deed of trust. This note is dated the 29th day of January, 1911. The trustee advertised the same for sale on the 2d day of February, 1915. A period of four years had elapsed between the date of the note and the date of the advertisement.

The testimony in the case shows that the appellee had made some effort to sell the land. There is no showing, however, that there were any exceptional circumstances which prevented her from making the sale during the above period of time. We are therefore of the opinion that the appellee has had a reasonable time within which to sell this land, and that the note was due at the time of the date of the advertisement of sale by the trustee.

It therefore follows that the judgment of the lower court is reversed, the injunction dissolved, and the bill dismissed.

**Annotation—Time of payment of obligation purporting to be payable on specified event, the happening of which is wholly or partially within the control of the promisor.**

On effect of promise to pay as soon as promisor can, see note to *Benton v. Benton*, 27 L.R.A.(N.S.) 300.

As to the admissibility of parol evidence that written instrument for the payment of money was executed in reliance upon a parol promise that payment was subject to a condition not incorporated therein, see note to *Gandy v. Weckerly*, 18 L.R.A.(N.S.) 434. The question there covered differs from the one that may arise in the present note, since here, the condition being incorporated in the instrument, parol evidence, if

admitted, must be for the purpose of aiding the interpretation of the condition.

In *HUGHES v. McEWEN*, ante, 1048, the position that the note was payable at the date mentioned therein at all events, and sooner if the land should be sold before that time, was held to be untenable. Had the court supported this proposition, of course the question made the subject of this annotation could not have arisen.<sup>1</sup>

As indicated in the title, this note is concerned for the most part with cases in which the happening of the event upon

<sup>1</sup> This preliminary question is not within the scope of this note, and is not here annotated exhaustively. The wording of the particular note was such that it seems quite obvious that the position taken by the court was the correct one. A comparison of its wording with that of a few cases in which the opposing position was taken makes the soundness of the court's position in the *HUGHES CASE* more obvious.

It has been held that a note is payable on or before the date named therein, that L.R.A.1917B.

is, payable in any event at that date, and before, if the contingency happens before, —where the wording was:

\$284.

Denver, Colorado, January 12, 1882.

On or before March 12, 1882, after date, I promise to pay to the order of J. O. Allen two hundred and eighty-four dollars, at the City National Bank, with interest 10 per cent per annum. Value received. This note becomes due and payable when (if before March 12, 1882) Allen, Burke, & Company shall dispose of

which the debt is payable is wholly or partially within the control of the promisor. For the reason, however, that some courts have not distinguished this class of cases clearly from the cases in which the promisor has no control

over the happening of the event,<sup>2</sup> some cases of the latter class have been cited for the purpose of distinction; but the note does not purport to be exhaustive of that class of cases.

When an instrument purports to be

a part or all their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of.

(Signed) M. C. Burke.

And indorsed, William Kiskadden.

Kiskadden v. Allen (1883) 7 Colo. 207, 3 Pac. 221;

—where the note read as follows:

Aurora, August 26th, 1858.

Four months after date, or as soon as I shall be able to collect a certain note against Abram Davis, of Chicago, for value received, I promise to pay G. Marlett or bear one hundred and twenty-five dollars, with use.

(Signed) S. McCarty.

McCarty v. Howell (1860) 24 Ill. 341;

—where the note read as follows: \$120. May 2, 1871.

On the 1st day of September, 1871 (or before, if made out of the sale of J. B. Drake's horse hayfork and hay carrier), I promise to pay James B. Drake or order one hundred and twenty dollars, for value received, with use.

John W. Cisne.

Witness: George W. Schroyer.

Cisne v. Chidester (1877) 85 Ill. 524;

—where the note read as follows:

\$500. May 8th, 1872.

Six months after date, or before, if made out of the sale of Drake's horse hayfork and hay carrier, I promise to pay to James B. Drake or order five hundred dollars, payable at the Citizens National Bank of Indianapolis, value received, with use, without any relief from valuation or appraisal laws. If suit be instituted to enforce the payment thereof, I agree to pay a reasonable attorney's fee. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note.

(Signed) James P. Walker.

Walker v. Woollen (1876) 54 Ind. 165, 23 Am. Rep. 639;

—where the note read as follows:

\$400. February 5th, 1872.

Six months after date (or before, if made out of the sale of J. B. Drake's horse hayfork and hay carrier, we promise to pay James B. Drake or order four hundred dollars, payable at the First National Bank at Indianapolis, value received, with use, without any relief from valuation or appraisal laws. If suit shall be instituted to enforce the payment hereof, we agree to pay a reasonable attorney's fee. Woollen v. Ulrich (1878) 64 Ind. 120;

—where the note read:

October 18, 1880.

Twelve months after date (or before, if made out of the sale of Drake's horse hayfork and hay carrier), I promise to L.R.A.1917B.

pay to James B. Drake or bearer sixty dollars, negotiable and payable at the First National Bank, Sioux City, Iowa, with 10 per cent interest after date until paid. If interest is not paid when due the same shall bear interest at 10 per cent; and if expenses and costs are incurred by the holder in consequence of a failure to pay at maturity, the undersigned agrees to pay a collection fee of 10 per cent on the amount due.

D. M. Reed.

Charlton v. Reed (1883) 61 Iowa, 166, 47 Am. St. Rep. 808, 16 N. W. 64;

—where the note read as follows:

Wyandotte, Kansas, May 4, 1870.

In consideration of a purchase from Jacob Palmer of a right patented May 18th, 1869, by Theodore De Kamp, of Kirkwood, Missouri, for making and vending wooden spring seats for wagons, I hereby promise to pay him two hundred and fifty dollars in six months, or as soon as I can with due diligence make the money out of said patent right.

M. Hummer.

Palmer v. Hummer (1872) 10 Kan. 464, 15 Am. Rep. 353;

—where the note read:

New Ashford, March 13th, 1840.

For value received, I promise to pay John Pero or bearer five hundred and seventy dollars and fifty cents, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming.

Bushrod Buck.

Cota v. Buck (1844) 7 Met. (Mass.) 588, 41 Am. Dec. 464;

—where the note read as follows:

Gardner's Dec. 9th, 1861.

Nine months after date, or as J. W. Barger's horse earns the money in the cavalry of the C. S. A. Army, we, or either of us, promise to pay Jno. A. Gardner or bearer ninety dollars, for a horse this day sold by him to said Barger for cavalry service.

J. W. Barger.

H. C. McCutchen.

Gardner v. Barger (1871) 4 Heisk. (Tenn.) 668.

<sup>2</sup> For example, the court in *HUGHES v. McEWEN*, ante, 1048, cites *De Wolfe v. French* (1864) 51 Me. 420, to the proposition that, "where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time." In the

payable upon the happening of a certain event, the question which must precede any inquiry as to the time of payment, assuming that the event has not happened, is whether the instrument imports an absolute liability. If the event is one that is certain to happen, the

mere promise to pay may import such an absolute liability. But if the event is one wholly or partially within the promisor's control, and therefore not certain to happen, the absolute character of the liability cannot be inferred,<sup>3</sup> as it may in the case of a note, from the mere

Maine case the debt was payable when a certain vessel returned to a certain port. Not only was the event not within the control of the promisor, but it was proved that the event could never happen,—the vessel had been sunk before its return. The holding was that, "where the debt is absolute, the law will require the payment to be made within a reasonable time after it is ascertained that the event will never happen." The holding assumed that the debt was absolute and that the event could not possibly happen. It would be very much more reasonable to assume that the debt is absolute in a case like this—where both parties evidently regarded the event as certain and made no provision for a chance failure—than it would be to assume that it is absolute in a case where the promisor can control the happening of the event. The happening of the event, at the time suit was commenced, was an impossibility, while in the HUGHES CASE the happening of the event was still possible. These facts show that the Maine case is not authority to control cases that come within the scope of the present note.

In *Randall v. Johnson* (1881) 59 Miss. 317, 42 Am. Rep. 365, cited by the court in *HUGHES v. McEWEN*, the note read as follows:

\$240. Moss Point, July 8, 1879.

Ninety days after the first return trip of the schooner *Mary Bloom*, I promise to pay to Nals Johnson or order the sum of two hundred and forty dollars as final payment on rigging, etc., furnished for said schooner, with interest at 6 per cent per annum from the date of return trip.

James Glass.

Surety, L. Randall.

The ship had been lost at sea, making it impossible that the event should ever happen. It was held that the note was due in ninety days after the time when the ship would in all probability have returned had no accident happened. So this citation was also not authoritative for the HUGHES CASE.

<sup>3</sup> On certainty of time of payment as affecting negotiability of commercial paper, see note to *Joseph v. Catron*, 1 L.R.A. (N.S.) 1120.

*Nunez v. Dautel* (1873) 19 Wall. (U. S.) 560, 22 L. ed. 161; *Brooks v. Hargreaves* (1870) 21 Mich. 254; *Sackett v. Palmer* (1857) 25 Barb. (N. Y.) 179; *Wiggins v. Vaught* (1840) Cheves, L. (S. C.) 91; *Carlos v. Fancourt* (1794) 5 T. R. 482, 101 Eng. Reprint, 272.

In *Brooks v. Hargreaves* (1870) 21 Mich. 254, the note read as follows:

\$583. Detroit, Mich., Dec. 24, 1867.

One year after date, for value received, L.R.A.1917B.

we promise to pay to Joseph Smith or bearer five hundred and eighty-three dollars, with interest,—this to be paid when any dividends shall be declared on such shares as Joseph Smith has been holding heretofore in the Agricultural & Broom Handle Manufacturing Company of Trenton, Mich.

(Signed) Geo. Hargraves & Bro.

The court stated the facts as follows: "The defendants pleaded the general issue. On the trial, the plaintiff having put the instrument in evidence, the defendants introduced evidence showing that said instrument was given by them to Joseph Smith for certain shares or certificates of stock in the Agricultural & Broom Handle Manufacturing Company of Trenton, which he transferred to them, and that for the same consideration, and as part of the same transaction, they also gave him another note or obligation in every respect like the one in suit, except that in place of the words 'one year' were written the words 'two years.' It was admitted that no dividends had been declared on said stock since said instruments were made. No other or further evidence was offered or introduced on either side." While not deciding absolutely what the meaning of the note was, the court said: "It is somewhat difficult to determine the precise meaning of this instrument. When read in the light of the circumstances referred to, it would appear as if it was intended to give credit for one and two years, and to require no payment at all until, by yielding some dividend, the stock sold should be found to have some real value. And such I think is the natural meaning of the language used." It was held that the instrument was not a promissory note, which imports a consideration.

In *Sackett v. Palmer* (1857) 25 Barb. (N. Y.) 179, the note read as follows: \$550.

Ninety days after the dissolution of the copartnership between Nelson Chapin, of the party of the first part in said copartnership, and J. F. Palmer, of the party of the second part in said copartnership, and the settling of the books of the said firm, I, in behalf of the party of the second part, promise to pay to the said Nelson Chapin, of the party of the first part, five hundred and fifty dollars; the interest to be paid annually by the aforesaid J. F. Palmer, of the party of the second part in the aforesaid copartnership.

(Signed)

Nelson Palmer.

And the court held that this was not a promissory note for the reason that the

promise, but must be sought in the other terms of the instrument or in extrinsic circumstances.<sup>4</sup> It is therefore a mistake to argue that an instrument made payable on the happening of an event that may or may not happen takes the standing of a note, which necessarily imports an absolute obligation, and then deduce the conclusion that it is payable in a reasonable time even though the event has not happened. That would be begging the question, for, while it is logical to conclude that if the debt is ab-

solute the parties intended to fix a certain time—or a time that may be made certain—for its payment, the hypothesis would not be proved by assuming the certainty of the time of payment, as is the case with a note.

This, of course, does not mean that the instrument could not be so worded that it would be in itself very strong evidence that the debt was or was not an absolute one,<sup>5</sup> but it does mean that the circumstances should be considered together with the wording of the instru-

settling of the books was an event that might never happen.

In *Stamps v. Graves* (1825) 11 N. C. (4 Hawks) 102, it was held that an instrument which read as follows:

I promise to pay John Stamps for John W. Graves the sum of two hundred and eighty-six dollars and 32/100, out of a bond, when it shall be collected, on James Daniel for the sum of four hundred and fifty-two dollars, due the 1st of March, 1820, eighteen hundred and twenty. 30th Dec. 1819.

(Signed) A. Graves,  
—was not a promissory note.

In *Wiggins v. Vaught* (1840) Cheves, L. (S. C.) 91, the promise was to pay "as soon as I am in possession of funds to do so, from the estate of B.," and the instrument was held to be not a promissory note. The court said: "In such a case the consideration must be stated and the agreement consequent thereupon; and the condition precedent to the liability must be averred to have happened. All these matters must be proved as laid. In the declaration before us, the note is stated as the promise, and the happening of the contingency or performance of the condition is averred. But nothing is said in the declaration, nor was there any proof given on the trial, about the consideration. The plaintiff was therefore neither on his allegation nor proof entitled to recover."

An instrument payable on a contingency, as one made payable out of an estate "when sold," cannot be declared on as a promissory note, within the statute 3 & 4 Anno. chap. 9. *Carlos v. Fancourt* (1794) 5 T. R. 482, 101 Eng. Reprint, 272.

<sup>4</sup> *Nunez v. Dautel* (1873) 19 Wall. (U. S.) 560, 22 L. ed. 161; *Blake v. Coleman* (1868) 22 Wis. 415, 99 Am. Dec. 53. It will be observed that most of the other cases cited herein assume that this proposition is correct. In practically all the cases the courts, in determining whether or not the debt is absolute, consider the extrinsic circumstances in connection with the wording of the particular instrument. In the *Nunez* Case the court held directly that the instrument, because made payable upon the happening of an event that was not sure to happen, was not a note, which imports a consideration, but was a mere agreement. It found, however, from the L.R.A.1917B.

wording and from circumstances, that the obligation was an absolute one.

<sup>5</sup> *Nunez v. Dautel* (U. S.) supra; *Wolf v. Marsh* (1880) 54 Cal. 228, 3 Mor. Min. Rep. 204; *Swift Coal & Timber Co. v. Lewis* (1916) 170 Ky. 588, 186 S. W. 479; *Ubsdell v. Cunningham* (1885) 22 Mo. 124; *Allen v. Maxwell* (1904) 56 W. Va. 227, 49 S. E. 242. See abstract of holding in these and other cases, as cited under footnote 6, infra.

The holding in *Jones v. Eisler* (1865) 3 Kan. 134, strongly supports this construction. The note read as follows: \$237.37. Ottawa Creek, April 20th, 1860.

For value received (in cutting stone) by Gouliep Anders, I promise to pay, when I receive it from government, for losses sustained in August, 1856, or as soon as otherwise convenient, the sum of two hundred and thirty-seven dollars and thirty-seven cents.

John T. Jones.

The court said: "The first question presented by the record is, When did the note sued on become due? The note is not a conditional one. The maker owed the payee, who had performed labor for him. He declares in the paper that he has received the consideration, which all must admit was a valuable one. The existence of the debt was not made to depend upon a condition or contingency. Everything necessary to constitute a promissory note, except the time of payment, is clearly expressed. As to the time the language is peculiar. It could not have been contemplated that if Jones never got his money from the government, or never should be in a situation when he could conveniently pay, that the money never was to be payable. Jones evidently expected, within a reasonable time, to get money from the government, or failing in that, within a like time, it would otherwise be convenient to pay. After having performed work to the full amount of the note, it could not have been intended that Andres should never get his money unless Jones got his from the government, or should find it otherwise convenient to pay. The intention of the parties doubtless was that it should in any event be payable in a reasonable time, and such is the legal effect of the instrument."

ment, just as any other contract would be interpreted, in order to get the intention of the parties on the question of

whether or not the debt was an absolute one.<sup>6</sup> The mere fact that the maker promised to pay a certain amount "when

<sup>6</sup> In *Noland v. Bull* (1893) 24 Or. 479, 33 Pac. 983, cited in *HUGHES v. McEWEN*, ante, 1048, the instrument read as follows:

This is to certify that I, the undersigned, do agree to pay the sum of five hundred dollars unto Delia Noland when the sale of the property known as the Stephens ranch shall be accomplished; the said place to be sold for not less than two thousand five hundred dollars.

(Signed)

Benjamin Bull.

The court, after hearing all the evidence surrounding the transaction of giving the note, found as a fact that there was a present indebtedness, and that it was the intention of the parties that the amount was to be paid in any event, and that the effect of the instrument was merely to postpone the time of payment. It therefore held that seven years was a reasonable time in which payment could be made.

In *Allen v. Maxwell* (1904) 56 W. Va. 227, 49 S. E. 242, the note read as follows: \$805.

Due W. H. Lipscomb eight hundred and five dollars, borrowed money, to be repaid when collected off of Stone, Bowman, & Company out of drafts which I have had to pay for them. This March 9th, 1888.

Witness my hand and seal.

W. B. Maxwell (seal).

It was held that the promise in this note or his assigns could collect from the promisor only so much of the amount expressed in this instrument as the maker of the note actually succeeded in collecting from Stone, Bowman, & Company. It will be observed that in form this instrument would indicate that the debt was absolute, it being for "borrowed money." But it was proved that Lipscomb, the promisee, was a member of the firm of Stone, Bowman, & Company, for whom the promisor had indorsed; that on such indorsement he had been compelled to pay some \$2,000. The note itself shows that the money was borrowed to help pay the indebtedness of that firm.

In *Nunez v. Dantel* (1873) 19 Wall. (U. S.) 560, 22 L. ed. 161, the note read as follows:

Columbus, Ga., Sept. 1, 1865.

Due Joseph Dantel or order, \$1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold or the money raised from any source; payable with interest. The court said: "The paper was clearly not a promissory note, because it was not payable at a time certain, and it was not such a duebill as the law regards as in effect a promissory note, for the same reason. *Story, Promissory Notes*, § 27; *Salinas v. Wright* (1854) 11 Tex. 575; *Ex parte Tootell* (1798) 4 Ves. Jr. 372, 31 Eng. Reprint, 189. It was made up of the following particulars: It acknowledged the amount specified, consist-

ing of principal and interest, to be due to the plaintiff for four years and six months' services, and promised to pay him that sum, with interest, as soon as the crop could be sold, or the money could be raised from any other source. No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulations secured to the defendants a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

The decision in *Swift Coal & Timber Co. v. Lewis* (1916) 170 Ky. 588, 186 S. W. 479, illustrates this point very nicely. The note read as follows:

Whitesburg, Ky., Feb. 5, 1913.

We bind ourselves to pay Martha Lewis \$200, two hundred dollars, when the suit now pending in the Letcher court of Martha Lewis v. John E. Golden is settled in favor of Martha Lewis in full.

Swift Coal & Timber Co.,

by S. H. Fields.

The court, in holding that the note was not due while an appeal was pending from a judgment in defendant's favor in the suit referred to in the note, said: "The note provided that it was to become due when that suit had been 'settled in favor of Martha Lewis in full,' and, as the note was given in payment for land, the title to which was involved in the suit of *Lewis v. Golden*, it would seem reasonable that the provision in the note that it was not to become due until said suit was settled in full in favor of Martha Lewis could mean only that the note would be due and the money payable when said title litigated in that suit had been settled finally in her favor. This, in our judgment, is the only reasonable construction to put upon the words 'in full,' and must have been what was intended by the parties when the note was delivered and accepted. It therefore results that the note was not due when the suit was filed and a judgment entered thereon."

In *Ubsdell v. Cunningham* (1855) 22 Mo. 124, the court said: "The only question that can be made here is whether the obli-

I sell the piece of land" is not at all conclusive of the fact that it was given to secure an absolute debt.<sup>7</sup> Therefore no

absolute rule can be established for the interpretation of these instruments in this respect. The same language used

gation incurred by these notes is suspended upon the condition that the accounts referred to should be collected, or whether the words in one note, 'to be paid as soon as collected from my accounts at Pokeepsie,' and in the other, 'to be paid as soon as collected at Pokeepsie, now in the hands of H. B. P. of that place,' ought to 'be understood merely as prescribing the time of payment, by indicating the fund out of which the debtor expected to pay, and thereby securing to him the delay necessary to render it available. Both notes contain direct acknowledgments of indebtedness, the language being 'due Messrs. U. & P. — Dollars,' although only one of them discloses the cause of it (goods sold); and we think the subsequent words, 'to be paid,' etc., were not intended to show that the debts were conditional, depending for their existence as valid demands against the makers, upon the fact that the sums to be paid could be collected out of the accounts referred to, but only to prescribe the time of payment by reference not to days and years, but to a reasonable time for the collection of the accounts. This construction is warranted by the language used, and we have no doubt will execute the real intention of the parties. It being admitted that all had been collected upon these claims that could be collected, the term prescribed for the payment of the notes had expired, and they became due, according to our construction of them."

In *Allen v. Davis* (1848) 11 Mo. 479, the note read as follows:

I promise to pay to Thomas Isbell thirty dollars, without defalcation or discount, so soon as that amount can be made from a suit now pending in the Charlton circuit court, in which I am plaintiff, and the heirs and representatives of James H. Usher, late deceased, are defendants, as witness my hand, this 9th July, 1844.

Th. H. Allen,  
and it was held that the note was not due until the money was paid out of the suit then pending, to which the instrument referred. There were two suits pending in which the maker of the note was plaintiff, and the only real question before the court was as to which suit the instrument referred to.

In *Wilson v. Morrison* (1859) 29 Ga. 269, a note read as follows:

On or by the 25th December, 1855, I promise to pay B. J. Wilson or bearer one hundred and seventy-seven dollars, with interest from date. This 10th December, 1853, for value received; said note to be paid out of a certain note I have this day traded to said Morrison, on L. B. Perryman, when collected, due at the same time as the above.

(Signed) J. J. Morrison.

The court said: "Did the court err in L.R.A.1917B.

granting the nonsuit? We think not. The instrument declared on is so absurd as it stands that we may assume it to contain a mistake. It is probable that it was Wilson who drafted the instrument, and that he, by inadvertence, forgetting that he was writing for Morrison, used the words, 'a certain note I have this day traded to said Morrison,' instead of the words, a certain note the said B. J. Wilson has traded to me. Assuming this supposition to be true, did the court err in granting the nonsuit? What, on this supposition, does the instrument mean? This, we think: That Morrison promised to pay Wilson \$177 by the 25th day of December, 1855, out of a note on Perryman, 'traded' by Wilson to Morrison, provided the note should, by that time, be collected, but if it should not be, then to pay him the \$177 when the note should be collected, and not before. The promise was a promise to pay out of the proceeds of the note, and out of them only. This, we think, the most natural and obvious meaning of the instrument. Therefore, in the absence of aliunde evidence of a different meaning, we must say that this is the meaning. Taking this as the meaning, it is obvious that the nonsuit was right, for there was no proof that the Perryman note had been collected, or that it might, by the use of ordinary diligence, have been collected. We think, then, that the nonsuit was right."

<sup>7</sup> In *Blake v. Coleman* (1868) 22 Wis. 415, 99 Am. Dec. 53, the instrument was in the regular form of a promissory note, but upon the instrument were indorsed the words, "The conditions of the within note are as follows: L. S. Blake or bearer is not to ask or expect payment of said note until his, Coleman's, old mill is sold for a fair price," and it was held that this indorsement, if upon the note when delivery was made, reduced it to the plane of a mere conditional agreement, and that the debt could not be collected until the condition had been fulfilled. The court said: "The court below erred in holding that the instrument on which the action was brought was not affected by the indorsement on the back, but was admissible as a mere promissory note. It may be shown by parol that the indorsement was on the note at the time it was signed. And that being so, it became part of it, and turned it into a mere agreement. Chitty, Bills, 8th ed. pp. 160, 161; *Leeds v. Lancashire* (1809) 2 Campb. (Eng.) 205; *Hartley v. Wilkinson* (1815) 4 Campb. (Eng.) 127; *Cook v. Kelsey* (1859) 19 N. Y. 415. As this condition qualified the note, the action could not be sustained without showing that it had been fulfilled. We are inclined to think the legal effect of the indorsement is that the owner of the old fanning mill was to sell it, and that parol evidence would be incompetent to show that it was



under different circumstances means different things.

The real significance of the provision that the instrument is payable upon the happening of an event that is wholly or partially within the control of the promisor is seen after it has been determined that the debt is or is not an absolute one. If the instrument, read in the light of the surrounding circumstances,

shows that the debt is an absolute one, it is reasonable to suppose that the parties intended that a reasonable effort should be made to cause the event to happen within a reasonable time.<sup>3</sup> But in deciding what is reasonable it may appear that the happening of the event was not wholly within the control of the promisor,<sup>4</sup> for the reason that he may be compelled to deal with third parties, as in

agreed that the plaintiff should sell it. But for the reason above stated, the judgment must be reversed and cause remanded for a new trial." See also other cases of sales cited throughout the note, especially those cited under footnote, 6, supra.

<sup>3</sup> See *Nunez v. Dautel*; *Ubsdell v. Cunningham*; and *Noland v. Bull*, as cited under footnote 6, supra; and *Williston v. Perkins*, as cited under footnote 10, infra.

*Hicks v. Shouse* (1856) 17 B. Mon. (Ky.) 483, was tried upon this theory. The instrument in question read as follows:

I have this day purchased a negro named John, belonging to Mrs. James McKinney, under two decrees of the Fayette circuit against her, in the names of Shouse & Smith and James H. Shouse & Co., for which negro I promise to pay James H. Shouse, who is the owner of said decrees, the sum of five hundred dollars; and I promise to pay said money so soon as I sell a house and lot in the city of Lexington, bought of C. J. Sanders and wife; and until said sale is made, I promise to pay 8 per cent interest per annum on said sum. November 29, 1848.

Beverly A. Hicks.

The court said: "A reasonable construction should be given to the covenant; the intention of the parties should be effectuated, if practicable, and their understanding carried out,—such a construction as, we think, results in the conclusion that the house and lot were to be sold in a reasonable time or the money be paid without a sale. The argument of defendant's counsel would, as it seems to us, lead to an absurdity, and would do violence to all reasonable calculation as to the intention of the parties. It leads to the conclusion that the defendant, by paying 8 per cent interest annually, might postpone the payment of the debt to an indefinite period. As we understand the covenant, construing it according to its reason and spirit, the plaintiff was willing, and intended, that the defendant, by paying an annual interest of 8 per cent, might have a reasonable time to make sale of his house and lot, not that he might sell when he pleased and pay when he pleased. A reasonable time has elapsed for the sale, and it has not been made; and it is not stated by the defendant that he could not sell, but only that he could not sell at what he esteemed a reasonable and fair value for the property. It could have been sold at its market value at any time, and the contrary is not even intimated. If the defendant thought

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proper not to sell for the market value, he ought, after the lapse of a reasonable time for a sale at his own price, and his failure to sell, to pay the money."

In *Scull v. Roane* (1831) *Hempst.* 103, *Fed. Cas. No. 12,570c*, the note read as follows:

Due Samuel C. Roane \$160.05, value received. N. B. This note to be paid when Mrs. Sarah Embree shall settle her account with H. Scull. March 7, 1828.

(Signed) H. Scull.  
It was held that it was the duty of the promisor to force a settlement of his account with the third party named in the instrument, within a reasonable time after signing the instrument, and if he neglected to do so, the debt represented by the instrument could be collected. It will be observed that the control of the event was wholly within the control of the promisor, since she could force a settlement of her account with the third party by court procedure.

<sup>4</sup> In *Stout v. Hill* (1867) 45 Ill. 326, the note read as follows:

Due Daniel Condon or order \$464, with interest at 10 per cent, to be paid as soon as I have time to foreclose a mortgage given by William Cantlin and Michael Roach to said Condon, dated September 6, 1856, for \$480, and by him this day assigned to me, and to sell said land by a judicial sale; or as soon as I shall otherwise dispose or settle said mortgage.

Warren Hill.

May 4, 1858.

The court said: "The record shows the land mortgaged was covered by a homestead right, and that right set up in the proceedings to foreclose, and properly recognized and allowed by the court. It is very evident, we think, that, by the express terms of the instrument, the money specified in it is not yet due. It was not to be paid until the mortgage could be foreclosed and the land sold. The homestead claim has prevented this, as this court has repeatedly decided, consequently the time of payment has not yet arrived, and the suit was premature. Should the homestead right expire by its own limitation as provided in the statute, or be abandoned, then the note will be due and payable, and not before."

In *Wilder v. Sprague* (1863) 50 Me. 354, where defendant had accepted an order drawn upon him for a definite amount, "when you sell the wharf logs I have hauled for you this winter," and three years

the case of a sale of land. While, as some courts have well said, it would be a mockery of justice to permit him to defeat the object of the obligation altogether by refusing or neglecting to sell, yet it would be no less a mockery of justice to compel him to sacrifice a valuable property in order to bring about the happening of the event within an arbitrarily set time. So it would seem that the good faith of his efforts to sell at a reasonable

price should be considered in fixing upon the time that is considered reasonable,<sup>10</sup> even though the debt has been held to be absolute.

If he has put it out of his power to cause the event to happen, of course, the case is analogous to one in which he never had the power, and in which it is certain that the event will never happen.<sup>11</sup> Such a case would not be author-

thereafter suit was brought to charge defendant on the acceptance, it was held that defendant must be permitted to show that he had used reasonable diligence in trying to sell the logs, but had been unable to do so, and the question was then left to the jury. The court pointed out that in the earlier case of *Sears v. Wright* (1844) 24 Me. 278, the defendant had put it out of his power to sell the logs.

<sup>10</sup> In *Williston v. Perkins* (1876) 51 Cal. 554, the instrument read as follows:

Vallejo, Cal., July 11, 1874.

This certifies that Chas. Booth is entitled to receive fifteen dollars and 75/100 in payment for three and a half days' work in the employ of the Vallejo Co-operative Ship Building Association, when the three-masted schooner now in course of construction by said association is sold. This certificate, when properly indorsed, is payable to bearer.

Joseph Perkins, President.

Orin C. Junkins, Secretary.

The court found "that the defendants did not use reasonable diligence in the construction of the vessel, and did not make an honest effort to sell it at its market price, and render judgment for the plaintiff."

In *Worden v. Dodge* (1847) 4 Denio (N. Y.) 159, 47 Am. Dec. 247, where the amount was made payable "out of the net proceeds after paying the costs and expenses of ore to be raised and sold from the bed on the lot this day conveyed by Edward Madden to Edwin Dodge, which bed is to be opened and the ore disposed of as soon as conveniently may be," it was held that a nonsuit was properly entered as the plaintiff had not proved that enough had been received out of the proceeds of the ore to pay the sum named in the agreement, nor that defendants had failed to realize such sum from any fault or neglect on their part.

<sup>11</sup> See footnote 1, supra.

The decision in *Sears v. Wright* (1844) 24 Me. 278, cited in *HUGHES v. MCEWEN*, ante, 1048, is based upon this theory. The note read as follows:

For value received, we promise to pay Silas Sears two hundred and thirty-three dollars and ninety-six cents, from the avails of logs bought of Martin Mower, when there is a sale made.

\$233.96.

Winslow Wright & Co.

The defendant at the time of the suit had put it out of his power to cause the event to happen. He had caused the logs to be

manufactured into boards, and he claimed that he had lost heavily on the deal, and this was his only defense. The court held that the obligation was absolute, and that the defendant had a reasonable time in which to sell the logs and pay it. It excluded all evidence of his losses.

The same court in a later case (*Wilder v. Sprague* (1863) 50 Me. 354) took this view and made the distinction. It there said: "The case of *Sears v. Wright* (Me.) supra, varies in very material respect from the one now before us. There the logs had been manufactured into boards and the boards had been sold before the suit was commenced. Parol evidence was offered to vary the meaning of the written contract entered into by the defendant, and was excluded. The exclusion was adjudged proper. As the defendant in that case had long before manufactured the logs into boards, it was impossible to show the logs could not have been sold, if they had not been manufactured. The similarity between the cases is apparent rather than real."

In *Crooker v. Holmes* (1875) 65 Me. 195, 20 Am. Rep. 687, cited by the court in *HUGHES v. MCEWEN*, the note was made "payable when I sell my place where I now live, in Oxford, Me.," and was given to secure a debt that had nothing whatever to do with the place in Oxford, Maine. The note was also secured by a mortgage which did not recite the condition. At the time of the suit the property in question had been sold upon an execution, and it was therefore impossible for the event to happen, if it had not already happened. The court said: "If a party puts it out of his power to perform his contract, his liability at once accrues. It matters not whether by his neglect this be so, or whether it be intentional. The maker of a note, by his indebtedness and suffering judgment and execution to issue against him and a levy to be made, is not to be thereby permitted to defeat a debt justly due. It was the fault or neglect of the complainant's mortgagor that he was unable to sell his farm. Had he paid his debts, the sale of the equity would not have happened. But the complainant is not to suffer on that account."

Where an instrument is made in the form of a promissory note and the condition is added that "this note is made with the express understanding that if the coal mines in the Marsh ranch yields no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null.

ity for cases in which the promisor claimed to be still doing his best to sell.

and void," no cause of action arises upon the instrument until the maker of the note receives some profits from the mine, or puts it out of his power to receive profits by the sale of the mine, and the Statute of Limitations does not begin to run until a cause of action arises, even though the note is given as part payment of a prior obligation which is then due. But when the

maker disposes of all his interest in the mine by a sale thereof to a stranger, a cause of action at once arises upon the note, and it is not barred until the expiration of the full statutory period of limitation, counting from that date. *Wolf v. Marsh* (1880) 54 Cal. 228, 3 Mor. Min. Rep. 204.

J. W. M.

#### NEW YORK COURT OF APPEALS.

WILLIAM J. PERRY, SR., Admr., etc., of  
William J. Perry, Jr., Deceased, Appt.,  
v.

ROCHESTER LIME COMPANY, Respt.

(219 N. Y. 60, 113 N. E. 529.)

#### Proximate cause — explosion — leaving explosives unguarded.

Wrongfully leaving explosives stored in a public place is not the proximate cause of the injury where boys take an unmarked box of explosives from the unlocked chest where it was stored, and, after concealing it over night, attempt to make some use of it the next day, when an explosion occurs, to the injury of a playmate who is with them.

For other cases, see *Proximate Cause, II. d.*, in *Dig. 1-52 N. S.*

(July 25, 1916.)

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County, overruling his exceptions, and denying a motion for a new trial, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. C. D. Kiehel and Claude S. Smith, for appellant:

It was a question of fact for the jury to determine from the evidence whether the de-

fendant maintained a nuisance on the banks of the canal, and if it found that the defendant maintained such a nuisance, the plaintiff's right to damages must follow as a corollary.

*People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74; *Cohen v. New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143; *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761; *Wittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 410, 62 N. Y. Supp. 297; *Travell v. Bannerman*, 174 N. Y. 47, 66 N. E. 583; *Frank v. Warsaw*, 198 N. Y. 403, 31 L.R.A.(N.S.) 676, 92 N. E. 17, 1 N. C. C. A. 917; *MacPherson v. Buick Motor Co.* 217 N. Y. 382, L.R.A.1916F, 696, 111 N. E. 1050, Ann. Cas. 1916C, 440; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; *Statler v. Geo. A. Ray Mfg. Co.* 195 N. Y. 478, 83 N. E. 1063; *Kinney v. Koopman*, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593; *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; *Wells v. Gallagher*, 144 Ala. 363, 3 L.R.A.(N.S.) 759, 113 Am. St. Rep. 50, 39 So. 747; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

Any intervening or contributing cause or causes of the intestate's death do not preclude a recovery against the defendant, but the liability may be attributed to all of them.

*Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Lilly v. New York C. & H. R. R. Co.* 107 N. Y. 566, 14 N. E. 503; *Kremer v. New York Edison Co.* 102 App. Div. 433, 92 N. Y. Supp. 883, affirmed 186 N. Y. 557, 79 N. E. 1109; *Murphy v. Hudson River Teleph. Co.* 127 App. Div. 450, 112 N. Y. Supp. 149, affirmed in 196 N. Y. 505, 89 N. E. 1106; *Rossiter v. Cooper's Glue Factory*, 15 App. Div. 413, 140 N. Y. Supp. 296.

**Note.** — As to liability for injury to children from explosives left accessible to them, including the question of proximate cause, see annotation to *Folsom-Morris Coal Min. Co. v. De Vork*, L.R.A.1917A, 1295, and earlier notes there referred to.

Generally as to intervening act of third person as affecting proximate cause in case of injury by explosives, see note to *Clark v. Du Pont de Nemours Powder Co.* L.R.A. 1915E, 479.

Generally as to violation of statute or ordinance relating to explosives as ground for private action, see note to *Molin v. Wisconsin Land & Lumber Co.* 48 L.R.A.(N.S.) 876. L.R.A.1917B.

Messrs. Wile & Oviatt, for respondent:

In order to render the defendant liable, whether it be said that the defendant was guilty of maintaining a nuisance, or was guilty of negligence, the wrongful act of the defendant must be the proximate cause of the injury.

Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; 38 Cyc. 442; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

No act or omission on the part of the defendant can possibly be said to have been the proximate cause of death.

Martin v. Althaus, 139 App. Div. 622, 124 N. Y. Supp. 83; Miller v. Bahmmuller, 124 App. Div. 558, 108 N. Y. Supp. 924; Demarest v. 42d Street, M. & St. N. Ave. R. Co. 104 App. Div. 503, 93 N. Y. Supp. 663; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; Trapp v. McClellan, 68 App. Div. 362, 74 N. Y. Supp. 130; Independent Ice Cream Co. v. United Ice Cream Co. 69 Misc. 623, 125 N. Y. Supp. 1106; Beetz v. Brooklyn 10 App. Div. 382, 41 N. Y. Supp. 1009; Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; McDonald v. Metropolitan Street R. Co. 80 App. Div. 233, 80 N. Y. Supp. 577; Fortune v. Hall, 122 App. Div. 250, 106 N. Y. Supp. 787; Loftus v. Dehail, 133 Cal. 214, 66 Pac. 379; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731, 13 Am. Neg. Rep. 500; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, 18 Am. Neg. Rep. 97; Stark v. Muskegon Traction & Lighting Co. 141 Mich. 575, 1 L.R.A.(N.S.) 822, 104 N. W. 1100; McGhee v. Norfolk & S. R. Co. 147 N. C. 142, 24 L.R.A.(N.S.) 119, 60 S. E. 912; Scheffer v. Washington City V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Holmes v. Delaware & H. Co. 128 App. Div. 24, 112 N. Y. Supp. 421; Lowery v. Western U. Tele. Co. 60 N. Y. 198, 19 Am. Rep. 154; Saverio-Cella v. Brooklyn Union Elev. R. Co. 55 App. Div. 98, 66 N. Y. Supp. 1021; Davy v. Lyons, 71 Misc. 139, 127 N. Y. Supp. 1083; Horn v. Breakstone, 75 Misc. 343, 133 N. Y. Supp. 285; Afflick v. Bates, 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539; Hall v. New York Teleph. Co. 214 N. Y. 49, L.R.A.1915E, 191, 108 N. E. 182.

Cardozo, J., delivered the opinion of the court:

The defendant stored explosives in a chest on the bank of the Erie Canal in the city of Rochester. It stored them in a public place and in violation of law. Two L.R.A.1917B.

boys carried away some of the boxes, secreted them in a barn, and, handling the contents the next day, brought about an explosion. A little boy of eight years, who was near them, was killed. The question is whether the defendant may be held to answer for his death.

A narrow strip of land separates the defendant's warehouse from the Erie canal. This land is public property. Boys were accustomed to go there to play and to fish. On this public space the defendant kept a chest of nitroglycerin caps, used to explode dynamite. The caps were packed in tin boxes, which were marked "Blasting Caps, Handle with Care," and the tin boxes were packed in a wooden box. The wooden boxes were without marks; they had sliding covers, which were closed; and they were about 1 foot long and 9 inches high. Each wooden box contained at least 33 tin boxes.

On Sunday, November 12, 1911, this chest of explosives was left open. It was seen in that condition during the afternoon and evening by the operator of a nearby bridge. The practice had been to keep it closed and locked. So far as the record shows, it had never been left open before. Between 5 and 6 o'clock, John McGuire, a boy of thirteen years, and Archie Clark, a boy of twelve, went by the warehouse on an errand. There is evidence that on their way back they stopped at the chest and carried off one of the wooden boxes. They took supper that evening at the house of a friend. Before supper, they hid the boxes in the back yard. During the evening they showed the caps to their playmates. They had some of the tin boxes in their hands and other caps in their pockets. Before they left for home, they went to the yard, emptied the contents of most of the tin boxes into the wooden box, and carried the spoils away. Arriving home, they hid the box in a neighboring barn. Their home was with the Perry family, and about half a mile from the defendant's warehouse.

After school hours the next day, Mrs. Perry saw McGuire in the barn, and heard him call to Clark to join him. They came out of the barn with a wooden box. She did not know at the time what was in it. They walked off, carrying the box, and the Perry boy, eight years of age, ran after them. The mother sent her little girl to call the boy back, but he was out of sight. A few minutes later, there was the sound of an explosion. McGuire and Clark and the Perry boy were killed. This action involves the defendant's liability for the death of Perry only.

The defendant stored the explosives without a permit and in violation of an or-

dinance. It stored them, moreover, in a public place. It thus became a wrongdoer, and answerable as such for the proximate consequences of the wrong. It became answerable, in other words, for those consequences that ought to have been foreseen by a reasonably prudent man. *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U. S. 1, 7, 53 L. ed. 671, 674, 29 Sup. Ct. Rep. 321; *McDowell v. Great Western R. Co.* [1903] 2 K. B. 331, 337, 72 L. J. K. B. N. S. 652, 88 L. T. N. S. 825, 19 Times L. R. 562; *Hall v. New York Teleph. Co.* 214 N. Y. 49, L.R.A.1915E, 191, 108 N. E. 182.

But we cannot say that what was done with these explosives was something that ought to have been foreseen. The chest, it is true, was open; but the caps were not exposed. A large wooden box hid them. The boys did not play with caps scattered about loosely. They did not play at all. They carried away a large wooden box containing 33 smaller boxes, and appropriated the contents. They stole the caps in quantities that must have carried notice even to boys of their age that the act was wrongful. Indeed, there is good reason to believe that they stole, not for play, but for profit, intending to sell the spoils as junk. The defendant had done nothing to invite or provoke this theft. It had not scattered the caps about, or even exposed them to view, so that children might feel tempted, and perhaps licensed, to handle and play with them. It had packed the caps in tins, and then hidden the tins from sight by packing them in wooden boxes. The theft of one of the boxes was no more to be looked for than the theft of the whole chest. It was possible, of course, that the contents would be stolen by boys, or even by adults. But nothing in the situation made that outcome probable. In short, a series of new and unexpected causes intervened, and had to intervene, before these explosives could bring death to Perry. Not one of them was within the range of reasonable expectation. Boys discovered the hidden caps, stole a box, carried it to their home a half a mile away, and killed a playmate. His death was not the proximate result of the open chest in the highway.

We are not without apt precedents for this conclusion. *Horan v. Watertown*, 217 Mass. 185, 104 N. E. 464; *Jacobs v. New York, N. H. & H. R. Co.* 212 Mass. 97, 40 L.R.A.(N.S.) 41, 98 N. E. 688; *Afflick v. Bates*, 21 R. I. 281, 79 Am. St. Rep. 801, 43 Atl. 539; *Hall v. New York Teleph. Co.* supra. Indeed, the cases in other jurisdictions go farther than we need to go here, and farther, perhaps, than we should be willing to go. Very similar in its facts is *Horan v. Watertown*, 217 Mass. 185, 104 L.R.A.1917B.

*N. E. 464*. Employees of the defendant's sewer department left a tool chest in a highway, unlocked and unwatched. The chest contained dynamite. Some boys took sticks of dynamite out of the chest, and threw them on a bonfire which they built in an adjoining field. The plaintiff, who was standing with other boys about the fire, was badly burned from the explosion. The court held that the wrongful storage of the dynamite was not the proximate cause of the injury. Yet the case at bar is even a clearer one for the defendant. There the dynamite was exposed to view; here it was concealed. There the explosion followed close upon the trespass; proximity in time and place gave unity to the transaction. Here the period of a day and the space of a half a mile intervened, and separated the theft from the explosion. The motives and impulses which provoked the theft had cooled, and a wrongful asportation had placed the thing of danger in new and strange surroundings. *Jacobs v. New York, N. H. & H. R. Co.* 212 Mass. 97, 40 L.R.A.(N.S.) 41, 98 N. E. 688.

Nothing in our ruling is in conflict with the recognition of a duty to protect the young and heedless from themselves, and guard them against perils that may reasonably be foreseen. To define the orbit of that duty is unnecessary now. *Travell v. Bannerman*, 71 App. Div. 439, 75 N. Y. Supp. 866, Id., 174 N. Y. 47, 66 N. E. 583; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L.R.A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Lynch v. Nurdin*, 1 Q. B. 29, 113 Eng. Reprint, 104, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 331, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28; *Harrold v. Watney* [1898] 2 Q. B. 320, 322, 67 L. J. Q. B. N. S. 771, 78 L. T. N. S. 788, 14 Times L. R. 486, 46 Week. Rep. 642. It is enough to assume that there are times and circumstances that will call the duty into play. The remoteness of the relation controls our judgment, and distinguishes the case at hand from others where liability has been enforced. Thus, in *Travell v. Bannerman*, 71 App. Div. 439, 75 N. Y. Supp. 866; id., 174 N. Y. 47, 66 N. E. 583, the explosives were thrown into a vacant lot, they were apparently mere refuse, and the defendant ought to have foreseen that a child would think itself at liberty to handle them. The situation was much the same in *Wells v. Gallagher*, 144 Ala. 363, 8 L.R.A.(N.S.) 759, 113 Am. St.

Rep. 50, 39 So. 747. In other cases, the defendant intentionally put the dangerous implement in the hands of one incompetent to use it, and was chargeable with knowledge of the consequences. That was so in *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 632, where gunpowder was sold to a child, and in *Dixon v. Bell*, 5 Maule & S. 198, 105 Eng. Reprint, 1023, 1 Starkie, 287, 17 Revised Rep. 308, 19 Eng. Rul. Cas. 26, where a loaded gun was given to an inexperienced maidservant, and in *Anderson v. Settergren*, 100 Minn. 294, 111 N. W. 279, where, in violation of a statute, there was a sale of firearms to a minor. *Sullivan v. Creed* [1904] 2 Ir. R. 317, 2 B. R. C. 139, is a case where a loaded gun was left beside a highway. That a traveler would innocently pick it up and injure a bystander was held to be a consequence that might reasonably be foreseen. *Lynch v. Nurdin*, 1 Q. B. 29, 113 Eng. Reprint, 1041, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797, is a case where a horse was left unattended in

the street. The chance that someone would set it in motion was within the range of prudent foresight. Other cases, more or less similar in some features, are to be distinguished on like grounds. *Illidge v. Goodwin*, 5 Car. & P. 192; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 331, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28; *Williams v. Eady*, 10 Times L. R. 41; *Powers v. Harlow*, 58 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511. In none was there so tenuous a bond as here between the ensuing mischief and the wrong.

The judgment should be affirmed with costs.

Willard Bartlett, Ch. J., and Hiscock, Chase, Collin, and Seabury, JJ., concur. Hogan, J., concurs in result.

## OKLAHOMA SUPREME COURT.

S. P. RENDER, Plff. in Err.,  
v.

ROSS N. LILLARD.

(— Okla. —, 160 Pac. 705.)

### Pleading — Statute of Frauds.

1. A general denial raises the question of the Statute of Frauds.

*For other cases, see Pleading, III. d, in Dig. 1-52 N. S.*

### Appeal — question not raised.

2. The question of the Statute of Frauds was not presented nor urged in the trial court, neither was it mentioned therein in any manner, nor was it relied upon in said court by the defendant for a defense. This court, therefore, will not consider this question when presented and urged by the defendant upon this court for the first time on appeal.

*For other cases, see Appeal and Error, VII. j, 3, in Dig. 1-52 N. S.*

(July 25, 1916.)

**E**RROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to enforce a verbal contract of employment alleged to have been made by defendant

Headnotes by DAVIS, C.

**Note.**—As to the question whether the Statute of Frauds may be raised for first time on appeal, where, under the pleadings, it might have been raised below, see annotation following this case, post, 1071. L.R.A.1917B.

with the plaintiff as attorney, to prosecute a certain action. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Ames, Chambers, Lowe, & Richardson for plaintiff in error.

Messrs. Sam Hooker and E. L. Fulton, for defendant in error:

Defendant, by not presenting the question of the Statute of Frauds in the trial court, waived it and cannot raise it for the first time on appeal.

*Altoona Portland Cement Co. v. Burbank*, 44 Okla. 76, 143 Pac. 845; *Prior v. Sanborn County*, 12 S. D. 80, 80 N. W. 169; 2 Cyc. 665; *Highley v. Metzger*, 187 Ill. 237, 58 N. E. 407; *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235; *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 696; *Walker v. Cooper*, 97 Mo. App. 441, 71 S. W. 370; *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 17 N. E. 671; *Healy v. Loofbourrow*, 2 Okla. 458, 37 Pac. 823; *McDonald v. Carpenter*, 11 Okla. 115, 65 Pac. 942; *Baker v. Marcum*, 22 Okla. 21, 97 Pac. 572; *Tirey v. Darneal*, 37 Okla. 611, 132 Pac. 1087; *Bouton v. Carson*, — Okla. —, 152 Pac. 131; *Duffey v. Scientific American Compiling Dept.* 30 Okla. 742, 120 Pac. 1088; *Harris v. First Nat. Bank*, 21 Okla. 189, 95 Pac. 781; *Smith v. Colson*, 31 Okla. 703, 123 Pac. 149; *Hamilton v. Brown*, 31 Okla. 213, 120 Pac. 950; *Herbert v. Wagg*, 27 Okla. 674, 117 Pac. 209; *St. Louis &*

*S. F. R. Co. v. Key*, 28 Okla. 769, 115 Pac. 875; *Myers v. First Presby. Church*, 11 Okla. 544, 69 Pac. 874; *Shuler v. Collins*, 40 Okla. 126, 136 Pac. 752; *Turley v. Feebeck*, 38 Okla. 257, 132 Pac. 889; *Rhame Mill. Co. v. Farmers' & M. Nat. Bank*, 40 Okla. 131, 136 Pac. 1095; *Horne v. Oklahoma State Bank*, 42 Okla. 37, 139 Pac. 992; *Coombs v. Cook*, 35 Okla. 326, 129 Pac. 698; *Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331; *Watson v. Taylor*, 35 Okla. 768, 131 Pac. 922; *Wallace v. Killian*, 40 Okla. 631, 140 Pac. 162.

The contract sued on was not within the statute.

*Lindley v. Kelly*, — Okla. —, 147 Pac. 1015; *Greenough v. Eichholtz*, 1 Monaghan (Pa.) 433, 15 Atl. 712; *Cooper & P. Structural Iron Works v. Rosing*, 85 Misc. 409, 147 N. Y. Supp. 241; *A. Schwoerer & Sons v. Stone*, 200 N. Y. 560, 93 N. E. 1116; *Roy & Titcomb v. Flin*, 10 Ariz. 80, 85 Pac. 725; *Trulock v. Blair*, 8 Okla. 347, 58 Pac. 1097.

**Davis, C.**, filed the following opinion:

The parties will be spoken of throughout this opinion as in the court below. The plaintiff, **Ross N. Lillard**, sued the defendant, **S. P. Render**, in the district court of Oklahoma county, Oklahoma, on a verbal contract of employment alleged to have been made by the defendant with the plaintiff as an attorney and counselor at law to prosecute an action for \$50,000 damages on behalf of the plaintiff, one **Minnie Bond**, in what is known as the case of **Bond v. Gore**, in the district court of Oklahoma county, Oklahoma. Plaintiff averred in his petition that his services were well worth the sum of \$1,500, proved said averment by competent testimony, which was not controverted on the part of defendant, admitted a credit on same of \$175, and recovered by verdict of a jury the balance of \$1,325 on February 11, 1915, for which sum, together with 6 per cent interest per annum from February 11, 1915, until paid, and for costs, judgment was by the trial court duly rendered on May 7, 1915, the court having previously heard, duly considered, and overruled the defendant's motion for a new trial. The petition of the plaintiff, omitting caption and formal parts, reads as follows: "The plaintiff, **Ross N. Lillard**, for his cause of action herein, says that he is a regular licensed practising attorney at law of the state of Oklahoma and county of Oklahoma, and has been for the last past three years, with his office in the city of Oklahoma City; that on or about the 1st day of October, 1913, he was employed by one **Minnie Bond** and **Julian R. Bond** to institute suit in the district court of

Oklahoma county, state of Oklahoma, in the sum of \$50,000 against one **T. P. Gore** for assault, and that on or about December 1, 1913, this plaintiff notified the said **Minnie Bond** and **Julian R. Bond** that he would not remain in said case any longer, unless arrangements were made for a fee for his services in said cause, and that he then and there notified said parties that he would withdraw from the case unless the same was done, and thereupon, on or about the 1st day of December, 1913, the defendant, **S. P. Render**, came to this plaintiff and said to him that if this plaintiff would continue his services in said cause, and not withdraw therefrom, he, the said **S. P. Render**, would pay a fee for plaintiff's services in said cause, and requested this plaintiff not to withdraw from said cause, but to continue his services therein, and, acting upon the defendant's representations that he would pay plaintiff's fee in said cause, this plaintiff did continue in said case and did not withdraw therefrom; that from the 1st of December, 1913, up and to and including the trial of said cause, which was in February, 1914, this plaintiff devoted all of his time and attention to the preparation of said case, and spent much time from his office in taking depositions and consulting with witnesses and other parties necessary for a trial of said cause, and upon the trial thereof, participated therein; that the services rendered by this plaintiff in said cause, for which the defendant agreed and promised to pay, were reasonably worth the sum of \$1,500, and that no part thereof has been paid to this plaintiff, save and except the sum of \$175; that said defendant frequently, from December 1st up to the time of the trial and during the trial, stated to this plaintiff that he would pay him for his services in said cause, and this plaintiff rendered and performed the same relying upon the defendant's promise and agreement to pay him therefor. Wherefore, premises considered, the plaintiff prays judgment against the defendant, **S. P. Render**, for the sum of \$1,325, with interest from this date, for costs and all proper relief."

The defendant to this petition filed the following verified answer: "Comes now **S. P. Render**, defendant above named, and, for answer to the petition of said plaintiff denies each and every allegation therein contained."

The defendant in the court below defended against this action on the theory, and the sole and only theory, that he did not make the promise or enter into the contract as alleged and set forth in plaintiff's petition, and as proven by plaintiff. The sole question presented to the court

below upon the trial of this case, and submitted by the trial court to the jury, was whether or not the defendant made and entered into the contract with the plaintiff as alleged and proven by him. The defendant requested no instructions and saved no exceptions to any of the instructions given by the court to the jury in his charge—none. For the first time in this lawsuit and in his printed brief the defendant raises and urges upon this court the sole and single proposition that this was a verbal contract, made by the defendant with the plaintiff in the nature of a special promise to answer for the debt, default, or miscarriage of another, and that it does not fall under the article of our statutes on guaranty, and that hence, under § 941, Rev. Laws of Oklahoma 1910, the same is expressly inhibited and invalid, the plaintiff having first been employed by one Minnie Bond and Julian R. Bond to institute and prosecute the \$50,000 damage suit against T. P. Gore for assault, and upon their failure to arrange for or pay the plaintiff his fee for said services, conceding that the defendant contracted to pay same as alleged and proven by plaintiff in this action in the trial court, still the said contract clearly falls under the Statute of Frauds of our state.

Conceding but not deciding that this contract falls within the Statute of Frauds, has defendant waived this point by his failure to raise and urge it, obtain a ruling thereon, and when decided adversely to him, save the proper exception in the trial court? We think so. A verbal promise to answer for the debt of another is not illegal, unlawful, or immoral. It is not, strictly speaking, void, but merely voidable. The statute is solely for the benefit of a person sought to be bound by such promise. He may avail himself of the statute, or not, as seems best to him. It is a question in which he, and no one else, is interested. If he fails to take advantage of the statute, the contract, under all the authorities, is valid and enforceable. While there may be a conflict in the authorities as to what will constitute a waiver of the statute, yet we know of no authority which holds that the statute cannot be waived. This court in the case of *Altoona Portland Cement Co. v. Burbank*, 44 Okla. 76, 143 Pac. 845, in passing on this question, held as follows: "Such contracts are not positively illegal in any particular, but are negatively invalid, although only as against one who has not subscribed a note or memorandum thereof in writing, and only to the limited extent that no enforceable demand against him can be predicated thereon in the absence of at least his tacit con-

sent, as by waiver of that point, in the action, or of an equitable estoppel to deny liability." (Italics ours.)

Defendant did not demur to the petition of plaintiff on the ground that the contract was within the statute, or on any other ground. He did not plead the Statute of Frauds in his answer. He did not object to the introduction of evidence under the petition of the plaintiff on the ground that no cause of action was stated, or on the ground that the contract was within the Statute of Frauds. He did not object to the testimony of plaintiff when testifying regarding the verbal contract, nor move to strike the same out on any ground or for any reason. After the evidence was all in and established, as now claimed, by defendant, that the contract was within the statute, he did not demur thereto or move the court for a directed verdict. He requested no instructions on any ground, and took no exceptions to the instructions given by the court, which presented to the jury but the one question, and that was whether or not the plaintiff entered into the contract alleged. And he did not even raise the question in his motion for a new trial. That all this constituted a plain waiver of the statute and the rights, if any, he had thereunder, we think, is plain. The supreme court of South Dakota passed on this question in the case of *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169, wherein it held: "Failure to urge an objection that a contract is within the Statute of Frauds, in the trial court, is a waiver thereof."

Defendant, as the record affirmatively shows, at no time and in no manner even attempted to raise the question of the Statute of Frauds in the trial court, and he therefore brought himself squarely within the rule laid down by this court in the *Altoona Portland Cement Co. Case*, supra. Not having raised this question in the trial court, he cannot raise it for the first time in this court. That a party cannot, for the first time on appeal, raise the question that the contract sued on is within the Statute of Frauds, we think is settled by all the authorities. The general rule in this regard is laid down in 2 Cyc. 665, as follows: "An objection to the validity of a contract or instrument in suit must be made in the court below, and cannot be urged for the first time in the appellate court. . . . Thus, it cannot be first objected on appeal that a contract is void under the Sunday laws; that a contract or deed is tainted with fraud or usury; that it is champertous; that it is void under the Statute of Frauds."

The supreme court of the state of Illinois passed on this question in the case of *Highley v. Metzger*, 187 Ill. 237, 58 N. E. 407,



as follows: "The objection that defendant was sued on an oral promise to answer for the debt of another, which has not been raised by the pleadings, nor by objections to evidence, nor by exceptions to the instructions, cannot be taken advantage of for the first time on appeal."

The supreme court of South Dakota upheld the same rule in the case of *Prior v. Sanborn County*, 12 S. D. 86, 80 N. W. 169, as follows: "Whether the foregoing record is sufficient to take the agreement out of the statute need not be determined, because the failure to raise the point in the trial court constitutes a waiver, and it is now too late to urge the objection for the first time."

The supreme court of Iowa also followed this rule in the case of *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235, from which case we quote as follows: "Where the Statute of Frauds is not pleaded, nor objection made to evidence on the trial, because the contract is within the statute, but the objection is first made in the argument of counsel on appeal, it comes too late."

In the case of *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 606, the supreme court of Massachusetts held as follows: "A defense of the Statute of Frauds on a contract sued on is not available on appeal, where it is not raised on the trial."

The court of appeals of Missouri passed on this question in the case of *Walker v. Cooper*, 97 Mo. App. 441, 71 S. W. 370, as follows: "The Statute of Frauds cannot be invoked as a defense to an action on a contract for the first time on appeal."

In the case of *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93, the court held: "The Statute of Frauds cannot be, for the first time, invoked on appeal."

The supreme court of Vermont, in the case of *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11, upheld this same rule as follows: "A defense that a contract was within the Statute of Frauds could not be set up on appeal where appellants had allowed the same to be established on the trial by parol evidence without objection."

The court of appeals of New York passed on this question in the case of *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 17 N. E. 671, wherein it was held: "The question whether an assignment of a debt is valid under the Statute of Frauds cannot be raised on appeal when exception is not taken below."

Other courts have held:

The defense of the Statute of Frauds is waived, if not pleaded. *Hogan v. Easter-L.R.A.1917B.*

*day*, 58 Ill. App. 45; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142.

Failure to plead the Statute of Frauds in an action on a verbal contract is a waiver of that defense. *Carpenter v. Davis*, 72 Ill. 14.

By placing a defense on other grounds, and failure to plead the Statute, a party waives the defense that the contract sued on is within the Statute of Frauds. *Finucan v. Kendig*, 109 Ill. 198.

Where, in an action by the vendor for the price, the purchaser did not seek to avoid the sale as being in parol, but sought to have the lands purchased secured by a good deed, and it was proper to consider the case as if the contract of sale had been in writing. *Richardson v. Milner*, 5 Ky. Law Rep. 118.

"Where the defendant, in his answer, admits substantially the contract set out in his petition, but alleges that the plaintiff has violated its provisions, and there is no plea of the Statute of Frauds, the statute will be considered as waived." *Connor v. Hingtgen*, 19 Neb. 472, 27 N. W. 443.

Where the defendant admits the contract declared upon, and does not plead the Statute of Frauds, or insist on it in his answer, he will be deemed to have renounced the benefit of it. *Duffy v. O'Donovan*, 46 N. Y. 223.

An objection that a contract was void under the statute, not taken in the complaint, and raised for the first time in the requests for finding, comes too late. *Porter v. Wormser*, 94 N. Y. 431.

A defendant can waive the immunity granted him by the Statute of Frauds, and unless he sets up the defense, or in some way calls it to the attention of the court, the court is not required to interpose it. *League v. Davis*, 53 Tex. 9.

"The Statute of Frauds is waived, unless pleaded." *Howe v. Chesley*, 56 Vt. 727.

Century Digest, topic, "Frauds, Statute of," § 365.

"The privilege is personal, and cannot be made available by a third person, a stranger to the contract, and it may be waived, and is regarded as waived, unless the party avails himself of it either by his pleadings, or under the general issue, where advantage may be taken of it without a special plea. . . . The courts, of course, take judicial notice of the statute, but they will not take judicial notice that a given contract is void because not in writing. The party must allege and prove such ground of defense." *Wood*, Stat. of Fr. § 277.

In *McCoy v. Williams*, 6 Ill. 584, the court held that the plea of the Statute of Frauds is a personal privilege, which the

party may waive; another cannot plead it for him, or compel him to plead it.

In Vermont, if a plea avers that the promise sued on was a promise to pay the debt of another, to wit, B, a replication that the promise was not a promise to pay the debt of said B is good, and the defense of the statute may be shown under the general issue, or pleaded specially. *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 670.

In Illinois the statute must be pleaded, if it is to be relied upon by the defendant. He cannot set it up, for the first time, in an instruction. *Warren v. Dickson*, 27 Ill. 115.

So, in Alabama, the defense arising under the statute must be pleaded; and, if waived, and the contract is admitted or established by proof, it will be enforced. *Patterson v. Ware*, 10 Ala. 444.

In New Jersey the statute must be relied on; that is, the party must either plead it specially or urge it as a ground of defense. Thus, a defendant may insist upon the benefit of the Statute of Frauds, although he admits the parol agreement; but if he does not insist upon the statute, he is not entitled to its benefit. *Ashmore v. Evans*, 11 N. J. Eq. 151.

We are of the opinion that the correct rule as to properly raising the question of the Statute of Frauds by the defendant in this jurisdiction is that when the defendant denies in his answer the making of the contract upon which the action is brought, he may then avail himself of the defense that the agreement was invalid under the Statute of Frauds; but where the defendant admits the making of the contract sued on in the petition, in his answer, he must then specially and specifically set up and plead the Statute of Frauds in his answer, or he will be held thereby to have waived it. Under a general denial the defendant raises the issue that he did not make the contract sued upon as set forth by the plaintiff in his petition, and the issue that the same, if made, is invalid under the Statute of Frauds.

Generally anything going to show that the cause of action sued upon never existed, or which merely disproves what plaintiff alleges, may be given in evidence under a general denial. The defendant may give evidence controverting any facts necessary to be established by plaintiff, but not to disprove a defense founded on new matter. Evidence to disprove wholly or in part any fact which plaintiff must establish to show a cause of action may be given in evidence under a general denial. "Under our system of practice, and under every rational, logical system of pleading, the defendant must, under a general denial, be permitted

to controvert by evidence everything which the plaintiff is bound, in the first instance, to prove to make out his cause of action." *Griffin v. Long Island R. Co.* 101 N. Y. 348, 4 N. E. 740; *Evans v. Williams*, 60 Barb. 346; *Greenfield v. Massachusetts Mut. L. Ins. Co.* 47 N. Y. 430; *Andrews v. Bond*, 16 Barb. 633; *Weaver v. Barden*, 49 N. Y. 286; *O'Brien v. McCann*, 58 N. Y. 373.

The defendant quotes from and cites the following authorities in his reply brief filed herein July 7, 1916: *Altoona Portland Cement Co. v. Burbank*, 44 Okla. 76, 143 Pac. 845; *Feeney v. Howard*, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 191; *Talbot v. Bowen*, 1 A. K. Marsh. 436, 10 Am. Dec. 747; *Williams-Haywood Shoe Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 343; *Fontaine v. Bush*, 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465; *Luton v. Badham*, 127 N. C. 96, 53 L.R.A. 337, 80 Am. St. Rep. 783, 37 S. E. 143; *Wiswell v. Tefft*, 5 Kan. 263,—to show that the Statute of Frauds may be raised under a general denial. To this proposition we have acceded and do now accede. "But one thing lackest thou yet." The defendant, having thus raised said issue by his general denial, which at the same time raises the other issue denying the making of the contract sued upon, must, in some manner, someway, somehow, and by some means, go further and challenge the attention of the trial court to the issue of the Statute of Frauds, and insist and rely upon it as a defense in the trial court. He will not be permitted by some legerdmain to keep this issue, so raised by him, snugly snuggled away somewhere in the mental catacombs of silence and obscurity, jealously keeping and guarding it from the sight and attention of the trial court from the inception of the cause to its uttermost close, and then for the first time spring it on this court, *Minerva*-like, and press it for the first time, and as the sole, single, and only issue in his brief here.

We have carefully examined each of the cases cited by defendant in his reply brief, as set out herein, supra, and find that in each and all, save and except, perhaps, *Wiswell v. Tefft*, supra, it is plainly to be seen, that under the general denial, the defendant in some manner brought the attention of the trial court specifically to the issue raised of the Statute of Frauds. In *Wiswell v. Tefft*, supra, equal comfort can be found that it was or that it was not drawn to the attention of the trial court. In the case of *Altoona Portland Cement Co. v. Burbank*, supra, *Thacker, C.*, speaking for this court, said: "The defendant, as seller, is not

bound by a merely oral acceptance of plaintiffs' order for 500 barrels of cement at \$1.17 per barrel, nor liable for damages for failure to deliver the same, as such a contract is invalid under § 847, Okla. Stat. 1890 (§ 941, Rev. Laws 1910). . . . The plaintiffs' bill of particulars, demanding \$199.50 as, in effect, 'the excess . . . of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled' (quoting § 2627, Okla. Stat. 1890; § 2860, Rev. Laws 1910), and disclosing that defendant had not directly nor by agent subscribed any note or memorandum of the contract in writing, as required by § 847 (§ 941), cited *supra*, stated no cause of action. See cases cited *supra*. Although our statute renders such contracts invalid only in the qualified sense stated in *Schechinger v. Gault*, 35 Okla. 416, 130 Pac. 305, Ann. Cas. 1914D, 468, we think they are so far invalid, as held in *Jones v. Pettigrew*, 25 S. D. 432, 127 N. W. 538, under a statute in the same form and derived from the same source (the territory of Dakota), that it is unnecessary for defendant to specially plead the statute. Such contracts are not positively illegal in any particular, but are negatively invalid, although only as against one who has not subscribed a note or memorandum thereof in writing, and only to the limited extent that no enforceable demand against him can be predicated thereon in the absence of at least his tacit consent, as by waiver of that point, in the action, or of an equitable estoppel to deny liability. And, where there is at least a general denial, as here, the court should, upon a motion therefor, as was made in this case, direct a verdict for the defendant. Such a bill of particulars was subject to demurrer; but, even if there was a failure to demur, this would not constitute a waiver of the invalidating effect of the Statute of Frauds, as the contract itself is invalid in respect to plaintiffs' demand; and nothing less than the tacit consent of the defendant that it be treated as valid, or its estoppel to deny its validity, as by failing both to demur and to deny its alleged valid effect, or by some other act or omission implying such consent or showing such estoppel, could be regarded as precluding it from asserting its invalidity at any time prior to the final submission of the case to the jury. See *Jones v. Pettigrew*, *supra*. There is a contrariety of views, however, upon the question of proper defensive pleadings in such cases, as will be seen from an examination of 20 Cyc. 312-314; *Owen v. Riddle*, 81 N. J. L. 546, 79 Atl. 886, Ann. Cas. 1912D, 45, with the extensive notes thereto. Further, it will be presumed that defendant's pleadings, being oral, were sufficient to pre-

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sent the question of the validity of the contract under the Statute of Frauds as a partial and legally necessary explanation of the action of the trial court in submitting to the jury the question as to whether the contract was valid notwithstanding the Statute of Frauds, upon the ground that the amount involved was under \$50 (which was contrary to all the evidence), or upon the ground that some note or memorandum of the contract in writing had been signed by the defendant or its agent (of which there was no evidence), although this does not explain why this question was so submitted, in the absence of any issue of fact made by the evidence in this regard."

We have also gone to the trouble of obtaining from the clerk's office the original case made or record in this case, and the same lies before us. We find from it: That the plaintiffs originated this action by filing the following bill of particulars in the justice court, before M. D. Asher, Justice of the Peace in and for the city of Enid township: "Comes now C. J. Burbank and C. F. Holmes, plaintiffs in the above entitled cause, and for cause of action against the defendant allege: That on or about the 30th day of October, 1909, the plaintiffs and the defendant entered into an agreement, upon a statement or memoranda in writing, signed by plaintiff, whereby the defendant sold and agreed to deliver to the plaintiffs 500 barrels of cement at the agreed price of \$1.17 per barrel. Said cement to be delivered to the plaintiffs, at any time, upon ten days' notice. Plaintiffs state that on or about the 25th day of October, 1909, they gave notice to the defendants that said cement would be needed, and delivery, at Enid, was demanded on 8th day of November, 1909, as provided for in said agreement. Plaintiffs further state that they repeatedly and at various times made inquiry about said cement, and that said cement was not delivered within the ten days, after notice given, as aforesaid, and that said cement has never been delivered, according to the agreement, by the defendant to the plaintiffs, at Enid, Oklahoma, to the damage, to the plaintiffs, in the sum of \$199.50. Wherefore plaintiffs pray judgment against the defendant, in the sum of \$199.50, together with the costs of this action."

That this bill of particulars was afterwards, and on the 17th day of February, 1910, filed in the office of the clerk of the county court of Garfield county, Oklahoma. That afterwards said cause came on regularly for trial in said county court, whereupon the following journal entry was entered of record:

On this 3d day of September, 1910, the

same being one of the days of the regular August, 1910, term of this court, the above-entitled action came on to be heard upon the pleadings and the evidence, and, a jury being waived, was submitted to the court, Swigert & Wedgewood appearing for the plaintiffs, and Kruse & Hills for the defendant. After the plaintiff C. J. Burbank had been sworn and some testimony elicited from him on part of the plaintiffs, the plaintiffs made application for a continuance, in order to enable them to serve notice upon the defendant to produce in court, that the same might be used in evidence, the order or memoranda in writing, claimed by the plaintiffs to have been delivered to the defendant, for the cement mentioned in plaintiffs' bill of particulars, the defendant having objected to the production thereof without notice, as required by law, upon request of the plaintiffs, and objected to the introduction of parol evidence to show the contents thereof; and the court, after carefully considering said application, finds that the same ought to be granted, upon condition that the plaintiffs pay all court costs to this date; and, the plaintiffs having agreed to said terms, it is ordered by the court that this action be, and the same hereby is, continued to the next regular term of this court, and it is further ordered that the plaintiffs pay all court costs herein to and including this term of court. To all of which the defendant excepts, and exception is hereby given it.

By the court:

[Signed] James B. Cullison, Judge.

O. K. Swigert & Wedgewood, Attys. for Plaintiffs. Kruse & Hills, for Deft.

That thereafter, and on January 10, 1911, plaintiffs served upon the defendant notice to produce certain papers, as follows:

"The defendant is hereby notified to produce and have the same present that they may be used in evidence upon trial of the above-entitled action, in the county court of Garfield county, Oklahoma, wherein said action is now pending, on the hearing and trial thereof, an order or memoranda, in writing, claimed by the plaintiffs to have been furnished and delivered to the defendant, through Park Cole, its agent at Enid, Oklahoma, for the cement, which is mentioned in the plaintiffs' bill of particulars, and also an order for cement, which was offered and used in evidence on part of the defendant, in the trial of this said action, in justice court of Garfield county, Oklahoma.

"Dated January 10, 1911. Swigert & Wedgewood, Attys. for plaintiffs.

"We hereby acknowledge service and the receipt of a copy of the above and foregoing L.R.A.1917B.

notice, this 10th day of January, 1911. Carl Kruse, Atty. for defendant."

That afterwards and upon the trial of said cause in said county court on the 28th day of February, 1911, before the court and a jury of six men, the plaintiff, C. J. Burbank, was called to the stand, and testified in behalf of the plaintiffs. Over objections and exceptions, multifarious and multitudinous, he testified that he had given to one Park D. Cole, as agent for defendant company, an order for the cement in question, and that a memorandum in writing was made of said order, and signed by said Cole on behalf of said defendant company, and the same was delivered to said Cole by plaintiff. The price of said cement so purchased exceeded \$50. The plaintiffs rested their case with the testimony of this single witness. Whereupon the defendant company interposed the following demurrer to the evidence of plaintiffs:

"At this time the defendant demurs to the evidence introduced by the plaintiff, and asks the court to direct the jury to return a verdict in favor of the defendant and dismiss the plaintiff's cause of action, for the following reasons, to wit:

"First. Because the testimony does not show any cause of action in favor of the plaintiff and against the defendant.

"Second. Because the plaintiff has wholly neglected to establish any contract with the defendant.

"Third. For the reason that in the bill of particulars filed in this case the allegation is that the plaintiff entered into a verbal contract with the defendant, and that the testimony shows that no such contract was entered into between the plaintiff and defendant.

"Fourth. For the further reason that plaintiff has wholly failed to show that Park D. Cole, who took the order, was the agent of the defendant, or had any authority from the defendant to represent the defendant as such agent.

"By the court: For that reason the demurrer will be overruled, and the request for a peremptory instruction will be overruled, and exception noted."

Thereupon the defendant company introduced J. J. Helfer, who y-clept himself as a "usually recognized salesman" of said defendant company; said he knew one Park D. Cole; said he had a contract with the company for the output of this mill, and that he employed all the salesmen, and that he checked all sales and all shipments, and that everything pertaining to the sales department came through his hands; that at the time this memorandum was signed by the said Park D. Cole, he, the said Cole, was no agent of said company; denied the agen-

cy of Cole, and denied that the company was bound by said memorandum of agreement. The defendant rested its case on the testimony alone of this witness, J. J. Helfer. The court then charged the jury in instruction No. 1, as follows: "Gentlemen of the jury, you are instructed that this is a case wherein C. J. Burbank and C. F. Holmes, partners, plaintiffs, sued the Altoona Portland Cement Company, defendants, upon the following cause of action: That on or about the 30th day of October, 1909, the plaintiffs and the defendant entered into an agreement upon a statement or memoranda in writing signed by plaintiff, whereby the defendant sold and agreed to deliver to the plaintiff 500 barrels of cement at the agreed price of \$1.17 per barrel, said cement to be delivered to the plaintiff at any time upon ten days' notice. That plaintiffs further allege that on or about the 25th day of October, 1909, they gave notice to the defendant that said cement would be needed on the 8th day of November, 1909, as provided for in said agreement. Plaintiffs further allege that they repeatedly and at various times made inquiry about said cement from the said defendant, and that said cement was not delivered to the plaintiff within the ten days after notice was given, as aforesaid, and that said cement has never been delivered according to the agreement by the defendant to the plaintiffs at Enid, Oklahoma, and that by reason of said defendant failing to deliver said cement the said plaintiffs have been damaged in the sum of \$199.50. To all of which the defendant herein has filed herein its general denial, denying that the said defendant ever entered into any contract of any kind whatever, either directly or indirectly with the plaintiff. Which puts into issue every material allegation in the plaintiff's petition, filed herein, and in order for the plaintiff to recover, the burden of proof is upon the plaintiff, and they must prove every material allegation in their petition by a preponderance of the evidence, and unless the plaintiffs so prove the material allegations in their petition by a preponderance of the evidence, your verdict should be for the defendant."

And in instruction No. 3, as follows: "The jury are instructed that under the law of the state of Oklahoma a contract is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, that is, the defendant, or by his agent, where the same is for an agreement for the sale of goods, chattels, or things in action such as is involved in this case at a price not less than \$50, and in this connection you are instructed that, if you find from a fair preponder-

ance of the evidence in this case that the amount attempted to be charged against the defendant is more than \$50, and that the defendant or its agent did not subscribe a memorandum in writing, your verdict should be for the defendant."

This instruction, the court's instruction No. 3, supra, was clearly prepared and asked by the defendant for the following reasons: The court gave 16 instructions, 1 to 16, inclusive, marked by numerals at the bottom of each. Instruction No. 1 has no number or other notation at the top, and was clearly prepared and given strictly by the court. Instruction numbered 2 at bottom is designated at top with style of court, style of cause, "Instruction No. 4, requested by Plffs.," and begins with, "Gentlemen of the jury." It is marked at bottom, "Given, objected to by Deft., objection overruled, exception noted. Winfield Scott, Co. Judge." The same is true as to instruction 10 as numbered by the court, except it is marked at top, "Instruction No. 3, requested by the plaintiffs." The same is true as to instruction No. 11, as numbered by the court, except it is marked at top, "Instruction No. 2, requested by plaintiff." The same is true as to instruction numbered 12 by the court, except it is marked at top, "Instruction No. 1, requested by the plaintiff." Instruction numbered 3 by the court, and marked at bottom, "Given, Winfield Scott, Co. Judge," —is marked at top, "Instruction No. 8." This is true of court's No. 4, except marked at top, "Instruction No. 2." The same is true of court's No. 5, except marked at top, "Instruction No. 7." The same is true of court's No. 6, except marked at top, "Instruction No. 6." The same is true as to court's No. 7, except marked at top, "Instruction No. 5." The same is true as to court's No. 8, except marked at top, "Instruction No. 4." The record then shows the exception on the part of the defendant to the court's refusal to give instructions Nos. 1, 9, and 10, asked for by the defendant. Thus it becomes manifest that the plaintiffs asked for four instructions, each of which were given by the court and objected to and excepted to by the defendant, and that the defendant asked for 10 instructions, instructions as numbered by defendant, 2, 3, 4, 5, 6, 7, and 8, being given by the court, with no objections made nor exceptions saved by the plaintiffs, and instructions as numbered by the defendants 1, 9, and 10, refused by the court and excepted to by the defendant. The record does not disclose any exceptions on the part of plaintiffs to the refusal of the court to give any instructions asked for by them. In the instructions asked for by both sides and given by the court the question as to agency and the

proof of same, etc., are fully set forth to the jury. The remaining instructions given by the court are general. It, therefore, needs no comment from us. It doth now most gloriously appear from the face of the record that, under his general denial in the trial court, the defendant not only raised the two issues of not having made the contract and of the question of the Statutes of Frauds, but that it most strenuously, and with a dogged and stubborn persistence born of despair to win its lawsuit, pounded said question, so raised, upon the attention of the court and jury from alpha to the omega of the cause in the court below.

The case of *Feeney v. Howard*, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984, is quoted from by counsel for defendant most extensively, heavily underscored very frequently, and largely relied upon for the sustention of the proposition that the defendant can raise the issue of the Statute of Frauds under a general denial. This case lies before us. We will call upon Hayne, C., to repeat for us his words uttered by him in the statement of this opinion in speaking for the supreme court of California, July 1, 1889: "Michael Feeney, in his lifetime, commenced the present suit in his own name (not as administrator) to have it declared that he was entitled to said balance. On the trial, he introduced in evidence the deeds above mentioned, and then offered parol evidence to prove that they were without consideration, and that the property was conveyed to Howard upon certain trusts, and was to be re-conveyed on request. Howard objected on the ground of the Statute of Frauds. The parol evidence was admitted against such objection, to which Howard excepted, and judgment was given for the plaintiff, from which, and from an order denying a motion for a new trial, the appeal is taken. . . . Unless the case can be brought within some one of the exceptions hereinafter noticed, we think that it is clear that the Statute of Frauds is a defense to the action, and that the parol evidence was improperly admitted. If a trust could be raised in such a way, what operation could the Statute of Frauds ever have? The authorities are overwhelming to this effect."

We will next call to the stand Dickinson, J., who spoke for the supreme court of Minnesota, in the case of *Fontaine v. Bush*, 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465: "This action is for the recovery of the price (more than \$50) of a large quantity of potatoes, alleged to have been sold by the plaintiffs to the defendants at an agreed price. The answer denied the sale. The court, trying the cause without a jury, found in favor of the defendants, upon the

ground that the case was within the Statute of Frauds. The mere oral agreement was void, under the statute, and the denial of the sale in the answer was sufficient to enable the defendants to avail themselves of that defense. *Tatge v. Tatge*, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121. The case justified the finding of the court that there had been no acceptance on the part of the defendants satisfying the requirement of the statute."

We will now call upon Poland, Ch. J., to tell us again what he said on this question in speaking for the supreme court of Vermont in the case of *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679: "To the plaintiff's declaration the defendant pleaded the Statute of Limitations and the Statute of Frauds, to both which pleads the plaintiff replied, and to these replications Ladd demurred. The defendant Ladd claims, not only that the plaintiff's replications are insufficient, but that the plaintiff's declaration is also defective, so as to be reached by the demurrer. Two objections are made to the declaration: First, that it states no sufficient consideration to support the promise declared on; second, that the promise is within the Statute of Frauds. Whether either of these objections is well founded or not depends mainly upon the construction to be given to the declaration. It is exceedingly difficult from the declaration to determine the real character of the transaction between the parties, and its allegations are nearly repugnant to each other."

And lastly, we will again hear from Chief Justice Potter, when speaking for the supreme court of Wyoming in the case of *Williams-Haywood Shoe Co. v. Brooks*, 9 Wyo. 424, 64 Pac. 343: "As disclosed by the testimony, plaintiff, a corporation, is engaged in the wholesale boot and shoe business at Omaha, Nebraska. On or about November 1, 1897, a traveling salesman of the plaintiff visited Sheridan, where the defendant firm conducted a mercantile business, and solicited their order. The salesman testified that Mr. J. H. Ivey went with him to the hotel, examined his samples, and gave him an order for goods, which he, the salesman, put down upon a written statement or memorandum, describing the various items, with the price opposite each item. When the statement or order was offered in evidence, the defendants made the following objection: 'Defendants object to the admission of Exhibit "A," for the reason that the contract is within the Statute of Frauds; that the same is a verbal statement, not signed by the defendants, or either of them, and in no way can bind them, and is void; and for the further reason that it is incompetent, irrelevant, and immaterial.' The total amount of the order was \$789.20, and

the statement thereof so offered in evidence was not signed by either of the defendants. No other writing or memorandum in writing showing the order or contract for the sale was produced. In the following April the plaintiff shipped the goods by rail to the defendants, but the latter refused to receive or accept them, and, in fact, did not take the goods from the depot, and never did accept them. Indeed, upon the trial it was admitted 'that the goods are at the depot, and that the firm of J. H. Ivey & Company refused to receive them from the depot, and never have received the goods from the station at Sheridan, and have never accepted them, and have paid no part of the purchase price.' The court found that neither Lyman H. Brooks nor Ida Ivey were members of the firm of J. H. Ivey & Company, but that said Brooks had so held himself out as such a member as to be liable to creditors. The court further found, among other things, that the defendants had not received or accepted the goods, nor paid any part of the purchase price thereof; that no written contract of sale or purchase, or note or memorandum thereof, had been made or executed by the defendants, or either of them. Thereupon the law was found to be with the defendants, and judgment was rendered accordingly, and against the plaintiff for costs. A motion for new trial having been filed, it came on for argument, at which time, at the request of defendants, they were permitted 'to amend their answer by adding thereto the defense of the Statute of Frauds in accordance with the facts proved,' which was thereupon done, and the motion for new trial overruled. An exception was duly preserved to the ruling, permitting the answer to be amended, and to the overruling of the motion for new trial."

This sufficeth to show that this question was directly brought to the attention of the trial court in these cases.

This court has laid down the same principle a number of times, and that is, that this court will not pass upon questions not raised or presented in the trial court. One of the earliest decisions on this point is the case of Healy v. Loofbourrow, 2 Okla. 458, 37 Pac. 823, wherein it was held as follows: "As a general rule, the supreme court of this territory will not consider for the first time on appeal questions not presented in the cause in the court below."

Later, in the case of McDonald v. Carpenter, 11 Okla. 115, 65 Pac. 942, the territorial supreme court held: "The points now contended for in the brief were not raised upon motion for a new trial, nor presented to the [trial] court for review at all. And the defendant in error was entitled upon these grounds, to have the cause dismissed." L.R.A.1917B.

In the case of Baker v. Marcum, 22 Okla. 21, 97 Pac. 572, this court held: "This court will not consider questions that do not go to the jurisdiction of the trial court that are raised for the first time in this court."

One of the latest expressions of this court on this question is found in the case of Tirey v. Darneal, 37 Okla. 611, 132 Pac. 1087, wherein the court held: "In order to properly present a question to the supreme court for review, the record must affirmatively show that the alleged error complained of was presented to the trial court, and either ignored or decided adversely to the complaining party; and, unless it is thus presented to the trial court, and an opportunity there given to pass upon it, the same will not be considered by this court on appeal."

This court has repeatedly held that where a defendant relies upon a certain defense in the trial court, he will not be permitted on appeal to shift his position and present a defense that was not presented in the trial court. The latest expression of this court on this question that we have found is contained in the case of Bouton v. Carson, — Okla. —, 152 Pac. 131, wherein this court held: "A party cannot try his case in the trial court on one theory and then ask a reversal of the judgment in this court on a theory not presented to the trial court or raised by the pleadings."

In the case of Wattenbarger v. Hall, 26 Okla. 815, 110 Pac. 911, this court said: "The right of the plaintiff in error to recover was properly submitted on his theory, to the jury; and, the jury having found against him thereon, he will not be permitted to change front in this court, amend his hold, and claim his right to recover on some other theory."

A similar expression is found in the case of Duffey v. Scientific American Compiling Dept. 30 Okla. 742, 120 Pac. 1088, as follows: "Where a defendant relies upon a certain defense in the trial court, he will not be permitted to shift his ground of defense on appeal, so as to present another defense, not presented nor relied upon in the trial court."

In the following cases the court upheld this same rule: Harris v. First State Bank, 21 Okla. 189, 95 Pac. 781; Smith v. Colson, 31 Okla. 703, 123 Pac. 149; Hamilton v. Brown, 31 Okla. 213, 120 Pac. 950; Herbert v. Wagg, 27 Okla. 674, 117 Pac. 209; St. Louis & S. F. R. Co. v. Key, 28 Okla. 769, 115 Pac. 875; Myers v. First Presby. Church, 11 Okla. 544, 69 Pac. 874; Shuler v. Collins, 40 Okla. 126, 136 Pac. 752; Turley v. Feebeck, 38 Okla. 257, 132 Pac. 889; Rhome Mill. Co. v. Farmers' & M. Nat.

Bank, 40 Okla. 131, 136 Pac. 1095; Horne v. Oklahoma State Bank, 42 Okla. 37, 139 Pac. 992; Coombs v. Cook, 35 Okla. 326, 129 Pac. 698; Chicago, R. I. & P. R. Co. v. McBee, 45 Okla. 192, 145 Pac. 331; Watson v. Taylor, 35 Okla. 768, 131 Pac. 922; Wallace v. Killian, 40 Okla. 631, 140 Pac. 102.

For the reasons herein stated, it becomes and is manifest to us that the judgment of

the lower court should be, in all things, affirmed. Judgment affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied October 3, 1916. Leave to file second petition denied October 31, 1916.

**Annotation—May Statute of Frauds be raised for first time on appeal where, under the pleadings, it might have been raised below.**

As suggested by the title, the question now under annotation presupposes that the pleadings were such that the objection based on the Statute of Frauds might have been interposed in the court below; and the note is therefore not concerned with the question whether the statute must be specially pleaded, or is available under a general denial.

Generally as to necessity of pleading the Statute of Frauds, see annotation to Henry v. Hilliard, 49 L.R.A.(N.S.) 1.

The conclusion in RENDER v. LILLARD, ante, 1061, that the Statute of Frauds could not be raised on appeal where it was not interposed in the lower court, although it might have been under the general denial, is in harmony with the other decisions on the question. While, as already implied, it is assumed in the cases cited in this note that the objection based on the statute might have been raised under the pleadings, the reports do not ordinarily show whether the statute was specially pleaded, or, as in the RENDER CASE, was available under a general denial.

The rule is of almost universal application that questions not raised in the trial court will not be noticed on appeal (2 Cyc. 661); and this conclusion is well founded, as to hold otherwise would be unfair toward the opposite party and the lower court, and also burdensome to the appellant court.

This rule was applied in the following cases, in which it appears that the Statute of Frauds might, under the pleadings, by proper objections, have been, but was not, interposed as a defense in the lower court, and in which, under such circumstances, it was held that this defense could not for the first time be raised in the appellate court: Johnson v. Latimer (1883) 71 Ga. 470; Berkowsky v. Viall (1896) 66 Ill. App. 349; Niedner v. Friedrich (1897) 69 Ill. App. 622; Lanser v. Fidler (1910) 158 Ill. App. 94; Highley v. Metzger (1900) 187 Ill. 237, 58 N. E. 407; Rozenski v. F. J. L.R.A.1917B.

Brewery Co. (1901) 93 Ill. App. 370; Crossen v. White (1865) 19 Iowa, 109, 87 Am. Dec. 420; Trayer v. Reeder (1876) 45 Iowa, 272; Marr v. Burlington, C. R. & N. R. Co. (1903) 121 Iowa, 117, 96 N. W. 716; Holt v. Brown (1884) 63 Iowa, 319, 19 N. W. 235; Penninger v. Reilley (1891) 44 Mo. App. 255; Yeoman v. Mueller (1889) 33 Mo. App. 343; Hobart v. Murray (1893) 54 Mo. App. 249; Walker v. Cooper (1902) 97 Mo. App. 441, 71 S. W. 370; Scharff v. Klein (1887) 29 Mo. App. 549; Clement v. Gill (1894) 59 Mo. App. 482; Lammers v. McGeehan (1891) 43 Mo. App. 664; LaFayette Mut. Bldg. Asso. v. Kleinhoffer (1890) 40 Mo. App. 388; Hackworth v. Zeiting (1892) 48 Mo. App. 32; Grampp v. De Peyster (1894) 80 Hun, 134, 29 N. Y. Supp. 1039; Boomer v. American Spiral Spring Butt Hinge Mfg. Co. (1880) 81 N. Y. 468; King v. Murray (1911) — Tex. Civ. App. —, 135 S. W. 255; Miller v. Drought (1907) — Tex. Civ. App. —, 102 S. W. 145; Sartwell v. Sowles (1900) 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11.

In Wiswell v. Tefft (1870) 5 Kan. 262, the appellate court decided that the defense based on the statute was available under the general denial, and considered the question whether the contract before them was invalid by reason of the statute; but it does not appear whether or not the objection was raised in the lower court.

And the same result as that reached by the cases cited to the general proposition above was arrived at in the following cases, where it does not clearly appear that the Statute of Frauds could, under the pleadings or otherwise, have been interposed as a defense in the lower court, but in which there is an inference that it might have been: Muir v. Pratt (1903) 18 Colo. App. 363, 71 Pac. 896; Shierling Bros. v. Richland Grocery Co. (1911) 9 Ga. App. 271, 70 S. E. 1126; Sandford v. Davis (1899) 181 Ill. 570, 54 N. E. 977;



Mellish-Hayward Co. v. R. Haas Electric & Mfg. Co. (1913) 181 Ill. App. 664; Deniston v. Hoagland (1873) 67 Ill. 265; Levitan Lumber Co. v. Yegendorf (1915) 191 Ill. App. 454; Hoagland v. Easterday (1894) 58 Ill. App. 450; Boss v. Dulin (1896) — Iowa, —, 68 N. W. 707; Lydig v. Braman (1900) 177 Mass. 212, 58 N. E. 696; Obenauer v. Solomon (1908) 151 Mich. 570, 115 N. W. 696; Beld v. Darst (1906) 146 Mich. 143, 109 N. W. 275; Arther v. Zeh (1843) 5 Hill (N. Y.) 199; Throop Grain Cleaner Co. v. Smith (1888) 110 N. Y. 83, 17 N. E. 671; Eiseman v. Heine (1896) 2 App. Div. 319, 37 N. Y. Supp. 861; Isaacs v. New York Plaster Works (1876) 8 Jones & S. (N. Y.) 277, reversed on other ground in (1876) 67 N. Y. 124; Johns v. Gustin (1874) 2 Thomp. & C. (N. Y.) 662; Goldman v. Cohen (1915) 167 App. Div. 666, 153 N. Y. Supp. 41; Schuyler v. Wheelon (1908) 17 N. D. 161, 115 N. W. 259; Groff v. Cook (1916) — N. D. —, 157 N. W. 973; Rhode v. Tuten (1891) 34 S. C. 496, 13 S. E. 676; Prior v. Sanborn County (1899) 12 S. D. 86, 80 N. W. 169; Meldrum v. Kenefick (1902) 15 S. D. 370; 89 N. W. 863; Schramm v. Owens Lumber Co. (1914) — Tex. Civ. App. —, 163 S. W. 1016; Larabee v. Porter (1914) — Tex. Civ. App. —, 166 S. W. 395; League v. Davis (1880) 53 Tex. 9; Day v. Dalziel (1895) — Tex. Civ. App. —, 32 S. W. 377; Erhard v. Callaghan (1870) 33 Tex. 171; First Nat. Bank v. Geske & Co. (1915) 85 Wash. 477, 148 Pac. 593.

The defense of the Statute of Frauds in the lower court may be raised in several ways; for example, it may be asserted by objections to evidence, by motions to strike out evidence, or by requests to give or objections to instructions. But, in whatever manner it is sought to take advantage of the statute in the lower court, it must, in order for the defense to be considered on appeal, have been brought to the attention of the lower court in such a manner as to show that it was relied upon.

In the following cases the defense of the Statute of Frauds was held not to have been sufficiently called to the attention of the trial court to entitle the party relying upon it to have it considered on appeal:

—where a peremptory instruction was asked which did not disclose for what reason or on what principle it was requested, International Harvester Co. v. Campbell (1906) 43 Tex. Civ. App. 421, 96 S. W. 93;

—where such defense was not sug-

gested, except in a motion for an instructed verdict, and the record did not show that the motion was ever called to the trial court's attention, Savage v. Mowery (1914) — Tex. Civ. App. —, 166 S. W. 905;

—where the defense was not raised by the answer or by objections to evidence, but was attempted to be raised for the first time in a motion for a directed verdict, Erickson v. Wiper (1916) 33 N. D. 193, 157 N. W. 592;

—where the statute was pleaded in the answer, but was not referred to in the original brief, Bowling v. Stough (1911) 101 Ark. 398, 142 S. W. 512;

—where a demurrer to the evidence was filed, Clement v. Gill (1894) 59 Mo. App. 482; Scharff v. Klein (1887) 29 Mo. App. 549;

—where the defense was not raised by demurrer, and facts in the answer from which it might be inferred were simply reiterations of the averments of the bill, and were part of the plea of the statute of limitations, Lewis v. Teal (1886) 82 Ala. 288, 2 So. 903.

And in Hawley v. Dawson (1888) 16 Or. 344, 18 Pac. 592, the court stated that to make the objection that the facts involved were within the Statute of Frauds available on appeal, it must be presented by an exception to the ruling of the court below, either to the admission or exclusion of evidence, or to the giving or refusing of instructions, or by demurrer in a proper case; that, so far as appeared from the record in the case before them, no such objection had been made in the lower court, and that, for this reason, the defense could not be submitted on appeal.

In an action originating before a justice of the peace, the defendant is not bound to raise the defense of the Statute of Frauds by a written plea, but he is bound in some manner to call the attention of the trial court distinctly to the fact that he relies upon the statute as a defense, before he can be heard in the appellate court to say that the trial court has ignored such defense, and where he makes no objection to theoretical evidence introduced to establish the contract, and his witnesses testify to the details of the contract, and the point is not distinctly raised by any of his instructions, nor called to the attention of the court by his motion for a new trial, except by inference, such defense will not be considered by the appellate court. Scharff v. Klein (1888) 29 Mo. App. 549.

In the following cases it was held that the defense of the Statute of Frauds was

sufficiently asserted in the lower court to justify its consideration on appeal:

—where evidence in regard to the parol contract was admitted without objection, but, at the close of the trial, the defendant's counsel requested the court to find as a fact that the contract was by parol, and, as a conclusion of law, that it was void under the statute, *Popp v. Swanke* (1887) 68 Wis. 364, 31 N. W. 916;

—where the statute was pleaded and objection made to testimony tending to take the case out of its operation, *Storthz v. Watts* (1915) 117 Ark. 500, 175 S. W. 406;

—where the sufficiency of the description of land attempted to be conveyed was raised in the lower court after the admission of the agreement in evidence had been objected to, and before the trial closed, although the statute was not

pleaded in the answer, *Barnes v. Rea* (1908) 219 Pa. 287, 68 Atl. 839;

—where an objection was made to oral evidence offered to prove a contract required to be in writing, *Lammers v. McGeehan* (1891) 43 Mo. App. 664.

And in the following cases in which the defense of the Statute of Frauds was clearly asserted in the lower court, either by the pleadings or by objections to evidence, the defense of the statute was considered on appeal without discussion of the sufficiency of the assertion in the lower court: *Feeney v. Howard* (1889) 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; *Fontaine v. Bush* (1889) 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465; *Altoona Portland Cement Co. v. Burbank* (1914) 44 Okla. 75, 143 Pac. 845; *Hotchkiss v. Ladd* (1863) 36 Vt. 593, 86 Am. Dec. 679. J. T. W.

#### OKLAHOMA SUPREME COURT.

A. P. BUCY et al., Pliffs. in Err.,  
v.

ARDMORE BRICK & TILE COMPANY.

(— Okla. —, 160 Pac. 1126.)

#### New trial — casualty preventing perfecting appeal.

Judgment was rendered against plaintiffs in error, and from the judgment rendered an appeal was attempted to be prosecuted to the supreme court; case-made being duly signed, sealed, and filed in the trial court within the time provided. Two firms of lawyers, living at different points, represented plaintiffs in error, and one of said firms, after said case-made was settled and signed, mailed the same to the other firm of attorneys, with request that such attorneys prepare the petition in error and file the case-made in the supreme court. The said case-made was miscarried by the mail and never reached the attorneys to whom it was sent, and the said case-made and petition were not filed in the supreme court within the time provided by law for taking an appeal. Thereafter, in accordance with the statute, the plaintiffs in error filed petition in the trial court in which said judgment was rendered, praying that the judgment rendered be vacated and a new trial granted, predicated upon "an unavoidable casualty and misfortune preventing the par-

ties from prosecuting or defending," and setting up as such unavoidable casualty and misfortune, the loss of said case-made in the mail. Held, that the loss of said case-made in the mail and the subsequent failure to file the same in the supreme court within the time provided by law was not such "unavoidable casualty or misfortune as entitled the plaintiffs in error" to a new trial of the cause in which said judgment was rendered. For other cases, see *New Trial, I. in Dig.* 1-52 N. S.

(October 10, 1916.)

**E**RROR to the Carter County Court to review a judgment in defendant's favor in an action brought to vacate a judgment rendered against plaintiffs. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Eddleman & Graham and Cruce & Potter, for plaintiffs in error:

Defendants have a complete defense to plaintiff's cause of action.

*Hutchinson v. Krueger*, 34 Okla. 23, 41 L.R.A.(N.S.) 315, 124 Pac. 591, Ann. Cas. 1914C, 98.

Defendants have, by unavoidable casualty or misfortune, been prevented from prosecuting their defense to said action, and are therefore entitled to relief.

*Chicago, R. I. & P. R. Co. v. Reese*, 26 Okla. 613, 110 Pac. 1071; *Chicago, R. I. & P. R. Co. v. Eastham*, 26 Okla. 605, 30 L.R.A.(N.S.) 740, 110 Pac. 887; *Williams v. Richmond & D. R. Co.* 110 N. C. 466, 15 S. E. 97; *McLaughlin v. Nettleton*, 25 Okla. 319, 105 Pac. 662; *Schnitzler v. Fourth Nat. Bank*, 1 Kan. App. 674, 42 Pac. 496; *Ennis v. Fourth Street Bldg.*

Headnote by COLLIER, C.

Note. — The disposition of an appeal or motion for new trial, where, without fault of appellant, the record is lost or incomplete, is discussed in the notes to *Bailey v. United States*, 25 L.R.A.(N.S.) 860, and *Sanders v. Wise*, L.R.A.1915B, 353. L.R.A.1917B.

Asso. 102 Iowa, 520, 71 N. W. 426; Searles v. Christensen, 5 S. D. 650, 60 N. W. 29; Bexter v. Chute, 50 Minn. 164, 36 Am. St. Rep. 633, 52 N. W. 379; Sherman v. Southern P. Co. 31 Nev. 285, 102 Pac. 257.

Messrs. Johnson & McGill, for defendant in error:

The case-made, the loss of which is alleged to have prevented plaintiffs in error from appealing from the original judgment, was a nullity, because not served within three days after judgment was rendered; and by their failure to make said service plaintiffs lost their right to have said judgment reviewed on appeal.

Garfield County v. Porter, 19 Okla. 173, 92 Pac. 152; Lee v. Summers, 36 Okla. 784, 130 Pac. 268; St. Louis & S. F. R. Co. v. Nelson, 40 Okla. 143, 136 Pac. 590; Chicago, R. I. & P. R. Co. v. Shawnee, 39 Okla. 728, 136 Pac. 591; Edwards v. Bynum, 43 Okla. 148, 141 Pac. 678; Noble v. Harter, 6 Kan. App. 823, 49 Pac. 794; Powell v. Johnson-Larimer Dry Goods Co. 35 Okla. 644, 130 Pac. 945.

The casualty and misfortune complained of did not authorize the lower court to vacate its judgment.

Marshall v. Marshall, 7 Okla. 240, 54 Pac. 461; Dumbarton Realty Co. v. Erickson, 143 Iowa, 677, 136 Am. St. Rep. 778, 120 N. W. 1025, 21 Ann. Cas. 258; McDaid v. Territory, 1 Okla. 92, 30 Pac. 438, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59.

Collier, C., filed the following opinion:

This is an action brought by the plaintiffs in error against the defendant in error to vacate a judgment entered in favor of defendant in error and against plaintiffs in error on the 21st day of October, 1911, for the sum of \$316, with interest thereon from the 15th day of October, 1909, and for costs of suit. The parties hereto will hereinafter be designated as they were in the trial court. Within due time defendants filed a motion for new trial, which was overruled, and time fixed within which to prepare and present a case-made.

The unquestioned evidence is that the defendants presented a case-made, and the same was duly settled, signed, and filed in the trial court within the time prescribed in said order; that two firms of attorneys, Cruce & Potter, composed of W. I. Cruce and W. D. Potter, residents of the city of Ardmore in said county of Carter, and Eddleman & Graham, composed of A. Eddleman and J. C. Graham, residents of Marietta, Love county, Oklahoma, were and are the attorneys for defendants; that after said case-made had been duly settled, signed, and filed as aforesaid, W. I. Cruce, on L.R.A.1917B.

the 10th day of February, 1912, mailed the same to Eddleman & Graham, at Marietta, Oklahoma; that said case-made was inclosed in an envelop properly addressed, postage thereon being fully prepaid, and said case-made deposited in the postoffice at Ardmore, Oklahoma, with a letter addressed to said Eddleman & Graham, requesting that they prepare a petition assigning errors to the supreme court of the state of Oklahoma, and forward the case-made to and file the same with the clerk of the supreme court of Oklahoma; that said Eddleman & Graham, nor either of them, never received said letter or said case-made, but that the same was lost or miscarried in the mail; that if said Eddleman & Graham had received said case-made they would have prepared a proper petition in error, and would have transmitted and filed said case-made with the clerk of the supreme court of the state of Oklahoma within the time, and would have perfected the appeal of these petitioners; that said Cruce & Potter, relying upon Eddleman & Graham to prepare petition in error and file the same in the supreme court, believed, and had a right to believe, that said appeal had been perfected, and did not know that said case-made had been miscarried and lost until the statutory time had expired for filing same in the supreme court; that said Eddleman & Graham not having received said case-made nor said letter, believed that said Cruce & Potter had perfected said appeal and filed said case-made in the supreme court, and did not know that the same had not been filed until after the statutory time for filing same in the supreme court had expired.

There was evidence also tending to show that the defendants had a defense to the action in which said judgment, which it was sought to set aside, was rendered. The case was tried to the court, and a judgment rendered denying the vacation of the judgment rendered, and refusing the defendants a new trial.

Within the statutory period, motion was made for a new trial of the action of the court in refusing to vacate the judgment rendered and grant a new trial, which was overruled and duly excepted to. To reverse the judgment denying the vacation of the judgment rendered, and refusal of the court to grant defendants a new trial, this appeal is prosecuted.

This action is a statutory one, and the right to a new trial in the cause is predicated "upon unavoidable casualty, or misfortune preventing the parties from prosecuting or defending." The question of the validity of defense to the action in which the judgment was rendered we think un-

necessary to consider, as the ground upon which a new trial of the cause is urged is not sustained by the evidence.

We do not think that the failure of the attorneys to file within the proper time the appeal in the supreme court, due to the failure of one set of attorneys to receive the case-made, by reason of failure of the mail to deliver the same, is such "an unavoidable casualty" as is provided by the statute upon which to predicate a new trial, especially in view of the fact that such unavoidable casualty, in order to be available, must have occurred in the trial in which judgment was rendered.

In *Farmers' & M. Bank v. Welborn*, 32 Okla. 1, 121 Pac. 620, it is held: "The fact that the stenographer, who took the testimony at a trial, loses his notebook and is unable to make a transcript thereof for the losing party, is not sufficient ground for a new trial." *Marshall v. Marshall*, 7 Okla. 240, 54 Pac. 461.

In *Butts v. Anderson*, 19 Okla. 367, 91 Pac. 906, it is held: The district court is only authorized to grant a new trial for the causes and in the manner set forth in the statute; and it is manifest and material error to grant a new trial when the complaining party is unable to procure anyone who can transcribe a deceased stenographer's notes of the trial.

We are of the opinion that the court did not commit error in its refusal to set aside the judgment rendered and to grant a new trial, and that this cause should be affirmed.

**Per Curiam:**

Adopted in whole.

A petition for rehearing having been filed, Collier, C., on November 28, 1916, handed down the following additional opinion:

The petition for rehearing in this case is predicated upon the averment that subsec. 9 of § 5033, Revised Laws of Okla-

homa 1910, was not called, by brief of plaintiffs in error, to the attention of the court, and was overlooked by the court.

Subsection 9 of said § 5033 reads: "When without fault of complaining party, it becomes impossible to make case-made."

It is true that subsec. 9 of § 5033 was not called to the attention of the court, but in fact was not overlooked by the court. The facts of the petition under review show conclusively that subsec. 9 has no field of operation in the instant petition, as said subsection relates alone to making a case-made. In the instant case, the case-made was not only made, but duly certified by the trial judge and attested by the clerk under seal of the court, and lost in the mail while in transit from one to another of the plaintiffs' attorneys.

The misfortune of being denied a review of this cause upon its merits, that comes to the plaintiffs in error, is not "due to the impossibility of making the case-made," but failure to file the case-made together with petition in error in this court within the statutory time, due to the fact that plaintiffs in error had two sets of lawyers, residing in different towns, each of whom relied upon the other to file said case-made and petition in error in this case. We are not informed, and have not been directed to any law, that, under the facts of said petition, that subsec. 9 of § 5033 could be invoked as entitling the plaintiffs in error to a new trial in this case. Failure to secure a review of this case upon its merits may work a hardship, but with this we have nothing to do. We are to construe, but not make, laws.

Finding no grounds upon which a rehearing in this case should be granted, petition for rehearing is hereby denied.

**Per Curiam:**

Adopted in whole.

## ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS  
EX REL. SAMUEL P. THRASHER

v.

DAVE SMITH et al., Appts.

(275 Ill. 256, 114 N. E. 31.)

**Constitutional law — suppression of bawdyhouse — class legislation.**

1. A statute for the suppression of bawdyhouses is not void as class legislation because the only private persons authorized

**Note.** — As to validity of statutes or ordinances against bawdyhouses, see annotation following this case, post, 1078.  
L.R.A.1917B.

to institute the proceedings must be citizens of the county.

For other cases, see *Constitutional Law*, II, a, 7, in *Dig. 1-52 N. S.*

**Same — closing and disposition of property — due process of law.**

2. The owner of property used as a bawdyhouse is not deprived of his property without due process of law if he is accorded notice and hearing, by selling the personal property at auction and paying him the proceeds after deduction of costs, and closing the building for a year unless security is given for the immediate abatement of the nuisance.

For other cases, see *Constitutional Law*, II, b, 2 and 5, in *Dig. 1-52 N. S.*

(October 24, 1916.)

**A**PPEAL by defendants from a decree of the Circuit Court for Cook County overruling their demurrer to a bill filed to enjoin the maintenance of a public nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. Rudolph Frankenstein and Maurice J. Slater for appellants.

Messrs. Sims, Welch, & Godman and Daniel J. Ward, for appellees:

The right to bring an action to abate a public nuisance may be conferred, by the legislature, upon a private individual.

State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215; State ex rel. Estes v. Persica, 130 Tenn. 48, 168 S. W. 1056; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Ex parte Morgan, 57 Tex. Crim. Rep. 551, 136 Am. St. Rep. 996, 124 S. W. 99; Ex parte Lane, — Tex. Crim. Rep. —, 124 S. W. 100; Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 918; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Clopton v. State, — Tex. Civ. App. —, 105 S. W. 994; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 125 Am. St. Rep. 653, 90 S. W. 870.

The citizen acts as the agent for the state in beginning the action, and it is within the power of the legislature to so authorize.

State ex rel. Estes v. Persica, 130 Tenn. 48, 168 S. W. 1056; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 125 Am. St. Rep. 653, 90 S. W. 870; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182.

It is proper to close the building for all purposes for the period of a year, unless the statutory bond is furnished.

State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215; State ex rel. Kern v. Jerome, 80 Wash. 261, 141 Pac. 753; State ex rel. Kern v. Schropfer, 81 Wash. 699, 142 Pac. 1190; State v. Adams, 81 Iowa, 593, 47 N. W. 770; Craig v. Werthmueller, 78 Iowa, 598, 43 N. W. 606; State ex rel. Robertson v. Wheeler, 131 Minn. 308, 155 N. W. 90.

Independently of statute, the jurisdiction of equity extended to abatement of nuisances long prior to the adoption of the statute.

State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N. W. 953; Hutchinson Twp. v. Filk, 44 Minn. 536, 47 N. W. 255; Roloson v. Barnett, 243 Ill. 130, 90 N. E. 228; State ex rel. Dow v. Nichols, 83 Wash. 676, 145 Pac. 986; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Ex L.R.A.1917B.

parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870.

The act is civil as distinguished from penal, inasmuch as the criminal aspect of the maintenance of bawdyhouses was fully covered prior to its enactment.

State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N. W. 953; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870; Clopton v. State, — Tex. Civ. App. —, 105 S. W. 994; Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; State v. Murphy, 71 Vt. 127, 41 Atl. 1037; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State ex rel. Rhodes v. Saunders, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588; State v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; State ex rel. Robertson v. Wheeler, 131 Minn. 308, 155 N. W. 90.

The act in its remedial details, as well as its general purpose, is a proper exercise of the police power, under the test that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion.

State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N. W. 953; State ex rel. Beek v. Wagener, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; State ex rel. Estes v. Persica, 130 Tenn. 48, 168 S. W. 1056; State ex rel. Robertson v. Wheeler, 131 Minn. 308, 155 N. W. 90; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788.

It is within the power of the legislature to determine what shall be regarded as public nuisances.

State ex rel. English v. Fanning, 97 Neb. 224, 149 N. W. 413.

The act does not unlawfully deprive a citizen of his property without trial by jury, and does not invade his property rights without due process of law, and does not deny to all the equal protection of the law.

State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549; State ex rel. Estes v. Persica, 130 Tenn. 48, 168 S. W. 1056; Cooley, Const. Lim. 7th ed. 855; State ex rel. Robertson v. Wheeler, 131 Minn. 308, 155 N. W. 90; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870;

Waterloo v. Waterloo, C. F. & N. R. Co. 149 Iowa, 129, 125 N. W. 819; Mugler v. Kansas, 123 U. S. 623, 665, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N. W. 953; State ex rel. Dow v. Nichols, 83 Wash. 676, 145 Pac. 986; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; State v. Jordan, 72 Iowa, 377, 34 N. W. 285.

In the enactment of statutory law the legislature is presumed to have intended to keep within constitutional bounds, and unless a statute is unconstitutional beyond a reasonable doubt it must be sustained.

State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N. W. 953; Ex parte Allison, 99 Tex. 455, 2 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 653, 90 S. W. 870.

Dunn, J., delivered the opinion of the court:

This is an appeal by the defendants from a decree of the circuit court of Cook county overruling their demurrer to a bill in equity filed under the provisions of the act approved June 22, 1915, entitled: "An Act Regarding Places Used for Purposes of Lewdness, Assignment, or Prostitution, to Declare the Same to be Public Nuisances, and to Provide for the More Effectual Suppression Thereof." Laws 1915, p. 371.

It is unnecessary to set forth the allegations of the bill, for no claim is made that they are not sufficient to comply with the terms of the act, but the appellants' contentions are that the statute is unconstitutional and void as class legislation; that it deprives the appellants of their property without due process of law; that it attempts to confer upon a private citizen the duties of the state's attorney and the attorney general; and that the act attempts to prevent the commission of a criminal offense by injunction.

The bill was not filed by the state's attorney or the attorney general, but upon the relation of a private citizen of Cook county, under the authority of § 2 of the act. Section 1 declares all buildings, apartments, and places, and the fixtures and movable contents thereof, used for purposes of lewdness, assignment, or prostitution, to be public nuisances; and § 2 authorizes the state's attorney, or any citizen of the county in which such a nuisance exists, to "maintain a bill in equity, in the name of the people of the state of Illinois, perpetually to enjoin all persons from maintaining or permitting such nuisance, and to abate the same, and to enjoin the use of such building or apartment, or such place for any purpose, for a period of one year: . . . Provided, that no such injunction shall issue, except on behalf of an owner or agent, unless it

be made to appear to the satisfaction of the court that the owner or agent of such building or apartment or of such place, knew or had been personally served with a notice signed by the petitioner."

The appellants contend that, in extending the right to maintain the bill to citizens of the county only, many residents of the county who are not citizens, and many property owners who are neither residents nor citizens of the county, are deprived of the benefit of the bill. The jurisdiction of a court of equity to enjoin the maintenance of a public nuisance at the suit of the attorney general or state's attorney, even though such maintenance may be punishable by indictment, cannot be doubted, and is recognized in *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680, and *People ex rel. Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994, Ann. Cas. 1916D, 785. The action is one affecting the public welfare, and it is within the constitutional power of the legislature to designate the agency to set the law in motion on behalf of the public. *Carleton v. Rugg*, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; Ex parte Allison, 48 Tex. Crim. Rep. 634, 3 L.R.A.(N.S.) 622, 90 S. W. 492, 13 Ann. Cas. 684.

The decree restrained the appellants from maintaining, using, or permitting the use of the premises for the purpose of lewdness, assignment, or prostitution, and from using the building, apartments, and premises for any purpose for one year from the date of the decree, and ordered that the building, apartments, and premises should remain in the custody of the court while the decree remained in effect. It was further ordered that the sheriff should remove all fixtures and movable property used in conducting the nuisance and sell them at public sale, as provided by law, and that he should close the premises and keep them closed for the period of one year. These latter provisions of the decree were authorized by the terms of § 5 of the statute, and it is insisted that the appellants were thereby deprived of their property without due process of law.

The act was an exercise of the police power of the state, passed in the interest of the public welfare, for the preservation of good order and public morals. The keeping of a bawdyhouse was a nuisance at common law. The legislature did not exceed its powers in declaring, as it did in the 1st section, all places, and the property therein, used for the purposes mentioned, to be public nuisances. The contention of the appellants is that the nuisance is not in the property itself, but in the manner in which it is used, and that the unlawful use may be pre-

vented without the confiscation or destruction of the property itself. The statute does not undertake to confiscate or destroy property. The personal property is required to be sold and the proceeds, after the payment of costs, paid to the owner. The deprivation of the use of the property for one year as security against the continuance or renewal of the nuisance is not an unreasonable means to that end, in view of the fact that such deprivation is not absolute. The owner may be at once restored to the possession if he will give security, in a reasonable amount, to abate the nuisance immediately and prevent its being established or maintained within a year. No injunction can issue and no order to close the place can be enforced against an owner who has in good faith endeavored to prevent the nuisance.

Under the police power the state may interfere whenever the public interest demands it, and a large discretion is vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests, the only restriction being that the interest of the public, in general, requires such interference, and that the means are reasonably necessary to the accomplishment of the purpose, and not unduly oppressive upon individuals. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143. Since the use of a building and the furniture in it, for the pur-

pose mentioned in the statute, may properly be declared a nuisance, the legislature has authority to abate such nuisance and to adopt any means reasonably adapted to prevent its recurrence in the future which are not unduly oppressive. Deprivation of the possession and use of the property is certainly adapted to the purpose. It is not unduly oppressive under the circumstances. There is no summary proceeding. Provision is made for notice and hearing, and only in case of a wilful violation of the law can the injunction be granted and the possession be taken from the owner in order to make the injunction effectual. An effort in good faith to abate the nuisance will prevent a decree to close the place, and even after decree reasonable security to immediately abate the nuisance and prevent its establishment or maintenance within a period of one year will cause a vacation of the decree. These results may all be easily avoided by not keeping a house of prostitution or permitting one to be kept, and it cannot be regarded as unduly oppressive upon one who has wilfully kept or permitted such a house, to require him, after a judicial determination of that fact, to give security for the discontinuance of the nuisance long enough to assure the permanence of its abatement before he shall be permitted to again occupy and use the property within a year. Such a requirement does not deprive him of his property without due process of law.

Decree affirmed.

### Annotation—Validity of statutes or ordinances against bawdyhouses.

#### I. Statutes, 1078.

#### II. Ordinances:

##### 1. Constitutionality, 1083.

##### 2. Validity under charter provisions, 1084.

#### I. Statutes.

Statutes such as those involved in *PEOPLE EX REL. THRASHER V. SMITH*, ante, 1075, have been enacted in a number of states to more effectually suppress the evil with which the statutes deal. It is recognized that the criminal stat-

utes are not as effective as is necessary in dealing with the evil.<sup>1</sup> Hence power is vested in equity. In view of the ineffectiveness of the criminal laws it cannot be claimed that the legislature, in enacting such a statute, intended to enact another penal statute.<sup>2</sup>

Bawdyhouses were public nuisances at common law,<sup>3</sup> and equity had jurisdiction of actions to abate them or to enjoin their maintenance.<sup>4</sup> The legislature therefore, in conferring on equity power to suppress bawdyhouses, is conferring

<sup>1</sup> It is stated in *State ex rel. Wilcox v. Ryder* (1914) 128 Minn. 95, 147 N. W. 953, that the general justification of such an act as a matter of legislative discretion under the police power cannot fairly be questioned, for it is a matter of common knowledge that prosecutions under the criminal statutes do not result in efficient repression or suppression of the evil aimed at.

<sup>2</sup> *State ex rel. Wilcox v. Ryder* (Minn.) supra.

<sup>3</sup> 1 Wood, Nuisances, 3d ed. § 29; Joyce, L.R.A.1917B.

Nuisances, § 391; *PEOPLE EX REL. THRASHER V. SMITH*, ante, 1075.

<sup>4</sup> Wood, Nuisances, § 777; *State ex rel. Wilcox v. Ryder* (Minn.) supra; *State ex rel. English v. Fanning* (1914) 96 Neb. 123, 147 N. W. 215.

That equity has jurisdiction to enjoin the maintenance of a public nuisance, even though such maintenance may be punishable by indictment, see *PEOPLE EX REL. THRASHER V. SMITH*.

no new power except as it may enlarge the jurisdiction. That it may so enlarge the jurisdiction of equity, subject to constitutional limitations, is the theory of the cases dealing with such statutes.<sup>5</sup> The right to abate a public nuisance may be conferred upon an individual by statute.<sup>6</sup> But in order to maintain an action in equity to enjoin a bawdyhouse under a statute extending the right of individuals to maintain an action to abate such a nuisance, the complainant must bring himself within the term of the statute.<sup>7</sup>

The purpose of statutes such as the one involved in *PEOPLE EX REL. THRASHER v. SMITH* is to suppress and prevent the maintenance of bawdyhouses. Injunction will not issue if there has been an abandonment of the business. In discussing this question it was stated<sup>8</sup> that, "if the proof establishes conclusively that the defendants have in good faith permanently abandoned the business, and do not intend to re-engage in it at the place in question, or in any other place, then an injunction should not issue; but if there is a doubt as to whether the business has been permanently abandoned in good faith, it presents a proper case for granting a permanent injunction. In order to show an abandonment in good faith within this rule, it is not sufficient to show that, after the prosecution was instituted, there was a

swift change in existing conditions, coupled with a professed declaration not to re-engage in the business." The evidence was then reviewed and the court concluded that the showing in favor of the defendant was not sufficient to justify the appellate court in reversing the trial court, and thereby holding that the evidence conclusively established a permanent abandonment in good faith. Accordingly the judgment of the trial court granting a permanent injunction was affirmed and the tax of \$300 prescribed by statute imposed upon the premises.

These statutes in general declare bawdyhouses to be nuisances and provide for the maintenance of a bill in equity to enjoin or abate the same. It is usually provided that the building may be closed for all purposes unless a bond is filed, and that the personal property found therein may be sold; and some of the statutes provide for the imposition of a tax or penalty upon the house. Such a statute is a valid exercise of the police power.<sup>9</sup>

Such statutes cannot be held unconstitutional because a jury trial is not provided.<sup>10</sup> The guaranty of a trial by jury is held to have no application to equitable remedies existing at the time of the adoption of the guaranty;<sup>11</sup> there being jurisdiction in equity at common law to abate nuisances and deprive per-

<sup>5</sup> *State ex rel. Wilcox v. Ryder* (Minn.) *supra*.

<sup>6</sup> *State ex rel. English v. Fanning* (1914) 96 Neb. 123, 147 N. W. 215, approved on rehearing (1914) 97 Neb. 224, 149 N. W. 413; *PEOPLE EX REL. THRASHER v. SMITH*.

As to the rights of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution, see note to *Tedescki v. Berger*, 11 L.R.A.(N.S.) 1060, and the subsequent case of *Seifert v. Dillon*, 19 L.R.A.(N.S.) 1018.

<sup>7</sup> *Spence v. Fenchler* (1912) — Tex. Civ. App. —, 151 S. W. 1094. Accordingly, the complainant was held not entitled to maintain the action in a city which was excepted from the operation of the statute. The statute involved in this case was not such a statute as was involved in *PEOPLE EX REL. THRASHER v. SMITH*, but merely provided that any person might abate a nuisance arising from the maintenance of a bawdyhouse.

<sup>8</sup> *State ex rel. Kern v. Jerome* (1914) 80 Wash. 261, 141 Pac. 753; *State ex rel. Kern v. Schropfer* (1914) 81 Wash. 699, 142 Pac. 1199.

<sup>9</sup> *State ex rel. Robertson v. New England Furniture & Carpet Co.* (*State ex rel. Robertson v. Lane*) (1914) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549; *State ex rel. Wilcox v. Ryder* L.R.A.1917B.

(1914) 126 Minn. 95, 147 N. W. 953. The decisions in the foregoing cases are approved generally in *State ex rel. English v. Fanning* (1914) 97 Neb. 224, 149 N. W. 413.

See *PEOPLE EX REL. THRASHER v. SMITH*, ante, 1075.

It is held in *State ex rel. Robertson v. New England Furniture & Carpet Co.* (Minn.) *supra*, that a statute authorizing seizure and forfeiture of personal property used with the knowledge of the owner in connection with the maintenance of a bawdyhouse is not invalid as constituting an unreasonable exercise of the police power with respect to such property.

<sup>10</sup> *State ex rel. Wilcox v. Ryder* (Minn.) *supra*, the provisions as to closing the house, forfeiture and sale of personalty, and the imposition of a penalty, were all involved.

*State ex rel. English v. Fanning* (1914) 96 Neb. 123, 147 N. W. 215 (objection was made by owner to closing property).

<sup>11</sup> *State ex rel. Wilcox v. Ryder* (Minn.) and *State ex rel. English v. Fanning* (Neb.) *supra*. In such cases due process of law is observed by using the equitable remedies existing concurrently with the strictly legal one of trial by jury, or those provided by statute law which afford notice and an opportunity to defend.



sons of property used in the perpetration thereof, a statute which prescribes the remedy by equity for the abatement of the nuisance cannot be held unconstitutional as depriving one of property without trial by jury. One court<sup>12</sup> concludes that, "since, therefore, a review of the act as a whole leads irresistibly to the conclusion that its purpose is repression of the evil, to be worked out by equitable attack upon the property of those engaged in or abetting it, and not punishment of the offenders by infliction of personal penalties, except as for contempt of court, the contention that, because the thing itself—the lewd place—declared a nuisance by the act would in its maintenance have constituted a criminal offense at the time of the adoption of the Constitution, a jury trial is indispensable, has no foundation, and is thus answered by the authorities." The court then reviews the authorities, and concludes that the fallacy of this argument lies in disregarding the distinction between a proceeding to abate a nuisance, which relates simply to the property which in its use constitutes the nuisance, and the prosecution of one for the crime of maintaining it.

Particular attack has been directed against the provision in these statutes for a penalty, on the ground that no jury trial is provided, it being argued that penalties are regarded as punishments for infractions of law and statutes imposing them as penal; consequently there must be a jury trial. This is answered in one case<sup>13</sup> by stating that, while the act designates the exaction as a "penalty," the same section clearly indicates that it is to be imposed, treated, and collected as a tax. It is stated that the fact that a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. And the court concludes that "we hold it not penal, which disposes of the defendant's main contention regarding right to trial by jury." This exaction is

not, however, a tax within the meaning of a constitutional provision requiring that bills for the raising of revenue shall originate in the house.<sup>13</sup>

It has also been held that, the imposition of the tax not being penal, there can be no objection based upon the constitutional provisions relating to excessive fines and unusual punishment, the right to be confronted by witnesses, testifying against one's self, bills of attainder, and ex post facto laws.<sup>14</sup>

Proceedings under such a statute not being criminal, it is not necessary to consider whether there is a violation of the constitutional provision that no conviction shall work forfeiture of estate, since it is settled that by due process of law specific forfeitures may be imposed for specific acts, including even total destruction of property per se innocent, when such fairly tends, and is reasonably necessary, to accomplish a legitimate purpose under the police power.<sup>14</sup>

Such a statute is not open to the objection that it deprives one of property without due process of law, where notice and an opportunity to defend are afforded,<sup>15</sup> especially where the statute does not authorize relief against anyone not proved to be a participant either active or by consent or acquiescence. The provision making lack of reasonable care or diligence equivalent to notice of the uses to which the property is being put does not negative this conclusion, for ignorance due to negligence is the equivalent of notice; furthermore the owner of property is presumed to know the business conducted thereon.<sup>16</sup>

Such a statute has also been sustained as against the objection that it is a denial of the equal protection of the law.<sup>17</sup>

We have heretofore noticed questions as to the validity of such statutes which have arisen upon general objections thereto and those which have arisen from the vesting of jurisdiction in equity. We come now to notice the validity of the particular provisions of such

<sup>12</sup> State ex rel. Wilcox v. Ryder (Minn.) supra.

<sup>13</sup> State ex rel. Robertson v. Wheeler (1915) 131 Minn. 308, 155 N. W. 90. The statute cannot therefore be held invalid because it originated in the senate.

<sup>14</sup> State ex rel. Wilcox v. Ryder (Minn.) supra.

<sup>15</sup> State ex rel. Wilcox v. Ryder (Minn.) supra; State ex rel. English v. Fanning (1914) 96 Neb. 123, 147 N. W. 215, approved on rehearing (1914) 97 Neb. 224, 149 N. W. 413.

See State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex L.R.A.1917B.

rel. Robertson v. Lane) (1914) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549, infra, note 30; and State ex rel. Kern v. Jerome (1914) 80 Wash. 281, 141 Pac. 763, and State ex rel. Kern v. Schropfer (1914) 81 Wash. 699, 142 Pac. 1199, infra, note 26.

PEOPLE EX REL. THRASHER v. SMITH, ante, 1075.

<sup>16</sup> State ex rel. Wilcox v. Ryder (Minn.) supra.

<sup>17</sup> State ex rel. English v. Fanning (1914) 96 Neb. 123, 147 N. W. 215, approved on rehearing (1914) 97 Neb. 224, 149 N. W. 413.

statutes, as to the closing of the building and the forfeiture and sale of the personal property and the imposition of a fine.

That a building may constitutionally be closed for all purposes unless a bond is given is held by the cases that have passed on this question.<sup>18</sup> These acts manifest an intention that the owner of the premises shall not be subject to the penalty of having the premises closed unless he had notice of the nuisance.<sup>19</sup> The owner is bound, however, by the knowledge of his agent, and also by such knowledge as the agent should have obtained by reasonable diligence.<sup>20</sup> It has been held that a building may be closed for all purposes unless a bond is given, although the owner had no knowledge that the building was being so used prior to the granting of the temporary injunction.<sup>21</sup> Even where the owner has knowledge, the place cannot be closed against him if he has in good faith endeavored to prevent the nuisance.<sup>22</sup>

The procedure prescribed by the Minnesota statute under which the owner of the premises may obtain its release by payment of all the costs of the proceedings, and giving bond with certain prescribed conditions looking to abatement of the nuisance, is not fully set out in the report of the cases passing upon that statute. It is held, however, that the provisions of the statute are not in conflict with the constitutional provision that any person "ought to obtain justice freely and without purchase."<sup>23</sup>

In a case involving a hotel it is stated that it is impossible to separate the building into parts and segregate one portion as that in which the nuisance existed. The only method to abate the same is to declare the entire premises a public nuisance, and to abate the same by the decree.<sup>24</sup> But upon rehearing<sup>25</sup> it was stated that "the object of the statute is to provide an efficient and prompt means for suppressing the so-called 'red-light district' in communities that are unwilling to tolerate such a nuisance. The statute is not intended as a means of regulating the morals of private individuals, nor to prevent immorality in hotels mainly devoted to the accommodation of families and moral, well-behaved people. Of course, if a hotel becomes 'a house of lewdness, assignation, and prostitution,' it will not escape the ban of the statute because some innocent people are deceived and patronize the house in good faith as a hotel. It is not necessary to prove that the owner of the property knew that it was being used for the prohibited purposes; if the proprietor, that is, the person in control and management of the house, has such knowledge, it is sufficient."

Some statutes in addition to providing for the closing of the building unless a bond is filed impose a fine or tax. The owner cannot by filing the bond evade the payment of this tax, where the statute expressly provides that "the release of the property under the provisions of this (section) shall not release it from

<sup>18</sup> Ibid.

This is implied also from the decision in *State ex rel. Wilcox v. Ryder* (1914) 126 Minn. 95, 147 N. W. 953, supra, note 10, where this provision was before the court with others.

*State ex rel. Kern v. Jerome* (1914) 80 Wash. 261, 141 Pac. 713, and *State ex rel. Kern v. Schropfer* (1914) 81 Wash. 699, 142 Pac. 1199; *PEOPLE EX REL. THRASHER v. SMITH*.

<sup>19</sup> The court in *State ex rel. Robertson v. Wheeler* (Minn.) supra, does not decide whether a statute might constitutionally provide for the closing of the property and the levying of a fine or penalty thereon without notice to the owner of the nuisance, but states that the Minnesota statute does not provide for such action without notice.

<sup>20</sup> *State ex rel. Robertson v. Wheeler* (Minn.) supra; *State ex rel. English v. Fanning* (1914) 97 Neb. 224, 149 N. W. 413.

<sup>21</sup> *State ex rel. English v. Fanning* (1914) 96 Neb. 123, 147 N. W. 215. It is stated that the granting of a temporary injunction L.R.A.1917B.

was notice to the owner that illegal practices were charged to be carried on in his building; that he should then have taken steps to abate the nuisance, or at least determine by legal proceedings whether the terms of his lease were being violated. Failing this, he accepted as an alternative the contingency of having the building declared a nuisance and being compelled to give the statutory bond for its release.

<sup>22</sup> *PEOPLE EX REL. THRASHER v. SMITH*, ante, 1075.

See *State ex rel. Kern v. Jerome* and *State ex rel. Kern v. Schropfer* (Wash.) supra, note 8.

<sup>23</sup> *State ex rel. Robertson v. Wheeler* (Minn.) supra.

The statement in *State ex rel. Wilcox v. Ryder* (Minn.) supra, that the provisions of the statute in this regard are unnecessarily drastic and probably invalid, is disapproved.

<sup>24</sup> *State ex rel. English v. Fanning* (Neb.) supra.

<sup>25</sup> *State ex rel. English v. Fanning* (1914) 97 Neb. 224, 149 N. W. 413. The decree closing the house was reversed.

any judgment, lien, penalty, or liability to which it may be subject by law."<sup>26</sup>

The imposition of such a tax does not offend against the constitutional provision for uniformity and equality of taxation.<sup>27</sup> Nor does it offend against the due process of law clause, where the owners were parties to the action and process was served upon them and they appeared in contesting the validity of the tax.<sup>27</sup>

Many of the statutes dealing with this question provide for a sale of the personal property found in the house. It is held that, in providing for the abatement of a nuisance, the legislature may confer upon the courts power to order the personal property used in connection with such a house sold and the proceeds applied in payment of the costs, the balance to be paid to the defendants as their interests may appear.<sup>27</sup> The actual owner of such property is entitled to a day in court before the property can be seized and sold.<sup>28</sup> No person, however, has any vested right to have property used in such a place. Thus, it has been held that the vendor of the personal property in such a house, under a conditional sale contract entered into prior to the passage of the statute, has no vested right which will be impaired by the application of the act, as no vested or constitutional right exists to use or allow the use of property for purposes injurious to either public health or morals, and an owner with knowledge or notice

in the premises cannot complain if losses ensue when the law deals with the property in any way reasonably necessary for the suppression of the evil in connection with which it is used.<sup>29</sup>

Provisions in such statutes as to evidence have been sustained. Thus, it has been held that neither a provision in such a statute making the general reputation of a place as being a bawdyhouse prima facie evidence of the existence of a nuisance, nor another provision of such statute creating a presumption of knowledge on the part of all persons having property interests in the property in or about such house, constitutes interference with the property rights of a vendor of the personal property under conditional sale contracts without due process of law, since they relate merely to a matter of procedure.<sup>30</sup>

Statutes directed against the keepers of houses of ill fame have also been attacked as to the character of evidence which authorizes a conviction. A statute imposing a fine or imprisonment on any person who shall keep a house which is, or which is reputed to be, a house of ill fame, is not unconstitutional because it permits a conviction for the offense of keeping a house which is in fact a house of prostitution on proof that it is reputed to be such a house.<sup>31</sup>

A statute making it an offense to keep or be concerned in keeping a bawdy or disorderly house, and prescribing a penalty therefor, cannot be held invalid on

<sup>26</sup> State ex rel. Kern v. Jerome (1914) 80 Wash. 261, 141 Pac. 753, and State ex rel. Kern v. Schropfer (1914) 81 Wash. 699, 142 Pac. 1199. The court was accordingly held justified in refusing to accept the bond containing a stipulation that the tax should not be imposed.

<sup>27</sup> State ex rel. Kern v. Jerome and State ex rel. Kern v. Schropfer (Wash.) supra.

The forfeiture of rights or interests of innocent persons in property used in violation of law is discussed in the note to Skinner v. Thomas, L.R.A.1916E, 343.

Whether a gambling device is property within constitutional protection is discussed in note in Mullen v. Mosely, 12 L.R.A. (N.S.) 394.

<sup>28</sup> State ex rel. English v. Fanning (1914) 96 Neb. 123, 147 N. W. 215. The property was owned by a corporation. The secretary of the corporation, a stockholder therein, was made a party to the proceedings to sell the furniture, but not the corporation. It was accordingly held that the judgment ordering the property to be removed and sold was erroneous. The decision in this case was modified upon rehearing (1914) 97 Neb. 224, 149 N. W. 413, but it does not appear that it was modified on L.R.A.1917B.

the point now under discussion. The building involved in this case was a hotel, and it is further stated that the principle which allows the seizure and destruction or sale of property used for an unlawful purpose cannot be applied in such a case as this, where the property which may have been used for such purposes was not identified, and where, if so used, it in all probability constituted an exceedingly small proportion of the total loss.

<sup>29</sup> State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) (1914) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549.

<sup>30</sup> Ibid. Nor is the provision of § 5 (Gen. Stat. 1913, § 8721), that claimants of personalty used in maintaining the house must prove innocence "to the satisfaction of the court," subject to the objection that it calls for more than a preponderance of the evidence.

<sup>31</sup> State v. Anderson (1910) 83 Conn. 55, 75 Atl. 81. It is stated, however, that it did not appear upon the record on appeal but that the defendant was properly convicted upon direct evidence only.

the ground that it is in conflict with another statute making it an offense to invite or solicit a female to visit and be at any house, room, or place for the purpose of meeting and having unlawful sexual intercourse with any male, and fixing a punishment for a violation thereof, the two statutes relating to different and distinct, though somewhat allied, offenses.<sup>32</sup>

A statutory provision for the enjoining of a bawdyhouse cannot be held invalid on the ground of an insufficient title, where the title simply embraces more territory than the act itself and the constitutional provision relating to the matter declares that no bill shall contain more than one subject, which shall be expressed in its title, but if any subject shall be embraced in the act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.<sup>33</sup>

## II. Ordinances.

### 1. Constitutionality.

The validity of a municipal ordinance must be tested in two ways: First. Whether it is within the charter power of the municipality; Second. Whether it violates any general constitutional provision. The latter question is similar in principle to that arising upon a challenge to the validity of an act of the legislature on the ground that it conflicts with some constitutional guaranty, although in the case of municipalities the question arises under different circumstances.

The right of a municipality to regulate the subject under discussion has been objected to especially where the mayor is empowered to punish for violation of the ordinance. Where there was no question but that the municipality was fully authorized by the laws of the state to pass the ordinance in question and provide punishment for its violation, it has been held that an ordinance providing "that no person shall, within the corporate limits of this city, keep any house

of ill fame, bawdyhouse, or house of assignation," and empowering the mayor to punish violations thereof, is not in conflict with the United States constitutional Amendment that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," on the theory that this provision of the Federal Constitution is applicable only to the exercise of power by the United States, and is not a restriction upon the legislative authority of the state.<sup>34</sup>

On the contrary it has been held where the keeping of a house of ill fame or prostitution is a criminal offense both by statute and common law, that an ordinance prescribing a punishment for the keeping of a house of ill fame or prostitution, and providing for trial and conviction of violators in the mayor's court where the proceedings were by complaint, without presentment or indictment by a grand jury, is unconstitutional as violating the guaranty that "no person shall be held to answer for any criminal offense unless on the presentment or indictment of a grand jury."<sup>35</sup>

In some cases the objection is not that there was a failure to obtain a presentment or indictment by a grand jury, but that there was a failure to provide a trial by jury. It is the theory of some cases that the enforcement of a penalty for violating a city ordinance is not a criminal prosecution within the meaning of the constitutional provision guarantying a trial by jury; that it is in no sense a trial for a crime against the state, but a proceeding to enforce a municipal regulation adopted to prevent licentiousness and to protect the community of the city;<sup>36</sup> hence it does not require a jury trial.

Some municipal regulations are similar to the statutes discussed in subd. I. *supra*. One ordinance stopped short of closing the house, but required the removal therefrom of the occupants. The fact that an occupant is the owner of the house cannot avail to protect her in its occupancy when perverted to a prohibit-

<sup>32</sup> *Wilson v. State* (1909) 55 Tex. Crim. Rep. 176, 115 S. W. 837.

<sup>33</sup> *Spence v. Fenchler* (1912) — Tex. Civ. App. —, 151 S. W. 1094.

See Index to L.R.A. Notes, Statutes, §§ 13, 14, upon the general question of entitling.

<sup>34</sup> *State v. Wells* (1877) 46 Iowa, 662.

<sup>35</sup> *Slaughter v. People* (1846) 2 Dougl. (Mich.) 334, note, followed in *Welch v. Stowell* (1846) 2 Dougl. (Mich.) 332.

<sup>36</sup> *Wong v. Astoria* (1886) 13 Or. 538, 11 Pac. 295. The state Constitution author- L.R.A.1917B.

ized the creation of municipal courts for the purpose of administering the regulations of the city. It is stated that it is not a deprivation of the right of a jury trial proper because a party is not able to obtain it in an inferior court; that if it can be secured upon appeal by reasonably simple procedure, the conditions of the guaranty are met. It is then stated that the provisions of the city charter may have authorized an appeal in such case, but whether it did so or not, no constitutional guaranty was violated.

ed use.<sup>37</sup> Where such removal is required after hearing and on proof, there is no violation of the constitutional guaranty of "due process of law." Such an ordinance is a valid exercise of the police power.<sup>38</sup>

## 2. *Validity under charter provisions.*

We now come to a discussion of the validity of municipal ordinances, as tested by the municipal charter. It is a well-settled rule of law that a municipality is a creature of statute, and possesses and can exercise only such powers as are conferred expressly or by necessary implication, or such as are essential to the accomplishment of the declared objects and purposes of the corporation.<sup>39</sup> It is essential, therefore, to the validity of an ordinance relating to bawdyhouses, that some authority be conferred upon the municipality to deal with this subject.<sup>40</sup>

Bawdyhouses being public nuisances, it is held in some cases that the municipality is empowered to legislate in regard thereto under a charter authorizing it to make by-laws relative to nuisances.<sup>41</sup> Under this power it may impose a fine upon the person owning the house and having knowledge of the keeping for such illegal purpose.<sup>41</sup> It was claimed that the municipality did not possess power to enact the ordinance, for the reason that it subjected the owner to the penalty merely because

he had knowledge of the uses to which his property was put when he had no power to prevent it so being used. The court states that this is not the fair meaning of the word "owner" as used in the by-law; that "when it speaks of an owner having knowledge of this improper use of his property, it means at least a knowledge of a use which he has power to prevent, and therefore permits." The court then states that, in the case of a landlord who has leased his property in good faith with no knowledge that it was intended to convert it into a house of this description, and of a tenant who had, contrary to the intention and wish of the landlord, made this improper and unlawful use of it, it could not be claimed that as soon as the improper use became known to him, he would be liable to the penalty of the by-law; and the court states further that if, in such a case, he should go to the proper prosecuting officers and inform them of the unlawful use to which his property was being subjected, and should request them to take measures to abate the nuisance, he would not be liable to the penalty. But it is stated that no such question arises in the case at bar, since the defendant, so far as anything to the contrary can be known from the declaration, may have been himself the keeper of the house, and the lease, if there was one, to any nominal keeper, may itself have been merely colorable.

<sup>37</sup> *State v. Mack* (1889) 41 La. Ann. 1079, 6 So. 808. It is stated, however, "that the ordinance under consideration does not deprive defendant of her property; it simply prevents its use by her for purposes inconsistent with public order and morals."

The ordinance in question provided that "wherever a house of prostitution or of assignation may become dangerous to public morals, . . . the mayor may on such facts coming to his knowledge order the occupants of such house . . . to remove therefrom within a delay of five days, by service of notice on such occupants in person or by posting the notice on the door of such house; . . . and upon such occupants failing so to do, each shall be fined in the sum of \$25, and in case of failure or refusal to pay said fine, each occupant shall be imprisoned for a time not exceeding thirty days."

<sup>38</sup> *State v. Mack* (La.) supra.

<sup>39</sup> Dill. Mun. Corp. 5th ed. § 237.

<sup>40</sup> It is stated, however, in *Childress v. Nashville* (1855) 3 Sneed (Tenn.) 347, that without the aid of express power by legislative grant the validity of such an ordinance might be maintained. "A bawdy-house is a common nuisance, because it not only tends to corrupt the public morals by an open profession of prostitu-

tion, but it likewise endangers the public peace and good order by drawing together profligate and disorderly persons. It is therefore an indictable offense at common law to keep such a house. And not only may the keeper of the house be indicted for the nuisance, but the owner of the property, letting it with knowledge that it is to be used for the purposes of prostitution. . . . In this view, the general power of a corporation to adopt such police regulations as are not incompatible with the Constitution and general laws of the state would suffice to give validity to the ordinance in question."

<sup>41</sup> *McAlister v. Clark* (1865) 33 Conn. 91, holding valid an ordinance declaring houses of ill fame or assignation houses, houses reputed to be houses of ill fame or assignation houses, to be common nuisances, and subjecting the persons owning them and having knowledge of their keeping, occupation, use, and reputation to a fine of \$50, on the ground of their being deemed guilty of causing, committing, or maintaining a nuisance. The fine of \$50 was held not excessive.

Generally, as to the power of municipality over nuisance, see Indexes to L.R.A. Notes, under the title, "Municipal Corporations," subtitle, "As to nuisances."

But statutory authority to "abate or prevent nuisances," or to pass "such ordinances, by-laws, rules, and regulations for the better government of the city" as are deemed necessary, has been held not to empower a municipality to enact a law declaring that not only suffering or allowing prostitution, but permitting single acts of illicit sexual intercourse in a house or room, should constitute the owner or occupant of the room or house the keeper of a house of ill fame.<sup>42</sup> Nor is the municipality empowered under the general power above stated to enact a rule of evidence providing what shall be sufficient to establish the character of the house; this is held to be true whether the rule is repugnant to or in consonance with the established rule of evidence.<sup>43</sup> Nor can the municipality impose a fine upon the owner or occupant who, after it is "so adjudged" (under the preceding provisions of the ordinance inflicting a penalty and the other provisions changing the rules of evidence) that his home, building, or room is a house of ill fame or a bawdyhouse, shall continue for two days longer to allow "disorderly persons, or persons of notorious bad character," to frequent such house or room.<sup>44</sup> Speaking more particularly of the owner of such a building, the court states that

"the power to prevent nuisances does not, directly or by implication, carry with it the authority to hold the owner of a building, who may never himself visit it, responsible for the nuisance of keeping a house of prostitution, bawdyhouse, or house of ill fame, committed by his tenant without his knowledge or consent, and subject him to a fine, to say nothing of the disjunctive liability to be deemed the keeper of a house of ill fame, and to have the inference drawn against him on account of the bad character rather than the conduct of those who occupy his houses as lessees or frequent them."<sup>45</sup>

It has been held that statutory authority "to define and prevent disorderly conduct; to prevent all disorderly assemblages, . . . and to punish . . . disorderly persons as defined by law," empowers the municipality to define disorderly conduct as including the keeping of a house of ill fame, prostitution, or assignation, or contributing to the support thereof or voluntarily residing therein.<sup>46</sup>

Under authority to prohibit and suppress bawdyhouses, the municipality may impose a fine upon the keeper of such a house, or upon an owner who permits such a house to be kept in a building owned by him.<sup>47</sup> This is es-

<sup>42</sup> *State v. Webber* (1890) 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598. The ordinance provided "that the occupant or owner of any house or room or part of the same within the city of Asheville, who shall suffer or allow prostitution therein, or males and females to cohabit therein without then and there being lawfully married, shall be deemed the keeper of a house of ill fame and be fined on conviction the sum of \$50." The court argues that, in order to prove the charge of keeping a bawdyhouse or house of ill fame, it must be shown that it was a common resort of people of both sexes for the purpose of prostitution, and that it was not sufficient to prove acts of illicit intercourse on the part of the occupants without showing also that it was kept for the convenience of people who visited it to indulge in lewdness. It is then stated that to lay the foundation for suppressing such houses, the ordinance in question first declares that to be a bawdyhouse which the law declares is not one.

<sup>43</sup> *State v. Webber* (N. C.) supra. It is stated that competent testimony would be admissible on the trial of a properly constituted case under the general law of evidence, not by reason of the passage of a by-law without authority. The ordinance in question provided that "circumstances from which it may reasonably be inferred that any house is inhabited or frequented

by disorderly persons, or persons of notorious bad character, shall be sufficient to establish that such house is a disorderly or house of ill fame." It is stated that the fact that a house is "either inhabited or frequented by disorderly persons, or persons of notoriously bad character," is not, without further testimony tending to show actual disorder or prostitution, sufficient to go to the jury to establish a charge of keeping either a disorderly house or a bawdyhouse.

<sup>44</sup> *State v. Webber* (N. C.) supra.

<sup>45</sup> *People v. Miller* (1885) 38 Hun (N. Y.) 82. It was urged in this case that, as the act imputed to the accused was a crime by the general law of the state, the provisions of the chapter quoted did not confer upon the common council the power of declaring that the keeping of a house of ill fame was disorderly conduct. The court, however, held that the council had such power, and with reference to the fact that keeping such a house was an offense under the state law, states that "if this respondent kept a bawdyhouse as charged, she was liable to arrest and to be dealt with as a disorderly person, or she could have been indicted and punished as a criminal for keeping a house of that character. The offenses are separate and distinct and are made so by the statute."

<sup>46</sup> *Childress v. Nashville* (1855) 3 Sneed (Tenn.) 347.

pecially true where, in addition to the statutory authority "to prohibit and suppress . . . disorderly houses and bawdyhouses," there is authority to impose fines, forfeitures, and penalties and terms of imprisonment for the violation of ordinances and by-laws.<sup>47</sup> The authority of the municipality under such charter authority is so clear that it has been stated that "no question can be raised, therefore, as to the validity of the ordinance, the power being given in express terms by the statute. And the grant of the power to 'prohibit and suppress all disorderly houses and bawdyhouses' carries with it, by necessary implication, the right and the power to adopt all such lawful means or methods as may be found necessary to effect the end in view. The method adopted in the case before us, by forbidding the owners of houses within the corporation, under a penalty, to let a house to be used or kept for the purposes of prostitution, was unquestionably a proper exercise of the power granted."<sup>48</sup>

An ordinance prohibiting persons from entering a disorderly house has been held authorized under statutory authority to "suppress and restrain disorderly houses."<sup>49</sup>

A municipality has power to punish by fine or imprisonment any person resorting to or frequenting or found in a disorderly house or place or house of ill fame, or place resorted to for the purpose of prostitution, assignation, fornication, under a charter provision authorizing the municipality "to suppress disorderly houses and houses of ill fame, and to provide for the arrest and punishment of the keepers thereof," and power to "prevent and restrain obscenity, lewdness, or indecency within said city, whether committed in a public or a private place therein, and to provide for the arrest and punishment of all persons who shall be guilty of the same."<sup>50</sup> Such an ordinance making it an offense to be found in a disorderly house will not be construed to include a person lawfully there.<sup>51</sup>

An ordinance making it an offense to

The court in *Wong v. Astoria* (1886) 13 Or. 538, 11 Pac. 295, pertinently states that "the power to suppress and prohibit practices that are demoralizing and pernicious would be of little avail if it could not be vindicated. The offense directly affects the welfare of the city, and how could the latter suppress and prohibit it unless it had the right to adopt a by-law against it and affix a penalty for its violation?"

The contrary holding in *Chariton v. Barber* (1880) 54 Iowa, 360, 37 Am. Rep. 209, 6 N. W. 528, that any provision such as that cited in the text above does not authorize the enactment of an ordinance providing that anyone who shall within the city "keep any bawdyhouse or house of ill fame or house of assignation, or shall lease or let any house for such purpose, or permit any house under his control to be so used, . . . 'shall be deemed guilty of a misdemeanor, and upon conviction shall be fined'" in a sum named and costs of prosecution, and stand committed, is unsupported by reason or authority. The court relies upon an earlier decision in the jurisdiction holding that the authority conferred upon a city to suppress gambling did not authorize the punishment of keeping devices for gambling. Grave doubt is expressed, however, as to the validity of the earlier decision, but it is stated that it had been accepted without question or challenge for more than nineteen years and ought not to be disturbed. The theory of this case is that authority to suppress must be exercised in such a way that the suppression will be the direct, not the incidental, result of the application of the ordinance.

<sup>47</sup> *Owensboro v. Simms* (1896) 99 Ky. 49, L.R.A.1917B.

34 S. W. 1085. The ordinance involved provided "that any person or persons who shall in the city of Owensboro establish or carry on, or permit to be carried on, upon his or her property, any house of ill fame, shall upon conviction for each offense be fined not less than \$25 nor more than \$100; that each twenty-four hours same is carried on or permitted to be carried on shall constitute a separate offense under this section." That the municipality had power under the statutory provision quoted in the text is assumed rather than decided.

<sup>48</sup> *Childress v. Nashville* (Tenn.) supra.

<sup>49</sup> *State v. Botkin* (1887) 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185. The disorderly house involved in this case was apparently not a bawdyhouse, but was one coming under the provisions of a definition of an ordinance that if the keeper of any store, grocery, saloon, etc., or other place, permits games of cards or other games of chance to be played therein, he shall be deemed the keeper of a disorderly house, and shall be subject to fine.

<sup>50</sup> *State ex rel. Salter v. McDonald* (1913) 121 Minn. 207, 141 N. W. 110; *State ex rel. Kent McDonald* (1913) 121 Minn. 525, 141 N. W. 112.

<sup>51</sup> *State v. Botkin* (Iowa) supra, holding that a city ordinance providing that "any person who shall be found in or frequenting a disorderly house shall be subject to a fine" is not void because it does not use the word "unlawfully."

*State ex rel. Salter v. McDonald* (Minn.) supra. It was urged that an ordinance making it an offense to be found in a disorderly and ill-governed house was unreasonable and void. In answer to this the court, after defining the term "disorderly

resort to a house of ill fame for lewdness is invalid under charter authority to restrain and punish prostitutes, or under an act amendatory thereof giving it power to suppress or restrain bawdy or other disorderly houses and punish the keepers thereof.<sup>52</sup>

A municipality has no power to order the destruction of a house used as a house of ill fame, under a charter conferring upon the common council of the city "full power and authority to make all such by-laws and ordinances as may by the said common council be deemed expedient for effectually preventing and suppressing all disorderly houses and houses of ill fame within the limits of said city," especially where, by the common and statute law of the state, fine and imprisonment are considered adequate for the suppression of such houses.<sup>53</sup> The fact that such a house is a nuisance which the municipality is undoubtedly authorized to abate does not authorize the destruction of the house, since it is a nuisance in consequence of it being the resort of persons of ill fame, and that which constitutes or causes the nuisance may be removed.<sup>54</sup>

Authority "to exclude" bawdyhouses from certain limits and "to close the

same" empowers the municipality to enact an ordinance authorizing the mayor to cause the removal of the occupants of any such house that has become dangerous to public morals.<sup>54</sup>

A statutory provision empowering cities to make ordinances "to improve the morals and order" of their inhabitants has been held not to authorize the enactment of an ordinance making it a misdemeanor to keep a bawdyhouse, house of ill fame, or house of assignation.<sup>55</sup> On the contrary it is assumed, at least, that power is conferred upon a municipality to punish by fine anyone who carries on, or permits to be carried on, upon his premises, a house of ill fame, by a statutory provision authorizing cities to provide for the "general health, comfort, and convenience" of their inhabitants, and also for "the morals and the safety of the public."<sup>56</sup>

It is settled in some jurisdictions that a municipality cannot punish an offense made penal by the criminal laws of the state. Hence an ordinance attempting to make it an offense to allow to be occupied a house or portion of a house as a house of ill fame is invalid where such acts are criminal under the state laws.<sup>57</sup> On the contrary the theory pre-

house," states that "we apprehend that one casually there on an errand of mercy or business need not fear a prosecution." The ordinance was accordingly held not void for unreasonableness. This case was followed in *State ex rel. Kent v. McDonald* (Minn.) supra.

<sup>52</sup> *Ogden City v. McLaughlin* (1888) 5 Utah, 387, 16 Pac. 721.

<sup>53</sup> *Welch v. Stowell* (1846) 2 Dougl. (Mich.) 332.

<sup>54</sup> *State v. Mack* (1889) 41 La. Ann. 1079, 6 So. 808. See supra, note 37, for ordinance.

There is stated to be full charter authority for such an ordinance in *Shreveport v. Ross* (1883) 35 La. Ann. 1010, but such authority is not set out, except that it is stated generally that power to suppress such houses is conferred.

<sup>55</sup> *Chariton v. Barber* (1880) 54 Iowa, 360, 37 Am. Rep. 209, 6 N. W. 528. See supra, note 46, for substance of ordinance enacted.

<sup>56</sup> *Owensboro v. Simms* (1896) 99 Ky. 49, 34 S. W. 1085. See supra, note 47, for text of ordinance.

<sup>57</sup> *Cotton v. Atlanta* (1912) 10 Ga. App. 397, 73 S. W. 683; *Dannie v. Atlanta* (1912) 10 Ga. App. 471, 73 S. E. 684, holding that a city ordinance, in so far as it makes it punishable for any person to allow a house or a portion of a house to be occupied as a house of ill fame, creates no different offense from that created by the state statute (Penal Code 1910, § 382) providing that, "if any person shall maintain L.R.A.1917B.

and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor."

That the municipality may legislate in regard to bawdyhouses although the state has also legislated in that regard is clearly recognized in *State v. Charles* (1871) 16 Minn. 474, Gil. 426, but perhaps the extent to which the holding in that case goes is that the state had not conferred upon the municipality exclusive jurisdiction in this regard, as was urged by the defendant in a prosecution under the state law. That the state had not conferred exclusive jurisdiction upon the municipality in this particular instance is also held in *State v. Oleson* (1880) 26 Minn. 507, 5 N. W. 959.

It is the opinion of Berry, Judge, in *State v. Oleson* (Minn.) supra, that the municipality cannot make the keeping a house of ill fame, resorted to for the purpose of prostitution, a misdemeanor punishable by a fine and by imprisonment in a city prison not more than thirty days, where such keeping is made a felony by state law punishable by imprisonment in state prison from six months to a year, or by a fine from \$1 to \$300, and where the municipal charter prescribes that the power to enact ordinances is subject to the proviso "that they be not repugnant to the Constitution and laws of the United States or of this state." The judge states that the city ordinances for the arrest and



vails in other states that municipalities may enact ordinances covering the same subject as the criminal laws of the state. Accordingly, an ordinance prohibiting houses of ill fame, assignation, or resort of common prostitutes, and imposing a penalty for a violation, cannot be held invalid because covering the same subject as the criminal laws of the state.<sup>58</sup> The rule that a municipality will not be held to have power to legislate in regard to a matter covered by the criminal laws of the state, unless a clear intention is apparent to delegate such power to it, has been held applicable only where the power delegated is general; where a special authority over a particular subject is granted, such as the power to suppress and prohibit bawdy-houses, and the corporation is invested with authority to adopt ordinances and punish for their violation, there is such a clear delegation of power as to relieve the matter of all doubt.<sup>59</sup> So, where the municipality is vested with the more extensive power to prohibit, prevent, and suppress the keeping and leasing of houses of ill fame or assignation, or for the resort of common prostitutes, and to restrain, suppress, and punish keepers

of such houses and the owners and lessors of the premises, an ordinance prohibiting bawdyhouses is valid, although this matter is covered by state law.<sup>60</sup> Nor is such an ordinance repealed by a subsequent state statute making the offense of keeping such a house a felony and punishable as such.<sup>61</sup> That the municipality may legislate in regard to a matter covered by state law within certain limitations is expressly recognized in some Constitutions. For example, a limitation is provided in the Kentucky Constitution that "no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense." Such a constitutional provision is held to be a restriction upon municipal legislation in respect to offenses to which a statutory penalty has been affixed. Consequently, although the keeping of a bawdyhouse or house of ill fame is a common-law offense, if no statutory penalty has been provided, the municipal council is not limited by the constitutional provision in question.<sup>62</sup>

Other cases which sustain ordinances relating to bawdyhouses where the state laws also deal with this subject do so

punishment of keepers of houses of ill fame must therefore be directed to something else than the simple keeping of such houses, resorted to for the purpose of prostitution, as, for instance, to something relating to the manner of keeping them, or perhaps to the place in which they are kept.

The power of a municipality to punish what is also an offense under state law is discussed in the note to *Seattle v. MacDonald*, 17 L.R.A.(N.S.) 49.

And see note to *Thrower v. Atlanta*, 1 L.R.A.(N.S.) 382, as to right of a municipality to enact ordinances on a subject covered by state law.

<sup>58</sup> *Wong v. Astoria* (1886) 13 Or. 538, 11 Pac. 295. And see note in 17 L.R.A.(N.S.) 49, for general discussion of this question.

<sup>59</sup> *Wong v. Astoria* (Or.) supra.

Cornell, Judge, expressed the opinion in *State v. Oleson* (Minn.) supra, that a municipality is empowered to enact an ordinance making the keeping of a house of ill fame, resorted to for the purpose of prostitution, a misdemeanor punishable by a fine of from \$5 to \$100 and by imprisonment in the city prison not more than thirty days, although the keeping of a house of ill fame for the purpose of prostitution is a felony by a state law and punishable as such, where the municipality is expressly given the power in its charter "to suppress houses of ill fame" within the city, and "to provide for the arrest and punishment of the keepers thereof" by "a fine not ex-

ceeding \$100 and imprisonment in the city prison or county jail not exceeding thirty days, or both." It is stated that a grant of authority thus specifically enumerated does not violate the proviso of the charter that the municipal ordinances shall not be repugnant to the state Constitution or laws. In this opinion, as to the power of the municipality to enact the statute, *Gilfillan, Ch. J.*, concurs with *Cornell, J.*

<sup>60</sup> *People v. Hanrahan* (1889) 75 Mich. 611, 4 L.R.A. 751, 42 N. W. 1124. A constitutional provision authorizing the legislature to confer upon incorporated cities and villages such powers of a local, legislative, and administrative character as they may deem proper was held to authorize the legislature to confer upon the common council of a municipality this power.

<sup>61</sup> *People v. Hanrahan* (Mich.) supra.

<sup>62</sup> *Owensboro v. Simms* (1896) 99 Ky. 49, 34 S. W. 1085. The section of the Constitution containing the provision quoted above in the text contained the further provision that "a conviction or acquittal under either shall constitute a bar to another prosecution for the same offense." A question was suggested in the case whether, in the absence of a statutory penalty, a conviction or acquittal of anyone charged with a violation of the ordinance would be a bar to a subsequent indictment and prosecution for the same offense at common law; but the court states that this question is not before it on the record, and it is not passed upon.

on the theory that the offense created by the ordinance is not the same as that defined by statute.<sup>63</sup>

Under the last-mentioned view the trial and conviction under either the state law or the ordinance are no bar to a prosecution under the other.<sup>64</sup> On the contrary it has been held that, where a properly constituted court, acting under the authority of an ordinance of a municipal corporation, punishes a person for violation of the ordinance, he cannot be again punished for the same offense under the general laws of the state.<sup>65</sup>

The extent to which a municipality may recognize bawdyhouses where the state law prohibits them is not uniformly answered by the courts. Any power to recognize what is prohibited by state law must be found in some charter authority which in effect repeals, or at

least suspends, the operation of the general state law. It has been held that the municipality may license bawdyhouses under charter power "to suppress bawdyhouses or license the same."<sup>66</sup> But this power is denied under similar charter powers where there is a constitutional provision that "no power of suspending laws . . . shall be exercised except by the legislature."<sup>67</sup>

It has been held that a city may license bawdyhouses under an act empowering a city, by ordinance not inconsistent with any law of the state, to "regulate or suppress" bawdyhouses, notwithstanding such houses are totally prohibited and declared nuisances by the general law of the state.<sup>68</sup> On the contrary, power to restrain, regulate, and inspect such establishments has been held not to include power to license them.<sup>69</sup> This diversity in holding is due

<sup>63</sup> For an example of this situation, see *People v. Miller* (1885) 38 Hun (N. Y.) 62, supra, note 45. And see note in 17 L.R.A. (N.S.) 49, upon the general question of the power of municipality to punish what is also an offense under state law, particularly at p. 54, where the theory of two distinct offenses is discussed.

<sup>64</sup> *People v. Miller* (N. Y.) supra.  
The court in *State v. Charles* (1871) 16 Minn. 474, Gil. 426, expressly refrains from deciding this question.

That a conviction under one is not a bar to a prosecution under the other, is the theory of Cornell, Judge, in *State v. Oleson* (1880) 20 Minn. 507, 6 N. W. 959, where it is stated that the conviction and punishment of one violating the municipal ordinance were "for an offense against the city which it was legally authorized to punish," and that an indictment for an offense committed against the state by violation of its laws is for a distinct offense from that for which the defendant was previously convicted and punished, and he is liable to punishment for both. On the contrary, in this case, Berry, Judge, was of the opinion that if the municipal ordinance was valid, a conviction under it was a bar to a prosecution under the state statute, but Berry, Judge, held the ordinance invalid and therefore a prosecution and conviction under it no bar to a prosecution under the state statute. In this opinion of Berry, J., that a conviction under the city ordinance is a bar to the indictment, if the conviction under the city ordinance was a valid conviction, Gillilan, Ch. J., concurs; but as to the validity of the ordinance he differs from Berry, J., holding the ordinance valid, and therefore a conviction under it a bar to a conviction under the state statute.

As to whether a conviction under a municipal ordinance is a bar to a prosecution under a state statute, and vice versa, see note to *Seattle v. MacDonald*, 17 L.R.A. (N.S.) 49, at page 69.  
L.R.A.1917B.

<sup>65</sup> *State v. Thornton* (1866) 37 Mo. 360. Neither the ordinance nor the statute is set out in the report, so it is impossible to determine the exact form of the same. See opinions of the judges in *State v. Oleson* (Minn.) supra, note 64.

<sup>66</sup> *Davis v. State* (1877) 2 Tex. App. 425. It is further held in this case that the repeal of the ordinance providing for the licensing of such houses after the defendant had taken out a license did not affect the validity of the license, unless the license was revoked, and repayment made, after deducting the amount due on the time expired, as the municipality had a right to do under another ordinance.

<sup>67</sup> *Burton v. Dupree* (1898) 19 Tex. Civ. App. 275, 46 S. W. 272. The court points out that the Constitution under which the Davis Case arose provided that "no power of suspending the laws of the state shall be exercised except by the legislature or its authority." The omission of the words, "or its authority," restricted the power to suspend laws to the legislature, and expressly prohibited the exercise of such power by any other body, and the legislature now cannot delegate to a municipal corporation or to anyone else authority to suspend the statute law of the state. The licensing ordinance in this case was practically a segregation ordinance, as the licenses were granted only within the limited districts.

<sup>68</sup> *State v. Clarke* (1873) 54 Mo. 17, 14 Am. Rep. 471; *State v. De Bar* (1874) 58 Mo. 395. Accordingly, a license is a defense to a prosecution under the state law.

<sup>69</sup> *Ex parte Garza* (1890) 28 Tex. App. 381, 19 Am. St. Rep. 845, 13 S. W. 779. The provision in the act of incorporation relied upon as conferring the authority to license such houses gave to the municipality power "to suppress and restrain disorderly houses, . . . bawdyhouses, houses of prostitution or assignation," and also power "to enact all necessary ordinances to restrain and punish . . . prostitutes,"

to the circumstances under which the charters were given and the context of the particular provisions relied upon. In the case in which there was held to be power to license such houses,<sup>70</sup> the charter provision in question had been enacted subsequently to other charter provisions in which the city was given simply power to "suppress" these houses. The change by the insertion of the power to "regulate" is stated to be a specific grant of power, especially where with reference to other matters the municipality is given power simply to "suppress." The court states: "It is clear that the legislature understood the difference between regulation and suppression, and whilst they only conceded to the city the power to suppress prize fighting, gambling houses, etc., they allowed the city to either suppress or regulate bawdyhouses." In the case<sup>71</sup> denying the power to license, it is stated that it is shown very clearly that it was not the legislative intent to confer this power by the fact that the power to license other occupations is expressly conferred upon the city.

A municipality is held not entitled to segregate such houses under charter authority "to prohibit and punish keepers and inmates of bawdyhouses, . . . to prevent and suppress assignation houses and houses of ill fame, and to regulate, colonize, and segregate the

same," where bawdyhouses are prohibited by state law, and where the charter also contains a provision that "no ordinance shall be enacted inconsistent . . . with the laws 'of the state,'" and there is a constitutional provision that "no power of suspending laws . . . shall be exercised except by the legislature."<sup>72</sup> After holding the ordinance in question in conflict with the state statutes relating to the subject,<sup>73</sup> the court states that it must be determined which is to be maintained. The constitutional provision that no power of suspending laws shall be exercised except by the legislature is discussed, and it is stated that the present Constitution omits at the end of this section the words, "or by its authority," which were in that section in former Constitutions. The court adds: "Under the former Constitutions it might have been, and probably should have been, held that the provision in the charter authorizing the city 'to regulate and segregate,' etc., such houses, gave authority to such city to suspend the state law on the same subject, and that the enactment of such an ordinance would have that effect," but under the present Constitution it must be held that the legislature cannot now delegate to a municipal corporation or to anyone else authority to suspend a statute law of the state. That a municipality has no power to segregate such

and also power to "prevent and punish the keeping of houses of prostitution within the city or within such limits therein as may be defined by ordinance, and to adopt summary measures for the removal or suppression or regulation and inspection of all such establishments." It is accordingly held in this case that one who has conducted a bawdyhouse without obtaining a license cannot be prosecuted under the ordinance.

So, in *San Antonio v. Schneider* (1896) — *Tex. Civ. App.* —, 37 S. W. 767, a city was held to have no power to license such houses under charter authority "to prevent and punish the keeping of houses of prostitution, . . . and to adopt summary measures for the removal or suppression, or license, taxation, regulation, and inspection of all such establishments," the court stating: "We cannot believe that the legislature of this state ever intended to authorize the city council to license and tax what its statutes denounce as a crime against society, for to license, tax, or even regulate crime is something unknown to civilization." One who had paid the license was accordingly allowed to recover the same, except so far as recovery was barred by the Statute of Limitation.

<sup>70</sup> *State v. Clarke* (Mo.) *supra*, followed in *State v. De Bar* (Mo.) *supra*.  
L.R.A.1917B.

<sup>71</sup> *Ex parte Garza and San Antonio v. Schneider* (Tex.) *supra*.

<sup>72</sup> *Brown Cracker & Candy Co. v. Dallas* (1911) 104 Tex. 290, 137 S. W. 342, Ann. Cas. 1914B, 504. Property owners surrounding the segregated districts were held entitled to an injunction restraining the creation thereof.

<sup>73</sup> *Brown Cracker & Candy Co. v. Dallas* (Tex.) *supra*. The lower court in this case (*Hatcher v. Dallas* (1911) — *Tex. Civ. App.* —, 133 S. W. 914) was of the opinion that the ordinance involved, segregating such houses, did not attempt to give keepers of such houses license to carry on their business; therefore it was not in conflict with the state law. The supreme court states that "an argument to demonstrate that the ordinance permits such houses to exist in that district would be inexcusable; the language is too plain to require explanation or application."

That an ordinance making it unlawful to conduct a house of prostitution outside certain limits, and making it unlawful for any person to rent any house outside the prescribed limits to any lewd woman, legalizes by implication such houses within the prescribed limits, is the view of the court in *McDonald v. Denton* (1910) — *Tex. Civ. App.* —, 132 S. W. 823.

houses under charter authority "to prohibit and punish keepers and inmates of bawdyhouses and variety shows, and to segregate and regulate the same, and to determine such inmates and keepers to be vagrants and provide the punishment of such persons," where the Constitution provides that "no power of suspending laws . . . shall be exercised except by the legislature," has been held, although, so far as appears from the report at least, there was no charter provision such as that contained in the preceding case, that "no ordinance shall be enacted inconsistent with the laws of the state," the court approving the statement in a previous case that the legislature never intended to authorize a city council to recognize what is declared by the state law to be a crime.<sup>74</sup>

The validity of a segregation ordinance has arisen independently of the question of conflict with state law. The supreme court of Louisiana has sustained the right of a municipality to segregate houses of prostitution by an ordinance which neither sanctions nor undertakes to punish the vice. The limits of the segregated district are held to be a question for the municipal council, and not for the court, at least where there is nothing in the record to authorize the conclusion that the judgment

of the council on this question was erroneous. Nor is the power of the municipal council in this regard exhausted by once fixing the limits of such districts; such limits may be changed.<sup>75</sup> The objection in this case was made by property owners who claimed to be damaged by the establishment of the segregated district. On the theory that such an ordinance is an exercise of the police power which does not invade the rights of property owners in or adjacent to the prescribed limits in violation of the Federal Constitution, although the pecuniary value of their property may be depreciated in consequence thereof, this decision of the supreme court of Louisiana is affirmed by the Supreme Court of the United States.<sup>76</sup>

An ordinance entitled, "An Ordinance Defining and Prescribing Punishment for Certain Offenses," is not open to the objection that it does not comply with that section of the Code which provides that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title," although there were a large number of offenses defined and the punishment therefor prescribed.<sup>77</sup> It is stated: "The subject of the ordinance is offenses against the city. The one subject is composed of many parts."

<sup>74</sup> McDonald v. Denton (Tex.) supra.

<sup>75</sup> L'Hote v. New Orleans (1899) 51 La. Ann. 93, 44 L.R.A. 90, 24 So. 608.

The right of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution is discussed in the notes to Tedeschi v. Berger, 11 L.R.A.(N.S.) 1060, and Weidner v. Friedman, 42 L.R.A.(N.S.) 1041.

<sup>76</sup> (1900) 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788. The supreme court of Louisiana was also of the opinion that there was no unconstitutional invasion of property rights by the ordinance in question.

<sup>77</sup> State v. Wells (1877) 46 Iowa, 662.

W. A. E.  
J. D. C.

# MISSOURI SUPREME COURT. (In Banc.)

LORENZO B. POINTER, Appt.,  
v.

MOUNTAIN RAILWAY CONSTRUCTION  
COMPANY, Resp't.

(— Mo. —, 189 S. W. 805.)

Pleading — specific acts of negligence  
— res ipsa loquitur.

1. One pleading specific acts of negli-

Note. — The effect of pleading a particular cause of action as waiver of right to rely on res ipsa loquitur is considered in the notes to Walters v. Seattle, R. & S. Co. 24 L.R.A.(N.S.) 788, and Biddle v. Riley, L.R.A.1915F, 992.

The general subject of the applicability of res ipsa loquitur in actions against car-

riage is treated at length in the notes to Barnowski v. Helson, 15 L.R.A. 33; McGinn v. New Orleans R. & Light Co. 13 L.R.A.(N.S.) 601; Brown v. Union P. R. Co. 29 L.R.A.(N.S.) 808; and Lee Line Steamers v. Robinson, L.R.A.1916C, 364.

Other specific aspects of the rule res ipsa loquitur are treated in notes referred to in

Evidence — res ipsa loquitur — injury on scenic railway.  
2. The doctrine res ipsa loquitur is not applicable to support a recovery by one injured while riding on a scenic railway by getting his foot outside the car, who merely shows that the speed of the car varied by

riers is treated at length in the notes to Barnowski v. Helson, 15 L.R.A. 33; McGinn v. New Orleans R. & Light Co. 13 L.R.A.(N.S.) 601; Brown v. Union P. R. Co. 29 L.R.A.(N.S.) 808; and Lee Line Steamers v. Robinson, L.R.A.1916C, 364.

Other specific aspects of the rule res ipsa loquitur are treated in notes referred to in

slackening and speeding up, and that the car shook from side to side, which is not shown to be unusual for cars so employed. For other cases, see *Evidence*, II. h, I, f, in Dig. 1-52 N. S.

(Bond, Walker, and Blair, JJ., dissent.)

(November 11, 1916.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court of St. Louis in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. James J. O'Donohoe, for appellant:

Defendant was bound to exercise the highest degree of care, and the doctrine of *res ipsa loquitur* applies.

Tennessee State Fair Asso. v. Hartman, 134 Tenn. 159, 183 S. W. 735; Hartman v. Tennessee State Fair Asso. 134 Tenn. 149, 183 S. W. 733; Hollis v. Kansas City Retail Merchants' Asso. 205 Mo. 508, 14 L.R.A. (N.S.) 284, 103 S. W. 32; Best Park & Amusement Co. v. Rollins, 192 Ala. 534, 68 So. 417; Chesapeake Beach R. Co. v. Brez, 39 App. D. C. 58; Lee Line Steamers v. Robinson, L.R.A.1916C, 358, 134 C. C. A. 287, 218 Fed. 563; Hughes v. Atlantic City & S. R. Co. L.R.A.1916A, 927, note; Seiter v. Bischoff, 63 Mo. App. 157; Gallagher v. Edison Illuminating Co. v. 72 Mo. App. 576; Sackewitz v. American Biscuit Mfg. Co. 78 Mo. App. 144; Shuler v. Omaha, K. C. & E. R. Co. 87 Mo. App. 618; Tateman v. Chicago, R. I. & P. R. Co. 96 Mo. App. 448, 70 S. W. 514; Johnson v. Metropolitan Street R. Co. 104 Mo. App. 592, 78 S. W. 276; Cleary v. St. Louis Transit Co. 108 Mo. App. 433, 83 S. W. 1029; ~~Scharff v.~~ Southern Illinois Constr. Co. 115 Mo. App. 167, 92 S. W. 126; Freeman v. Foreman, 141 Mo. App. 359, 125 S. W. 524; McFadden v. Lott, 161 Mo. App. 652; Gannon v. Laclede Gaslight Co. 145 Mo. 502, 43 L.R.A. 505, 46 S. W. 968, 47 S. W. 907.

The petition pleads general negligence, and the doctrine of *res ipsa loquitur* applies.

Stauffer v. Metropolitan Street R. Co. 243 Mo. 305, 147 S. W. 1032; Briscoe v. Metropolitan Street R. Co. 222 Mo. 104,

120 S. W. 1162; Price v. Metropolitan Street R. Co. 220 Mo. 435, 132 Am. St. Rep. 588, 119 S. W. 932; MacDonald v. Metropolitan Street R. Co. 219 Mo. 466, 118 S. W. 78, 16 Ann. Cas. 810; Chlanda v. St. Louis Transit Co. 213 Mo. 844, 112 S. W. 249; Malloy v. St. Louis & Suburban R. Co. 173 Mo. 75, 73 S. W. 150; Patterson v. Springfield Traction Co. 178 Mo. App. 250, 163 S. W. 955; Nagel v. United R. Co. 168 Mo. App. 284, 142 S. W. 621; Moore v. Missouri P. R. Co. 164 Mo. App. 84, 147 S. W. 488; Estes v. Missouri P. R. Co. 110 Mo. App. 725, 35 S. W. 627.

Furthermore, a plaintiff who proves the happening of an accident, and is otherwise entitled to presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged what he conceives to be the specific cause of the accident.

Gallagher v. Edison Illuminating Co. 72 Mo. App. 576; Walters v. Seattle, R. & S. R. Co. 48 Wash. 233, 24 L.R.A. (N.S.) 788, 93 Pac. 419; Louisville & S. I. Traction Co. v. Worrell, 44 Ind. App. 480, 66 N. E. 78; Lebb v. Seattle, R. & S. R. Co. 49 Wash. 228, 93 Pac. 420; Kluska v. Yeomans, 54 Wash. 465, 132 Am. St. Rep. 1121, 103 Pac. 819; McNeill v. Dunham & C. R. Co. 130 N. C. 256, 41 S. E. 383; Dearden v. San Pedro, L. A. & S. L. R. Co. 33 Utah, 147, 93 Pac. 271; Wood v. Roxborough; G. H. & N. P. R. Co. 12 Montg. Co. L. Rep. 155; North Chicago Street R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Sullivan v. Rowe, 194 Mass. 500, 80 N. E. 469; Pierce v. Great Falls & C. R. Co. 22 Mont. 445, 56 Pac. 867, 6 Am. Neg. Rep. 109; McNamara v. Boston & M. R. Co. 202 Mass. 491, 89 N. E. 131; Terre Haute & I. R. Co. v. Sheeks, 155 Ind. 74, 56 N. E. 434; Palmer Brick Co. v. Chenall, 119 Ga. 842, 47 S. E. 329.

The doctrine of assumption of risk, if applicable, is of no value to defendant, for the reason that the plaintiff's injuries are the result of defendant's sundry acts of negligence. These the plaintiff did not assume. Neither are unknown dangers assumed.

Jewell v. Kansas City Bolt & Nut Co. 231 Mo. 176, 140 Am. St. Rep. 515, 132 S. W. 793; George v. St. Louis & S. F. R. Co. 225 Mo. 364, 125 S. W. 196; Crader v. St.

the Indexes to L.R.A. Notes, under the title "Evidence," subdivision, "Care; negligence; *res ipsa loquitur*."

Generally as to liability of one maintaining place of amusement for safety of patrons, see notes to Williams v. Mineral City Park Asso. 1 L.R.A. (N.S.) 427; Higgins v. Franklin County Agri. Soc. 3 L.R.A. (N.S.) 1132; Blakeley v. White Star Line, L.R.A.1917B.

19 L.R.A. (N.S.) 772; Greene v. Seattle Athletic Club, 32 L.R.A. (N.S.) 713; Wodnik v. Luna Park Amusement Co. 42 L.R.A. (N.S.) 1071; and Johnson v. Hot Springs Land & Improv. Co. L.R.A.1916F, 690. These notes include some cases involving the specific question as to liability for personal injuries received on scenic railway.

Louis & S. F. R. Co. 181 Mo. App. 526, 164 S. W. 678.

If a jar or sudden jerk of the train was an ordinary occurrence, it constituted a sufficient basis of inference of defective construction of the car, and such imperfections implied negligence on the part of defendant in providing cars and tracks of such a character as to inflict injury upon passengers in their normal operation.

Van Horn v. St. Louis Transit Co. 198 Mo. 481, 95 S. W. 326; Parks v. St. Louis & Suburban R. Co. 178 Mo. 108, 101 Am. St. Rep. 425, 77 S. W. 70.

Messrs. Charles E. Morrow and Schnurmacher & Rassieur, for respondent:

A person taking a ride on an amusement device submits himself to the inconvenience and dangers necessarily attending its operation, and negligence cannot be inferred from the mere fact that injury resulted from the jarring, unless such jarring was unusual or extraordinary.

Hedrick v. Missouri P. R. Co. 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793; Bartley v. Metropolitan Street R. Co. 148 Mo. 124, 49 S. W. 840, 5 Am. Neg. Rep. 635; Wait v. Omaha, K. C. & E. R. Co. 165 Mo. 612, 65 S. W. 1028; Erwin v. Kansas City, Ft. S. & M. R. Co. 94 Mo. App. 289, 68 S. W. 88; Tickell v. St. Louis, I. M. & S. R. Co. 149 Mo. App. 648, 129 S. W. 727; Ray v. Chicago, B. & Q. R. Co. 147 Mo. App. 332, 126 S. W. 543; Woos v. St. Louis Transit Co. 198 Mo. 674, 7 L.R.A.(N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584; Benedick v. Potts, 89 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; Fenner v. Atlantic Amusement Co. 84 N. J. L. 691, 87 Atl. 344; Lumsden v. L. A. Thompson Scenic R. Co. 130 App. Div. 209, 114 N. Y. Supp. 421.

The *res ipsa loquitur* doctrine can never be invoked where specific negligence is pleaded.

Roscoe v. Metropolitan Street R. Co. 202 Mo. 576, 101 S. W. 32; Evans v. Wabash R. Co. 222 Mo. 435, 121 S. W. 36.

Graves, J., delivered the opinion of the court:

Action for personal injuries. The sum first claimed was \$50,000, but about the conclusion of the trial nisi a gracious amendment of the petition reduced the sum to \$25,000. Plaintiff was a metal polisher in the city of St. Louis, earning, when at work, \$4 per day, the amount to which the union of which he was a member limited the earnings of their members. Country bred, he had not, at the date of the accident, been fully initiated in all the amusements of a great city, although he had lived there for a considerable time. His chum, Arthur L.R.A.1917B.

Boardman, was of city origin, but not fully acquainted with some of the devices for entertaining a metropolitan public. At least they both disclaimed knowledge of the operation of a certain scenic railway called "The Racer Dips," and in the petition alleged to have been operated at Forest Park Highlands by the Park Circuit & Realty Company and the Mountain Railway Construction Company.

So close was the relationship of the two that we find the following from Boardman in the course of his testimony:

Q. What interest have you in this case that you continually, when I ask you one question, put in something at the tail end that nobody asks you for?

A. Well, this is a friend of mine, and we had it made up to stick together, and I am going to stick to the finish.

On a Sunday evening early in May, 1910, these two friends, after partaking of a couple of bottles of beer each (according to Boardman), which beer was obtained from a negro bootlegger in the vicinity of plaintiff's home, repaired to plaintiff's home, where they had supper. After supper they visited Delmar Garden for a short time, and then wended their way to Forest Park Highlands, and whilst there were attracted to the scenic railway, or "Racer Dips." The cars and tracks of this miniature railway were in plain view, and could have been seen had they looked. The evidence shows, though not from these two parties, that the cars and most of the tracks were in open view for a person standing at the platform from which the trains started. The evidence shows that "The Racer Dips" was a device for public entertainment, consisting of two miniature railway tracks upon which separate trains of small cars were run, and so arranged that there was the appearance of a racing between the two trains. The tracks had a common starting point and a common ending point. By mechanical force the trains of cars were pulled up grade to a considerable height and then turned loose to make the trip by gravity. This was accomplished by steep declines and elevations in the tracks so that the momentum gathered by going down a decline would carry the train up the next elevation. Of necessity these declines and elevations were marked and sharp and had to follow each other in rapid succession. Variety was added to the trip by acute and sharp curves in the tracks, as well as by a tunnel constructed thereover. Gravity being the sole power operating the train, the speed down the incline would be great, and this speed would slacken gradually until the

succeeding elevation was passed and the next decline reached. When the car turned the next decline it of necessity picked up speed rapidly. The evidence discloses that these trains were made up of three cars having three seats each, and which seats would accommodate two pleasure seekers; in other words, eighteen persons constituted a trainload. While plaintiff was not always clear in his testimony, yet, taken as a whole, the evidence shows that plaintiff and his friend took passage on this pleasure device in the middle seat of the middle car of one of these trains. It is made quite clear that they were not in the front seat of the car. When the train was nearing the end of the journey plaintiff's foot got out of the car and struck an object to the side of the car, and a severe fracture of the right leg resulted, together with some other injuries.

It appeared from the evidence that the Park Circuit & Railway Company was the holding company for the defendant, Mountain Railway Construction Company, and was not itself engaged in the actual operation of the pleasure device known as the "Racer Dips." But, while it held and owned the stock of the operating company, it was not, in fact, operating the device. Upon this showing plaintiff voluntarily dismissed as to such corporation.

The plaintiff's case largely turns upon the testimony of himself and his friend, although he introduced some other evidence which will be noted in the course of the opinion.

Going to the pleadings, it will be seen that the negligence of the defendant is thus stated in the petition: "That said racer dip, the cars and track thereon were so faulty and so defectively constructed and defendant so negligently and carelessly maintained and operated the same that by reason thereof the car in which plaintiff was a passenger as aforesaid vibrated and shook so that the plaintiff was thrown with much force against the back of the conveyance or car in which he had passage, and plaintiff's right foot and leg were suddenly and violently thrown upwards and out of said conveyance or car, thereby causing his said right foot and leg to be caught in and thrown upon and against railings, posts, and uprights along and outside of said conveyance or car, through which plaintiff was greatly and permanently injured, as follows."

The answer filed by defendant thus reads:

"Comes now the defendant in the above-entitled cause, and for answer to the plaintiff's amended petition denies each and every allegation and said amended petition contained and set forth.

L.R.A.1917B.

"Further answering, defendant says that what, if any, injuries were received by the plaintiff on the occasion in question and by and on account of the things mentioned in his amended petition were caused by the ordinary and usual movements of the racer dip mentioned in the plaintiff's petition, which was an amusement device, the real attractiveness of which depended solely upon the sensations that rapid changes of speed give the person using it, and that the plaintiff assumed all such dangers and risks and on account thereof cannot recover.

"Further answering, defendant says that what, if any, injuries plaintiff received on the occasion in question and by and on account of the things mentioned in his amended petition were caused by his own negligence in this: That the plaintiff negligently and carelessly failed to remain in his seat in the car, and negligently and carelessly threw his feet up and outside of the car, and negligently and carelessly failed to hold to the car in which he was riding, and negligently and carelessly failed to keep a lookout for his own safety, and that by reason thereof threw his right leg up, above, and outside of the car in which he was riding, whereby he received what, if any, injuries complained of in his amended petition, and that the same were caused by his own negligence contributing thereto.

"Wherefore, having fully answered, defendant prays to go hence and recover of plaintiff its costs herein."

The reply was a general denial.

Upon a trial the court gave to the jury a peremptory instruction to find for the defendant, and plaintiff chose to submit his case to the jury rather than take an involuntary nonsuit. Verdict and judgment were for defendant, and plaintiff has appealed. The evidence in greater detail will be considered in the course of the opinion in connection with the points made therein.

I. In his petition plaintiff avers that he was a passenger for hire, and to break the force of the want of proof invokes the doctrine of *res ipsa loquitur*. There is absolutely no proof in the record that the train of cars upon which plaintiff was injured was run otherwise than in the usual and ordinary manner for the operation of trains upon this pleasure device or other similar pleasure devices. Both plaintiff and his chum disclaim any knowledge of how such trains should be, or were in fact, run. Plaintiff tried to make no proof that the train at the time of the accident was run otherwise than in the customary and usual manner. He put on as a witness a man connected with the defendant company, and this man testified that he examined both the cars and the track immediately after the ac-

cident, and they were in good and proper condition. There is no showing that the cars and tracks were not constructed just as cars and tracks are usually constructed for such purposes. Both plaintiff and his friend testify that the train was pulled to a given height and then loosed for gravity action thereafter.

The manner of the accident had best be given in their own language. Plaintiff says:

Q. Now, will you tell the jury if you had any accident there and how it happened?

A. I was sitting in one of these cars, and sitting on the right side, and it started out on the run and got very near all the way around, and the car slackened speed and threw me forward, and started up all of a sudden and threw me backward, and shot up that way (indicating) and threw me to one side, and threw my right foot out and caught my leg.

Q. When your foot was thrown out, what happened to it?

which naturally turned him back, and his right foot fell between the car and the railing, the outside railing.

Q. Between what track?

A. The railing.

Q. Did it catch on anything on the outside?

A. When the car kind of wiggled, it naturally caught his foot.

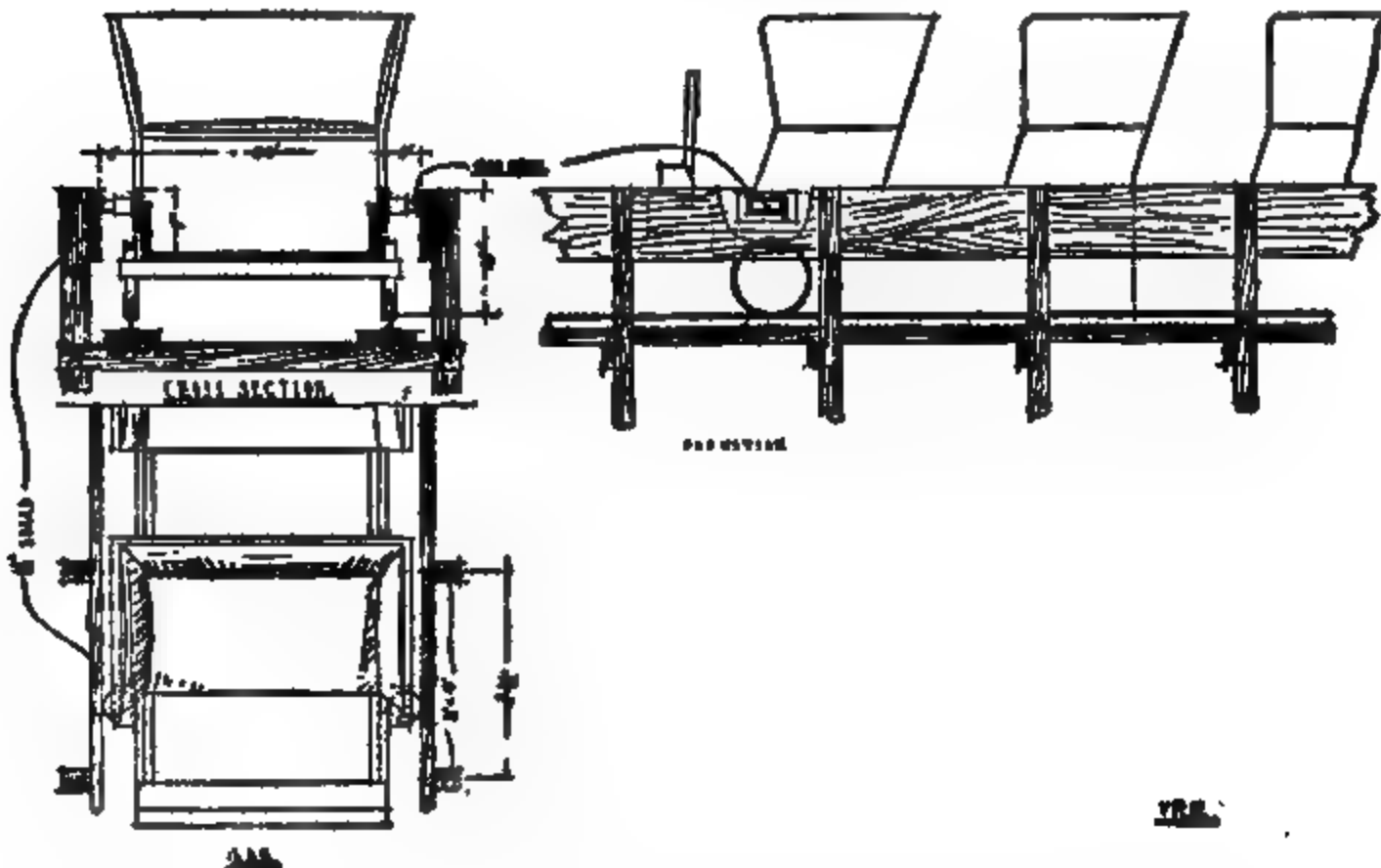
Q. What do you mean by wiggled?

A. Well (indicating) kind of shaken from one side to the other.

Plaintiff's exhibit C shows the construction of the cars and the seats thereof, although it is conclusively shown by the evidence that there are three seats to the car. Plaintiff being in the middle seat, his position can be seen at a glance at this exhibit, which we here insert.

It is practically conceded that there is no case for the jury unless the doctrine *res ipsa loquitur* bridges over the chasm and puts the case to the jury. Under the facts,

### PLAINTIFF'S EXHIBIT C.



A. It was caught against posts or uprights or rails and alongside the track where the car was.

Arthur Boardman, his friend, says:

Q. Was Pointer injured on that occasion?

A. Yes, sir.

Q. Will you state just how he was injured?

A. Yes, sir. We was on the last curve coming in, and the car was running at a high speed, and the car slacked up kind of, and he was thrown up forward, and the car started up at a pretty high speed again, L.R.A.1917B.

can such doctrine be invoked? Of the several phases of this question later.

II. The doctrine *res ipsa loquitur* is not in this case, and without the invocation of that rule it is conceded that plaintiff's case failed nisi. The petition filed by plaintiff excludes the application of the *res ipsa loquitur* doctrine. This plaintiff has pleaded specific negligence, and in such case he cannot rely upon presumptive negligence under the rule *res ipsa loquitur* to make out his case. One who pleads specific acts of negligence must prove such negligence or



enough of such acts to justify a recovery, and a failure so to do bars him from a recovery. And this is true although he might have pleaded negligence generally, and by an invocation of the doctrine *res ipsa loquitur* had a recovery upon making proper proof. We have gone over this question thoroughly in several recent cases. *McGrath v. St. Louis Transit Co.* 197 Mo. 105, 94 S. W. 872; *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 920, 99 S. W. 1062; *Roscoe v. Metropolitan Street R. Co.* 202 Mo. 576, 101 S. W. 32; *Price v. Metropolitan Street R. Co.* 220 Mo. loc. cit. 453, 132 Am. St. Rep. 588 et seq. 119 S. W. 932. Now, in the petition before us in this case the plaintiff avers: (1) The faulty and defective construction of the cars used on the "Racer Dips;" (2) the faulty and defective construction of the tracks of the "Racer Dips;" and (3) a negligent maintenance and operation of the cars over such tracks. This charge of negligence cannot be tortured into a general charge of negligence. It specifically charges: (1) A negligent construction of the car upon which plaintiff was riding; and (2) a negligent construction of the tracks upon which such car was operated. This places the case beyond the reach of the doctrine of presumptive negligence nurtured by the rule of *res ipsa loquitur*.

In the *McGrath Case*, *supra*, we said: "But even if it were a case to which, under proper pleadings, the doctrine would apply, yet in this case specific acts of negligence are charged, and not general negligence. In such cases, where the plaintiff chooses in the petition to allege specific acts of negligence, the rule of law places the burden of proving such specific negligence upon the plaintiff, and a recovery, if had at all, must be upon the specific negligence pleaded. *Hamilton v. Metropolitan Street R. Co.* 114 Mo. App. loc. cit. 509, 89 S. W. 893; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50, 4 Am. Neg. Cas. 669; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 576, 18 L.R.A. 599, 21 S. W. 1, 4 Am. Neg. Cas. 714; *Buynan v. Citizens' R. Co.* 127 Mo. loc. cit. 19, 29 S. W. 842; *Hite v. Metropolitan Street R. Co.* 130 Mo. loc. cit. 136, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; *McNanamee v. Missouri P. R. Co.* 135 Mo. loc. cit. 447, 37 S. W. 119; *Bartley v. Metropolitan Street R. Co.* 148 Mo. loc. cit. 139, 49 S. W. 840, 5 Am. Neg. Rep. 635; *Gayle v. Missouri Car & Foundry Co.* 177 Mo. loc. cit. 450, 76 S. W. 987; *Breedén v. Bfg Circle Min. Co.* 103 Mo. App. 179, 76 S. W. 731."

In the *Roscoe Case*, 202 Mo. loc. cit. 587, 101 S. W. 34, we said: "The petition L.R.A.1917B.

charges specific negligence, and not general negligence, as plaintiff would have had the right to charge in this class of cases. A general allegation of negligence is all that is required in cases of accident where the relation of passenger and carrier exists. This general allegation of negligence is permitted upon the theory that the instrumentalities are in the hands of the defendant and he knows the condition thereof, whereas plaintiff does not or may not know them. Not only does the established rule permit a general allegation of negligence, but, in making the proof, it is sufficient to show an accident and the resultant injury, whereupon there is a presumption of negligence, and a *prima facie* case for plaintiff is made. What we have said above applies to cases where there is a general allegation of negligence, but the rule is different where there are specific allegations of negligence. The rule as to proof is different, and the rule as to the presumption is different. General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence is indulged. But, if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing or contributing to his injury as to plead them specifically as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does so know it by his petition, then he must prove it, and if he recovers, it must be upon the negligent acts pleaded, and not otherwise. In other words, the burden of proof is upon plaintiff, as it would be in any other kind of a case. The rule of presumptive negligence and the rule allowing the pleading of negligence generally are rules which grew up out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. Where plaintiff by his petition admits that there is no necessity, the reason for the rule *ex necessitate* fails, and with it the rule itself."

But in the case at bar the plaintiff says his injuries were due to a negligently constructed car and a negligently constructed track. He points out the negligence of defendant which caused his injury. One cannot plead specific acts of negligence and rely upon presumptive negligence to bridge the chasm in making out a case for the jury. The trial court evidently so viewed this case, and, as there was absolutely no evidence upon which a verdict could stand upon the specific negligence alleged, he rightfully

directed a verdict for defendant. Plaintiff, realizing that he had proved all that he could prove, chose to submit his case and take a verdict rather than to take an involuntary nonsuit. It matters not whether his specific negligence was as well pleaded as it might or should have been. It is only necessary to determine that his plea was one of specific negligence. The defendant had the right to move for more specific pleading if he thought the specific negligence was not as well pleaded as it should have been, or it had the right to accept it as sufficiently pleaded. The negligent construction of a track is specific negligence, and we have so held. *Price v. Metropolitan Street R. Co.* 220 Mo. loc. cit. 454, 132 Am. St. Rep. 588, 119 S. W. 932. So, likewise, is the negligent construction of a car specific negligence, and this is in effect held in the *Price Case*, supra. Because the plaintiff chose to simply charge that the track was negligently constructed, without naming the particular fault of construction, simply gave him a roving commission to prove any and all defects; and if defendant chose not to challenge the pleading, it had a right so to do, but that does not make the charge any the less specific rather than general negligence. A fair sample of a plea of general negligence appears in the *Price Case*, supra.

Under the pleadings in this case the plaintiff cannot invoke the doctrine of *res ipsa loquitur*, and his case failed nisi, and the judgment should be affirmed.

In 5 R. C. L. loc. cit. p. 84, the general rule is thus tersely expressed: "In any event, where the cause of the accident by which a passenger was injured is known as well to the passenger as to the carrier, the presumption of negligence which arises from the fact of the injury of a passenger while on the carrier's vehicle has no application, but the passenger must affirmatively show negligence."

In this case the plaintiff avers that his injury was occasioned by a defective car and a defective track. He thus says that he knows the cause or causes of his injury, and the rule just quoted applies. There is no question as to what the rule is in Missouri. Vide list of cases collated in *McGrath v. St. Louis Transit Co.* supra. In 5 R. C. L. loc. cit. pp. 84 et seq., it is said: "When the plaintiff chooses to allege the specific acts of negligence of which he complains, the authorities are not in harmony as to the effect of such allegation upon the operation of the doctrine of *res ipsa loquitur*. According to some authorities, the plaintiff, by thus alleging the specific acts of negligence, assumes the burden of proving them; and, as in other cases, must recover, if at all, upon the negligence pleaded, and the

doctrine of *res ipsa loquitur* does not apply. Other decisions, however, are to the effect that the plaintiff does not lose the right to rely upon the doctrine of *res ipsa loquitur* by attempting to show particularly the cause of the accident, at least where, at the close of the testimony, the cause does not clearly appear, or if there is a dispute as to what such cause was."

As to the first-named rule in this quotation the Missouri cases and some others are referred to, and as to the latter rule, cases from Washington, Massachusetts, and Virginia are cited. All the text-writers recognize the Missouri rule and state it as we have stated it. Our cases proceed upon the very reasonable theory that, if the plaintiff alleges in his petition the things which caused the injury, such allegations evince his knowledge of the causes of his injury, and he is bound thereby, and his case falls within the first rule quoted from 5 R. C. L. supra.

In an extensive note in 24 L.R.A. (N.S.) loc. cit. 792, it is said: "This question has arisen more frequently in Missouri than in any other jurisdiction, and the cases for the most part are harmonious in holding that the doctrine of *res ipsa loquitur* applies only where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury."

Some 20-odd Missouri cases from this court and the courts of appeal are collated, and all of them support the text. In accord with the Missouri rule the following cases are cited: *Norton v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 108 S. W. 1044; *Chicago Union Traction Co. v. Leonard*, 126 Ill. App. 189; *West Chicago Street R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, 11 Am. Neg. Cas. 364; *Highland Ave. & B. B. Co. v. South*, 112 Ala. 642, 20 So. 1003; *Lone Star Brewing Co. v. Willie*, 52 Tex. Civ. App. 560, 114 S. W. 186.

III. Granting, for the sake of argument only, that this case is governed by the rule in cases of carrier and passengers, the facts do not make a case for the invocation of the doctrine *res ipsa loquitur*. It is not every case where an injury is suffered and where that relation exists that the facts shown bespeak negligence. Each case must be determined upon its own facts. In *Whitaker's Smith on Negligence*, § 419, p. 533 (Enlarged ed. with Notes by Webb), it is said: "It has already been stated that in actions of negligence (as indeed in all actions) the plaintiff must give some proof of his case beyond a mere scintilla of evidence, and if he does not, it is the duty of the judge to direct a nonsuit. The question of what is sufficient evidence to go to the

jury is one for the judge in the particular case before him; but there are a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened which has caused the injury; and upon the maxim, or rather phrase, '*res ipsa loquitur*,' it has been held that there is evidence of negligence. As the phrase imports, there must be something in the facts which speaks for itself, and therefore each case will depend upon its own facts, and it will be difficult to lay down any guiding principles."

The mere fact that the plaintiff was injured is not of itself evidence of defendant's negligence. Nor will the mere fact of injury, without other facts, authorize the application of the rule of presumptive negligence, as such rule is recognized by the doctrine *res ipsa loquitur*. Before the rule *res ipsa loquitur* can be invoked, there must be shown facts other than of the mere fact of injury to plaintiff from which the negligence of defendant can be reasonably inferred. These other facts, in case of carrier and passenger, must show that something out of the ordinary in the course of carriage has happened as to the means or methods of transportation, and that this extraordinary happening was the cause of the injury to plaintiff. If there is no evidence tending to show that something unusual and out of the ordinary has happened, as to the means of transportation (which includes the appliances used in the transportation) or in the method of transportation (which includes the acts of agents, etc.), then the rule *res ipsa loquitur* cannot be invoked, although the facts may disclose injury to plaintiff. *Benedict v. Potts*, 88 Md. loc. cit. 55, 41 L.R.A. 478 et seq. 40 Atl. 1068, 4 Am. Neg. Rep. 484.

The reasoning of the Maryland Case is so well stated that we quote: "In no instance can the bare fact that an injury has happened, of itself, and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and in the very nature of things it never can be disregarded. There are instances in which the circumstances surrounding an occurrence and giving a L.R.A.1917B.

character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine of *res ipsa loquitur* is applied. This phrase, which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz.: First, 'when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property and is so tortious in its quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency.' Thomas, Neg. 574. But it is obvious that, in both instances, more than the mere isolated, single segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the cause of that injury; it is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish the ground for a presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent, and it is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know what did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is therefore a difference between inferring as a conclusion of fact what it was that did the injury and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim *res ipsa loquitur* has no application: it is confined, when applicable at all, solely to the second. In no case where the thing which occasioned the injury is un-

known has it ever been held that the maxim applies, because, when the thing which produced the injury is unknown, it cannot be said to speak or to indicate the existence of causative negligence. In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence; something more was required to be shown."

With this general outline of the law, let us get the facts of the case. In justice to defendant they should be fully stated. It is undisputed that nothing occurred until the train was turned over to the immutable law of gravity,—a law of nature unbending and ever-faithful when it has a duty imposed. Gravity is the same at all times under same and similar circumstances. Its work is done without a variance, and only a variance in the means of its application will show variant results. Plaintiff proved by his own witness there was nothing wrong with the car upon which he rode or the track upon which said car traveled. Both he and his friend testified that they did not know that plaintiff had been injured until the journey was over, and the friend jokingly cursed the plaintiff and told him to get up out of the car. Whilst they do say the car "slackened up kind of," and then "the car started up at a pretty high speed again," yet they do not testify that this was an unusual occurrence in the operation of "Racer Dips." There is not even a scintilla of evidence that cars moving up and down inclines and declines by the force of gravity would not actually do this very thing. On the contrary, our knowledge of the laws of physics leads us to know that such would be the natural movement. Going down the decline the speed would be rapid, but in going up the incline the momentum gathered would gradually decrease until the speed would slacken at or near the crest of the next hill, and then rapidly increase as the car took the next decline. This condition is all that is described by either of these two witnesses. They do not claim that the car stopped or that it suddenly lurched. It devolved upon plaintiff to show that the movement of the car upon which he was riding was an unusual one for cars in the mode of transportation he was then using. He made no attempt to do this, and no negligence can be inferred from this very natural movement of the car. The only other movement of the car is thus described by the friend of plaintiff in telling how plaintiff's foot was caught. He says, "The car kind of wiggled," and, being asked what he meant by that, he said, "Well (indicating) kind of shaken from one side to the other," and that this shaking was more on the last curve than on any other portion of the dip. This

is the sum total of the evidence upon the question of the movement of this car. There is no evidence in the record or tendered in the record to the effect that the movements described by the witnesses were anything unusual for the cars in this particular mode of transportation. It was shown that this pleasure device was made up of tracks going down declines, ascending inclines, and going around acute or sharp curves. There is not a syllable in the testimony that these "wiggles" or movements from side to side of the car were not usual movements of cars used in this mode of transportation. We shall discuss the mode of transportation more thoroughly in other paragraphs.

Before the rule *res ipsa loquitur* can be invoked, something more than the usual happenings (exclusive of the mere fact of injury) must be shown by the testimony. In this case two other passengers were in the same car with plaintiff and his friend, and they arrived at their destination in safety. Other cars (two more) were in the train, and nothing occurred to their passengers. The car returned without injury or accident, and the tracks were found intact.

Something is said about the absence of a handhold for passengers. For that reason we have copied into our statement the drawings of the cars as such drawings were introduced in evidence by plaintiff. It is conclusively shown by the evidence that there are three seats in each car, and plaintiff says he was in the seat next to the rear seat of the car, and that the rear seat was occupied by two other passengers. Abstract of Record, p. 24. The drawings of this car show that plaintiff could have held onto (1) the side of the seat, (2) the back of the seat, and (3) the back of the seat in front of him; yet he says that at the time of the accident he had his arm around his friend's shoulders. He first said partly around the shoulders and partly upon the back of the seat, but, being driven down to facts, finally said his arm was only around his friend's shoulders, and the other hand was in his lap. He was on the right-hand side of the car, and thus it appears he rode with his left hand around the shoulders of his friend and his right hand (the one next to the outside of the car, and which should have been hold of the side of his seat for safety) was in his lap. Take one view of the drawing in the statement and the contributory negligence of plaintiff is apparent. It took four minutes to make the trip. It was one continuous ascent and descent and rounding of curves. Even if plaintiff had no knowledge of the danger in the first instance, he had gone far enough to see that common prudence would dictate the use of his hands

for safety. Barren as this case is of facts tending to show negligence, the trial court could have done but one thing, and that is just what it did do.

We are cited to the following as being authority for holding that the facts of this case bring it within the rule *res ipsa loquitur*: "4 Wigmore, Ev. § 2509, and cases cited in note; 5 R. C. L. § 712, p. 74; 20 Cyc. p. 591, and cases cited; *Sweeney v. Erving*, 228 U. S. 232, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; *Brown v. Louisiana & M. River R. Co.* 256 Mo. 522, 145 S. W. 1060; *Dougherty v. Missouri R. Co.* 81 Mo. 325, 51 Am. Rep. 239; *Gallagher v. Edison Illuminating Co.* 72 Mo. App. 579; *O'Callaghan v. Dellwood Park Co.* 242 Ill. 396, 26 L.R.A.(N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1006, 17 Ann. Cas. 407, s. c. 149 Ill. App. 34; *Redmond v. Metropolitan Street R. Co.* 185 Mo. loc. cit. 10, 105 Am. St. Rep. 558, 84 S. W. 26; *Price v. Metropolitan Street R. Co.* 220 Mo. loc. cit. 457, 132 Am. St. Rep. 588, 119 S. W. 932; *Logan v. Metropolitan Street R. Co.* 183 Mo. loc. cit. 606, 82 S. W. 126; *Whittaker's Smith, Neg.* § 419, p. 552; *Turner v. Haar*, 114 Mo. loc. cit. 346, 347, 21 S. W. 737; *Hughes v. Atlantic City & S. R. Co.* L.R.A. 1916A, 927, and notes pages 930 et seq. (85 N. J. L. 212, 89 Atl. 769, Ann. Cas. 1916A, 102)."

Of the Missouri cases first: In *Brown v. Louisiana & M. River R. Co.* 256 Mo. loc. cit. 535, 165 S. W. 1062, it is said: "The evidence is undisputed that the train was thrown from the track by the fracture of one of the steel rails while passing over it and transporting plaintiff, who was a passenger."

This case is all right and in accord with what we now urge, but it must be noted that an unusual thing was shown; i. e., the derailment of a car.

In *Dougherty v. Missouri R. Co.* 81 Mo. 325, 51 Am. Rep. 239, a very unusual jerk of a car was shown.

In *Gallagher v. Edison Illuminating Co.* 72 Mo. App. 576, an arc light was shown to have fallen from its position on plaintiff's head as he passed thereunder.

In *Redmond v. Metropolitan Street R. Co.* 185 Mo. loc. cit. 10, 105 Am. St. Rep. 558, 84 S. W. 26, a train of two street cars came to a very sudden stop, thereby producing a very violent jerk, which injured plaintiff,—very different from the case at bar, where the evidence is the car "slacked up, kind of" and then "the car started up at a pretty high speed again."

In *Logan v. Metropolitan Street R. Co.* 183 Mo. loc. cit. 606, 82 S. W. 126, the street car left the track.

The case of *Turner v. Haar*, 114 Mo. loc. L.R.A.1917B.

cit. 346, 347, 21 S. W. 737, is cited. That case does not involve the question at all. An employee was suing for an injury occasioned by the falling of a building in which the employer placed him to work. He charged an unsafe working place. The building blew down in a storm. Without going further, it will be seen the facts do not fit here, nor does the law.

*Price v. Metropolitan Street R. Co.* 220 Mo. 457, 132 Am. St. Rep. 588, 119 S. W. 932, is given as authority here. In that case there was a collision between two cars on a street railway. We shall not stop to argue that such a fact is not in the case at bar. There was clearly an unusual occurrence in the *Price* case.

Suffice it to say that the text-books and the cases from the Federal and other state courts cited on this proposition are no nearer in point than the Missouri cases which we have analyzed. These cases and these texts are discussing unusual and extraordinary occurrences in the course of operation. The facts in the case at bar do not measure up to that standard. We concede that an unusual or extraordinary occurrence (excluding the mere fact of injury) may raise a presumption of negligence on the part of the carrier. If, in the case at bar, the train had been brought to a sudden stop in rounding this curve and going down the incline, a different case would be presented. It would have been an unusual occurrence. But here we only have the slackening of speed, which was natural as the train went up hill, and increase of speed, which was natural for a gravity train going down steep inclines, and a "wiggling" of the car, which was natural upon acute and sharp curves; nothing unusual, under the facts shown, save mere injury to the plaintiff, and this, of itself, will not invoke the doctrine *res ipsa loquitur*.

Other suggestions are made as to the absence of an operator on the car, as to the absence of a handhold, and as to the sides of the car not being sufficiently high. We need not discuss these matters, because they were all known acts of negligence, and, if relied upon, should have been pleaded. However, the evidence in the record does not show or tend to show that these things or either of them contributed to plaintiff's injury. The evidence shows that he could have held himself in the car by using the side of his seat or the back of the seat in front of him, and, further, the drawing introduced in evidence shows the very handhold of which he complains. But we will not discuss these matters, because, in our judgment, they are not pertinent.

IV. Still proceeding upon the theory that the relation of plaintiff to defendant is that

of carrier and passenger, yet we must not blind ourselves to the kind of carriage plaintiff was contracting for, and the relative duties of the parties under the facts. Plaintiff knew he was contracting for carriage upon a pleasure device, which device with its tracks of dips and curves was before him, as a circular swing stands before one contracting to ride upon it. He knew he was making no contract for a Pullman car upon the level tracks of a steam railroad. When he contracted for this peculiar carriage, it was written in such contract, by the law, that he must subject himself to the inconveniences, jerks, and even dangers usually incident to that mode of conveyance. This is clearly shown by our cases involving injuries to passengers upon freight trains. Thus in *Wait v. Omaha, K. C. & E. R. Co.* 165 Mo. loc. cit. 621, 65 S. W. 1030, *Brace, J.*, said: "It seems, now to be well-settled law here, as elsewhere, that where a railroad company carries passengers for hire on its freight trains, 'it must exercise the same degree of care as is required in the operation of its regular passenger trains, the difference only being that the passenger submits himself to the inconveniences and danger necessarily attending that mode of conveyance.' *Whitehead v. St. Louis, I. M. & S. R. Co.* 99 Mo. 263, 6 L.R.A. 400, 11 S. W. 751; *McGee v. Missouri P. R. Co.* 92 Mo. 208, 1 Am. Sh. Rep. 796, 4 S. W. 739; *Wagner v. Missouri P. R. Co.* 97 Mo. 512, 3 L.R.A. 156, 10 S. W. 486; *Hays v. Wabash R. Co.* 51 Mo. App. 438, 4 Am. Neg. Cas. 485; *Gulley v. Hannibal & St. J. R. Co.* 53 Mo. App. 492; *Ohio & M. R. Co. v. Dickerson*, 50 Ind. 317; *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 19 L.R.A. 313, 33 N. E. 204, 2 Am. Neg. Cas. 694; *Olds v. New York, N. H. & H. R. Co.* 172 Mass. 73, 51 N. E. 450, 5 Am. Neg. Rep. 38. The rule upon this subject is very clearly expressed in the two cases last cited. In the last one, decided by the supreme court of Massachusetts in 1898, *Knewlton, J.*, speaking for the court, said: 'The law is clearly expressed in *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 270; 19 L.R.A. 313, 33 N. E. 204, 2 Am. Neg. Cas. 694, as follows: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all the ordinary inconveniences, delays, and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and

skill. . . . But if a railway company company consents to carry passengers for hire by such trains, the general rule of responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train, and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from negligence or want of proper care of those in charge of it." . . . The plaintiff in the present case well understood the kind of business in which the defendant was engaged, and the manner in which the business was conducted. So far as there were dangers naturally incident to the running of freight cars and a passenger car in the same train, the parties must be presumed to have contracted in reference to them, and the plaintiff to have assumed them."

In this *Wait Case* the plaintiff thus testified as to the things which caused his injury: "I got on at the water tank, and the train started out. A man, by the name of Rickett got on with me, and there was one other man on the train, both strangers to me. The train started out; and just as the caboose had got a little past the depot, I supposed the train had pulled out for good; and I raised up in my seat to take off my overcoat, and I stepped out of the seat kind of sideways, and I had my left arm thrown out like that, when all at once the train stopped suddenly and it throwed me. There was a seat directly in front of me that had no back on it, it was broke off; and the next seat was turned the other way and the other one this way and throwed two backs together; and I struck my back and side . . . across those two seats; and I went on there with force enough that I broke them right down, and it kind of stunned me at first, and it knocked the breath out of me, and I lay there for a half minute, and got up and sat down in the seat. I could hardly speak and could hardly catch my breath. . . . I went on to Green Castle and got off there. I could hardly get up town. When I went up street I vomited blood, and went and saw a doctor. That night I took the passenger train for my home at Cedar Rapids, Iowa, and got there next day."

Upon these facts Judge *Brace* said: "There is no conflict in the evidence. There

is no evidence tending to show any defect in defendant's track, train, or any of its appliances. No evidence tending to show any want of skill or care on the part of its employees in the management of the train from the time plaintiff got on it until the accident happened, or that the train was stopped at an improper place, or in an improper manner, or that the shock which caused his fall was not a natural and ordinary incident of the stopping of such a train in a proper manner, by the proper application of the proper means for that purpose. In other words, there were no facts proved from which an inference of negligence on the part of defendant could be legitimately drawn."

In the *Wait Case*, supra, the trial court sustained a demurrer to the evidence, and this court sustained that rule.

In *Hedrick v. Missouri P. R. Co.* 195 Mo. loc. cit. 111, 93 S. W. 269, 6 Ann. Cas. 793, Gantt, J., thus sets out the facts: "Plaintiff's account of what took place at La Monte was that after the train got to La Monte it was in a manner stopped. Two of the trainmen had already left the caboose, and the plaintiff got up and started to the rear end of the car, and there was a jump, he did not know what happened, but thought the train had collided, and for a moment or two he did not know what had happened, and when he came to himself he felt that he was injured, and sat down on a seat,—went to a seat and sat down, and at that time the train was perfectly still. The caboose, after the train stopped, was in the neighborhood of 100 or 150 yards from the depot at La Monte. He testified that when he came to himself he was on his feet, and could not state whether he had been thrown down or not. He testified that he had traveled a number of times in cabooses attached to freight trains and on freight trains, and he was then asked the effect that the stopping of the train had, and he answered: 'The reaction on the car was so severe that it upset the water tank in the caboose and spilled water all over the floor.' 'That jar was severe—the severest I ever experienced on a freight train.' 'The extent was so hard it upset the water tank in the car.' 'It jerked me senseless and injured my neck.' On cross-examination he testified that when he started to go to the rear end of the caboose 'the train was barely moving; it was not running one mile an hour, not near as fast as a man could run or walk; it was not going as fast as a man could walk; the rate of speed was so that a child could walk and get off it if it had not been jarred.' He was asked whether he was thrown down, and answered: 'Well, I do not know whether I was or not; right there is L.R.A.1917B.

where I never will be clear. I do not think I went to the floor. I was stunned for a minute or two.' Asked whether or not he struck his head, neck, or arm against anything in the caboose at that time, he answered, 'I think I kind of caught myself on the—against the door casing or against the door as it swung; the jar was so violent and severe.'

After quoting and approving what we have quoted from the *Wait Case*, supra, and after a thorough review of other Missouri authorities Judge Gantt proceeds thus: "It is well settled that negligence cannot be presumed when nothing is done out of the usual course of business, unless the course is improper. There is nothing in this record to indicate that there was any act of omission or commission not usually incident to the constant moving of heavy freight trains under the control and management of skilful and careful employees. We are not unmindful of the contention of the plaintiff that the defendant jerked or knocked or bumped the train with unusual, unnecessary, and extraordinary force against the caboose, but we are clearly of the opinion that, in the light of the uniform expression of this court and of the several appellate courts, the evidence in this case was wholly insufficient to establish any such unusual and extraordinary jarring and jerking. In our opinion, the basic fact upon which a recovery must rest in this case, to wit, the negligence of the defendant, was not established either by the positive testimony of the witnesses or by any presumption of negligence arising out of the facts developed; and it results that the plaintiff was not entitled to recover, and the judgment of the circuit court must be and is reversed, and judgment rendered here for the defendant."

The case law is so thoroughly reviewed in the *Hedrick Case* that a reading thereof will suffice as to the Missouri rule.

Now, reverting to the case at bar: Plaintiff knew that he was going to ride upon "Racer Dips" in an open car. He saw the car. Long before he got to the place of accident he knew that his course was up and down steep inclines and declines and around sharp curves. He had contracted for a pleasure ride upon a device which was open to his view, or so open to his view in the greater part. No negligent act of the defendant is shown. No attempt is made to show that the movements of the car at the time of the injury were unusual or extraordinary movements for that particular mode of transportation. If the jerk described by Wait and by Hedrick were not sufficient in those cases to show an unusual happening in that mode of transportation,

how can it be said that the faint slackening of the car and the increase of speed of the car, and the "wiggles" of the car, described in this case, can be held to be evidence of an unusual occurrence in this mode of transportation? So we say that upon that theory of passenger and carrier the demurrer to this evidence was properly sustained, and the judgment of the court nisi should be affirmed.

V. Personally, I do not believe the case is one of passenger and carrier. We, as a court, are not more ignorant than the general public. What is generally known we must know. We know that there are a great number of pleasure devices, the objects and purposes of which are to furnish sensational experiences for pleasure seekers,—the scenic railways with all their variations; the circular swings with all their variations; toboggan slides, etc. They are not common carriers of passengers in any sense of the word. Nor do we believe the doctrine *res ipsa loquitur*, as applied to common carriers, has application here, but, as said in the Maryland Case, *supra*, in the quotation we have made, the doctrine may be said to apply to at least two classes of cases, which are described therein, and the latter class described in the Maryland Case may cover those devices, and the doctrine *res ipsa loquitur* be invoked upon a proper state of facts; but those facts are not in this record.

The cases holding that the parties in cases of this kind bear the relation of carrier and passenger are *O'Callaghan v. Delwood Park Co.* 242 Ill. 336, 26 L.R.A. (N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005, 17 Ann. Cas. 407, and cases citing and following that case. This question, however, goes only to the measure of care, and there are several cases which take a different view as to the relationship of the parties. In the view we have taken of the facts in this case, under the assumption that the relationship did exist, this question is largely a moot one now.

The judgment nisi should be affirmed.  
It is so ordered.

Woodson, Ch. J., and Revell, J., concur. Faris, J., concurs in result and all of opinion except paragraph V.

Bond, J., dissenting:

I. The following opinion written by me in Division, with a few additions, is now filed as my dissent from the opinion adopted by the majority of this court.

Plaintiff sued the defendant for \$25,000 for injuries sustained while riding on a scenic railway called the "Racer Dip," operated by defendant for the transportation

of persons for hire over and around double metal tracks supported by trestles and proceeding over very steep high and low grades so as to return on a circuitous course, after a trip of about three quarters of a mile, to the starting station. These tracks are situated in Forest Park Highlands, an amusement resort in St. Louis. The cause of action stated by plaintiff is, to wit: "Plaintiff further states that on or about the 8th day of May, 1910, for a valuable consideration paid defendant, they received the plaintiff into one of their conveyances or cars aforesaid, for the purpose of conveying him therein as a passenger on and around the racer dip aforesaid; that said racer dip, the cars and track thereon, were so faulty and so defectively constructed, and defendants so negligently and carelessly maintained and operated the same that, by reason thereof, the car in which plaintiff was a passenger as aforesaid vibrated and shook so that the plaintiff was thrown with much force against the back of the conveyance or car in which he had passage, and plaintiff's right foot and leg were suddenly and violently thrown upwards and out of said conveyance or car, thereby causing his said right foot and leg to be caught in and thrown upon and against railings, posts, and uprights along and outside of said conveyance or car, through which plaintiff was greatly and permanently injured," etc.

This pleading was either a statement of general negligence in the construction and operation of the "car and track" in their entirety, as would seem clearly to be the case under the examples and definitions of general negligence contained in the following cases: *Stauffer v. Metropolitan Street R. Co.* 243 Mo. loc. cit. 325, 326, 147 S. W. 1032; *MacDonald v. Metropolitan Street R. Co.* 219 Mo. loc. cit. 487, 118 S. W. 78, 16 Ann. Cas. 810; *Briscoe v. Metropolitan Street R. Co.* 222 Mo. loc. cit. 113, 120 S. W. 1162, and cases cited,—or it constituted an allegation of specific negligence, as is suggested in the majority opinion. If it be construed as a mere joinder of general allegations of negligence in the construction and operation of defendant's railway, then it stands admitted, and such is the universal law, that the case made by the plaintiff entitled him to go to the jury. On the other hand, if the theory of the learned majority opinion is correct, that the foregoing allegations constituted only averments of particular and specific negligence (which I do not concede), then the case should have gone to the jury upon the phase of the evidence presented by the testimony of plaintiff and his companion. This case presents these two alternatives; for there can be no doubt, either upon reason or authority,

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that the defendant owning and operating the scenic railroad for the transportation of the general public for hire was engaged in a calling essentially the same as that of a common carrier of persons. *Van Hoeffen v. Columbia Taxicab Co.* 179 Mo. App. 600, 162 S. W. 694; *O'Callaghan v. Dellwood Park Co.* 242 Ill. loc. cit. 343, 345, 26 L.R.A. (N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005, 17 Ann. Cas. 407; *Hartman v. Tennessee State Fair Asso.* 134 Tenn. 159, 183 S. W. 735; *Best Park & Amusement Co. v. Rollins*, 192 Ala. 534, 68 So. 417; *Chesapeake Beach R. Co. v. Brez*, 39 App. D. C. 58. Hence the only question is whether any phase of the evidence adduced by plaintiff tended to make a case to which the doctrine of *res ipsa loquitur* would be applicable under the theory that the allegations of negligence in the petition were general, or tended to show a state of facts giving rise to a reasonable inference of negligence on the part of the defendant in the construction and operation of its cars and track, upon the theory that the petition charged specific negligence in that respect.

The testimony of the plaintiff as to the occurrence of the injury is, to wit:

Q. What sort of a track is there on the racer dips?

A. There is two tracks.

Q. Is it a level track?

A. Part of the way it is level and part it is inclines and steep hills and short turns.

Q. Louder, please.

A. Inclines and steep hills and short curves and semicircles.

Q. Well, you say you had passage on one of these trains on the 8th of May, 1910?

A. Yes, sir.

Q. Now, will you tell the jury if you had any accident there and how it happened?

A. I was sitting in one of these cars and sitting on the right side, and it started out on the run and got very near all way around, and the car slackened speed and threw me forward, and started up all of a sudden and threw me backward, and shot up that way (indicating) and threw me to one side, and threw my right foot out and caught my leg.

Q. When your foot was thrown out, what happened to it.

A. It was caught against posts or up-rights or rails and alongside the track where the car was.

Q. Now, then did it injure your foot or leg?

A. It broke my right leg about an inch and a half above the ankle and threw the leg out of place, and tore all the flesh off L.R.A.1917B.

my leg and broke it off right up about here (indicating) and twisted the knee.

Q. Did the accident render you unconscious or not?

A. Yes, sir.

Q. How long were you unconscious?

A. Why, right after the accident I became unconscious, and I didn't know anything until Monday evening—until the following evening.

Plaintiff also testified that he sat in the second seat in the second car; that there was no rail or bar to which he could hold, adding further, "Only this little dashboard or something there in front that you could hold to, but there wasn't anything that you could reach your hands out to that we could hold onto;" that the train was sent out with no attendant, and carried four passengers on that trip; that he had never ridden on one before, and that he received no information from the defendant or its employees of the condition of the track or its sharp curves or steep grades, or that it was unprotected on the sides, nor of the jerking of the train, nor the danger of a ride thereon; that he paid a fare of 10 cents for his passage; that at the place of the accident the car was slanting a little over to the side where the plaintiff sat.

Plaintiff's companion on the trip testified, to wit:

Q. Will you state just how he was injured?

A. Yes, sir. We was on the last curve coming in, and the car was running at a high speed, and the car slackened up kind of, and he was throwed up forward, and the car started up at a pretty high speed again, which naturally turned him back, and his right foot fell between the car and the railing, the outside railing.

Q. Between what track?

A. The railing.

Q. Did it catch on anything on the outside?

A. When the car kind of wiggled, it caught his foot.

Q. What do you mean wiggled?

A. Well (indicating), kind of shaken from one side to the other.

Q. Was that shaking more violent than at any other point in the ride around the dip?

A. The shaking was more in the last curve than at any place on the dip.

Q. What effect, if anything, did this decreasing of the speed and then starting of the car, as you state, have on you?

A. Why it threw me back, but I was just lucky enough to catch my hold there or it would have threw me; I was lucky enough to catch my hold to keep from getting

thrown out of the car; then I grabbed Mr. Pointer's arm and tried to prevent him from getting hurt, but it was too late.

Q. What curve were you approaching on it at the time of the accident?

A. It was on the last curve—going in on the last curve.

Q. Sir?

A. It was on the last curve—going in on the last run.

Q. Have you since that time ridden on the racer dip?

A. Yes, sir; I have.

Q. Did it decrease and increase the speed in the manner in which you state it did so on the occasion when Pointer was injured.

A. Yes, sir; and it looks like they had the speed more under control afterwards.

Q. What would you say caused Pointer to be thrown, his foot to be thrown out of the car?

A. Why, the rate of high speed, and then the sudden stop. The sudden slow-down in the speed and the start-up right quick, which naturally threw him back and threw his foot out of the car.

The elevation of the track and its propulsive powers were these: The trains were started on their journey by being hauled up an angle of 75 degrees by means of an electric power cable. When they reached this summit the physical force was released, and the trains were carried thence by gravity and the momentum acquired by the sharp descent from the point where the electric force had been released. After the trains left the highest point to which they were carried by electric power, they started over a course of rapid descents and ascents and around sharp curves. The angles of the succeeding grades ranged from 45 to 60 degrees, and the trains are run "at a very high rate of speed."

The defendant's secretary testified that he could not tell what speed it was, although it took about four minutes from the time the train started to get to the returning point. He also testified that the scenic railway was opened on the 23d of April, and that its operation was delayed a few days on account of the snow, and that the accident occurred on the 8th of May. This was the substance of his testimony.

It is apparent, if the version of the occurrence given for the plaintiff is to be accepted as true, that he had become a passenger upon a train without any warning whatever of the care and the prudence necessary to be observed to render the trip safe, and was seated in a car which was not furnished with any handholds which he might seize in order to withstand the shock of a sharp

descent or a whirl around a curve, and which ran so near the uprights or posts supporting a structure of the side that, when the train reached its last ascent and began to descend from it on a sharp curve at a high rate of speed, he was thrown first forward and then backward by a sudden jerk so powerful as to throw his foot outside the car and cause his leg to be struck by the upright or post which supported the horizontal guard on which the side wheels of the train ran. As to the force and suddenness of the jerk, the testimony of the companion is that it was so great as to cause the injury as described in plaintiff's testimony, and to prevent him from catching hold of plaintiff in time to save him from injury.

There can be only two ways of looking at such a jar or sudden jerk of the train, which are: First, that it was an ordinary occurrence; or, second, an extraordinary and unusual happening. If it were the former, then it constituted a sufficient basis for a rational inference of defective construction of the car, in that it was not provided with a handhold nor sufficiently elevated at its sides, or that it ran too close to the outside posts, and that such imperfections implied negligence on the part of defendant in providing cars and tracks of such a character as to inflict injury upon passengers in their normal operation. Hence, upon the theory that the petition alleged specific negligence as to the construction and operation of its railway, the plaintiff did make a case from which the jury were entitled to infer the very specific negligence averred.

If, however, we take the other view that the jerk or jar was an extraordinary event of such force and suddenness as to cause the injury to plaintiff, then proof of that fact would necessarily call into play the rule of *res ipsa loquitur*, which is that, where the thing causing the injury is under the exclusive control of one who owes a duty to another, and it is shown that the injury would not have occurred in the ordinary course of things if the agency inflicting it had been managed or operated with due care, then evidence of the happening of the injury, without the fault of the person injured, affords prima facie evidence of negligence, and will take the case to the jury and permit it to infer negligence, and then find from all the evidence whether this inference has been rebutted or overcome and the plaintiff has sustained the burden of proof imposed on him by law. This rule has been applied to injuries caused by railroads, elevators, electric wires, and divers other appliances involving the use of powerful forces or machinery. 4 Wigmore, Ev. § 2509, and

cases cited in note; 5 R. C. L. § 713, p. 74; 29 Cyc. 591, and cases cited; *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; *Brown v. Louisiana & M. River R. Co.* 256 Mo. 522, 165 S. W. 1060; *Dougherty v. Missouri R. Co.* 81 Mo. 325, 51 Am. Rep. 239; *Gallagher v. Edison Illuminating Co.* 72 Mo. App. 579; *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 26 L.R.A. (N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005, 17 Ann. Cas. 407; s. c. 149 Ill. App. 34; *Redmon v. Metropolitan Street R. Co.* 185 Mo. loc. cit. 10, 105 Am. St. Rep. 558, 84 S. W. 26; *Price v. Metropolitan Street R. Co.* 220 Mo. loc. cit. 457, 132 Am. St. Rep. 588, 119 S. W. 932; *Whittaker, Smith, Neg.* § 419, p. 552; *Turner v. Haar*, 114 Mo. loc. cit. 346, 347, 21 S. W. 737; *Hughes v. Atlantic City & S. R. Co.* L.R.A. 1916A, 927, and notes pp. 930 et seq. (85 N. J. L. 212, 89 Atl. 769, Ann. Cas. 1916A, 102).

It follows that, whether the allegations of the petition be construed as a charge of general or specific negligence, in either

event, under the undisputed testimony, the plaintiff made a case entitling him to go to the jury; for the phase of the evidence above quoted tended to prove, as has been seen, the charge of defective construction and operation (which the majority opinion holds was a specific one), or it tends to show a state of facts invoking the rule of *res ipsa loquitur* if, as I think, the charges of negligence in the petition were general.

In these circumstances it was the duty of the defendant to rebut the *prima facie* case made by the evidence given for the plaintiff on one or the other theories of negligence alleged in his petition. Defendant took no steps to rebut the weight of the evidence against it at the conclusion of plaintiff's case, but interposed a general demurrer thereto which should have been overruled, and the case sent to the jury.

Walker and Blair, JJ., concur.

Petition for rehearing denied December 4, 1916.

#### TENNESSEE SUPREME COURT.

J. A. FORD

v.

FARMERS' EXCHANGE, Appt.

(— Tenn. —, 189 S. W. 368.)

#### Damages — breach of warranty of seed.

The damages for breach of warranty that seed sold to produce a crop for market is true to name is, in case the purchaser acts in ignorance of the breach, the value of a crop, had the seed been as warranted, such as would ordinarily have been produced that year less the value of the one actually produced.

*For other cases, see Damages, III. a, 4, c, in Dig. 1-53 N. S.*

(November 18, 1916.)

**A** PPEAL by defendant from a judgment of the Court of Civil Appeals reversing a judgment of the Law Court of Johnson City in his favor in an action brought to recover damages for breach of an alleged

**Note.**—The measure of damages for breach of warranty as to seeds is discussed in the notes to *Leonard Seed Co. v. Crary Canning Co.* 37 L.R.A. (N.S.) 79, 85, and *Buckbee v. P. Hohenadel, Jr. Co.* L.R.A. 1916C, 1011, 1013, covering the general subject of the liability of a vendor of seeds.

The analogous subject as to sale of trees, shrubs, plants, or vines, including the measure of damages, is treated in the note to *Kelly v. Lum*, 49 L.R.A. (N.S.) 1151. L.R.A. 1917B.

warranty by him in the sale of certain seed. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Thad A. Cox, Harr & Burrow, and Ben H. Taylor for appellant.

Messrs. Vines & Price and Divine & Guinn for appellee.

Williams, J., delivered the opinion of the court:

This suit was begun by Ford to recover damages for the breach of an alleged warranty made by defendant in the sale of watermelon seed.

It appears that plaintiff has for many years been engaged in raising melons for market on a large scale. There was testimony tending to show that defendant had sold plaintiff his melon seed for several years, the seed being known as "Klekley Sweets," and, knowing of the use intended to be made of them, guaranteed that the seed sold on the particular occasion, which were to come from a new and untried producer, were of that variety. The melons produced from such seed were the best for the soil and climate.

Plaintiff made expenditures in renting land, preparing the soil, and planting the seed; but on the crop coming to or nearing maturity it was discovered that the seeds were not as warranted, but of an inferior variety. An examination of the seeds would not disclose whether they were "Klekley Sweets" or not.

The vines produced small melons, which

were not readily sold on the market. In fact, plaintiff testified that he was able to obtain only about \$100 for the crop, selling some of the melons at 50 cents a hundred.

There was also proof tending to show that had the seed been true to kind the crop would have been of a considerably greater value.

The defendant tendered \$2 and the costs accrued in the case, and filed a plea of tender. The tender sum of \$2 represented the difference between the market value of the amount of seed delivered to plaintiff by defendant and the same amount of "Klekley Sweet's." The defense was that the measure of damages was at most that sum.

The trial judge held with this insistence and gave peremptory instruction to the jury to find for defendant.

The court of civil appeals, on appeal, held that this ruling was erroneous and remanded the cause to the lower court for trial.

We hold that this was a proper disposition of the case on the part of the appellate court, though we reach the result on a different theory of the law.

There have been developed two rules in respect to damages growing out of the warranting of seed that proved not true to name. The first class of cases, dealing with seed, improperly delivered under the contract, that are of such quality that no crop is produced, announce the restrictive rule that there is no proper basis for the allowance of expected profits as damages. The rule in such case appears to be that the items of damages recoverable are those of actual outlay, such as the price paid for the seed, the expense of preparing the soil to receive the seed (less general benefit to the land therefrom), the expense of planting, and the loss sustained from having the land lie idle for such period of time as the use of it was lost. *Shaw v. Smith*, 45 Kan. 334, 11 L.R.A. 881, 25 Pac. 886; *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508; *Reiger v. Worth*, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 721, 48 So. 410; *Sedgw. Damages* 9th ed. §§ 191, 768.

The other and more liberal rule is applied in cases where the defective seed germinate and produce a crop that is inferior in quality and value to the one that would have been produced in the same circumstances had the seed been as warranted. In such case, by an almost unbroken line of authorities in England and America, there is held to be a reasonable basis on which to estimate the profit that would have been made had the seed been of contract quality. It is held that this basis is found in the certainly ascertainable value of the crop

actually produced, the court having only to estimate the difference in value between that crop and the value of the crop that would ordinarily have been produced under the same circumstances if seed true to name had been supplied by the seller. The loss is held not to be conjectural and the damages not to be speculative, or beyond the contemplation of the contracting parties.

In *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, this basis for the allowance of expected profits is thus recognized: "The loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law exacts in the proof of damages. But . . . if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character. . . . The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed."

See also *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Vaughan's Seed Store v. Stringfellow*, *supra*.

In the case of *Hurley v. Buchi*, 10 Lea, 346, it appeared that Buchi, a market gardener, applied to Hurley to buy "Early Rose" potatoes, informing the latter that they were desired to plant for the early market; that that variety matured about the middle of June, and was worth on the market \$3.50 per bushel. A different kind, actually furnished and planted, did not mature until August. The court disallowed the claim of the plaintiff that he was entitled to recover as damages the increased value of the potatoes he would have raised and sold if the seed potatoes delivered had been of the "Early Rose" variety; and this on the ground that the claim was based on the assumption that if the variety ordered had been delivered, they would have been planted, cultivated, and matured at a given time (in June), and that therefore speculative profits would be involved. The speculative element, we conceive, was that the anticipated crop would have matured on a date that substantially differed from the date when the seed potatoes that were actually furnished would and did mature.

In its particular ruling on the point of speculative damages, the case of *Hurley v.*

Bucki may, and we think should, be treated as not out of harmony with the widely accepted general rule, but as announcing an exception to it, based on the fact above referred to. The uncertainty in the quantity of the crop, dependent on weather and season, under the facts of that case, was not removed by any adding reference to the actual yield under precise, or fairly similar, circumstances. The weather at or near the date of the maturing of "Early Rose" seed potatoes might have been such as to materially affect the quantity and quality of the production, while not having identical effect upon the later maturing variety.

Broadly stated, the rule is that for the breach of an expressed warranty that seed is true to name, where the seller knows the

use for which the same is brought and the purchaser sows in ignorance of the true character of the seed, the measure of recoverable damages is the value of a crop, had the seed been as warranted, such as would ordinarily have been produced that year, less the value of the crop actually raised. *Wolcott v. Mount*, 38 N. J. L. 498, 20 Am. Rep. 425; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Fuhrman v. Interior Warehouse Co.* 64 Wash. 159, 37 L.R.A.(N.S.) 60, 116 Pac. 606; *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581, 52 N. E. 1088; 2 Sedgw. Damages, 9th ed. 768.

The judgment of the Court of Civil Appeals is modified and affirmed. Remand for a trial of the cause in the circuit court.

### TEXAS SUPREME COURT.

ST. LOUIS SOUTHWESTERN RAILWAY  
COMPANY OF TEXAS, Plff. in Err.,

v.  
THOMAS A. GRIFFIN.

(106 Tex. 477, 171 S. W. 703.)

**Constitutional law — requiring statement of cause of discharge — impairing rights.**

1. Requiring an employer to give a discharged employee a true statement of the cause of discharge would unconstitutionally impair the employer's right to contract, and deny him the equal protection of the laws. For other cases, see *Constitutional Law*, II. a, 5, c; II. b, 4, b, (2), in *Dig. 1-52 N. S.*

**Master and servant — cause for discharge — liability.**

2. An employer cannot be held liable in damages for giving inefficiency as a cause for discharging an employee, although the evidence tends to show that he was efficient. For other cases, see *Master and Servant*, I. e, in *Dig. 1-52 N. S.*

**Same — reasons for discharge — duty to give.**

3. Under a constitutional provision that every person shall be at liberty to speak, write, or publish his opinions on every subject, an employer cannot be compelled to give reasons for the discharge of an employee. For other cases, see *Constitutional Law*, II. d, in *Dig. 1-52 N. S.*

**Constitutional law — liberty — right to refuse employment.**

4. The legislature cannot, in view of the constitutional guaranty of liberty, forbid an

employer to refuse to employ one who has participated in a strike.

For other cases, see *Constitutional Law*, II. b, 4, b, (2), in *Dig. 1-52 N. S.*

**Same — right to compel disclosures.**

5. The legislature cannot, in view of the constitutional guaranties of liberty and against searches, compel an employer to disclose to employees communications made by or to him with respect to the qualifications of a discharged employee or one seeking employment.

For other cases, see *Constitutional Law*, II. b, 4, b, (2); *Search and Seizure*, in *Dig. 1-52 N. S.*

**Same — reasons for discharge of employee — police power.**

6. The police power does not extend to compelling an employee to give reasons for the discharge of an employee.

For other cases, see *Constitutional Law*, II. c, 4, c, in *Dig. 1-52 N. S.*

(December 16, 1914.)

**ERROR** to the Court of Civil Appeals to review a judgment affirming a judgment of the District Court for Dallas County in plaintiff's favor in an action brought to recover damages for alleged failure and refusal of defendant to issue a true statement of the reasons why plaintiff was discharged by it. Reversed.

The facts are stated in the opinion.

Messrs. E. B. Perkins, J. E. Gilbert, D. Upthegrove, for plaintiff in error:

Defendant has the absolute right to determine the qualifications of its section foreman, and having discharged plaintiff for inability to surface and line track and properly distribute his work, and this being the statement made in the service letter requested by him, it is a violation of the state and Federal Constitutions for the court to permit plaintiff to have the truth or falsity of such statement submitted to the jury.

**Note.**—Upon the constitutionality of statutes requiring the employer to furnish a discharged employee with a statement of the cause of his discharge, see annotation following this case, post, 1115.  
L.R.A.1917B.

St. Louis Southwestern R. Co. v. Hixon, 104 Tex. 267, 137 S. W. 343; St. Louis, S. F. & T. R. Co. v. Inman, — Tex. Civ. App. —, 137 S. W. 1153; Ex parte Harrison, 212 Mo. 88, 16 L.R.A. (N.S.) 950, 126 Am. St. Rep. 567, 110 S. W. 708, 15 Ann. Cas. 1; Wallace v. Georgia, O. & N. R. Co. 94 Ga. 732, 22 S. E. 379; Pavesich v. New England L. Ins. Co. 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 184, 60 S. E. 68, 2 Ann. Cas. 561; Ex parte Neil, 32 Tex. Crim. Rep. 275, 40 Am. St. Rep. 776, 22 S. W. 923; Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 23 L.R.A. (N.S.) 247, 183 Am. St. Rep. 213, 102 Pat. 489, 18 Ann. Cas. 546; Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 270, 8 Sup. Ct. Rep. 273; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 16 S. E. 283; Coffeyville Vitriified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 948, 1 Ann. Cas. 936; State v. Chicago, M. & St. P. R. Co. 68 Minn. 391, 38 L.R.A. 672, 71 N. W. 400; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 118, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; Adair v. United States, 208 U. S. 172, 52 L. ed. 441, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Goddard), 188 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 39; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Loomis, 115 Mo. 307, 21 L.R.A. 799, 22 S. W. 350; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Wisconsin, M. & F. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Dupree v. State, 102 Tex. 455, 119 S. W. 301, 14 Am. & Eng. Enc. Law, 69.

No express malice being shown, the contents of the service letter was privileged, and could not be made the basis of the cause of action against defendant.

Missouri P. R. Co. v. Richmond, 73 Tex. 575, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; Gulf, C. & S. F. R. Co. v. Floore, — Tex. Civ. App. —, 62 S. W. 611; Davis v. Wells, 25 Tex. Civ. App. 155, 60 S. W. 506; Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; Schulze v. Jelenick, 18 Tex. Civ. App. 296, 44 S. W. 581; Brown v. Norfolk & W. R. Co. 100 Va. 419, 60 L.R.A. 474, 42 S. E. 664; Campbell v. Bostick, — Tex. L.R.A. 1917B.

Civ. App. —, 22 S. W. 828; Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A. (N.S.) 1104, 69 N. E. 1003; Lilley v. Roney, 61 L. J. Q. B. N. S. 727; White v. Nicholls, 3 How. 266, 11 L. ed. 591.

The court erred in submitting to the jury the question as to whether or not the statement made in the service letter was true or untrue.

St. Louis Southwestern R. Co. v. Hixon, 104 Tex. 267, 137 S. W. 343; St. Louis, S. F. & T. R. Co. v. Inman, — Tex. Civ. App. —, 137 S. W. 1153.

Mr. William H. Clark, for defendant in error:

The contention that the verdict and judgment herein are not due process of law and that the Blacklisting Statute is repugnant to the Constitution is simply an abuse of the English language in the light of the statutes of Texas regulating and controlling public service corporations, and the decisions of the courts holding that such state regulation of these public service corporations is within the power of the state.

Union Cent. L. Ins. Co. v. Chawing, 86 Tex. 654, 24 L.R.A. 504, 28 S. W. 482; Fidelity & O. Co. v. Allibone, 90 Tex. 660, 40 S. W. 399, 15 Tex. Civ. App. 178, 20 S. W. 632; New York L. Ins. Co. v. Oslopp, 25 Tex. Civ. App. 284, 61 S. W. 336; Mutual L. Ins. Co. v. Walden, — Tex. Civ. App. —, 26 S. W. 1012; Clark v. Finley, 93 Tex. 171, 34 S. W. 343; Brown v. State, 54 Tex. Crim. Rep. 121, 112 S. W. 80; Northern Texas Traction Co. v. Danforth, 53 Tex. Civ. App. 419, 116 S. W. 147; Fidelity Mut. Life Assn. v. Mettler, 165 U. S. 588, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 900, 19 Sup. Ct. Rep. 609; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 46 L. ed. 755, 21 Sup. Ct. Rep. 535; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 105; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 413, 38 L. ed. 1014, 1028, 1 Inters. Com. Rep. 560, 575, 14 Sup. Ct. Rep. 1047, 1060; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Paul v. Virginia, 8 Wall. 168, 10 L. ed. 357; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Merchants' Life Assn. v. Yacum, 39 C. C. A. 56, 98 Fed. 251.

Mr. William T. Strange also for defendant in error.

Brown, Ch. J., delivered the opinion of the court:

We copy from the opinion of Justice Moursund the following statement of the facts found by the court of civil appeals of the fourth district (— Tex. Civ. App. —, 154 S. W. 583):

"Thomas A. Griffin, appellee, sued the St. Louis Southwestern Railway Company of Texas, appellant, to recover damages for its alleged failure and refusal to issue to him a true statement of the reasons why he was discharged by appellant, he having made demand for such statement under chapter 89, p. 160, General Laws of Texas of 1909, commonly known as the 'Black-listing Law.' On May 9, 1910, appellee was employed as a section foreman by appellant, and on July 18, 1910, was discharged, whereupon he made his demand for a statement in writing as to the cause of his discharge. Appellant issued a service letter, as follows: 'This is to certify that Thomas A. Griffin has been employed in the capacity of section foreman at Renner on the St. Louis Southwestern Railway Company of Texas from May 9, 1910, to July 18, 1910. Discharged for not distributing work properly and inability to surface and line track. Previous record. March 25, 1910, to April 1, 1910, assistant extra gang foreman. Resigned. Service satisfactory.'

"Appellee alleged that this statement was false and malicious; that he had had several years' experience on section work and as section foreman, performing and directing said work, was capable, experienced, and skilled therein; that he could and did distribute his work properly, and could and did surface and line track; that the real cause of his discharge was on account of a personal difference which he had on July 10, 1910, with appellant's general roadmaster, J. J. Hughes.

"Appellant attacked the constitutionality of the Blacklisting Law, both by demurrer and plea, and alleged that it in good faith attempted to comply with said statute, and that the reasons stated in said service letter were the true reasons for appellee's discharge; that its assistant roadmaster, in making the report on which said letter was based, acted in good faith in an effort to perform his duty to appellant, and it would not be liable for a mistake in judgment made by its roadmaster. Appellant further alleged that it did not make such letter public, but furnished it to appellee in compliance with said statute, at his request, and without any malice, ill will, or evil intent towards appellee; that it had the right to exercise and act upon its own judgment as to the competency of those employed as section foremen, and if a mistake should be

made in the discharge of such employee it would not be liable to him; that it was required by law to keep its track in proper condition for the operation of its trains; that it was necessary to employ careful and competent section foreman to keep the track in proper repair; that other railroad companies had a like interest in keeping their tracks and roadbed in repair; and that such communication was privileged, and, there being no malice, ill will, or evil intent shown, plaintiff could not recover.

"Defendant's exceptions were overruled, and upon trial the jury found that the statement furnished as stated above, and awarded plaintiff \$500 damages. Judgment was entered for said amount, from which defendants appealed."

There is no conflict in the evidence to the fact of the employment and discharge of Griffin. The question presented to this court is the validity of a statute enacted by the legislature as stated above, from which we copy the following provisions: "Art. 594. Discrimination.—Either or any of the following acts shall constitute discrimination against persons seeking employment:

... (3) Where any corporation, or receiver of the same, doing business in this state, or any agent or employee of such corporation or receiver, shall have discharged an employee, and such employee demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent, or employee thereof fails to furnish a true statement of the same to such discharged employee, within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation or receiver, shall fail, within ten days after written demand for the same, to furnish to any employee voluntarily leaving the service of such corporation or receiver, a statement in writing that such employee did leave such service voluntarily, or where any corporation or receiver of the same, doing business within this state, shall fail to show in any statement under the provision of this title the number of years and months during which such employee was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail within ten days after written demand for the same to furnish to any such employee a true copy of the statement originally given to such employee for his use in case he shall have lost or is otherwise deprived of the use of the said original statement." 1 Rev. Stat. 1911, art. 594, § 3.

The act gives no right of action to the employee for failure to furnish the "true statement," but provides that the state may sue for and recover a penalty of \$1,000 for each failure to comply with the law.

For the purpose of testing the correctness of the judgment of the court of civil appeals in holding the act of the legislature valid, we must assume that the evidence was sufficient to sustain the claim that the statement of discharge furnished did not state a cause which was true in fact; but this does not concede that the statement of discharge furnished did not state truly the cause which operated upon the mind of the officer who discharged Griffin. We will first consider the validity of the statute relied upon by defendant in error, and if, by reasonably fair construction, it appears that the legislature was empowered to enact the law, this court will recognize it as valid; that is, a serious doubt of the power must be resolved in favor of the validity of the law. Lewis's Sutherland Stat. Constr. § 82, states the rule thus: "Every presumption is in favor of the validity of an act of the legislature, and all doubts are resolved in support of the act. 'In determining the constitutionality of an act of the legislature, courts always presume in the first place that the act is constitutional. They also presume that the legislature acted with integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution. The legislature is a co-ordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the constitutionality of all measures passed by it.' The unconstitutionality must be clear or the act will be sustained."

It is true that all legislative power is by the Constitution vested in the legislature, and the judicial department cannot frame laws, nor change nor mold them by construction. It is likewise true that the judicial power of the state is vested in the courts which are charged with the duty of enforcing the laws and with the duty to annul any law enacted by the legislature which is clearly in violation of the constitutional rights of any person, natural or corporate, and with the same purpose with which the courts refrain from trespassing upon the privileges of the legislative power, they will, when necessary, exercise their power to prevent the destruction or impairment of rights vested in citizens or corporate bodies, by the unauthorized action of the legislature.

The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him. The L.R.A.1917B.

liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed. When Griffin entered the service of the railroad company for an indefinite time, the law reserved to him the right to quit the service at any time without cause or notice to the employer. The railroad company had the corresponding right to discharge him at any time without cause or notice. The rights of the parties were mutual. *East Line & R. River R. Co. v. Scott*, 72 Tex. 75, 13 Am. St. Rep. 758, 10 S. W. 102. In the case cited, the court said: "It is very generally if not uniformly held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will, and so without cause. *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. 431; *Wood, Mast. & S.* §§ 133, 136, and citations."

If the servant could quit without notice and the master could discharge him at will without notice, the effect of the statute in question would be to preserve the servant's unqualified right to leave the service without cause or notice, but to deny to the corporation the corresponding right to discharge without cause or notice.

The requirement that the corporation give to the discharged employee, on his demand, a statement of the "true cause" for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else, how could the "true cause" be given? The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of its liberty of contract and a denial of the equal protection of the law, in violation of this provision of the 14th Amendment to the Constitution of the United States: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

But the statute did not stop at the destruction of the corporation's right to discharge the employee without cause, but provided that in case the statement of cause should be refused, or if the cause stated was not the "true cause," the state might recover from the corporation a penalty of \$1,000.

But the legislature did not stop with that provision, for under the construction placed on the law by the court of civil appeals the discharged employee could recover damages by proving that the cause stated was not true. The proof in this case was that the



person who discharged Griffin acted upon the report of another who had oversight of Griffin's work, and there was no controversy that he acted upon that report, but Griffin was permitted to prove that he was capable and did good work, which denied to the employer the right to determine the efficiency of the servant.

In *St. Louis Southwestern R. Co. v. Hixon*, 104 Tex. 267, 137 S. W. 343, this court held that the law required a true statement of the fact which operated upon the mind of the officer or agent who discharged the employee, but did not require that the fact stated must have been true. Under this most favorable construction, the law is no less in violation of the constitutional right of equal protection of the law as secured by the 14th Amendment to the Constitution of the United States.

The eighth section of art. 1 of the Constitution of this state is in this comprehensive and clear language: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

The liberty to write or speak includes the corresponding right to be silent, and also the liberty to decline to write. *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 23 L.R.A. (N.S.) 247, 138 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 738, 23 S. E. 579. To say that one can be compelled at the instance of another party to do what he has the constitutional liberty to do or not is a contradiction that is not susceptible of reconciliation. In *Wallace v. Georgia, C. & N. R. Co.* cited above, the Georgia court tersely and clearly covers the entire ground thus: "A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the L.R.A. 1917B.

Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred."

We find no authority to the contrary, and argument could not add force to the reasoning of those courts. The cases cited are sufficient to require this court to declare the law in question void, but we believe that we should point out other grounds which demand the judgment of this court in support of our conclusion.

The act of the legislature under consideration violates that provision of the Constitution by many harsh requirements. We will point out some of them. This statute declares the corporation to be guilty of discrimination against the employee in the following instances; but we do not exhaust the harsh features of the law:

First. It confers upon the employee a right to recover damages if the corporation, upon his demand, should fail to give to him a statement of the "true cause" of his discharge, "or why his relationship to such company ceased." The corporation has the constitutional right to discharge without cause, and the legislature cannot destroy this right of contract.

Second. Where the employing corporation by any means, directly or indirectly, shall communicate to any other person or corporation any information in regard to the said employee who may seek employment of such person or corporation, and, upon demand of such employee, shall fail within ten days thereafter to deliver to him a complete copy of such communication, if any written, and if not a true statement of it, whether it was done by sign or other means, if not in writing, and shall also give the names and addresses of all persons or corporations to whom such communication shall have been made. This is not a part of any proceeding at law, not even the act of an officer.

Third. When any such corporation shall have discharged an employee and such employee demands a statement in writing of the cause of his discharge, the corporation or its officers are required within ten days after the demand, to give a true statement of the cause for so discharging the employee. If the employee voluntarily leaves the service of the corporation, he may demand in writing from such corporation a statement that he did voluntarily leave such employment. The corporation is required in making a statement of the departure of his employee, whether voluntary or otherwise, to give the number of years and months during which the employee was in the service of the corporation, and state every capacity or position in which he was employed and whether his services were

satisfactory in each capacity or not. And if the employee should lose or destroy his statement, then he has the right to demand of the corporation to make a true copy of the original statement and furnish it to him. We have found no precedent for this palpable disregard of the rights of corporations under the Constitution of the state.

Fourth. If any corporation or receiver doing business in this state, etc., shall have received any request, notice, or communication, in writing or otherwise, from any person, etc., preventing or calculated to prevent the employment of such person seeking employment, and if such corporation or agent shall fail to furnish such person seeking employment a true statement of such request, notice, or communication, etc., if otherwise than in writing make a true statement thereof, and a true interpretation of its meaning, the names and addresses of all such persons or corporations making such inquiry.

Fifth. When any corporation doing business in this state shall have discharged any employee and has failed to give such employee a true statement of the causes of his discharge, within ten days after demand is made therefor, and shall thereafter furnish any other person or corporation, etc., unless it be at the request of the latter, the corporation is charged with discrimination.

Sixth. Wherein a corporation, etc., doing business in this state, shall discriminate against any person seeking employment on account of his having participated in a strike.

The effect of the foregoing section of the statute is to deny to a corporation the right to refuse employment to a man who had participated in a strike on a railroad. This is a clear invasion of the constitutional right of an individual or corporation to determine for himself, or itself, the matter of employing or discharging any person already employed, and the legislature has no power to prescribe terms by which such employer shall be governed, either in employing or discharging a servant.

The soundness or justice of the reason which prompts refusal or discharge of an employee does not affect the question of the constitutional right to exercise that authority. It may be that the party is acting upon what is a mere "whim;" i. e., without any foundation in fact or right; but nevertheless his constitutional right to deny or terminate employment exists, and the legislature cannot, for any reason, make such action a crime on the part of the person or corporation exercising that constitutional power. *Gillespie v. People*, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. L.R.A. 1917B.

1007; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 460, 62 L.R.A. 178, 44 S. E. 300.

Seventh. Where any corporation or receiver doing business in this state shall give any information or communication in regard to any person who is making application for employment to the effect that such person had participated in a strike.

A failure to comply with any one of the demands above is characterized as a discrimination and is by law made a criminal offense; for which the state may recover \$1,000, and under the decision of the court of civil appeals the employee may also recover damages limited only by the capacity of the jury to calculate the amount.

The second, third, fourth, and fifth grounds of liability under the statute, each is in violation of the natural right to speak or be silent, or the liberty of contract secured by the Constitution of this state and of the United States. Of the great number of cases which have settled these questions adversely to the provisions of the act of the Texas legislature, we have cited sufficiently, because there is no conflict on the question.

The second and fourth grounds, as above stated, are most remarkable, for they invest the discharged employee with inquisitorial authority such as has not been intrusted to any officer, and would not be enforced if granted to any officer, except it be in a legal proceeding.

There being no suit pending in court, a private person in his own interest is empowered to demand of a corporation which has discharged him, to disclose to him that corporation's private correspondence, even the conversation which may have occurred between its agents or officers and other people. Originality in devising these provisions surely must be accorded to the legislature of Texas. We have found nothing like them elsewhere. In the conflict between labor and capital, the legislature has the limitation of its authority in the Constitution of the United States and the state, and the courts have no authority, save to keep both parties within the limits of their constitutional rights.

Beyond controversy, the act of the legislature is void, unless it can be sustained as an exercise of the police power. To test the validity of the law as an exercise of that power, we will first ascertain the scope of the power as exercised by state legislatures. We find no more thorough treatment than is embodied in *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648. In that case the city of Dallas sought to compel the railroad company to reconstruct its crossings upon streets so as to conform to the ordinances of the city. In support of a judgment in accordance with

the claim of the city, the police power was invoked, and Judge Williams, for the court, in his usual logical and forcible style, said:

"The power of the legislature to regulate the use of property and the carrying on of business so as to protect the health, safety, and comfort of citizens is recognized by all of the authorities, and its use is not to be defeated by the mere fact that loss or expense may be imposed upon the owners of the property or business. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. The numerous cases on the subject of nuisances in this court and elsewhere are but instances of the use of this power. So the decisive question, as we have said before, is whether or not the action of the city is sustained by the existence of facts affecting the public welfare sufficient to justify such an application of the police power, and the answer to this question determines the one made by respondent as to whether or not the action of the city constitutes due process of law.

"The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But, as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power fulfils this requirement only when the power is exercised for the purpose of accomplishing and in a manner appropriate to the accomplishment of the purpose for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of a power rests, and into the manner of its exercise; and if there has been an invasion of property rights, under the guise of this power, without justifying occasion, or in any unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures.

"It is therefore not true, as urged by plaintiff, that the judgment of the legislative body concludes all inquiry as to the existence of facts essential to support the assertion of such a power as that now in question. If this were true, it would always be within legislative power to disregard the constitutional provisions giving protection to the individual. The authorities are practically in accord upon the sub-

ject. A few quotations will indicate the scope of the inquiry as far as it can be abstractly defined. In *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 20, the law is thus stated by the Supreme Court of the United States: 'It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.'

"In *Lawton v. Steele*, 162 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499, Mr. Justice Brown, speaking for the court, said upon this subject: 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the court.'"

We have quoted thus freely, because by so doing the question is fully presented by Judge Williams in his usual forcible manner, and by the Supreme Court of the United States. There can be no pretense that the act under examination deals with "the real needs of the people in their health, safety, comfort, or convenience."

To add cases as authority would be useless, for this is a fundamental principle of free government and gains no force by the repetition of it by different courts. The

subject of legislation in this statute and its various provisions, as stated above, are purely personal as between the employee and the corporation, and do not directly affect the public, in health, safety, comfort, convenience, or otherwise.

The act is in violation of the Constitution of this state and of the United States, and is void.

It is ordered that the judgments of the District Court and of the Court of Civil Ap-

peals be, and the same are, reversed; and it is ordered that judgment be entered for the plaintiff in error.

Hawkins, J.:

From such careful study and consideration as I have been able to give to the constitutional questions which are here involved, I am not now prepared to express an opinion in this case, but, later on, will prepare and file same.

**Annotation—Constitutionality of statutes requiring the employer to furnish a discharged employee with a statement of the cause of his discharge.**

Upon the constitutionality of statutes restricting the right of an employer to discharge an employee, see annotation following Re Opinion of Justices, post, 1119.

That a statute which requires a statement to a discharged employee, of the cause of his discharge, is unconstitutional as a violation of the employer's right of free speech, is a proposition established by the courts in Georgia, Kansas, and Texas. Other courts have not passed upon the question.

There are strong dissenting opinions in the Texas cases; and, as shown in the note to Re Opinion of Justices, post 1119, there are also strong dissenting opinions in the cases there cited and relied upon as authority upon the question there under annotation.

The general question as to duty of employer to give recommend or clearance card to discharged employee was considered in note to Cleveland, C. C. & St. L. R. Co. v. Jenkins, 62 L.R.A. 922.

And on the question of employer's liability growing out of the giving or refusing information affecting the character or reputation of servant, see note to Wabash R. Co. v. Young, 4 L.R.A.(N.S.) 1091. See page 1096 for wording of statutes dealing with the subject generally.

In Wallace v. Georgia, C. & N. R. Co. (1894) 94 Ga. 732, 22 S. E. 579, it was held that a statute entitled, "An Act to Require Certain Corporations to Give to Their Discharged Employees or Agents the Causes of Their Removal or Discharge, When Discharged or Removed," is unconstitutional. The court said: "The public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public

but for private information as to the reasons for discharges and as to the import and authorship of all complaints or communications which produced or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."

And in Atchison, T. & S. F. R. Co. v. Brown (1909) 80 Kan. 312, 23 L.R.A. (N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346, it was held that a similar statute was violative of the state's Bill of Rights, which provides that "all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right." The court said: "It would seem that liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to speak freely." The court appears also to have upheld the contention that the statute was in conflict

with the 14th Amendment to the Federal Constitution, which refers to due process of law, etc., and that the statute was not within the police power of the state.

And see *Re Opinion of Justices*, post, 1119, where the court immediately touches upon the question here under consideration.

In *Crall v. Toledo & O. C. R. Co.* (1893) 7 Ohio C. C. 182, 3 Ohio C. D. 696, the court construed a statute somewhat similar to those here under consideration, but its constitutionality was not passed upon by the court.

The decision in *St. Louis Southwestern R. Co. v. GRIFFIN*, ante, 1108, has been followed in *Galveston, H. & S. A. R. Co. v. King* (1915) — *Tex. Civ. App.* —, 174 S. W. 335, and in *Galveston, H. & S. A. R. Co. v. State* (1914) — *Tex. Civ. App.* —, 175 S. W. 1096. In the latter case *Jenkins, J.*, dissented, notwithstanding the binding force of the higher court decision, and stated his arguments with such great clearness and force that it has been deemed advisable to set forth his entire opinion here: "On a former day of the present term of this court, this case was reversed and rendered upon the authority of *St. Louis Southwestern R. Co. v. GRIFFIN*, wherein the supreme court of this state held the act commonly known as the 'Blacklisting' Statute to be unconstitutional, and a motion for rehearing herein has been overruled by the majority of this court solely upon the authority of that case. Under ordinary circumstances, I would feel bound by a decision of our supreme court, whatever might be my views in reference thereto; but in the instant case I feel justified in declining to follow that honorable tribunal for the reasons hereinafter set forth. 1. The statute under consideration was held to be constitutional by the fifth court of appeals in *St. Louis Southwestern R. Co. v. Hixon* (1910) — *Tex. Civ. App.* —, 126 S. W. 338, and again by the fourth court of civil appeals in the *GRIFFIN CASE* (1913), — *Tex. Civ. App.* —, 154 S. W. 583. The constitutionality of the statute was challenged in the petition for writ of error in the *Hixon Case*, but was not passed on by the supreme court. The decision in the *GRIFFIN CASE*, was by a divided court. It thus appears that this statute has been held to be constitutional by three district judges, six judges of courts of civil appeals, and one supreme judge, and has been declared to be unconstitutional by only two members of the su-

preme court. For these reasons, not being able to concur in the views of the majority of the supreme court, I believe that the issue should be again submitted to the consideration of that honorable tribunal. 2. I regard the issue as to the constitutionality of this statute important, not only because it is always a serious matter to declare a statute unconstitutional, but because this statute affects in a vital manner the welfare of the 60,000 railway employees in Texas, the railway companies, and the entire citizenship of this state. This statute is based upon a condition which, perhaps, we should judicially recognize; viz., that railway companies refuse to employ those who have previously worked for other companies, who cannot bring a statement from their former employer as to why they quit its service. The railway companies are clearly within their rights in so doing. If this law is complied with, it will protect railway companies from incompetent employees, the public from the dire consequences that often result from the employment of incompetent or negligent persons, and faithful and competent employees from the oppression of railway corporations, and from the spite and prejudice of their vice principals. As was said by the supreme court of Kentucky in *Hundley v. Louisville & N. R. Co.* (1898) 105 Ky. 162, 63 L.R.A. 292, 88 Am. St. Rep. 298, 48 S. W. 429: One who follows 'a certain trade or calling for years may be almost unfitted for any other business. To deprive him of his trade or calling is to condemn not only him, but perchance a wife and children, to penury and want. Public interest, humanity, and individual rights, alike, demand the redress' for wrongs which are followed 'by such lamentable consequences.' I believe that it is within the police power to prevent the infliction of such wrongs. The power to deny an employee who voluntarily quits the service of a railroad company, or is discharged therefrom, a statement as to why he quit or was discharged, is, under existing conditions, the power to deny him the opportunity to labor in his vocation. This is a power that no just railroad manager ought to desire, and that no unjust manager should be permitted to exercise. 3. In the *GRIFFIN CASE*, the court said that an employer has the right to discharge an employee without cause and without notice. This is no argument against the statute under consideration. It does not attempt to deny or abridge such right. *Griffin's* cause of

action was not based upon his being discharged, with or without cause, but upon the railway company's giving him a false statement as to the cause of such discharge. 4. The court further says: 'The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him.' I do not so understand the law. The courts will not only refuse to enforce some contracts, but, in certain instances, will declare a contract to be a crime, as witness our antitrust statutes and statutes against the employment of persons to commit crimes. The citizen has the right of contract only so far as such right is not abridged by law or public policy, and the law may rightfully abridge the right of contract when the public welfare so demands. 5. In the *GRIFFIN CASE*, the court held that the Blacklisting Statute violates § 8 of art. 1 of our state Constitution in reference to free speech. Quoting from the supreme court of Georgia in *Wallace v. Georgia, C. & N. R. Co.* (1894) 94 Ga. 732, 22 S. E. 579, it says: 'The right to speak includes the corresponding right to remain silent.' The answer to this is that a limited right of free speech is expressly guaranteed by the Constitution, while the right of silence is not mentioned in that instrument, except in reference to compelling one to give evidence against himself. If such right exists, it must be found elsewhere than in the section of the Constitution referred to. Continuing the quotation from the Georgia case, the court says that this statute is 'violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial.' No such absolute right was ever enjoyed by any person in this or any other state or in any civilized country. Men are daily required to speak in courts and before grand juries, when they would prefer to remain silent. The article of the Constitution in reference to free speech declares that every person shall be responsible for the abuse of speech, and we have from the beginning had laws upon our statute books punishing such abuse, both civilly and criminally. Why should not the legislature have the power to punish the abuse of the right of silence? Silence under some circumstances is as positive a wrong as slanderous speech. Silence has frequently been held to amount to fraud or to an estoppel, whereby men have lost their property. 6. But the right of silence was not involved in the *GRIFFIN CASE*. L.R.A.1917B.

The railway company did not remain silent. It spoke, and, having voluntarily chosen to speak, good morals require that it should speak the truth. I cannot believe that a law enforcing such moral obligation is unconstitutional. 7. The court holds in the *GRIFFIN CASE*, that the statute under consideration is 'in violation of the constitutional right of equal protection of the law as secured by the 14th Amendment to the Constitution of the United States.' In what respect is not stated. Paraphrasing the invocation of Madam Roland to the statue of liberty erected on the site of the Bastille, we may well exclaim: 'Oh, Equal Protection of the Law! How often has lawless oppression sought shelter under thy wings!' As I see it, the 'Blacklisting' Statute does not interfere with railway companies in the existence of any right to which they ought to be entitled. It requires nothing but justice at their hands. As was said of a similar statute by the supreme court of Minnesota (*State ex rel. Scheffer v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759): 'It is the purpose of this law to protect employees in the enjoyment of those natural rights and privileges guaranteed them by the Constitution; viz., the right to sell their labor and acquire property.' Their labor is their property. Constitutions are made to protect rights, not to shield wrongs. With all due respect for our supreme court, for the reasons above stated, and for additional reasons to be found in the able opinion of Mr. Justice Moursund in *St. Louis Southwestern R. Co. v. Griffin* (1913) — Tex. Civ. App. —, 154 S. W. 583, I decline to follow the opinion in *St. Louis Southwestern R. Co. v. Griffin*, ante, 1108, and dissent from the action of my associates in overruling the motion for a rehearing herein."

In the *Hixon Case*, to which the dissenting judge refers as having been overruled by *St. Louis Southwestern R. Co. v. Griffin*, the court said: "Appellant, in support of its contention, cites the cases of *Wallace v. Georgia, C. & N. R. Co.* (1894) 94 Ga. 732, 22 S. E. 579, and *Acheson, T. & S. F. R. Co. v. Brown* (1909) 80 Kan. 312, 23 L.R.A. (N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346. These cases seem to hold a statute in many respects similar to the statute under consideration unconstitutional, in that it violates that clause of the Constitution securing to a citizen liberty of speech. It is said that liberty of silence is not less important than

liberty of speech, and that the company cannot be forced by legislative enactment against its will to disclose its private information. The decision in the Wallace Case was rendered by the supreme court of Georgia in 1894, and the statute under consideration was entitled, 'An Act to Require Certain Corporations to Give Their Discharged Employees and Agents the Causes of Their Removal or Discharge, When Discharged or Removed.' Acts 1890-91, p. 188. It authorized a recovery for \$5,000 as a penalty for their failure to comply with the statute. No injury seems to have been alleged by the plaintiff, but the suit was brought to recover the penalty arbitrarily fixed by the statute. The decision in the case of Atchison, T. & S. F. R. Co. v. Brown is by the supreme court of Kansas, and is based on the ruling in the Georgia case. It may be that the conditions existing in Texas at the time of the passage of the statute under consideration did not exist in Georgia at the time of the passage of the statute construed in the Wallace decision. The statute here under discussion was passed to meet and remedy an evil that had grown up in this state among railway and other corporations to control their employees. It seems that a custom had grown up among railway companies not to employ an applicant for a position until he gave the name of his last employer, and then write to such company for the cause of the applicant's discharge, if he was discharged, or his cause for leaving such former employer. If the information was not satisfactory to the proposed employer, he would refuse to employ the applicant. They could thus prevent the applicant, by failing to give a true reason for his discharge or blacklisting him, from procuring employment in either instance. Even if the statute construed in the cases cited were in all respects similar to the statute before us, we would not be inclined to follow those decisions. It was to compel the former employer to state the true cause of its employee leaving its service, and to prevent blacklisting, that brought about the passage of this statute. We have statutes in this state more exacting and drastic than the statute under discussion, which are being enforced daily, and no decision of the appellate courts is cited holding them unconstitutional. . . . As stated in our opinion, no part of the Federal or state Constitution is violated by this act. It is not ex post facto; does not impair the obligation of contracts; does

not authorize searches or seizures of persons or houses; provides for trial in open court, and thereby guarantees due process of law. It gives security of persons and property; does not take away the right of free speech or right to make, print, or publish one's own opinion. It does require, under certain conditions, that an employer shall speak the truth in regard to the ex-employee."

The Hixon Case was reversed in (1911) 104 Tex. 267, 137 S. W. 343, and the court in *ST. LOUIS SOUTHWESTERN R. CO. v. GRIFFIN*, ante, 1108, states the ground of reversal to be that the statute "required a true statement of the fact which operated upon the mind of the officer or agent who discharged the employee, but did not require that the fact stated must have been true." It would appear that the highest court for some reason did not take into consideration actual conditions existing in the state and the evils at which the statute was aimed. The statute assumes that the mere whim of the employer may be the "true cause" of the discharge, and it imposes no liability for the discharge even for a mere whim. But its object is to protect the employee from being driven, not out of the service of a particular employer, but entirely out of his chosen occupation by the mere whim of his employer. So, when the court says, "the requirement that the corporation give to the discharged employee, on his demand, a statement of the 'true cause' for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else how could the 'true cause' be given?" and makes that inference the basis for the holding that the statute destroys the corporation's right to discharge the employee without cause, and in that respect violates the contract clause of the Constitution, it must have disregarded the aim and effect of the statute; otherwise its argument would be merely begging the question. It approved its former holding that under the statute the "true cause" meant that which is true in the judgment of the official who discharged the employee.

So, if it be conceded that a statute which destroys the employer's right to discharge the employee for a mere whim (see *Re Opinion of Justices*, post, 1119, on this point) is unconstitutional because in violation of the contract clause, it does not follow that a statute requiring a statement of the true cause of the discharge for the purpose of destroying the presumption, known to be indulged

in by other employers, that every discharge is based upon undesirable characteristics found to exist in the employee or his work, is also unconstitutional, especially one under which the employer's judgment cannot be questioned. As to the constitutional right to remain silent when the welfare of others demands a statement, the dissenting judges have spoken. It will be observed that this particular statute merely aimed to prevent the nefarious practice of "black-

listing" and to change conditions under which the silence of the employer has the full force of blacklisting the discharged employee. The subject of blacklisting employees was considered in note to *Hundley v. Louisville & N. R. Co.* 63 L.R.A. 289, and on the question of legislation on blacklisting, see note in 4 L.R.A.(N.S.) 1123. The constitutionality of blacklisting statutes is, of course, not within the scope of the present note.  
J. W. M.

# MASSACHUSETTS SUPREME JUDICIAL COURT.

## RE OPINION OF JUSTICES.

(— Mass. —, 108 N. E. 807.)

### Master and servant — forbidding discharge of employee without hearing — constitutionality.

1. Forbidding a railroad company to discharge an employee upon information touching his conduct without an opportunity to be heard in the presence of the one furnishing the information deprives it of its constitutional right to liberty and to acquire property.

*For other cases, see Constitutional Law, II, b, 4, b, (2), in Dig. 1-52 N. S.*

### Constitutional law — special privilege — requiring hearing for railroad employees before discharge.

2. Railroad companies are deprived of the equal protection of the laws and special privileges are conferred upon their employees by forbidding the discharge of a railroad employee upon information furnished by any person without giving him an opportunity to be heard in the presence of the informer.

*For other cases, see Constitutional Law, II, a, 5, c, in Dig. 1-52 N. S.*

(May 3, 1915.)

**S**UBMISSION to the Justices of the Supreme Judicial Court of questions as to the validity of a bill pending in the Senate, prohibiting railroad companies from discharging employees without a hearing. Negative answers returned.

The senate order of April 23, 1915, requesting the opinion of the justices, is as follows:

"Whereas, there is pending in the senate a bill, printed as senate document No. 537, a copy of which is hereto annexed wherein it is provided that no employee of a rail-

road corporation shall be disciplined or discharged in consequence of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information; now, therefore be it

"Ordered, that the opinion of the justices of the supreme judicial court be required by the senate upon the following important questions of law:

"First. Is it within the constitutional power of the general court to enact legislation limiting the right of railroad corporations to discharge their employees for cause by annexing conditions thereto of the nature above set forth?

"Second. Is it within the constitutional power of the general court to enact legislation of the nature above set forth relative to the employees of railroad corporations, giving them as a class privileges not enjoyed by the rest of the community?

"Third. Are the provisions of senate bill No. 537 constitutional?"

To the Honorable Senate of the Commonwealth of Massachusetts:

We, the justices of the supreme judicial court, having considered the questions propounded by the order of April 23, 1915, copy of which is hereto annexed, respectfully answer them as follows:

The substance of the proposed statute to which the questions relate is to prohibit, under a heavy penalty, a railroad corporation from discharging an employee by reason of information touching his conduct, until after he has been given an opportunity to make a statement in the presence, of the person or persons furnishing the information. As a corporation can have no first-hand observation and can acquire information as to incompetency, inefficiency, or wrongful conduct of its employees only through some person, the proposed statute means that such a corporation never can discipline or discharge any of its employees for misconduct, no matter how flagrant, ex-

Note. — As to constitutionality of statutes restricting right of employer to discharge employee, see note following this case, post, 1122.  
L.R.A.1917B.



cept on his own confession, without giving him a hearing in the presence of the person affording the information, regardless of the fact whether that person be an employee or an entire stranger. Although the title of the bill refers to the "use of detectives," there is no such limitation in the body of the bill. It applies broadly to all persons who may furnish information, whether pure volunteers or others, even though it be wholly beyond the power of the railroad to produce the person furnishing the information, and even though that person may be a stranger to the railroad and decline for any reason, or be unable to confront the employee. The questions have been considered, however, upon the broad principles involved in the proposed bill, and not upon its details.

The 14th Amendment to the Federal Constitution prohibits the several states from depriving "any person of life, liberty, or property, without due process of law." The Supreme Court of the United States is the final authority upon the scope and meaning of these words. That court has said that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right." *Lochner v. New York*, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

In the opinion in *Adair v. United States*, 208 U. S. 161, at pages 174, 175, 52 L. ed. 436, 442, 443, 28 Sup. Ct. Rep. 277, 280, 13 Ann. Cas. 764, is found this interpretation: "While . . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law are subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser . . . to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, L.R.A.1917B.

to dispense with the services of such employee."

It was said in *Coppage v. Kansas*, 236 U. S. 1, at page 14, 59 L. ed. 441, 446, L.R.A.1915C, 906, 35 Sup. Ct. Rep. 243: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

In the application of these principles it has been held that the right to liberty and property secured by the 14th Amendment was impaired by a statute which prohibited the discharge of any employee because he was a member of a labor union. *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764. That decision recently has been reaffirmed in its application to a statute which made unlawful any requirement not to join or remain a member of a labor union as a condition of securing or continuing in employment. *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 906, 35 Sup. Ct. Rep. 240. The ground upon which these decisions rest is that the freedom of contract guaranteed by the 14th Amendment prohibits the imposition of such restraints upon the right of the employer to decline to employ at all, or to continue to employ, a person whom he does not desire. It there was said that "the employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment."

It seems to us impossible to say that the right of an employer to discharge an employee because of information affecting his conduct in respect of efficiency, honesty, capacity, or in any other particular touching his general usefulness, without first providing a hearing, stands on a different footing or is less under the shield of the Constitution than the right held to be secured in the *Adair* and *Coppage* Cases. Our own Constitution contains in several clauses similar guaranties of the right to acquire, possess, and protect property, which doubtless have substantially the same meaning in this respect as has the 14th Amendment to the Federal Constitution. It has been held that the right to acquire, possess, and protect property secured by our Constitution "includes the right to make reasonable contracts, which shall be

under the protection of the law." *Com. v. Perry*, 155 Mass. 117, 121, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126. In the absence of a contract, conspiracy, or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also, as a prerequisite to the exercise of his right, to enable the employee to make a statement in the presence of someone else,—a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute. The power of the legislature to require a hearing in connection with the discharge of one employed under the civil service law rests on the authority of the commonwealth to direct the conduct of its government and that of its political subdivisions. *Opinion of Justices*, 208 Mass. 619, 34 L.R.A.(N.S.) 771, 94 N. E. 1044.

Legislation similar to that of the proposed bill has been held unconstitutional in other jurisdictions. *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 102 Pac. 459, 18 Ann. Cas. 346. *Wallace v. Georgia*, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579. These reasons make it imperative to answer the first question in the negative.

Absolute equality before the law and the equal protection of the laws are principles established by the Constitutions of the United States and of this Commonwealth. *Opinion of Justices*, 211 Mass. 618, 98 N. E. 337. While reasonable classifications may be made by the legislature in the interests of the public health, public safety, and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws. Many such classifications have been upheld as not contrary to this principle. See for example *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856. But the proposed bill L.R.A.1917B.

has no reference to the safety of the traveling public. It applies only to one kind of common carrier, and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employees of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employees a specially privileged class, and subjects railroads, as to a matter having no special relation to their business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong ground for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter having no particular relation to the management of railroads would be arbitrary, and hence unwarrantable under the Constitution. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Opinion of Justices* (Re House Bill No. 1230) 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713. We are of opinion that the second question must be answered in the negative.

It is not necessary to consider whether the proposed bill offends against other provisions of the Constitution. For the reasons already stated, the third question must be answered, No.

May 3, 1915.

Arthur P. Rugg.  
Henry K. Braley.  
Charles A. De Courcy.  
Edward P. Pierce.  
James B. Carroll.

We subscribe to the answer given above to the second question. The legislation which is the subject of the first question is confined to employees of railroad corporations, is open to the objections set forth in the answer to the second question, and is disposed of by them. We do not intend to throw doubt upon the answer to the first question. Upon that matter we express no opinion. But we prefer not to express an opinion on a matter which it is not necessary to consider in answering fully the questions asked.

We subscribe to the answer to the third question.

William Caleb Loring.  
John C. Crosby.

**Annotation—Constitutionality of statutes restricting right of employer to discharge employee.**

Most of the cases passing upon the constitutionality of statutes restricting the right of the employer to discharge the employee involve statutes designed to prevent discrimination against labor unions, and the court, in *RE OPINION OF JUSTICES*, ante, 1119, makes that class of cases the main basis of the decision. That question is fully covered in the note to *Coppage v. Kansas*, L.R.A.1915C, 960, and the earlier note to which reference is there made. The other class of cases upon which the court relies, i. e., those involving the constitutionality of statutes requiring the employer to give statement of reason for discharge, have been collected in the note to *St. Louis Southwestern R. Co. v. Griffin*, ante, 1108. Reference to cases cited in these notes will show that the courts have always regarded labor as a commodity to be bought and sold precisely the same as other commodities, so that the right to discharge an employee is protected by the contract clause of the Constitution of the United States as well as by similar clauses found in the various state Constitutions, and the power to abridge that right is not within the police power of the state. Several strong dissenting opinions, however, give some indication of a disposition to give the state greater power in the matter (see note in 51 L.R.A.(N.S.) 361, and notes to which reference is there made), and to recognize that such legislation may, under some circumstances, fall within the police power of the state. (See dissenting opinions of Mr. Justice Day and Mr. Justice Holmes, in *Coppage v. Kansas*, L.R.A.1915C, 970; also see dissenting opinions in note to *St. Louis Southwestern R. Co. v. Griffin*, ante, 1108. Mr. Justice McKenna also filed an able dissenting opinion in *Adair v. United States* (1908) 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; likewise Mr. Justice Holmes. As the *Coppage* and the *Adair* Cases form the basis of the decision in *RE OPINION OF JUSTICES*, these dissenting opinions throw much light upon the question.) However it may be in the future, the past reveals a practically unbroken line of decisions holding that all statutes that in any way restrict the right of the employer to discharge the employee without any cause or without a hearing are unconstitutional as violations of the contract clause of the Constitution. L.R.A.1917B.

Courts have apparently taken the view that the employee is as much benefited by this unyielding principle as the employer is. In *State ex rel. Zillmer v. Kreutzberg* (1902) 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 S. W. 1098, the court said: "Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. . . . We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employee. In answering the question now before us, we may not forget the possibility of being called on to answer whether the legislature may make a criminal of the employee who quits, for example, because his employer joins a blacklisting association; because nonunion men or members of some other union are employed, or nonunion or forbidden machines or materials are used; because of an obnoxious foreman; because excessive hours of work are required; because compelled to trade at employer's store or board at his boarding house; or because of any other fact or conduct now considered entirely adequate reason for refusing or leaving a particular service. It must not be forgotten if, as counsel for the state argues, the laborer is too weak to meet the employer on equal terms in the field of contract, that he will be far more subject to the latter's control and oppression in the field of politics, and that laws of the above character will surely come, if within the proper province of the legislature, unless, as we have faith to believe, the character and the individuality of the wage earners of the country are sufficient to maintain their independence—both contractual and political—in a field of equal rights under the law, and of full liberty to each to sell and buy labor to and from whom he will."

In *State v. Nashville, C. & St. L. R. Co.* (1910) 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805, the defendant, a corporation, was indicted for having threatened to discharge a certain one of its employees for trading or dealing, as a customer, with a certain merchant,

under a statute that made it a criminal offense for any corporation, joint stock company, or association to discharge any employee or threaten to do so for voting or not voting at any election, or for or against any candidate or measure, or for trading or not trading with any particular person or class of persons. The statute was held to be unconstitutional

on the ground that it was class legislation and discriminated between corporations and individuals engaged in the same business. Other constitutional objections were raised, but not passed upon by the court. The case thus supports only the second point made in *RE OPINION OF JUSTICES*, ante, 1119. J. W. M.

# KENTUCKY COURT OF APPEALS.

ROBERT A. CHRESTE, Appt.,

v.

LOUISVILLE RAILWAY COMPANY.

(167 Ky. 75, 180 S. W. 49.)

## Attorney and client — contract procured by solicitation — validity.

1. The mere fact that a contract employing an attorney to perform legal services was procured through solicitation does not render it void as against public policy.

*For other cases, see Contracts, III. c, 1, in Dig. 1-52 N. S.*

## Same — lien — compromise of judgment — effect.

2. Where, by statute, an attorney has a lien on the judgment for his fees, a judgment debtor who compromises the claim for less than the face of the judgment, in the absence of the attorney whose contract entitled him to a percentage of the recovery, is answerable to the attorney for the prescribed percentage of the judgment rather than of the amount paid under the compromise.

*For other cases, see Attorneys, II. c, 2, in Dig. 1-52 N. S.*

(November 30, 1915.)

**A**PPEAL by intervening petitioner from a judgment of the Common Pleas Branch, First Division of the Circuit Court for Jefferson County, denying a motion for a new trial and for judgment non obstante veredicto, in a proceeding to enforce a statutory lien for an attorney's fee under a contract with his client. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Edwards, Ogden, & Peak, for appellant:

Appellee cannot defeat the appellant in the collection of his contract fee with his

**Note.**—As to the right of an attorney at law to solicit business, see annotation following this case, post, 1128.

Generally as to compensation of attorney, including liens and questions arising out of compromise of the action by the client, see Indexes to L.R.A. Notes, under the title, "Attorneys," section heading, "Compensation; lien." L.R.A. 1917B.

client Drake, although his contract with Drake may have been tainted with champerty.

*Stephens v. Farrar Bros.* 4 Bush, 13; *Robertson v. Shutt*, 9 Bush, 659; *Louisville & N. R. Co. v. Proctor*, 21 Ky. L. Rep. 447, 51 S. W. 591; *Proctor Coal Co. v. Tye*, 123 Ky. 381, 96 S. W. 512; *Hubble v. Dunlap*, 101 Ky. 419, 41 S. W. 432; 4 Cyc. 990; 6 Cyc. 882; *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822; *Rust v. Larue*, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Bowser v. Patrick*, 23 Ky. L. Rep. 1579, 65 S. W. 824; *Torrence v. Shedd*, 112 Ill. 477; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582, 8 N. W. 437; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274, 3 Am. Neg. Cas. 330; *Courtright v. Burnes*, 2 McCrary, 60, 13 Fed. 317; *Ætna L. Ins. Co. v. Week*, 163 Ky. 37, 173 S. W. 317.

Messrs. Frank P. Straus and Howard B. Lee, for appellee:

A contract of an attorney, secured through "solicitation," is unenforceable either against the client or a third person sought to be charged with it.

*Ingersoll v. Coal Creek Coal Co.* 117 Tenn. 263, 9 L.R.A. (N.S.) 283, 119 Am. St. Rep. 1003, 98 S. W. 178, 10 Ann. Cas. 829; *Cumberland Teleph. & Teleg. Co. v. Maxberry*, 134 Ky. 647, 121 S. W. 447; *Ætna L. Ins. Co. v. Week*, 163 Ky. 37, 173 S. W. 317; *Wehmhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288; *Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Roberts v. Yancey*, 94 Ky. 244, 42 Am. St. Rep. 357, 21 S. W. 1047; *Norris v. Evans*, 15 Ky. L. Rep. 77, 22 S. W. 328; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Louisville R. Co. v. Burke*, 149 Ky. 438, 149 S. W. 865.

A person sought to be charged with a contract is not a "stranger" to the contract.

*Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Cumberland Teleph. & Teleg. Co. v. Maxberry*, 134 Ky. 647, 121 S. W. 447; *Ætna L. Ins. Co. v. Week*, 163 Ky. 37, 173 S. W. 317; *Wehmhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288; 6 Cyc. § 882.

The fee of the attorney is regulated by the amount received by the client, not by the amount of the judgment.

*Leslie v. York*, 112 Ky. 712, 66 S. W. 751; *Schmitz v. South Covington & C. Street R. Co.* 131 Ky. 207, 22 L.R.A. (N.S.) 766, 114 S. W. 1197, 18 Ann. Cas. 1114; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Louisville R. Co. v. Burke*, 149 Ky. 437, 149 S. W. 865.

Clay, C., filed the following opinion:

Henry B. Drake, while a passenger on the line of the Louisville Railway Company, was injured. Through his attorney, Robert A. Chreste, he brought suit to recover damages. The trial resulted in a verdict and judgment in his favor for \$1,000. Chreste had a written contract with Drake by which the latter agreed to pay Chreste a fee equal to 50 per cent of the amount recovered on his claim. After the motion for a new trial was overruled, the railway company employed L. C. Sherrick to settle with Drake, the company agreeing to pay Sherrick \$175 if he would secure a settlement with Drake for \$300. Sherrick agreed to pay Drake \$125 of the amount received by him. Thereupon the settlement was made, Drake receiving \$300 from the company and \$125 of the \$175 paid by the company to Sherrick. At the same time Drake signed a contract releasing the company from all liability, and the company indorsed on the release an agreement to pay Chreste his fee. Thereafter Chreste, by intervening petition, sought to enforce against the railway company the statutory lien for his fee under his contract with Drake.

The company answered in two paragraphs. By paragraph 1 it pleaded that it had settled with Drake in full for the sum of \$300. This paragraph was stricken out by the trial court on the ground that, if Chreste was entitled to recover at all, he was entitled to recover an amount equal to 50 per cent of the judgment, or \$500. By paragraph 2 the railway company pleaded that Chreste's contract with Drake was procured solely through the persuasion and solicitation of an agent employed by Chreste, and that the contract was champertous, against public morals and public policy, and null and void. A demurrer to this paragraph was overruled. Thereupon Chreste filed a reply, denying the facts therein alleged.

The only issue submitted to the jury was whether or not the contract was obtained by solicitation. On this issue defendant's evidence was to the effect that the contract of employment was obtained three or four days after the accident, at the suggestion

and through the solicitation of one Sherrick, a representative of plaintiff. On the other hand, plaintiff's evidence tends to show that Drake intended all along to employ plaintiff, and that the contract was not entered into as the result of any suggestion or solicitation on the part of Sherrick. The jury found that the contract was obtained by solicitation. Thereupon the trial court entered judgment in favor of the railway company. Chreste's motion for a new trial and for a judgment non obstante veredicto being overruled, he appeals.

Other questions are presented, but we proceed to the main question, and that is: Is a contract between a lawyer and his client, obtained by solicitation on the part of the lawyer, valid, or is it contrary to public policy and therefore void?

The distinction between solicitors or attorneys and counsel or barristers, under the English law, as to the right of compensation for services, does not prevail generally in the United States, and the employment of counsel is held not to differ in its incidents, or in the rules governing it, from the employment of an agent in any capacity or business. *Mellon v. Fulton*, 22 Okla. 636, 19 L.R.A. (N.S.) 960, 98 Pac. 911, 2 R. C. L. p. 1032, § 114. Before an attorney undertakes the business of a client, he may contract with reference to compensation for his services, as no confidential relation then exists, and the parties deal with each other at arm's length.

A contract made under such circumstances is as valid and unobjectionable as if made between other parties not occupying fiduciary relations, and who are in all respects competent to contract with each other. Such a contract will be enforced, unless champertous, or contrary to public policy, or unless induced by fraud or misrepresentation, or unless, in view of the nature of the claim, the compensation is so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over the client; and the attorney, as a condition of enforcing the contract, is not bound to show that it was just, fair, and reasonable, as is often held to be his duty in case of contracts made after the inception of the relation of attorney and client. *Elmore v. Johnson*, 143 Ill. 513, 21 L.R.A. 366, 36 Am. St. Rep. 401, 32 N. E. 413; *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; *Rust v. Larue*, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; *Morehouse v. Brooklyn Heights R. Co.* 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377; *Pindall v. Waterman*, 84 Ark. 575, 120 Am. St. Rep. 87, 106 S. W. 964; 2 R. C. L. p. 1036, § 120.

Furthermore, there is no law prohibiting an attorney from contracting with his client respecting his fees, and such contracts, when fairly made, will be enforced; but in determining the validity and conclusiveness of contracts for compensation thus entered into after the commencement of the relation of attorney and client, the general rule applies that all transactions between an attorney and his client will, by reason of the confidential nature of the relation, be closely scrutinized by the courts, and are often declared to be voidable when they would be deemed unobjectionable between parties not sustaining the relation of attorney and client. *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82; 2 R. C. L. p. 1037, § 120.

There are numerous classes of contracts between an attorney and client which are held to be in contravention of public policy, and therefore invalid and unenforceable,—such as contracts for lobby services (*Houlton v. Nichol*, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715; *Weed v. Black*, 2 MacArth. 268, 29 Am. Rep. 618; *McBratley v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; and *Stroemer v. Van Orsdel*, 74 Neb. 132, 4 L.R.A.(N.S.) 212, 121 Am. St. Rep. 713, 103 N. W. 1058, 107 N. W. 125); or for services to obstruct or prevent the administration of justice (*Weber v. Shay*, 56 Ohio St. 116, 37 L.R.A. 230, 60 Am. St. Rep. 743, 46 N. E. 377, and *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391); or for services in procuring liberation or pardon of convicts (*Hatzfield v. Gulden*, 7 Watts, 152, 31 Am. Dec. 750, and 2 R. C. L. p. 1043, § 124); or for services affecting marital relations, such as an agreement to obtain a divorce in consideration of a certain portion of the alimony awarded. (*McConnell v. McConnell*, 33 L.R.A.(N.S.) 1094, and note 98 Ark. 193, 136 S. W. 931 and 2 R. C. L. p. 1044, § 125); or contracts in restraint of settlement or compromise by client (*Burho v. Camichiel*, 117 Minn. 211, 135 N. W. 386, Ann. Cas. 1913D, 305, and 2 R. C. L. p. 1044, § 126).

In addition to the foregoing, it is generally held that a contract between an attorney at law and a layman, by which the latter agreed to solicit business for the former in consideration of a share of the fees, is void as against public policy. *Alpers v. Hunt*, 86 Cal. 78, 9 L.R.A. 483, 21 Am. St. Rep. 17, 24 Pac. 846; *Langdon v. Conlin*, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834; *Re Clark*, 184 N. Y. 222, 77 N. E. 1, affirming 108 App. Div. 150, 95 N. Y. Supp. 388. These decisions are based either on statutes providing for disbarment of at-

torneys who lend their names to be used in legal proceedings by persons who are not attorneys, or forbidding the promise or gift of a valuable consideration to any person as an inducement to placing a claim for prosecution in the hands of an attorney, or upon statutes clearly showing a legislative intent to provide that no persons other than licensed attorneys shall receive fees for legal services. In none of these cases was the question of solicitation involved, and in one of them at least (*Re Clark*, supra) the court apparently admits "that the law permits attorneys to solicit business."

We have been able to find only one case tending to sustain the doctrine that contracts obtained through solicitation are contrary to public policy and void, and that is the case of *Ingersoll v. Coal Creek Coal Co.* 117 Tenn. 263, 9 L.R.A.(N.S.) 282, 119 Am. St. Rep. 1003, 98 S. W. 178, 10 Ann. Cas. 829. In that case the facts were these: Several persons were injured or killed in an explosion which occurred at the Fraterville mine. A representative of the law firm of *Ingersoll & Peyton* went to the scene of the disaster and actively solicited parties having rights of action against the company growing out of the explosion to intrust their cases to the firm of *Ingersoll & Peyton*. He saw a number of widows and others whose husbands and next of kin had been killed in the explosion, and sought, as other lawyers were doing, to obtain contracts authorizing his firm to bring suits. He made several trips to the scene of disaster for that purpose, and secured about forty cases for his firm. About one hundred and fifty other cases were secured by other lawyers who were there for the same purpose. The representative obtained written contracts from the parties, and these contracts stipulated that the firm was to receive a certain specified per cent of the recovery obtained in each case. After the suits were filed on the contracts, the defendant settled with plaintiffs by paying about \$320 in each case. Messrs. *Ingersoll & Peyton* then brought suit to recover their fees of the defendant. The chancery court found in favor of plaintiffs. On appeal to the court of chancery appeals the decree was affirmed. On appeal to the supreme court the judgment was reversed. In discussing the question the court said: "We cannot agree to several propositions advanced by complainants. We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a 'business' instead of a 'profession,' and that it is now allowable to resort to

the practices and devices of business men to bring in business by personal solicitations, under the facts shown in this case.

"As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented, as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety and inconsistent with the character of the profession. We cannot—we dare not—lower the standard of the legal profession to that of a mere business, in which fleetness of foot or the celerity of the automobile determines who shall be employed.

"The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity they fly to anyone promising relief, when if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice.

"It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene, with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct, this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule, officers of the court, nor do they occupy that high status which the law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement under such circumstances, this court would not hesitate to disbar him.

"It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a precedent be set, and in such terms as may not be mistaken or misunderstood. The argument made in this case, that such practice is not looked upon with disfavor L.R.A.1917B.

by many members of the profession, that it is freely indulged in by prominent attorneys, that it is necessary to successful practice, and that the court of appeals, while depreciating the practice, does not condemn it,—these and other arguments call for a full and emphatic expression from this court in this case."

It will be observed that the court declined to pass on the question whether or not an attorney could solicit business, but based its conclusion solely on the particular facts of the case, which the court held showed acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties; in other words, the case is not authority for the position that contracts obtained by solicitation alone are contrary to public policy, but is authority for the position that contracts obtained by solicitation from persons who, because of their great bereavement, are in no condition to consider their rights, are contrary to public policy. Of course, where the circumstances tend to show that a contract of employment was obtained by fraud, or misrepresentation, undue influence, or imposition of any kind, an entirely new element is introduced into the case, which, regardless of the question of solicitation, would of itself be sufficient to avoid the contract as between the parties. In the case under consideration, there is no claim that the contract of employment was obtained by such means. Therefore we have to deal only with the question of solicitation. As before stated, we have been unable, in rather an extensive research, to find a single case holding that solicitation alone renders a contract of employment invalid. On the contrary, we find some authorities holding adversely to such contention. Thus, in *Dunne v. Herrick*, 37 Ill. App. 180, it was held that a contract to pay an attorney one half of the amount recovered for personal injury was valid and binding on the injured party, and she could not recover from the attorney more than one half of the amount collected by him, although it appeared that his clerk solicited the injured party to put the claim in the attorney's hands. In *Bunn v. Guy*, 4 East, 190, 102 Eng. Reprint, 803, 1 Smith, 1, 7 Revised Rep. 560, a practising attorney by the name of Carpenter agreed, for a valuable consideration, to relinquish and turn over his business and recommend his clients to two other attorneys by the names of Bunn and Guy. The question arose in chancery concerning the marshaling of assets, and a case stating the above contract was sent by the Lord Chancellor to the court of King's bench for its opinion. That court held the contract valid. This ruling was

followed in *Candler v. Candler*, Jacob, 225, 37 Eng. Reprint, 834, 6 Madd. Ch. 141, 56 Eng. Reprint, 1045, in an opinion by Lord Eldon. He, while expressing his pleasure over the fact that the court of King's bench had so decided, adds that he never could entirely reconcile himself to the doctrine.

Public policy is a variable quantity. It varies with the habits, capacities, and opportunities of the public. It often changes as the laws change, and therefore new applications of old principles are required. A contract is not void as against public policy unless it is injurious to the public, or contravenes some established interest of society. The public policy of a state is determined by its Constitution and statutes, and where these are silent, by the decisions of its courts. *Davies v. Davies*, L. R. 36 Ch. Div. 359, 56 L. J. Ch. N. S. 481, 56 L. T. N. S. 401, 35 Week. Rep. 697; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 978; *Union Cent. L. Ins. Co. v. Spinks*, 119 Ky. 261, 69 L.R.A. 264, 83 S. W. 615, 84 S. W. 1160, 7 Ann. Cas. 913. The varying views of the courts on the question of public policy led Mr. Justice Burrough, in *Richardson v. Melish*, 2 Bing. 229, 252, 139 Eng. Reprint, 294, to remark that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." For this reason it is the general rule that courts should hold themselves bound to the observance of extreme caution when called upon to declare a transaction void on the ground of public policy and prejudice to the public interest. *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761; *Warren v. Bouvier*, 68 Misc. 150, 124 N. Y. Supp. 641. We find no provision of the Constitution or of our statutes that directly or indirectly forbids an attorney from soliciting business. We find no decision of this court holding that such a contract is contrary to public policy. For the first time we are called on to deal with the question. In deciding every case, courts should project themselves into the future and anticipate, if possible, the probable consequence that will follow their decisions.

There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; other by asking their friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations, with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in L.R.A.1917B.

person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn? We recall one case where some parties visited an old lawyer and asked him what they should do. He replied that they ought to employ a lawyer. Thinking that the case was too small for him to take, they asked him to recommend a lawyer. He replied: "I will be glad to attend to the matter for you." On which side of the dividing line would such solicitation fall? If it be lawful for an attorney to send out announcement cards, or insert an advertisement in the newspaper, or buy stock in a corporation, with the understanding that he is to be employed as counsel, or ask his friends to recommend him for employment by firms or corporations, how can it be said that, if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy? In saying this we are not unmindful of the fact that what is usually termed "ambulance chasing" does not comport with the highest ideals of the profession. We do not wish to be understood as sanctioning such conduct. On the contrary, we take advantage of this occasion to express our unqualified disapproval of this method of obtaining law business. But it must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of an attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and yet it may fall far short of being so injurious to the interest of the public, as to invalidate a contract of employment thus obtained. While such conduct may sometimes result in the employment of the unworthy, the consequences that would follow the rule that mere solicitation is contrary to public policy would frequently be antagonistic to the public interest, in that it would prompt solvent firms or corporations to make unfair settlements in the absence of counsel, in the hope that the fee of the attorney might be defeated by a plea that the contract of employment was obtained by solicitation.

Considering the difficulty of fixing the dividing line between what is proper and improper solicitation, the uncertainty that the



doctrine would introduce into all contracts between attorneys and their clients, the fact that solicitation is not condemned at common law or denounced by our Constitution or statutes, and the further fact that it is difficult to perceive upon what theory it can be said to be clearly injurious to the public good, we conclude that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence, or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy. It follows that the second paragraph of defendant's answer presented no defense, and that the demurrer thereto was improperly overruled.

The next question is: How much is plaintiff entitled to recover of the railway company?

Section 107 of the Kentucky Statutes is as follows: "Attorneys at law shall have a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or, in the absence of such agreement, for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee; and if the records show the name of the attor-

ney, the defendant in the action shall have notice of the lien; but if the parties before judgment, in good faith, compromise or settle their differences without the payment of money or other thing of value, the attorneys shall have no claim against the defendant for any part of his fee."

This is not a case where settlement was made with the client prior to judgment; nor is it a case where the judgment debtor is insolvent. It is a case where there was a judgment for \$1,000, and a solvent judgment debtor settled with the plaintiff for \$300. In such a case the amount of the judgment, and not the amount of the compromise, controls; in other words, if the judgment debtor settles with the judgment creditor, in the absence of the creditor's attorney, for less than the amount of the judgment, he does so at his peril, and cannot thereby deprive the attorney of any portion of the fee to which he is entitled under and by virtue of his contract of employment. *Louisville & N. R. Co. v. Proctor*, 21 Ky. L. Rep. 447, 51 S. W. 591; *Gray v. Graziani*, 165 Ky. 771, 178 S. W. 1070. As Chreste's contract between him and Drake called for a fee equal to 50 per cent of the amount of recovery, and as Drake recovered a judgment for \$1,000, it follows that Chreste is entitled to recover of the railroad company one half of the amount of the judgment, or the sum of \$500.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

Petition for rehearing denied.

### **Annotation—Right of attorney at law to solicit business.**

The above question is considered in the note to *Ingersoll v. Coal Creek Coal Co.* 9 L.R.A.(N.S.) 282, to which this annotation is supplementary.

As to champertous contracts of laymen, see annotation to *Rohan v. Johnson*, L.R.A. 1916E, 64.

#### **In general.**

As a matter which may affect the conclusion, both in actions to enforce contracts and in disbarment proceedings, attention is called to a distinction which has been recognized by some courts between solicitation of business by attorneys personally and solicitation by them through persons whom they have employed to procure business for them, the right of attorneys to solicit personally being considered in a more favorable light than the practice of solicitation through runners.

This distinction was strongly emphasized in *Chreste v. Com.* (1916) 171 L.R.A.1917B.

*Ky. 77*, 186 S. W. 919, in which the court regarded *CHRESTE v. LOUISVILLE R. Co.* ante, 1123, as a case where the right of an attorney personally to solicit business was involved, and said: "But there is a very wide difference between the unprofessional and undignified practice of personal solicitation of business and the indefensible and vicious practice of employing agents and runners who are not lawyers to go about the country soliciting business and stirring up strife and litigation for a stipulated consideration or a contingent fee. Such agents and runners as these are not restrained in their activities by any professional or ethical sense of propriety. Their sole object is to secure clients for their employers, and they use in this effort such arts and schemes as will get results, without giving any thought or attention to the disturbing and objectionable nature of the business in which they are

engaged. The friends, acquaintances, and associates of an attorney have, of course, the unquestionable right to sound his praises and divert to him such clients as they can persuade in a legitimate way to engage his services. But there is a manifest difference between securing business through the influence and efforts of friends, acquaintances, and associates, and securing it through the methods employed by the strictly commercial enterprise of hired agents. And it would seem at first impression to strike any fair-minded man, whether lawyer or not, as being highly improper for an attorney to have agents or runners to go about and make their living by securing for him employment in cases he would not otherwise get. It is entirely outside of the legitimate functions of an attorney to incite litigation, although it should be said that there are few who indulge in this unprofessional conduct, and obviously it is much more reprehensible for an attorney to hire another, and often irresponsible, person to do this for him. It would also be idle to say that solicitors such as Sherrick and Saunders confined their efforts merely to persuading prospective clients, who had already made up their minds to litigate, to engage the services of the attorney they represented, without in any way endeavoring to induce them to bring a suit or present a claim or demand. When men accept employment to render such service as these men were expected to render, and their pay depends on the volume of business they can get for their employer, everybody knows that many of them will use every means possible to obtain the business without any regard to the method that may be used to secure it. And it is too plain for argument that, under a just and enlightened administration of the law, practices like this which it is charged Chreste engaged in should not be tolerated by officers of the court."

**As affecting contract.**

See also cases in note in 9 L.R.A. (N.S.) 282.

The personal soliciting of business by an attorney has been held not to render the contract of employment obtained thereby unenforceable.

Thus it will be noticed that in *CHRESTE v. LOUISVILLE R. Co.* it was decided that the fact that a contract by which an attorney was employed to perform legal services was secured through solicitation did not render it void as against public policy, and that the contract L.R.A.1917B.

might be enforced by the attorney. There was evidence in this case that the soliciting was done by a representative of the attorney, but in *Chreste v. Com. (Ky.) supra*, the court refers to the case as one of personal solicitation.

And in *Johnston v. Great Northern R. Co. (Minn.) post*, 1140, it was also held not against public policy as champerty or maintenance for an attorney to solicit business, or to advance money to a poor client for his living expenses during litigation, or to advise a client against the settlement of his case, and the right of the attorney to recover on a contract entered into in this manner was sustained. It appears in this case that the attorney employed solicitors, but it is not clear whether the soliciting in question was done by the attorney personally, or through his employees. The propriety of advancing money to a client as a distinct point is not within the scope of the note.

But recovery for services has been denied an attorney where it appeared that his employment was obtained through solicitation by one not an attorney with whom the attorney had entered into an agreement to procure business for him.

Thus in *Gammons v. Johnson (1899) 76 Minn. 76, 78 N. W. 1035*, an action by an attorney to recover for services performed and money expended for a client, it was held error to exclude evidence that the plaintiff and a layman were strangers to parties having claims against a railroad, and had no object in intermeddling therewith except a speculative one; that they entered into a systematic scheme to hunt up claims against the railroad company which the original holders would probably never have asserted, and induced certain claimants, among others the defendant, to bring actions; that the contract with such claimants authorized the layman to employ an attorney and prosecute the suits at his own expense and charge the claim owners nothing for services unless their claims were collected. The court said: "According to the facts alleged and offered to be proved, it consisted of an unlawful and barratrous systematic scheme to work up and instigate wholesale vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers, and in which they had no interest, except a speculative one in the pecuniary profit which they might derive from the litigation which they had instigated, and which in all probability never would have

been instituted except for their officious intermeddling. The illegality of the conduct of the parties enters into the very inception of the scheme by which the litigation itself was instigated and but for which it would never have existed. Even if the special written contracts regarding compensation be set aside or ignored, this original vice, in the very inception of the scheme, would still exist in full force. To hold that a party can thus illegally stir up and instigate litigation, and yet obtain the benefits of it by ignoring the special contracts and bringing suit upon a quantum meruit for services performed in prosecuting the litigation which he has unlawfully instigated, would be a travesty on justice, and to permit a party to do indirectly what he cannot do directly. It is unnecessary to consider whether the course of conduct alleged and offered to be proved would be a ground for the disbarment of an attorney. It is, however, so clearly against public policy, that the courts ought not to enforce such a contract, or aid a party in recovering the fruits of such a speculative and vicious scheme. If defendant can prove what he alleges in his answer, and what he offered to prove, it would constitute a complete defense to each and all of the causes of action set up in the complaint. It was therefore error for the court to exclude the evidence."

This case was followed in *Gammons v. Gulbranson* (1899) 78 Minn. 21, 80 N. W. 779, where it was held that the attorney connected with the illegal scheme mentioned for soliciting claims could not recover for services rendered in connection with them.

The attorney in this case, after the decision in *Gammons v. Johnson* (Minn.) supra, obtained new contracts from the claimants, running to himself instead of the layman, which were almost identical with the former contracts. It appeared that the layman was a party to the substitution, and that the same person who had acted as agent to procure the original contracts for the layman was employed as agent to procure the new contracts running to the attorney; and the facts were held sufficient to show conclusively that the attorney was cognizant of, and a party to, the illegal scheme.

And in some cases it has been held that no recovery could be had against the attorney for services rendered under a contract to solicit business for him.

Thus it has been held that a contract by which an attorney undertakes, in consideration of another's procuring him to L.R.A.1917B.

be appointed special counsel in certain litigated cases against the United States, and assisting in the preparation of such cases, to pay one half of his fees received from such cases, is contrary to public policy and void and cannot be enforced against the attorney. *Meguire v. Corwine* (1879) 101 U. S. 108, 25 L. ed. 899.

Likewise, a contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void; and the parties being in *pari delicto*, no recovery can be had on it by the layman to recover a portion of moneys received by the attorney on account of business brought to him by the layman. *Holland v. Sheehan* (1909) 108 Minn. 362, 23 L.R.A.(N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687.

And a contract between an attorney and one not an attorney, by which it is agreed that in consideration of one third of the amount the attorney receives by reason of the employment the other shall procure the attorney's employment, by persons interested in an estate, to prosecute certain suits, is void as against public policy, although the persons employing the attorney have knowledge of the contract for procuring the attorney's employment, and although one of the persons interested in the suit is a relative of the person undertaking to secure the attorney's employment, and no recovery can be had against the attorney on such contract. *Ford v. Munroe* (1912) — Tex. Civ. App. —, 144 S. W. 349.

In *Irwin v. Currie* (1902) 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161, it was recognized that there was a violation of a statute forbidding an attorney at law to promise or give to any person a valuable consideration as an inducement to placing, or in consideration of having placed, in his hands a demand for the purpose of having an action brought thereon, where a layman agreed with an attorney to procure his employment in prosecuting certain claims for a certain percentage; but it was held that the layman might recover the agreed compensation, as the parties were not in *pari delicto*.

In *Hirshbach v. Ketchum* (1896) 5 App. Div. 324, 39 N. Y. Supp. 291, there was held to be a violation of the statute involved in the preceding case where an attorney entered into a contract by

which the other party undertook to procure the attorney's employment by a firm for the purpose of recovering certain claims in consideration of a certain percentage of the amount recovered, and by which the attorney agreed to pay the person procuring his employment one half of the amount to which the attorney became entitled; but it was held in this case that no recovery on the contract could be had against the attorney.

The judgment in *Hirshbach v. Ketchum* (N. Y.) supra, was held *res judicata* in *Hirshbach v. Ketchum* (1903) 84 App. Div. 258, 82 N. Y. Supp. 739, where the right to recover was based upon the same contract as that involved in the former case, although recovery was sought for other and different moneys. It will be noticed, however, that the decision in the case in 5 App. Div. 324, was overruled in *Irwin v. Currie* (N. Y.) supra, where a recovery was allowed by the person with whom the attorney had contracted, on the ground that the parties were not *in pari delicto*.

#### As ground of disbarment.

For advertising as ground of disbarment, see annotation to *Re Schnitzer*, 33 L.R.A.(N.S.) 941.

There is obviously a distinction between solicitation by an attorney personally, in a fair manner, and solicitation accompanied by fraud, deception, and unfairness. The latter is clearly unprofessional and unlawful, and has been so considered in disbarment proceedings.

Thus, where an attorney obtained admission to hospitals in which there were patients who had been injured in a railway accident, by making false and misleading statements, and induced such patients to sign contracts when they were not in a condition to understand what they were doing, and advised them to simulate more serious injuries than they had actually sustained for the purpose of enhancing damages, and in disbarment proceedings assumed a contemptuous attitude towards the referee and court, his conduct was held to constitute ground for disbarment, when taken in connection with the fact that he had previously been before the court charged with unprofessional conduct. *Re Welch* (1913) 156 App. Div. 470, 141 N. Y. Supp. 381.

And where an attorney knows of testimony material to a case on trial, and approaches the counsel engaged in the case and states that he knows of such testimony, but will not disclose it unless

he is employed in the case and receives a contingent fee, he is guilty of unprofessional conduct warranting punishment. *Chreste v. Com.* (1916) 171 Ky. 77, 186 S. W. 919.

And a lawyer is guilty of unprofessional conduct justifying his suspension or disbarment where, in an endeavor to secure employment in the prosecution of a claim, he visited the home of a minor who had been injured, and, upon the refusal of the minor's parents to employ him, and after being told that the case was in process of settlement, procured the minor to go with him, and falsely stated to him that it would be necessary for him to have a guardian appointed, and that he could not have either his mother or father appointed, but must have a court official, although the minor desired the appointment of his father or mother. *Lenihan v. Com.* (Ky.) post, 1132.

Apart from statute, it has been held that the employment by an attorney of a layman to solicit the attorney's employment by persons who have been injured, in consideration of the payment to the layman of a stated sum per week and the allowance of an unlimited expense account, constitutes unprofessional conduct warranting the disbarment of the attorney. *Chreste v. Com.* (Ky.) supra.

In New York a statute forbids attorneys giving laymen a consideration for soliciting business.

Thus in *Re Welch* (N. Y.) supra, a disbarment proceeding, there was held to be a violation of a statute prohibiting attorneys from promising or giving laymen a valuable consideration for procuring business, where an attorney approached the wife of a person injured in a railway accident, who was in a hospital, and asked her if she would go among the other patients who were injured in the accident and recommend him as an attorney to them, and stated that he would make it worth her while if she would induce such persons to intrust their cases to him.

And in *Re Shay* (1909) 133 App. Div. 547, 118 N. Y. Supp. 146, affirmed in (1909) 196 N. Y. 530, 89 N. E. 1112, § 74, also a disbarment proceeding, the statute involved in the preceding cases was held to be violated where an attorney entered into a contract with persons who were not attorneys at law by which he agreed to pay them, for procuring contracts by which he was retained to prosecute actions at law, a percentage of his fees received for prosecuting the actions.

It was contended in this case that the fact that the lawyer had employed the solicitors to do other work for him in connection with his office, for which he paid them a salary, in some way affected the case; but the court refused to concur in this contention, stating that the only exception in the statute related to agreements between two attorneys to divide the compensation to be received in a case.

It was urged in this case in extenuation of the offense that it was a practice common among members of the profession engaged in the prosecution of negligence cases to employ solicitors, and that it was unfair to visit upon the offender who had first been brought before a court upon a charge of this character the extreme punishment of disbarment, and the majority of the court were of the opinion that this fact should be considered, and held that, instead of disbarment, the respondent should be suspended from practice for one year.

The warning sounded in this case was referred to in *Re Newell* (1916) 174 App. Div. 94, 160 N. Y. Supp. 275, where an attorney who employed a layman to solicit retainers in negligence cases was held guilty of unprofessional conduct justifying his disbarment, irrespective of any statute.

It was also held in this case that an attorney who entered into an agreement with a railroad employee, whereby the latter undertook to disclose telegraphic communications to the railroad containing the particulars of accidents which had occurred, to the end that the attorney might have his ambulance chaser at the place of the accident as soon as possible to obtain cases against the railroad, was guilty of vicious and unprofessional conduct.

In *Re Newman* (1916) 172 App. Div. 173, 158 N. Y. Supp. 375, a disbarment

proceeding, there was held to be a violation of the statute involved in the preceding cases, where it appeared that an attorney, at the suggestion of the head of a collection agency, entered into an agreement with it by which the attorney was to receive a certain percentage on claims which the collection agency turned over to him and which he collected, and was to allow the agency a stated percentage. It was argued for the attorney in this case that he was employed solely as the attorney of the collection agency, which agreed to allow him for his services one half of the fees which the agency charged its customer; that the arrangement was brought about at the instigation of the manager of the collection agency; and that the attorney had no personal relations with the customers of the agency, his only client being the agency itself. The court stated that the difficulty was that in the court proceedings which he had instituted he did appear as the attorney of record of the individuals who owned the claims and prosecuted the claims of the individuals, and that he was the attorney of the plaintiffs in the actions.

With reference to the arrangement whereby the attorney retained 20 per cent for services in collecting a claim and agreed to pay 10 per cent to the collection agency, the court stated that whether it was looked at as a payment by the attorney of a proportion of his fees to the agency procuring the claims, or whether the 10 per cent which he retained was regarded as compensation paid by the collection agency, there was a splitting of fees between an attorney and a person not an attorney and not competent to practise law, for legal services rendered to a third person whose attorney of record he was and toward whom the relation of attorney and client legally existed. J. T. W.

#### KENTUCKY COURT OF APPEALS.

JOSEPH LENIHAN, Appt.,  
v.

COMMONWEALTH OF KENTUCKY.

(165 Ky. 93, 176 S. W. 948.)

**Attorney — disbarment — fraud to secure business.**

1. An attorney may be suspended for securing business by calling upon an injured

infant, and, upon refusal of its parents to bring action for the injury, asking permission to take it to have the wound examined, and while having it in his possession securing the appointment of a stranger as guardian after informing it that neither of its parents could act as such.

*For other cases, see Attorneys, I. b, in Dig. 1-52 N. S.*

**Same — who may institute proceedings.**

2. The judge of any branch of a court of general jurisdiction in which an attorney

**Note.** — As to right of attorney at law to solicit business, see annotation following *Chreste v. Louisville R. Co.* ante, 1123.

Generally as to admissibility of evidence L.R.A.1917B.

as to character and reputation, see Indexes to L.R.A. Notes under the title "Evidence," subtitles "Relevancy and Materiality," "Character and Reputation."

has been admitted to practise law may file an information, on affidavits presented to him, to disbar an attorney for unprofessional conduct.

*For other cases, see Attorneys, I. b, in Dig. 1-52 N. S.*

**Evidence — affidavit — disbarment proceeding.**

3. The affidavits upon which an information to disbar an attorney are founded are not admissible in evidence before the jury impaneled to try the facts in the disbarment proceeding.

*For other cases, see Evidence, IV. g, in Dig. 1-52 N. S.*

**Same — character of accused.**

4. Evidence of the previous good reputation of an attorney, for honesty, probity, and good moral character is admissible in evidence in a proceeding to disbar him for an alleged attempt to secure business by getting possession of an injured infant through false representations, and having a guardian appointed for him without the parents' knowledge or consent.

*For other cases, see Evidence, XI. c, in Dig. 1-52 N. S.*

(May 27, 1915.)

**APPEAL** by defendant from a judgment of the Common Pleas Branch First Division of the Circuit Court for Jefferson County in favor of the Commonwealth in a proceeding for the disbarment of defendant for an alleged attempt to secure business by fraud. Reversed.

The facts are stated in the opinion.

Messrs. William A. Perry and A. J. Bizot for appellant.

Messrs. A. Scott Bullitt, Elmer C. Underwood, and Hugh B. Fleece for the Commonwealth.

Carroll, J., delivered the opinion of the court:

This is a disbarment proceeding instituted by Judge William H. Field, one of the judges of the Jefferson circuit court, against the appellant, Joseph Lenihan, an attorney at law. Upon a trial of the case Lenihan was found guilty, and it was adjudged: "That the right, license, and authority of the defendant, Joseph Lenihan, to practise as attorney or counselor at law in any of the courts of the commonwealth of Kentucky be and the same is hereby revoked, and said defendant is now hereby forever disbarred as an attorney or counselor at law in the commonwealth of Kentucky."

On this appeal by Lenihan from the judgment of disbarment a reversal is asked upon several grounds that will be later noticed; but, before taking them up, the information, accompanying affidavits, and the effect of the evidence heard on the trial, will be

set forth, so that the nature of the accusation and the errors assigned for reversal may be well understood.

The information recited that:

The commonwealth of Kentucky, upon information contained in the affidavits of Herbert Semar, Chris Semar, and Mrs. Semar, charges: That Joseph Lenihan is, and was at the times herein mentioned, an attorney at law, practising at the bar of the Jefferson circuit court; that Herbert Semar, an infant seventeen years of age, sustained certain injuries on Monday, September 21, 1914, through the falling of some glass from a front window of the establishment of Alex. Hirschberg, at 619 West Market street; that on Tuesday, September 22, 1914, defendant, Joseph Lenihan, visited the home of Herbert Semar and endeavored to secure either for himself or others employment to make a claim or bring suit for Herbert Semar; that the mother of Herbert, Mrs. Semar, declined to employ him, and declined to take any action without the knowledge and consent of her husband; that defendant, Lenihan, asked that Herbert Semar be allowed to guide him to the place of employment of the husband, Chris Semar, which Mrs. Semar allowed; that Herbert entered the automobile of defendant and guided him to his father's place of employment, the Peaslee-Gaulbert Warehouse, Fifteenth and Lytle streets; that defendant, Lenihan, asked Chris Semar to allow him to take his son, Herbert, before Honorable Samuel Greene, judge of the Jefferson county court, that his injured hand might be examined, to which Chris Semar consented; that Herbert Semar was thereupon taken by defendant, Lenihan, to an office in the Inter-Southern Building, where he was told that it would be necessary to have a guardian appointed for him; when asked whom he desired appointed, he answered that he wanted either his father or his mother named, whereupon he was told by defendant, Lenihan, and a Mr. Greene, who was present, that such an appointment could not be made and that his guardian must be a court official; that he was then instructed that when taken before Judge Greene and asked by him as to whom he desired appointed he should name Mr. Page; that he was taken before Judge Greene, followed the aforesaid instructions, and Robert L. Page was appointed his guardian; that said appointment was secured by defendant, Lenihan, without the knowledge and consent of the parents, or either of them, of Herbert Semar, and against the wishes of Herbert Semar himself, and against the wishes of his parents; that defendant, Lenihan, knew that none

of the parties desired to prosecute a claim against Alex. Hirshberg, having been told that the matter was in process of amicable adjustment, and having also been told that, if any attorney were needed, the parents of Herbert Semar would place the matter in the hands of a certain one whom they knew; that all of the aforesaid acts of defendant, Lenihan, were contrary to his oath and obligations as an attorney of the Jefferson circuit court, and against the peace and dignity of the commonwealth of Kentucky.

The affidavits of Herbert Semar, Chris Semar, and Mrs. Semar are filed herewith as part hereof.

[Signed] Wm. H. Field, Judge.

The affidavit of Herbert Semar was as follows:

"The affiant, Herbert Semar, states that he is seventeen years of age, and lives with his parents at 2208 Lytle street, Louisville, Kentucky; that on September 21, 1914, he left home to look for work; that at about 10:30 o'clock in the morning he was passing No. 615 W. Market street, the establishment of Alex. Hirshberg, when some glass fell from the front of the building, striking him upon the right hand and injuring him; that on Tuesday, September 22, 1914, at about 9 o'clock in the morning, Joseph Lenihan came to his home and endeavored to persuade his mother to allow him to enter suit; that his mother declined to do anything without the knowledge and consent of her husband, Chris Semar; that, with the understanding that affiant was to show said Lenihan where his father was employed, he entered the automobile of said Lenihan and accompanied him to the Peaslee-Gaulbert Warehouse, at Fifteenth and Lytle streets; that he heard said Lenihan ask his father if he could take affiant up to let Judge Greene see his hand and talk the matter over with him; that his father consented to this, and he accompanied Lenihan to an office on the fourteenth floor of the Inter-Southern Building; that affiant was told that a guardian would have to be appointed for him, and was asked whom he desired, whereupon he said he desired that his father or mother be named; that both Mr. Lenihan and Mr. Greene told him neither could be appointed, and that his guardian would have to be a court official; that he was then instructed that when taken before Judge Greene and asked by him whom he wanted as guardian he should say that he desired Mr. Page; that he was then taken before Judge Greene by Mr. Greene, and that he followed instructions, and he is advised that Mr. Page was appointed; that affiant did not want any

one appointed guardian, but, if any one was appointed, he preferred his father or mother."

The affidavit of Chris Semar was as follows:

"Affiant says that J. L. Lenihan, an attorney, called to see this affiant on the 22d day of September, 1914, at the Peaslee-Gaulbert Company's place of business, and that the said Lenihan told affiant he wanted to take his boy to see Judge Samuel Greene to have a talk with him, and that he had seen the piece of glass fall on the boy's hand,—had witnesses to this fact; that Lenihan also told this affiant that his partner, L. D. Greene, was a brother of Judge Greene, the county judge. Affiant says that Lenihan did not tell or say anything about having a guardian appointed. Affiant says that he told Lenihan it would be all right for him to take the boy to see Judge Greene."

And the affidavit of Mrs. Semar was in the following words:

"Affiant, Susie Semar, says she is the wife of Chris Semar and the mother of Herbert Semar. Affiant says that on the 22d day of September, 1914, J. L. Lenihan, an attorney, called at this affiant's home, 2208 Lytle street, and asked her to let him take up the claim against Alex. Hirshberg for her son, Herbert Semar; that he had several witnesses to the accident, and wanted her to let the boy go with him to see Mr. Semar. Affiant told Lenihan that Mr. Houston Quin was her attorney if she needed an attorney. Affiant says that she consented for Herbert to go with Lenihan to show him (Lenihan) the place where Mr. Semar was employed. Affiant says that Lenihan did not tell or say anything about having a guardian appointed for the boy."

Lenihan, for response to the rule, after a general denial, said that, while passing in an automobile the place where the accident happened, he learned the boy's name and where he lived; and on the following day, having occasion to go in the neighborhood of the boy's home for the purpose of looking at some property in which he was interested, he paid a visit to the boy, whom he found there in company with his mother; that during the conversation which ensued with the mother and the boy he found that, although they were not satisfied with the way in which Hirshberg was acting, they seemed unwilling to take any action against him without consulting the father; that, after talking further, Herbert and the respondent visited the father at the place where he was working, and in the course of a talk with him he expressed the fear that the boy might be badly injured, and

that something ought to be done, and then respondent offered to take the boy to the office of L. D. Greene for the purpose of taking such steps as might be necessary to protect the rights of the boy; that he told the father, if any action was taken or settlement made, it would be necessary to have a guardian appointed, and that, as the boy was over fourteen, he had the right to select his own guardian; that the father expressed himself as being entirely satisfied that the matter should be left in the hands of Mr. Greene, and made no objection to the appointment of a guardian; that thereupon respondent accompanied the boy to the office of Mr. Greene, and stated to Greene that the boy had been injured and desired to consult him about his case; that he may have suggested that R. L. Page, the public guardian, be appointed as guardian, but that he did not recollect distinctly about this, and soon after he left the boy in the office with Mr. Greene. He further said that "at no time did he try to deceive either the father, the mother, or the boy as to their rights in the matter, nor did he conceal anything from them, but frankly and fully informed them as to the boy's legal rights, and would have been satisfied if the boy had selected either parent to act for him, but that neither expressed such a wish in his presence; that the appointment of said guardian was made voluntarily on the boy's own motion, and this defendant was not present in the county court room at said time, nor did he have anything to do with the selection of said guardian, and did not know whom the boy had selected until several days later; that Herbert did not ask that he be allowed to name either of his parents as guardian, nor was he told by anyone that he could not have his parents act, or that a court official had to be appointed."

He further said that "he had made no contract of employment with said guardian; that he brought no suit, nor did he do anything that was contrary to the statute or in violation of the ethics of the legal profession."

On the trial of the case Judge Field impaneled a jury to hear and determine the issues of fact, and upon the trial the evidence for the commonwealth was, in substance, a recital of the facts set forth in the affidavits of the Semars, except that it did not appear from this evidence that Lenihan made any suggestion or request that Herbert be taken before Judge Greene so that his "injured hand might be treated;" while the evidence for Lenihan supported the statements contained in his response.

It will be observed that the substance of L.R.A.1917B.

the charge contained in the information is that Lenihan was guilty of grossly unprofessional conduct: (a) In endeavoring to instigate the bringing of a suit for damages after he learned that the matter was in process of settlement; (b) in taking the boy to his office for the purpose of having a guardian appointed so that a suit might be brought in which he would be employed, without getting the consent of the boy's parents or informing them that he contemplated having a guardian appointed; (c) in falsely representing to the boy that neither of his parents could act as guardian for him, and that it would be necessary to have some court official appointed, although the boy wanted one of his parents to act as guardian if a guardian was appointed.

On this appeal it is urged that the information did not state facts sufficient to constitute an offense for which the respondent could be disbarred, and therefore the demurrer to the information filed in the lower court should have been sustained.

In considering this question it may be well to here state that we have no statute regulating the subject of the disbarment of attorneys or the practice in such proceedings, except that § 97 of the Kentucky Statutes provides that "no person convicted of treason or felony shall be permitted to practise in any court as counsel or attorney at law," and § 104, providing that, if an attorney collects the money of his client, and on demand fails or refuses to pay over the same, he may be suspended from practice for twelve months, or until the money shall be paid. But the absence of a statute describing the causes for which an attorney may be disbarred does not prevent disbarment proceedings from being instituted or attorneys from being disbarred when they have been guilty of any personal or professional misconduct that shows them to be lacking in honesty, probity, and good demeanor, or unworthy to continue as officers of the court, charged with the duty of aiding in the correct administration of the law.

In *Baker v. Com.* 10 Bush, 592, this court said: "If the evidence of such a moral character must be produced in order to obtain the license, it is equally as essential that this character should be retained; and when an attorney commits an act, whether in the discharge of his duties as attorney or not, showing such a want of personal or professional honesty as renders him unworthy of public confidence, it is not only the province, but the duty, of the court, upon a proper and legitimate presentation of the case, to strike his name from the roll of attorneys. Nor is it necessary, as contended by appellant's counsel, that the



offense should be of such a nature as would subject him to an indictment. He has by his own misconduct divested himself of qualifications that were indispensable to the practice of his profession; and, while he may regard the judgment depriving him of that right as a punishment for the offense, the action of the court is based alone upon the ground of public policy and for the public good."

Again, in *Nelson v. Com.* 128 Ky. 779, 16 L.R.A. (N.S.) 272, 109 S. W. 337, we said: "To be admitted to the bar a person must not only be learned in the law, but possess a character of honesty, probity, and good demeanor. A certificate of such character, furnished by the county court of his residence, is a prerequisite to the granting of the license. It is the possession of the character described that entitled him to admission to the bar, allowing that he is able to pass the requisite examination touching his learning. The continued possession of character is as essential to maintain his relation as an attorney at law as it is to have it in the first instance to be admitted. The office is one peculiarly of confidence. Not only do his clients repose trust in his integrity, but, as an officer of the court in the matter of administering justice, his privileges and duties are such as to constantly call for the exercise of fidelity, both to his client and to the state. A lawyer without good character is not only a reproach to his profession, but he brings into public distrust, and is a very menace to, the administration of justice itself. All courts have, as an incident to the power to admit attorneys to their bar, the power to disbar them for such conduct as shows they are not longer worthy of confidence. It is not necessary that the misconduct should be such as would render him liable to criminal prosecution. If it shows that he is unfit to discharge the duties of his office, is unworthy of confidence, even though the conduct is outside of his professional dealings, it is sufficient. If he is not honest, if he is not moral, if he is not of good demeanor, he may be disbarred, and should be."

Also in *Com. v. Roe*, 129 Ky. 650, 19 L.R.A. (N.S.) 413, 112 S. W. 683, this may be found: "Section 97 of the Kentucky Statutes of 1903 provides that 'no person convicted of treason or felony shall be permitted to practise in any court as counsel or attorney at law.' But this does not mean that only those who have been convicted of felony or treason may be disbarred. It would be doing a serious injustice to the intelligence of the lawmaking department of the state to hold that such was their intention, or to conclude that, by the enact-

ment of this statute, they meant to declare that, however flagrant the misconduct of an attorney, if it was less than a felony, the courts were powerless to protect themselves, the profession, and the public. The statute points out two of the causes that peremptorily warrant disbarment proceedings, but it does not, and was not designed to, limit the right to the causes mentioned. An attorney may be guilty of many offenses, evidencing a want of honesty, probity, and good moral character, that would authorize the court to disbar him independent of the statute."

Therefore the question raised by the demurrer resolves itself into the inquiry whether the charges contained in the information, if true, amounted to such misconduct on the part of the respondent as showed him to be wanting in honesty, probity, and good demeanor in his professional capacity. He did the things charged in his capacity as an attorney, and not as an individual, and so what he did is to be measured by the standards of honesty, probity, and good demeanor prevailing in a profession that endeavors to maintain among its members high standards of respectability and honor.

The demurrer, of course, admitted the truth of the charges, and therefore, in disposing of this question, we must assume that the respondent was guilty of the acts set forth in the information.

Assuming, then, the truth of the information, we think it cannot be seriously questioned that an attorney who, for the purpose of securing employment in or compensation out of a contemplated lawsuit, resorts to false statements and fraudulent practices, is guilty of professional misconduct of such a nature as to merit and deserve either suspension for a period or permanent disbarment, depending on the facts and circumstances surrounding the transaction. If this method of securing business should be tolerated or be allowed to go unpunished, there is scarcely any corrupt or dishonest thing that an attorney in the pursuit of employment might not do.

It is generally known that there are lawyers who solicit employment in cases in which they would not otherwise be engaged, and this conduct on the part of a few has subjected the profession as a body to no little reproach and the lawyers engaged in this practice to much deserved censure. But the unprofessional effort to obtain business by mere volunteer solicitation is of small consequence as compared with the effort to secure employment or obtain business by false representations and deceitful methods. If a person who has a cause of action or grounds upon which a

suit might be maintained wishes to settle the matter amicably, an attorney cannot with propriety endeavor to prevent this peaceful adjustment, and, of course, an attorney should not be allowed to escape punishment if, for the purpose of inciting litigation and to accomplish this end, he resorts to false statements or deceitful practices. And, if the respondent committed the acts charged in the information, he was clearly guilty of such unprofessional conduct as would justify at least his suspension for such a period of time as might be sufficient to teach him the lesson that an attorney must not indulge in practices that will bring discredit on the profession.

Another ground of reversal earnestly pressed on our attention is that the information should have been dismissed on motion, because Judge Field did not have authority to institute the proceeding. The information, as we have seen, was issued by Judge Field upon the credit and strength of the affidavits heretofore noticed, and we think that Judge Field had ample jurisdiction and power to issue the information.

The respondent, Lenihan, having been admitted to practise law in the Jefferson circuit court, a branch of which was presided over by Judge Field, he was an officer of the Jefferson circuit court, and consequently of all the branches of that court. In other words, the situation was precisely the same as if there had been only one circuit court in Jefferson county, and that court had been presided over by Judge Field.

The practice regulating disbarment proceedings is not, as we have noted, regulated by statute, but all courts of general jurisdiction have at all times in the history of the law possessed the inherent power to suspend and disbar attorneys for professional misconduct of such a character as showed them to be unworthy to hold the place of officers of the court; and the books are full of cases in which the court, on its own motion, has instituted proceedings like this. Indeed, we think that it is not only the right, but the duty, of a judge of a circuit court to institute, upon his own motion, proper proceedings for the suspension or disbarment of an attorney, when from information laid before him, or from his personal knowledge, it appears to his satisfaction that the attorney is so demeaning himself as to be unworthy to continue as an officer of the court.

The circuit judges in this state are, excepting the judges of the court of appeals, the highest judicial officers in the state; and the circuit court is a court of general, common-law, criminal, and chancery jurisdiction, second in importance in its powers

and function only to the court of appeals of the state. Clothed with large authority, and possessing, as they do and should, the confidence and respect of the people, the judges of these courts, for the protection of the general public and to promote the purity of the administration of the law, may and should take appropriate action against any attorney who so conducts himself as to show that he is wanting in the proper measure of respect for the court of which he is an officer, or is lacking in the good character essential to continuance as an attorney. This action may be taken by the court on its own motion, or it may be taken by the court on motion of the county or commonwealth's attorney, or upon the motion of a committee of attorneys, or a bar association, or upon the motion of some person who has been aggrieved by the conduct of the attorney. The proceeding may be initiated in any of these ways. But, however it may be initiated, the question whether any action shall be taken lies with the judge of the court, because he must determine from the facts before him whether or not the proceedings shall be instituted. So that the information against an attorney to show cause why he should not be suspended or disbarred is, in its final aspect, the action of the judge of the court in which the proceeding is instituted or before whom the motion is made.

In *Rice v. Com.* 18 B. Mon. 472, which was a disbarment proceeding, this court, in answering an objection that the judge of the circuit court did not have authority to institute, on his own motion, the proceeding, said: "This objection is founded on a misconception as well of the power as of the duty of the court. The defendant in the rule was an attorney at law and an officer of the court. All courts have the power to control and regulate, to a certain extent, the conduct of their officers, and to inflict on them for their official misconduct such punishment as the law prescribes. If a court have knowledge of the existence of such official misconduct on the part of any of its officers, it not only has the power, but it is its duty, to institute an appropriate proceeding against the offender, and to bring him, if guilty, to condign punishment. And it is much to be regretted that this duty, which the law devolves upon the courts of the country, is so little regarded, and that the obligations which it imposes are so frequently overlooked or neglected."

In *Walker v. Com.* 8 Bush, 86, it was again said: "It is a well-established rule of the common law that courts may inquire into the conduct of their officers, such as attorneys and counselors who practice in their courts, and punish for offenses."

And so in *Com. v. Roe*, 129 Ky. 650, 19 L.R.A.(N.S.) 413, 112 S. W. 683, we said: "Courts, independent of statutes, have at all times possessed the inherent right to control and regulate the official conduct of their officers, and to inflict upon them punishment for official misconduct. Attorneys at law are officers of the court, and it has always been the rule in this state that, when the attention of the court in which they practice was called to acts of professional misconduct, it had the right to disbar them if the facts of the case justified the infliction of this punishment."

In *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569, the Supreme Court, quoting with approval from an opinion by Chief Justice Sharswood, said: "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of any attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense."

On the trial of the case the court permitted the counsel representing the commonwealth, who stated the case to the jury, to read to the jury the affidavits of the Semars upon which the information was based. This, we think, was error, and, in view of what will be later stated, prejudicial error. It was, of course, proper that the attorney for the commonwealth should read to the jury the information, so that they might be advised of the nature of the accusation; but it was improper to permit him to read the *ex parte* affidavits upon which the information was based. The jury, of course, should determine the issues only upon the evidence heard by them in the course of the trial, from witnesses introduced by the parties and open to cross-examination; but the affidavits of the Semars, as will later appear, contained facts prejudicial to the respondent that were not developed in the evidence, and that the jury would not have known except for the fact that these affidavits were read in their presence and hearing.

It appears that when the evidence was in the court submitted to the jury five questions. The first one read:

"Did the defendant, Lenihan, when he obtained the consent of the father of Herbert Semar to take said Herbert Semar uptown, represent to said father that he was taking the said boy uptown for the purpose of taking him before Honorable Sam Greene, judge of the Jefferson county court, that the boy's injured hand might be examined?"

The second one submitted the question whether Lenihan informed Chris Semar L.R.A.1917B.

that he was taking the boy to his office for the purpose of having a guardian appointed; the third one, the question whether Semar consented to whatever course Lenihan or L. D. Greene might see proper to follow: the fourth one, the question whether the boy indicated to Lenihan or Greene a desire to have his mother or father act as guardian; and the fifth one, whether Greene or Lenihan told the boy that his parents could not be appointed as guardian, and that he must have a court official. The jury answered in the affirmative questions 1, 4, and 5, and in the negative questions 2 and 3.

It will be observed that the first question directed the attention of the jury to representations made by Lenihan that he wanted to take the boy before the judge of the county court so that "his injured hand might be examined." The objection to this question is that there was no evidence upon which to rest it, except statements contained in the *ex parte* affidavits before mentioned. Interrogatories such as these should be directed and confined to evidence heard on the trial of the case, and, as there was no evidence of this character, it is apparent that the jury were enabled to answer this question in the affirmative from the statements made in the affidavits read to them, and which they doubtless concluded they had the right to consider in making up their minds.

Another and more serious question is presented in the refusal of the trial judge to permit the respondent to introduce evidence of his good character. The disposition of this question has given us no little trouble; but, after giving to it careful consideration, we have reached the conclusion that in disbarment proceedings for causes such as those here appearing the respondent should be permitted to show his previous good reputation for honesty, probity, and good moral character, not to justify or excuse the offense, but to support his evidence that he did not do or say the things charged, and to mitigate the gravity and consequences of the offense.

It is true that the authorities are usually agreed that disbarment proceedings are of a civil, and not criminal, nature. *Re McDonald*, 157 Ky. 92, 162 S. W. 566; *Com. v. Richie*, 114 Ky. 366, 70 S. W. 1054. It is also a general rule that in civil cases neither of the parties can introduce evidence in support of his good character until his character has been attacked by his adversary. But there are exceptions to this rule and classes of civil cases in which evidence of good character may be offered. As said in *Greenleaf on Evidence*, vol. 1, § 54: "In civil cases such evidence

is not admitted unless the nature of the action involves the general character of the party or goes directly to affect it."

And so, when the nature of the litigation is such as to put directly in issue the character of one of the parties, it is generally ruled that the party whose character is thus put in issue by the nature of the action may introduce evidence in support of it, although his adversary has not sought to impeach it. *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605; *Smith v. Lovelace*, 1 Duv. 215; *Johnson v. Featherstone*, 141 Ky. 793, 133 S. W. 753; 1 Wigmore, Ev. §§ 64-70.

It being, therefore, according to the weight of authority, admissible for a party to give evidence of his good character before it has been assailed, when the nature of the suit puts the character of the party offering this evidence directly in issue, it seems particularly appropriate that evidence of good character should be admissible in disbarment proceedings. The Kentucky Statutes provide in § 104, that no person can obtain a license to practise law in this commonwealth until he shall first have a certificate from the county judge of the county of his residence "that he is a person of honesty, probity, and good moral character." And we have often held that, if an attorney desires to remain a member of the profession, he must continue to retain the good character he possessed when he secured the privilege. When he loses this good character by personal or professional misconduct, he forfeits his right to the privilege he obtained by admission to the bar, and his name, as we have held, in proper proceedings, should be stricken from the roll of attorneys.

So that in every disbarment proceeding where the nature of the accusation puts in issue the honesty, probity, and good moral character of the accused, and it is sought to strip him of his license because he is wanting in these qualities, he should have the right to show by those qualified to speak that his character in these respects is good. Disbarment proceedings, although classed as civil, are nevertheless of a quasi criminal nature, and necessarily and directly involve the character of the person proceeded against. *Re Darrow*, — Ind. App. —, 83 N. E. 1026. The very thing the procedure seeks to establish is that the attorney proceeded against is not a person of honesty, probity, and good moral character, and on account of this delinquency there should be taken from him a valuable privilege and an honorable title. And so we think the respondent should have been permitted to show in his defense that he was a person of honesty, probity, and good moral character. *Re Lash*, 150 App. Div. L.R.A.1917B.

467, 135 N. Y. Supp. 370; *Re Stephens*, 84 Cal. 77, 24 Pac. 46; *Smith's Appeal*, 179 Pa. 14, 36 Atl. 134.

It is also pressed on our attention that the sentence imposed by the judge was entirely disproportionate to the offense, and that the judgment should be reversed for this reason. The judge, properly we think, submitted to a jury the issues of fact involved in this proceeding, and, when the jury by its verdict found that the respondent had committed the substantial acts charged in the information, the judge could not well have done otherwise than accept as true these findings of fact. Accepting them as true, it then became his duty to either suspend for a definite period the right of the respondent to practise law, or to strike his name from the roll of attorneys and permanently disbar him.

It is said by many authorities that the purpose of disbarment is not to punish the attorney, but to protect the court and the administration of justice from contamination by an officer who has proved himself unworthy. Punishment may not be the prime object to be accomplished in disbarment proceedings, but it cannot be questioned that disbarment is punishment. It would be idle to say that it was not punishment to take from a man his means of livelihood, and at the same time discredit and disgrace him. This, however, is the effect of disbarment an attorney, and this measure of punishment the judge, in the exercise of a sound discretion, may impose. But disbarment is the extreme penalty. Suspension from practice for a period of time is a lesser one. Which shall be imposed is generally agreed to be a matter in the sound discretion of the trial judge. As said in *Thornton on Attorneys at Law*, vol. 2, § 894: "The solution of this question frequently involves so many considerations of public policy and concrete justice, dependent upon the gravity and consequences of the misconduct, the age, character, and reputation of the attorney, the probability of his reformation, the circumstances attending the commission of the offense, and the like, that no fixed or arbitrary rules have been, or properly can be, adopted by the courts. . . . It is a generally accepted principle, however, that since the primary purpose of a disbarment proceeding is not punishment, but the protection of the courts and the public, disbarment should never be decreed, if any discipline less severe would accomplish the desired result, as when there are prospects that the attorney's conduct and character may undergo reformation."

In *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, the Supreme Court said: "A

removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired." *Re Sherin*, 27 S. D. 232, 40 L.R.A. (N.S.) 801, 130 N. W. 761, Ann. Cas. 1913D, 446.

In view, however, of the fact that there must be a retrial of this proceeding, when new facts may be developed and new light thrown on the transaction, it is not proper

that we should indicate the judgment that should be entered. It may, however, not be amiss to say that, in our opinion, the judgment appealed from, considering all the facts and circumstances in this case, might well have been suspension for a period, and not disbarment.

The judgment is reversed for proceedings in conformity with this opinion.

Petition for rehearing denied.

## MINNESOTA SUPREME COURT.

CHRIST JOHNSTON  
v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

JOHN I. DAVIS et al., Intervener, Respt.

(128 Minn. 365, 151 N. W. 125.)

### Attorney — soliciting business — policy.

1. It is not against public policy as champerty or maintenance, for an attorney to solicit business, or to advance money to a poor client for his living expenses during litigation, or to advise a client against the settlement of his case.

*For other cases, see Champerty and Maintenance, II. in Dig. 1-52 N. S.*

### Same — advancing money to client.

2. An agreement between attorney and client, by which the former is to advance money for expenses and is permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery.

*For other cases, see Contracts, III. c, 1, in Dig. 1-52 N. S.*

### Same — settlement of case — liability for attorney's fee.

3. Defendant settled a personal injury case with the injured person, agreeing to pay him \$4,500 and to reimburse him for any sum he should be compelled to pay his attorneys. Under a contract between the injured person and his attorneys, he was to receive two thirds and they one third of any amount received in settlement. It is held that this amount was \$4,500 plus the sum the attorneys would be entitled to un-

der their contract, and that the attorneys were entitled to recover of defendant at least \$2,000.

*For other cases, see Attorneys, II. c, 1, in Dig. 1-52 N. S.*

(February 5, 1915.)

**A** PPEAL by defendant from a judgment of the District Court for Lyon County in favor of petitioners, attorneys for plaintiff, in a proceeding to recover attorneys' fees for services rendered in an action by plaintiff against defendant to recover damages for personal injuries. Affirmed.

The facts are stated in the opinion.

Messrs. M. L. COUNTRYMAN and A. L. JAMES, for appellant:

Petitioners could recover from their client for their services but \$1,500 and if they have a lien in this case they should not be permitted to recover more from this defendant than they could recover from their client.

*Schmitz v. South Covington & C. Street R. Co.* 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114; *Pilking-ton v. Brooklyn Heights R. Co.* 49 App. Div. 22, 63 N. Y. Supp. 211; *Fenwick v. Mitchell*, 34 Misc. 617, 70 N. Y. Supp. 667, 64 App. Div. 621, 72 N. Y. Supp. 1102; *Smith v. Acker Process Co.* 102 App. Div. 170, 92 N. Y. Supp. 351; *Whitcotton v. St. Louis & H. R. Co.* 250 Mo. 624, 157 S. W. 776; *Powell v. Galveston H. & S. A. R. Co.* — Tex. Civ. App. —, 78 S. W. 975; *Morehouse v. Brooklyn Heights R. Co.* 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377, 102 App. Div. 627, 92 N. Y. Supp. 1134; *Young v. Howell*, 64 App. Div. 246, 72 N. Y. Supp. 5; *Re Winkler*, 154 App. Div. 532, 139 N. Y. Supp. 755; *Wolf v. United R. Co.* 155 Mo. App. 125, 133 S. W. 1172; *Cheshire v. Des Moines City R. Co.* 153 Iowa, 88, 133 N. W. 324; *Parsons v. Hawley*, 92 Iowa, 175, 60 N. W. 520; *Bogert v. Adams*, 8 Colo. App. 185, 45 Pac. 235; *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 493, 66 N. E. 395, 13 Am. Neg. Rep. 396.

The solicitation by these petitioners of the Johnston Case under the circumstances

Headnotes by BUNN, J.

**Note.** — As to right of attorney at law to solicit business, see annotation following *Chreste v. Louisville R. Co.* ante, 1123.

The basis for computing share of an attorney entitled to certain proportion of recovery, where the suit is compromised for a certain sum and attorney's fee, is discussed in the note to *Schmitz v. South Covington & C. Street R. Co.* 22 L.R.A. (N.S.) 776. L.R.A.1917B.

herein attempted to be disclosed should bar a recovery in this case.

Holland v. Sheehan, 168 Minn. 362, 23 L.R.A.(N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Huber v. Johnson, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779.

An agreement by an attorney to pay the expenses of litigation and reimburse himself from the proceeds of the action is void.

Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733; Hyatt v. Burlington, C. R. & N. R. Co. 68 Iowa, 662, 27 N. W. 815; Low v. Hutchinson, 37 Me. 196; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464; Taylor v. Hinton, 66 Ga. 743; Stearns v. Felker, 28 Wis. 594; Kelly v. Kelly, 86 Wis. 170, 67 N. W. 637; Gilbert-Arnold Land Co. v. O'Hara, 93 Wis. 194, 67 N. W. 38; Granat v. Kruse, 213 Ill. 328, 72 N. E. 744; Geer v. Frank, 179 Ill. 570, 45 L.R.A. 110, 53 N. E. 965; Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097; Comstock v. Flower, 109 Mo. App. 275, 84 S. W. 207; Moses v. Bagley, 55 Ga. 283.

Messrs. John I. Davis, Tom Davis, and Ernest A. Michel, for respondents:

Petitioners were entitled to judgment for the sum of \$2,000.

Curtis v. Metropolitan Street R. Co. 125 Mo. App. 369, 102 S. W. 62; Boyd v. G. W. Chase & Son Mercantile Co. 135 Mo. App. 115, 115 S. W. 1052.

Bunn, J., delivered the opinion of the court:

John I. Davis and Davis & Michel were the attorneys for Christ Johnston in an action brought by him against defendant to recover for personal injuries. Before the case came to trial, defendant settled with Johnston without the knowledge or consent of his attorneys. The terms of the settlement were these: Defendant agreed to pay Johnston \$4,500 in cash, to reimburse him for any sum he should be compelled to pay his attorneys, to pay all hospital and doctors' bill, and to furnish him free of charge with an artificial leg when he was in condition to use one. The \$4,500 was paid to Johnston, and the suit and cause of action compromised and settled.

The attorneys were employed by Johnston under a contingent-fee contract, by the terms of which they were to receive for their services 33½ per cent. of any amount recovered by settlement or suit. The contract provided that any moneys advanced by the attorneys for expenses were to be deducted from the gross amount received by settlement or suit. It also provided that no settlement

was to be made without the consent of Johnston.

This proceeding was by a complaint or petition filed by the attorneys, and was entitled in the main action. The petition set forth in detail the contract between Johnston and the petitioners, the commencement of the personal-injury action, the settlement thereof, and its terms. Fraud was also alleged. Judgment against defendant for \$2,000 and interest was demanded. Defendant filed an answer to the petition which, after admitting the commencement of the action and the settlement, proceeded to charge that petitioners were, and had been for a long time, engaged in "the business and conspiracy of unlawfully stirring up strife and contention and vexatious and speculative litigation between this defendant and persons having personal-injury claims against this defendant, and in discouraging and preventing the amicable compromise of said claims without litigation;" that petitioners, in soliciting and obtaining claims against defendant, traveled from place to place employed for such purpose a large number of laymen as agents and solicitors; that, for the purpose of obtaining cases against defendant, they have unlawfully paid to claimants large sums of money for the support and maintenance of claimants during the litigation; that they pay all costs and disbursements connected with litigation on the understanding with claimants that the latter, in case there is no recovery, shall not be liable therefor, and that petitioners will reimburse themselves, for the money so advanced, out of the proceeds of the litigation. The answer further charged petitioners with preventing the amicable settlement of claims by advising all claimants that they are entitled to sums of money greatly in excess of the actual damages suffered, thus unlawfully fomenting litigation against defendant. Thus far the charges made were general in their nature, and had no reference to this particular case. The answer then proceeded to allege that petitioners solicited the claim of Johnston, wrongfully persuaded him not to make an amicable settlement, by promising to obtain a recovery largely in excess of compensation, to advance large sums for his living expenses, and to pay all costs and expenses of the litigation, and to reimburse themselves solely out of the amount recovered from defendant. It was alleged that, had it not been for these representations and promises, the claim would have been amicably settled without suit for substantially the amount actually paid; that the unlawful conduct of petitioners in this case, and the whole course of unlawful conduct of the petitioners in soliciting and

obtaining personal-injury cases against this defendant and other corporations, has resulted in constant, needless strife and contention between this defendant and its employees and other claimants, and has resulted in unnecessary vexatious, and speculative litigation, much to the detriment of this defendant and greatly to the prejudice of justice." In conclusion, the answer alleged that, by reason of the unlawful and champertous conduct of petitioners, they have no lien upon the cause of action settled by defendant, and further that their contract with Johnston was null and void, for champerty and maintenance and as against public policy. The reply was a general denial.

The court, on petitioners' motion, made an order vacating the settlement for the purpose of hearing and determining what fees should be paid by defendant to the attorneys for plaintiff. This matter was heard by the trial court without a jury. After petitioners established their contract with Johnston, the fact of the settlement, and that they had received no compensation, defendant called each of the petitioners for cross-examination, and attempted to prove by him the allegations of its answer. The court sustained objections to practically all questions asked and to numerous offers to prove the facts alleged, and the case was submitted for decision with no evidence in support of the defense. The court subsequently filed its decision finding the facts in favor of petitioners, and that the "other allegations" of the pleadings were untrue, and ordering judgment in favor of the petitioners and against defendant for \$2,000 and interest.

The questions involved are these: (1) Did the court err in excluding the evidence offered by defendant in support of the allegations of its answer? (2) Did it err as to the amount petitioners are entitled to recover?

1. As to the ruling in sustaining objections to questions and offers relating to the conduct of petitioners in general, and in other cases, it is clear that these matters were wholly irrelevant to the issue,—petitioners' right to a lien in this particular case.

The facts offered to be proved that related to petitioners' conduct in the Johnston case were substantially these: (1) That they solicited Johnston's case; (2) that they paid money to Johnston for his support during the pendency of the litigation; (3) that they advised him not to settle the case.

Is conduct of this kind so against public policy that the courts will deny to attorneys guilty of it their statutory lien L.R.A.1917B.

on the client's cause of action? We freely concede that champerty or maintenance in a case may be ground for refusing the aid of the court in compelling compensation to the guilty attorneys. But is it champerty or maintenance or against public policy for an attorney to solicit business, to pay money to a poor client for his living expenses during the litigation, or to advise him against a settlement of his case? We may have our individual opinions on these propositions as questions of good taste or legal ethics. But in the absence of some statute, we are unable to hold that it is illegal or against public policy for an attorney to solicit a case. See concurring opinion of Justice Cauty in *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may, in a sense, tend to foment litigation by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered.

It is generally held that a person, whether an attorney or a layman, who furnishes assistance, by money or otherwise, to a poor man to enable him to carry on an action, is not guilty of maintenance. 6 Cyc. 865, and cases cited; *Northwestern S. S. Co. v. Cochran*, 111 C. C. A. 626, 191 Fed. 146. It is not against public policy for an attorney to loan his client money to enable him to carry on the suit. This is the utmost extent to which the offer of evidence went, and it was not error to sustain the objection.

As to the offer to prove that the petitioners advised Johnston against settling the case, representing that he was entitled to heavy damages, we know of no reason why this should be held contrary to public policy. Johnston did not agree not to make a settlement without the consent of his attorneys; indeed, the contract expressly provides that the attorneys shall not settle without his consent. The law favors the amicable settlement of controversies, and it is wrong for a lawyer to discourage settlements out of personal motives. But there was no offer to prove any such conduct in this case; indeed, the evidence shows pretty clearly that the petitioners advised and attempted to procure settlement.

2. Defendants argue that an agreement by an attorney to pay the expenses of litigation and reimburse himself from the proceeds of the action is void. But the contract in this case only provided that the attorneys might retain out of the amount

recovered any moneys advanced for expenses. There was no offer to show an oral agreement that the attorneys were to support the litigation at their own expense or to indemnify the client against costs. The argument therefore fails, and the cases cited have no application. As before stated, an agreement to loan the client funds with which to carry on the suit or to maintain himself during its pendency is not regarded as per se opposed to public policy. It is only when the attorneys are to ultimately stand the costs, or when the client is indemnified from liability for them in case of no recovery, that the law declares the arrangement void. *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; 6 Cyc. 858, 865, and cases cited.

After a careful reading of the record, we find nothing in the evidence excluded that was material,—nothing that would have justified the trial court in refusing relief to petitioners. Nothing can be added to what has been said in prior decisions of this court on the subject of champerty and maintenance. *Huber v. Johnson*, supra; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; id., 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbraunson*, 78 Minn. 21, 80 N. W. 779; *Holland v. Sheehan*, 108 Minn. 362, 23 L.R.A. (N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687. These cases in no way touch the case at bar. There was no illegality in the written contract between Johnston and the petitioners, and no offer to

prove any facts that would have made the contract illegal as against public policy.

3. Defendant insists that amount of the recovery if petitioners were entitled to anything, should have been \$1,500 instead of \$2,000. This is on the theory that the recovery by Johnson was \$4,500, and that under the contract he would have been liable to his attorneys for but one third of this sum. But the contract of settlement was that defendant was to pay Johnston \$4,500, and in addition to reimburse him for any sum he should be compelled to pay his attorneys. We do not add the hospital bills or the wooden leg. Under the contract between the attorneys and their client, he was to receive two thirds and they one third of the amount received or recovered of defendant. The \$4,500 paid to Johnston was his two thirds of the total settlement. The one third of the attorneys would be \$2,250. The court allowed \$2,000, which was the sum demanded, and we think that defendant has no ground for complaint. The case of *Schmitz v. South Covington & C. Street R. Co.* 131 Ky. 207, 22 L.R.A. (N.S.) 777, 114 S. W. 1197, 18 Ann. Cas. 1114, does not seem logically sound and is criticized in the note thereto in 22 L.R.A. (N.S.) 777. The question is somewhat perplexing, but we think it is fairly clear that the total amount of the settlement was not alone the \$4,500 paid to Johnston, but that sum plus the amount he had agreed to pay his attorneys.

Order affirmed.

## FLORIDA SUPREME COURT.

ARMANDO FLORES, Plff. in Err.,  
v.  
STATE OF FLORIDA.

(— Fla. —, 73 So. 234.)

### Appeal — evidence — objection.

1. General objections to evidence are without weight in an appellate court, if the evidence is admissible for any purpose. For other cases, see *Appeal and Error*, V. a, 2, a, in *Dig. 1-52 N. S.*

### Evidence — bastardy — child.

2. In a bastardy proceeding, the exhibi-

tion of an infant three months old to the jury for the purpose of having the jury compare it with the defendant to detect resemblances between the infant and reputed father is error.

For other cases, see *Evidence*, V. in *Dig. 1-52 N. S.*

### Trial — bastardy — damages.

3. In a bastardy proceeding, the amount which the statute requires the defendant to pay when the issue is found against him, for the necessary incidental expenses attending the birth, may be ascertained by the court without the intervention of the jury. For other cases, see *Jury*, I. b, 1, a, in *Dig. 1-52 N. S.*

(November 21, 1916.)

### Headnotes by ELLIS, J.

Note. — As to exhibition of child for purposes of determining paternity in bastardy proceedings, see annotation following this case, post, 1147.  
L.R.A.1917B.

**ERROR** to the Circuit Court for Hillsborough County to review a judgment in favor of the state, in a bastardy proceeding. Reversed.

The facts are stated in the opinion.



Messrs. Macfarlane & Chancey, for plaintiff in error:

In bastardy proceedings it is error to allow the infant to be introduced in the evidence and be viewed by the jury so as to enable them to judge, from the comparison of its appearance with that of the putative father, as to its paternity.

Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; Copeland v. State, — Tex. Crim. Rep. —, 40 S. W. 589; State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387; State v. Brathovde, 81 Minn. 501, 84 N. W. 340; Reitz v. State, 33 Ind. 187; Riak v. State, 19 Ind. 152; Robnett v. People, 16 Ill. App. 299; Hanawalt v. State, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489, 6 Am. Crim. Rep. 65; Overlock v. Hall, 81 Me. 348, 17 Atl. 169; Hilton v. State, 41 Tex. Crim. Rep. 190, 53 S. W. 113; State v. Harvey, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535; State v. Smith, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153; Kenniston v. Rowe, 16 Me. 38; Shorten v. Judd, 56 Kan. 43, 64 Am. St. Rep. 587, 42 Pac. 337; People ex rel. Fuller v. Carney, 29 Hun, 47; State v. Neel, 23 Utah, 541, 65 Pac. 494; United States v. Collins, 1 Cranch, C. C. 592, Fed. Cas. No. 14,835.

Where damages are indeterminate, the amount of such damages suffered by the plaintiff as expenses incidental to the birth of her bastard child is a question of fact, and a fact about which there is likely to be decided dispute, hence a fact for the jury.

Davis v. Pitman, Hempst. 44, Fed. Cas. No. 3,647a; Bayly v. London & L. Ins. Co. Fed. Cas. No. 1,145; Louisville & N. R. Co. v. Davis, 99 Ala. 593, 12 So. 786; Mammoth Springs Roller-Mill Co. v. Ellston, — Ark. —, 22 S. W. 344; King v. Southern P. Co. 109 Cal. 96, 29 L.R.A. 755, 41 Pac. 786; Wall v. Livezey, 6 Colo. 465; Culver v. Webb, 12 Conn. 441; District of Columbia v. Johnson, 1 Mackey, 51; Parkhurst v. Stone, 36 Fla. 463, 18 So. 596; Sunman v. Clerk, 120 Ind. 142, 22 N. E. 113; Wiley v. Arnold, 1 G. Greene (Iowa) 365; D. M. Osborne & Co. v. Stassen, 25 Kan. 736; Wichita & W. R. Co. v. Feckheimer, 36 Kan. 42, 12 Pac. 362; Louisville & N. R. Co. v. Bates, 8 Ky. L. Rep. 617; Shumway v. Walworth & N. Mfg. Co. 98 Mich. 411, 57 N. W. 251, 15 Am. Neg. Cas. 10; Hitchcock v. Supreme Tent, K. M. 100 Mich. 40, 43 Am. St. Rep. 423, 58 N. W. 640; Fell v. Newberry, 106 Mich. 542, 64 N. W. 474; Barrett v. Grand Rapids Veneer Works, 110 Mich. 6, 67 N. W. 976; Steinberg v. Gebhardt, 41 Mo. 519; Mooney v. Third Ave. R. Co. 2 N. Y. City Ct. Rep. 366; Reading City Pass R. Co. v. Eckert, 2 Sadler (Pa.) L.R.A.1917B.

431, 4 Atl. 530; Hart v. Charlotte, C. & A. R. Co. 33 S. C. 427, 10 L.R.A. 794, 12 S. E. 9; Galveston Wharf Co. v. McYoung, 2 Tex. App. Civ. Cas. (Willson) 560, 643; Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Taylor v. Porter, 4 Hill, 145, 40 Am. Dec. 274; Hoke v. Henderson, 15 N. C. (4 Dev. L.) 15, 25 Am. Dec. 677; Story, Const. 661; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; 2 Co. Inst. 45-50; Wilkinson v. Leland, 2 Pet. 657, 7 L. ed. 553.

The amount of damages, not being capable of measurement by any precise rule, is left to the discretion of the jury on the circumstances of each particular case, subject to the power of the court to set aside the verdict when it appears that the jury has been misled or influenced by passion or prejudice.

Southard v. Rexford, 6 Cow. 254; Wilbur v. Johnson, 58 Mo. 600; Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Goodall v. Thurman, 1 Head, 209; Denslow v. Van Horn, 16 Iowa, 476; Richmond v. Roberts, 98 Ill. 472; Schreckengast v. Ealy, 16 Neb. 510, 20 N. W. 853; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Kelley v. Highfield, 15 Or. 277, 14 Pac. 744; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329; Mahiat v. Codde, 106 Mich. 387, 64 N. W. 194; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Brown v. Odill, 104 Tenn. 250, 52 L.R.A. 660, 78 Am. St. Rep. 914, 56 S. W. 840; Hooker v. Phillippe, 26 Ind. App. 501, 60 N. E. 167; Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591; Wilbur v. Johnson, 58 Mo. 600; Collins v. Mack, 31 Ark. 684; Douglas v. Gausman, 68 Ill. 170; Wolters v. Schultz, 1 Misc. 196, 21 N. Y. Supp. 768.

Messrs. T. F. West, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State:

A child may be exhibited to the jury as evidence of alleged paternity.

3 R. C. L. p. 764; Kelly v. State, 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56; Land v. State, 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90; Shailer v. Bullock, 78 Conn. 65, 112 Am. St. Rep. 87, 61 Atl. 65; State v. Saidell, 70 N. H. 174, 35 Am. St. Rep. 627, 46 Atl. 1083; State ex rel. Stubblefield v. Woodruff, 67 N. C. 89; Scott v. Donovan, 153 Mass. 378, 26 N. E. 871; Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600, 8 Am. Crim. Rep. 297; Anderson v. Aupperle, 51 Or. 556, 95 Pac. 330; Adams v. State, 93 Ark. 260, 137 Am. St. Rep. 87, 124 S. W. 766; Gilmanton v. Ham, 38 N. H. 108; Crow v. Jordan, 49 Ohio St. 655, 32 N. E. 750.

The trial court had authority to fix the amount of the incidental expenses attending the birth of the child.

Andrew G. v. Catherine A. 16 Fla. 830; John D. C. v. State, 16 Fla. 554; C. T. v. State, 21 Fla. 171.

Ellis, J., delivered the opinion of the court:

This was a bastardy proceeding in which the plaintiff in error, who was the defendant below, was adjudged to pay to J. G., the mother of the bastard child, the sum of \$50 yearly for a period of ten years for the support, maintenance, and education of the child, and the incidental expenses attending the birth of the child, which amounted to \$67. There was evidence to show that the expenses attending the birth of the child amounted to that sum. The jury, however, did not assess any damages. The verdict simply found the defendant below, Armando Flores, to be the father of the bastard child of J. G.

To that judgment a writ of error was taken and four errors assigned. Two points of law are presented by the record and argued by counsel.

At the trial the mother of the child, over the defendant's objection, was permitted to exhibit the infant to the jury for the purpose of having the jury compare it with the defendant and consider its resemblance to the alleged father, if any, in determining its paternity.

At the time of the trial the child was within a few days of being three months old. It was insisted by the defendant's counsel that the exhibition of the child to the jury for the purpose above stated was "illegal and contrary to law;" that the evidence was "immaterial and irrelevant," and would tend to prejudice the jury against the defendant. These objections were most general in character, and, according to the rule frequently announced by the court, are entitled to little consideration, if the evidence was admissible for any purpose whatsoever. *Lewis v. State*, 55 Fla. 54, 45 So. 998; *Putnal v. State*, 56 Fla. 86, 47 So. 864; *Danson v. State*, 62 Fla. 29, 56 So. 677.

The evidence, as shown by the bill of exceptions, consisted of the testimony of the mother of the child, who said that she was twenty-eight years of age, was born in Spain, and that the defendant was the father of her child; that the child was born in February, 1916, and that the illicit intercourse between the mother and the defendant began in May, 1915, while the mother was employed as a maid in a lodging

house where the defendant and ten or twelve other men had rooms; the testimony of a witness by the name of Balma Ceida, who said that the expenses attending the birth of the child amounted to \$57; the testimony of the defendant, who denied that he ever had sexual intercourse with the child's mother, and the exhibition of the child before the jury. The introduction of the infant in evidence that the jury might compare it with the defendant and consider its resemblance to the putative father, if there was any resemblance, in determining the paternity of the child, might have had a strong influence upon the minds of the jury in arriving at the verdict which they rendered.

What comparisons were made by the jury between the child and the putative father we have no means of knowing; the record does not disclose, nor indeed could it disclose, what resemblances, actual or fancied, the jury perceived between the child and the defendant. There may have been resemblances between the defendant and the child in the color of the eyes and hair, the shape of the ears, nose, mouth, and hands, and other features; on the other hand such resemblances may have been imaginary, purely notional, and, if opportunity for so doing had been given the defendant, any fancied or imaginary resemblance might have been easily dispelled by close and careful comparison. The defendant, however, could not know what comparison each juror made when the child was exhibited. What to the defendant might have appeared as a dissimilarity to one or more jurors might have appeared as a striking resemblance, while other jurors, ignoring this one point of resemblance, might have discovered others which they fancied existed, and so the verdict may have rested, in a large measure, upon the variant opinions of the jurors based on facts not established by evidence, but which existed in the minds of the jurors as they severally fancied this or that resemblance between the child and the putative father to appear. As Mr. Justice Ladd, of the supreme court of Iowa, in *State v. Harvey*, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535, said: "How could a new trial be ordered because of the insufficiency of evidence in such a case?"

In the case at bar the child was exhibited to the jury, not for the purpose of showing any peculiarity of color or features, but merely to show a resemblance between it and its putative father, which was a matter of opinion, and that resting not upon any specific fact, but a vague, uncertain, and perhaps fancied resemblance of

the immature features of the child to those of the defendant.

An examination of the decisions of the courts of last resort in other jurisdictions reveals nothing more than that the courts are in irreconcilable conflict upon the question of the admissibility of such evidence. On the one hand, it is maintained that while it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, it is equally true as a matter of common knowledge that during the first few months of a child's existence it has that peculiar immaturity of feature which characterizes it as an infant, and that it changes often and very much in looks and appearance during that period. On the other hand, it is maintained that the weight to be given to such evidence is for the jury, and its weakness or uncertainty affords no reason for excluding it. This summing up of the decisions in this country upon the question is contained in 3 R. C. L. p. 764, from the text of which the above language is taken. Our examination of the authorities referred to in the footnotes to the above citation, and those referred to in the briefs of counsel and found by our research, convince us of the conflict of opinion on the question of the admissibility of such evidence where the child exhibited is only three months old when no question of the race or color of the bastard child's father is involved, but even in such case the child is exhibited to the jury to show some peculiarity of features or color, and not for the purpose of general comparison to discover resemblance between it and the defendant.

Mr. Wigmore in his work on evidence says that the sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporal indications. 1 Wigmore, Ev. p. 222. We think that this rule is supported by the better reason, and is the one that should be followed in the absence of any statute permitting the exhibition to the jury of a child of whatever age in bastardy or other proceedings involving the paternity of the child, to the end that the jury may make its own comparisons and form its own conclusions as to particular or general resemblances.

If the rule as suggested by Mr. Wigmore is followed, the objection to the evidence on account of its inherent weakness and unreliability would be largely, if not entirely, removed. In the first place the trial court

would have passed upon the question as to whether the child possessed features or other corporal indications of sufficient development to permit a comparison between them and those of the defendant; in the second place, the particular features or other corporal traits claimed to be possessed by the child would be by the adoption of the rule brought specifically to the jurors' attention, and the comparison made with reference only to such features or corporal traits. It seems to us that to permit an issue of such grave consequences to be determined against a defendant in a bastardy proceeding upon the imaginary, fancied, or notional general resemblance between a child of a week old, or even a few months old, and the defendant in such proceedings would be to place the defendant at a disadvantage which he could not possibly overcome. His counsel could only guess at the point of similarity which the jury might perceive and on which it might determine the issue, and he would be deprived utterly of the right to a review of the evidence by an appellate court.

In the case of *Adams v. State*, 93 Ark. 260, 137 Am. St. Rep. 87, 124 S. W. 766, the court quotes approvingly the rule as laid down by Wigmore and quoted above, but in its conclusion departs from the rule upon the authority of the dictum of the supreme court of Alabama in the case of *Paulk v. State*, 52 Ala. 427, 1 Am. Crim. Rep. 67. In the case of *Kelly v. State*, 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56, the court expressly announced that it followed the dicta in the *Paulk Case* and *Linton v. State*, 88 Ala. 216, 7 So. 261, but in the latter case the question was one of race, and not of resemblances. The case of *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687, the other case relied upon in the case of *Adams v. State*, supra, does not support the rule announced in the latter case. In the case of *Rex v. Hughes*, 22 Ont. L. Rep. 344, 19 Ann. Cas. 534, the court said: "It has long been the practice of the courts of this province to permit the production of the child at the trial and the pointing out to the jury of the likeness of the child to the defendant," and "it ought to be within the power of the court to prevent an abuse of the practice, though I think it would be better and more regular if the likeness were testified to by some witnesses in all cases; otherwise a court of appeal is at a great disadvantage if called upon to deal in any way with such evidence, as well as for other reasons."

In the case of *State ex rel. Stubblefield v. Woodruff*, 67 N. C. 89, the child was ex-

hibited to the jury with the full approbation of the defendant, and in the case of *State v. Britt*, 78 N. C. 439, the defendant offered to show by the midwife that the child bore a resemblance to a man other than the defendant. This was held admissible, the court citing the case of *State v. Woodruff*, supra, as a precedent for the admissibility of such evidence. In the case of *Anderson v. Aupperle*, 51 Or. 556, 95 Pac. 330, the case was an action for seduction. The child, being a little under three months of age, was offered and received in evidence for the inspection of the jury over the defendant's objection. The court held the evidence admissible upon the authority of *State v. Danforth*, 73 N. H. 215, 111 Am. St. Rep. 600, 60 Atl. 839, 6 Ann. Cas. 557. In that case the state was permitted to exhibit the child to the jury, and to argue from peculiarities of features claimed to be common to the child and the defendant and from a general resemblance between them. After verdict the defendant moved to set the same aside and for a new trial on the ground of alleged misconduct of the state's counsel. The court, after discussing the practice at some length, quoted approvingly the rule as laid down by Wigmore referred to above, but said: "Whether it should be here followed is a question which the present case does not raise for decision."

In the case at bar, however, the question is presented, and we think the rule should have been followed. 1 Wigmore, Ev. supra; *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153; *State v. Danforth*, 48 Iowa, 43, 30 Am. Rep. 387; *State v. Harvey*, 112 Iowa, 416, 52 L.R.A. 500, 84 Am. St. Rep. 350, 84 N. W. 535; *Robnett v. People*, 16 Ill. App. 299; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 480, 6 Am. Crim. Rep. 65; *State v. Neel*, 23 Utah, 541, 65 Pac. 494; *Clark v. Bradstreet*, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; *Reitz v. State*, 33 Ind. 187; *Overlock v. Hall*, 81 Me. 348, 17 Atl. 169. The exhibition of the child to the jury for the purpose of having the jury compare it with the defendant and consider its resemblance, if any, in determining its paternity, was prejudicial error, and for that reason the judgment should be reversed.

It is contended by plaintiff in error that the court erred in entering judgment against the defendant below in the sum of \$57 on the verdict of the jury. The verdict of the jury was as follows: "We, the jury, find the defendant, Armando Flores, is the father of the bastard child of Juana Gonzales, so say we all"—and was signed by L.R.A.1917B.

the foreman. The jury did not determine the amount of the necessary incidental expenses attending the birth of the child, although there was evidence that such expense amounted to \$57.

The plaintiff in error contends that the jury should have assessed the amount of the damages, and that if the statute contemplates the ascertainment of the amount to be paid by the defendant on account of such expense and the inclusion of it in the judgment, it is unconstitutional because it deprives the defendant of his right to a trial by jury as to the amount of such expenses.

A bastardy proceeding is a civil action in the circuit court. The statute was not designed to punish the accused for crime, but to make him contribute to the support of the child. *William H. T. v. State*, 18 Fla. 883; *Ex parte Hays*, 25 Fla. 279, 6 So. 64; *Bond v. State*, 34 Fla. 45, 15 So. 591. But it is a civil procedure to enforce a police regulation designed to secure immunity of the public from the child's support. See *State v. Wynne*, 116 N. C. 981, 21 S. E. 35; *Myers v. Baughman*, 61 Neb. 818, 86 N. W. 507; *Davis v. Carpenter*, 172 Mass. 167, 51 N. E. 530; 7 C. J. p. 967, and authorities cited.

The amount which the defendant is condemned to pay, when the issue is found against him, towards the support, maintenance, and education of the child, is limited by the statute within a certain maximum, and is in the nature of a penalty, and is not affected by the actual pecuniary damage which the mother of the child may suffer or incur; it is fixed by law within certain limits; but the necessary incidental expenses attending the birth of the child is a question of fact (*Andrew G. v. Catherine A.* 16 Fla. 830), which the court may ascertain after the verdict against the defendant upon the issue which the statute requires to be submitted. *Hamilton v. State*, 117 Ind. 348, 20 N. E. 252; *Scott v. State*, 102 Ind. 277, 1 N. E. 691. In the last case cited the court said that the trial proper ends with the finding that the defendant is the father of the child, and if there was error as to the amount of the judgment, it would not result in a reversal of the entire judgment, but simply in a remanding of the case, with instructions to hear the evidence and render the proper judgment. The matter of ascertaining the necessary expenses attending the birth of the child, which expense the statute imposes as a consequence following the verdict against the defendant, is in the nature

of ascertaining the costs of the proceeding, which the court, however, should not arbitrarily fix, but should ascertain upon evidence. There was evidence taken during the trial as to such expenses, and we can see no reason why the court should not have utilized that evidence in arriving at the

amount of the expense. There was no error in the judgment on that account.

For the error pointed out, the judgment is reversed.

Taylor, Ch. J., and Shackelford, Cockrell, and Whitfield, JJ., concur.

### **Annotation—Exhibition of child for purposes of determining paternity in bastardy proceedings.**

Generally as to resemblance as evidence of relationship, see note to *State ex rel. Scott v. Harvey*, 52 L.R.A. 500, wherein at page 502 will be found the earlier cases upon the present question, the following annotation including only those cases decided subsequent to the compilation of that note.

As to use of photographs as evidence, see note in 35 L.R.A. 805, and supplementary annotation in 51 L.R.A. (N.S.) 850. Cases involving the admission of such evidence to show likeness of parent and child will be found at page 806 of the earlier note.

As is stated in the earlier note, there is a decided conflict of authority upon the question of the propriety of allowing an alleged bastard child to be exhibited to the jury for the purpose of determining paternity, with, perhaps, the weight of authority in favor of allowing such exhibition. Some courts, however, have refused to permit profert where the child is too young to possess settled features or other corporal indications which afford a reasonable basis for comparison with the alleged father, the conclusions in such cases being based upon the inherent weakness of such evidence.

Thus it has been held in a number of recent cases that in bastardy proceedings profert may be made of the child for the purpose of showing a resemblance of features between it and the alleged father. *Kelly v. State* (1901) 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56 (child less than one year old); *Brantley v. State* (1914) 11 Ala. App. 144, 65 So. 678 (child born after prosecution was commenced, but before trial); *Land v. State* (1907) 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90; *Shailer v. Bullock* (1905) 78 Conn. 65, 112 Am. St. Rep. 87, 61 Atl. 65 (child ten months old); *Higley v. Bostick* (1906) 79 Conn. 97, 63 Atl. 786 (child nearly one year old); *Sims v. State* (1915) 16 Ga. App. 211, 84 S. E. 976, holding that the weight of authority is in favor of the rule allowing exhibition of the child and that L.R.A.1917B.

no ground for declaring a mistrial was established by the fact that "the babies" were shown to the jury at the request of one of the jurors after the case had been given to the jury, and no objection was made to such proceeding until after the jury had retired to make up its verdict; *Smith v. Hawkins* (1908) 93 Miss. 588, 47 So. 429 (age of child not shown). And see *Com. v. Pearl* (1907) 33 Pa. Super. Ct. 97, wherein it was held that prejudicial error was not committed either by the district attorney in taking the child, then sixteen months old, in his arms and commenting upon its resemblance to the defendant, or by the court in directing the jury that, while the child was not offered as an exhibit, it was in the case, and that if there was any resemblance between the child and the defendant which was apparent to the jury it was at liberty to take it into consideration; and *State ex rel. Berg v. Patterson* (1904) 18 S. D. 251, 100 N. W. 162, wherein it was held that it was not error for the prosecutrix' attorney to call the attention of the jury to the alleged bastard, which was in court without objection, where the defendant's attorney had introduced a photograph of it and discussed it to the jury. However, the courts which adhere to this rule admit that much may be said of the uncertainty of such evidence, but maintain that it should not be rejected merely on the ground that its bearing is not of a given degree of certainty, but rather that, even though it may in point of fact often throw little or no light upon the point in issue, it should be submitted for the jury's consideration as affording in most cases the basis for reasonable deductions on their part. See *Kelly v. State* (1901) 133 Ala. 195, 91 Am. St. Rep. 25, 32 So. 56, and *Shailer v. Bullock* (1905) 78 Conn. 65, 112 Am. St. Rep. 87, 61 Atl. 65, holding that upon "good grounds" such evidence is of probative value.

But, as above stated, some courts maintain that the true rule is that the

similarity of specific traits or peculiarities of features may be shown, but that the child should not be exhibited for purposes of general comparison where it is not old enough to possess settled features or other corporal indications. It was expressly so held in *FLORES v. STATE*, ante, 1143, where the exhibition of an infant three months old to the jury for the purpose of having the jury compare it with the alleged father to detect resemblances was declared to be prejudicial error. And in *State ex rel. Rison v. Browning* (1915) 96 Kan. 540, 152 Pac. 672, in discussing the rule that a child may be exhibited where it has some permanency of features, but otherwise where the exhibition could be of no value, the court said that "there are instances in which physical characteristics of a father are stamped upon his child so definitely that they distinctly appear at birth, or even before birth. In some instances resemblances may not appear until late in the course of the child's independent development, and in still other instances resemblances may never appear with recognizable certainty. Sometimes a child may strongly resemble one not its father, and not related to it. The result is that the evidence of paternity furnished by the features of the child may be strong or weak or inconclusive or worthless,"—and held that where the trial court in its discretion had permitted a child about five months old to be exhibited to the jury, it did not feel warranted in reversing the judgment, the presumption on appeal being that the jury gave it no more weight than it was entitled to receive. So in *State v. Brathovde* (1900) 81 Minn. 501, 84 N. W. 340, it was held improper for the prosecuting attorney to call the attention of the jury to any supposed resemblances of the child, which was only about three months old, to the defendant, but that a new trial would not be ordered, as the counsel for defendant had immediately objected and the trial court had directed the jury to wholly disregard such improper remarks. The court said that, to say the least, such conduct was inexcusable, and that the legal representatives should depend upon substantial credible evidence, and not seek to influence the jury by calling attention to the mobile features of a babe in arms. And see *State ex rel. Mundt v. Meier* (1908) 140 Iowa, 540, 118 N. W. 792, wherein it was held error which could not be cured by an objection for the plaintiff's counsel in his L.R.A.1917B.

argument to take the child, then about one year old, in his arms and comment upon the resemblance which it bore to defendant. This decision cited with approval the cases of *State ex rel. Scott v. Harvey* (1900) 52 L.R.A. 500, and *State v. Danforth* (1878) 48 Iowa, 43, 30 Am. Rep. 387, which is set out in the note appended to the Harvey Case, in the former of which the exhibition of a child nine months old for the purpose of showing its resemblance to the defendant was held error, and in the latter of which it was held that the resemblance of a child three months old to its father was too indistinct and uncertain to warrant the exhibition thereof in an action against its putative father for seduction. It is also of interest in this connection that the court in the Harvey Case refused to extend to that case the rule of *State v. Smith* (1880) 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153 (set out in note in 52 L.R.A. 504), to the effect that a child may be exhibited to the jury in a bastardy proceeding as evidence of paternity where it has attained an age when its features have assumed some degree of maturity or permanency, and under which a child two years and one month old was allowed to be exhibited to the jury.

Where the rule is adopted which permits exhibition of the child where there is maturity and permanency of features, but not where the features are very immature and unsettled, it has been said that no arbitrary age limit for the exhibition of a child can be fixed, but that it is the province of the trial court to exercise its discretion in the matter, and that the exhibition should be allowed if same would appreciably tend to promote the purpose of the proceeding, but that if the court should be satisfied that no substantial advancement toward the truth would result from the exhibition, it should be forbidden. *State ex rel. Rison v. Browning* (1915) 96 Kan. 540, 152 Pac. 672. And see *Stahl v. State* (1903) 67 Kan. 864, 74 Pac. 238, wherein it was held that the error, if any, of the trial court in refusing to require the relatrix to produce the child in court was cured where subsequently the child was exhibited to the jury and their attention called to it.

Of course where a child is rightfully exhibited to the jury as proof of paternity, counsel are at liberty to discuss the subject to the jury. *Ibid*.

Closely allied to the foregoing cases are those which have involved the ques-

tion of the right of the prosecuting witness to bring the alleged bastard into court, and to take it on the stand with her while testifying, the rule being that such conduct is permissible. Thus even in Iowa, where the courts refuse to allow a child so immature as to have unsettled features to be tendered in evidence or exhibited to the jury in argument, it has been broadly maintained that there is no rule which requires the separation of mother and child while in the court room or even on the stand. See *State v. Stark* (1911) 149 Iowa, 749, 129 N. W. 331, Ann. Cas. 1912D, 362 (in this case, however, the child was nearly two years old, no objection was made to its presence, and the jury was cautioned against considering or discussing any supposed or fancied resemblance or non-resemblance between it and the defendant). And in *Rose v. People* (1899) 81 Ill. App. 128, it was held not to be prejudicial error for the court as against an objection to permit the child to remain in the court room in the presence of the jury; it not appearing that it was either given in evidence or exhibited to the jury, or in any manner referred to by the prosecution in the presence of the jury. So, in *Esch v. Graue* (1904) 72 Neb. 719, 101 N. W. 978, it was held that the refusal of the trial court to order that the child, which was less than five months old, be removed from the court room, was not erroneous, the child neither having been exhibited to the jury nor its attention called to it. And in *People use of Dunn v. Moore* (1914)

188 Ill. App. 418, it was held neither improper to have the child present in the court room nor prejudicial in that prosecutrix sat near the jury with the child, where the court, on objection of defendant's counsel, required her to remove with the child to another part of the room, and it appearing that there was no effort made to exhibit the child to the jury for their critical examination. And in *Johnson v. State* (1907) 133 Wis. 453, 133 N. W. 674, it was held that the trial court did not err in merely permitting the complaining witness to hold the alleged bastard child in her arms on exhibition before the jury while giving her testimony, where there was no attempt made to offer the baby in evidence or exhibit it to the jury. And in *Benes v. People* (1905) 121 Ill. App. 103, it was held that it was no error for the court to permit the prosecutrix to bring the alleged bastard, which was eight months old, into the court room and take it with her to the stand while testifying, it being too young to be left alone, and no one being provided to take care of it, although the defendant's attorney objected to its presence. And see *Johnson v. Walker* (1905) 86 Miss. 757, 1 L.R.A. (N.S.) 470, 109 Am. St. Rep. 733, 39 So. 49, wherein it was held that merely bringing the child into the court room was not reversible error where it was immediately removed without the attention of the jury being called to it, or any reference being made to it in the presence of the jury. G. J. C.

#### ILLINOIS SUPREME COURT.

CHARLOTTE O. MCDOLE, Appt.,  
v.  
LUELLA THURM et al.

(— Ill. —, 114 N. E. 542.)

#### Will — devise to illegal wife.

1. A devise in favor of the woman with whom testator was living as his wife is not void because the marriage between them occurred within the prohibited time after she was divorced from another.

For other cases, see *Wills*, I. a, 1, in *Dig.* 1-52 N. S.

Note. — For annotation of the question whether a devise or bequest to one described as husband or wife is affected by the illegality or nonexistence of marriage, see annotation following this case, post, 1152.

For annotation of the question whether L.R.A.1917B.

Same — mistake in relationship — effect.

2. That testator's marriage to a woman with whom he lived as his wife was invalid, because it occurred within the prohibited time after her divorce from another, does not render a devise to her by name as his wife void on the theory that he acted under an erroneous impression as to her relationship to him.

For other cases, see *Wills*, III. a, in *Dig.* 1-52 N. S.

(December 21, 1916.)

APPEAL by complainant from a decree of the Circuit Court for Lee County

the right of a beneficiary of a life insurance policy, described as the husband or wife of the insured, is affected by the illegality or nonexistence of their marriage, see note in 47 L.R.A. (N.S.) 189, on "Insurance on life in favor of paramour."

sustaining a demurrer to and dismissing a bill filed to construe the will of complainant's deceased father. Affirmed.

The facts are stated in the opinion.

Messrs. Dixon & Dixon and Ray T. Luney, for appellant:

Neither party to a divorce shall marry again within one year, and a pretended marriage ceremony, performed in another state, for the purpose of evading the provisions of the laws of this state, will not be recognized in this state for any purpose.

Wilson v. Cook, 256 Ill. 460, 43 L.R.A. (N.S.) 365, 100 N. E. 222; Nehring v. Nehring, 164 Ill. App. 527; Szlausz v. Szlausz, 255 Ill. 314, L.R.A.1916C, 741, 99 N. E. 640, Ann. Cas. 1913D, 454; Snell v. Snell, 191 Ill. App. 239.

A gift in a will to "my wife" is a gift to her as testator's wife, and if she failed to answer that description, the gift to her would fail.

Collard v. Collard, — N. J. —, 67 Atl. 190; Kennell v. Abbott, 4 Ves. Jr. 802, 31 Eng. Reprint, 416, 4 Revised Rep. 351, 25 Eng. Rul. Cas. 480; Wilkinson v. Joughin, L. R. 2 Eq. 319, 35 L. J. Ch. N. S. 684, 12 Jur. N. S. 330, 14 L. T. N. S. 394; 4 Gray, Cases on Property, 133, 143; 2 Jarman, Wills, 5th Am. ed. 576.

A gift in a will to "my wife" means "lawful wife," the same as a gift in a will to "my children" means "legitimate children."

Vaughan v. Dalton-Lard Lumber Co. 119 La. 61, 43 So. 926; Thompson v. Lewiston Daily Sun Pub. Co. 91 Me. 528, 39 Atl. 556; United States v. Tenney, 2 Ariz. 29, 8 Pac. 295; Names v. State, 20 Ind. App. 168, 50 N. E. 401; Richard v. Lazard, 108 La. 540, 32 So. 559; Re Harris, 152 App. Div. 52, 136 N. Y. Supp. 712; Kemper v. Fort, 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022; Bealafeld v. Slaughenhaupt, 213 Pa. 565, 62 Atl. 1113; Brisbin v. Huntington, 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

Mr. H. A. Brooks, for appellees:

A will devising property to a man's wife, naming her, vests title in the woman named and designated as wife, though it is shown in the bill to construe the will, and by the evidence, that the marriage is void, provided it is shown by the will or by extrinsic evidence that the woman named as wife was the person claiming to be a devisee under the will.

Brack v. Boyd, 202 Ill. 440, 66 N. E. 1073; Peet v. Peet, 229 Ill. 354, 13 L.R.A. (N.S.) 780, 82 N. E. 376, 11 Ann. Cas. 402; Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422; Giger v. Busch, 122 Ill. App. 13; Marks v. Marks, 40 Can. S. C. 210, 12 L.R.A.1917B.

Ann. Cas. 751; Pastene v. Bonini, 106 Mass. 85, 44 N. E. 246; Dicke v. Wagner, 95 Wis. 260, 70 N. W. 159; Hardy v. Smith, 136 Mass. 328; Prentice v. Achorn, 2 Paige, 30; Klein v. Hayck, 5 Redf. 210; Powers v. McEachern, 7 S. C. 290; Doe ex dem. Gains v. Rouse, 5 C. B. 422, 136 Eng. Reprint, 942, 17 L. J. C. P. N. S. 108, 12 Jur. 99; Page, Wills, § 511, p. 598; 40 Cyc. 1456; Re Wagstaff [1908] 1 Ch. 162, 4 B. R. C. 50, 98 L. T. N. S. 149, 77 L. J. Ch. N. S. 190, 24 Times L. R. 136; Hitchcock v. Home Missions, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1.

A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provisions of a will in which it is found, if, from the will itself, or extrinsic evidence, the object of the testator's bounty can be ascertained.

Goodwin v. New Church Bd. of Publication, 160 Ill. App. 483; Missionary Soc. v. Cadwell, 69 Ill. App. 280; Woman's Union Missionary Soc. v. Mead, 13 Ill. 338, 23 N. E. 603.

Carter, J., delivered the opinion of the court:

This was a bill filed by appellant in the circuit court of Lee county to construe the will of Fred Heavens, deceased. A demurrer to the bill was sustained, and a decree was entered dismissing the bill for want of equity. From that decree this appeal was prayed.

From the allegations of the bill and the exhibits attached and made a part thereof, it appears that the deceased, Fred Heavens, executed his last will and testament on January 18, 1916. The will, after directing that his just debts and funeral expenses be paid, provided: "I give, devise and bequeath my watch to my grandson, Fred McDole, my bookcase to my daughter, Charlotte McDole. All my other goods and chattels to my wife, Luella Heavens, to be in lieu of dower and widow's award. I also give and devise unto my wife, Luella Heavens, the premises on Boyd street, Dixon, Illinois, 50x160 feet, to have and enjoy for her natural life, but upon her death, or when she remarries, the said premises I devise to my daughter, Charlotte McDole, if she shall then be living, and if not, to her children then living, in equal parts. Lastly, I direct my executor to sell my vacant lot on North Galena avenue, in Dixon, at public or private sale and out of the proceeds to pay all debts and expenses and mortgage thereon, and the balance of said proceeds I give unto my wife, Luella Heavens."

The will named Robert H. Scott, or, in



case he did not act, Luella Heavens, as executor, and revoked all former wills and codicils made by the testator.

It appears from the allegations of the bill that Luella Thurm was a resident of Dixon, Illinois, in 1907, and in September of that year obtained a decree in the circuit court of Lee county granting her a divorce from her husband; that at that time Heavens was a widower, residing in said city of Dixon; that on December 23, 1907, Luella Thurm and Fred Heavens went to Clinton, Iowa, and then and there were united in marriage; that said marriage ceremony was in violation of the statute of Illinois of 1905, providing that neither party to a divorce shall be remarried within one year from the time of the decree of divorce. From the record and briefs before us it appears that Heavens and Luella Thurm returned to Dixon and lived together as man and wife until Heavens died, and that his last will and testament was admitted to probate in said county February 28, 1916; that the only child surviving him was his daughter, appellant herein, who, at the time of her father's death, had two children living, Fred McDole and Olive McDole.

Counsel for appellant contend that it is clear from this record that testator, Fred Heavens, thought that he was legally married to appellee Luella Thurm, and that the presumption must be that he made the gift to her under the erroneous impression that the marriage was valid, and that it cannot be told how he would have drawn the will had he known the marriage was invalid. It is a reasonable presumption, from the record before us that he knew of her former marriage and her recent divorce at the time when the marriage ceremony between them was performed. There can be no question, under the law, that testator could have left this property to Luella Thurm, even conceding that they were not legally married, and conceding that he knew the marriage ceremony between them was invalid. The rights of Luella Thurm are to be determined by the intention of the testator, and not as to whether public policy or good morals demand that a divorced person shall not remarry within a year from the date of the divorce. However unlawful such conduct may be, it is not the duty of courts of equity to deprive persons of their civil rights to punish them for immoral conduct. *Hardy v. Smith*, 136 Mass. 328; *Prentice v. Achorn*, 2 Paige, 30.

Council for appellant argue that the intention of the testator can be found only from reading the will. While the intention of the testator as expressed in the will must

prevail, yet the court is not bound to disregard the circumstances under which the will was made, but should endeavor to place itself in the situation of the testator, in order to understand the language in the sense in which it was used. *Hawhe v. Chicago & W. I. R. Co.* 165 Ill. 561, 46 N. E. 240; *Strickland v. Strickland*, 271 Ill. 614, 111 N. E. 592; *Wallace v. Foxwell*, 250 Ill. 616, 50 L.R.A.(N.S.) 632, 95 N. E. 985; *Abrahams v. Sanders*, 274 Ill. 452, 113 N. E. 737.

It is clear from the admitted facts in this record that the testator lived with Luella Thurm as his wife from the time when the marriage ceremony was performed, in 1907, until his death, and that during all this time he held her out to the public as his wife. The terms "husband" and "wife" have undoubtedly for their primary meaning only those persons who are actually and lawfully living together as husband and wife; but the surrounding circumstances may extend the meaning of the terms to those who are in the ostensible relation of husband or wife, although not legally so, especially if it appears that this was the intention of the testator. Page, Wills, § 511; *Pastene v. Bonini*, 166 Mass. 85, 44 N. E. 246; *Marks v. Marks*, 12 Ann. Cas. 751, and cases cited in note, 40 Can. S. C. 210; 40 Cyc. 1456; *Dicke v. Wagner*, 95 Wis. 260, 70 N. W. 159. In view of the relations in which he had lived with Luella Thurm from 1907 until his death, and of the other surrounding circumstances, we think it clearly appears from the wording of the will that the testator intended to leave the interest in the property in question to the woman with whom he was living as his wife; that is, the appellee Luella Thurm. The reasoning of this court in *Brack v. Boyd*, 202 Ill. 440, 66 N. E. 1073, tends strongly to uphold this conclusion. In that case the will provided, among other things, that "at the death of my said wife, it is my will that my said property be vested in my adopted daughter, Mary Jane Ralls (whose name before her said adoption was Mary Jane Singleton)."

It was argued that the adoption proceedings were invalid. In passing on that question the court said: The language "identifies the beneficiary beyond question, and is sufficient to vest the estate in remainder in her. This being the case, it will be unnecessary to determine . . . whether there was any defect in the adoption proceedings, as it could not affect the result."

The authorities cited and relied upon by council for appellant are not controlling here. Under all the facts and circumstances before us it is obvious that the testator in-

tended to leave the property in question to appellee Luella Thurm. We find nothing in the record to justify the presumption, even, that the testator would not have left this property to her if he had known that their marriage was invalid. The decrees of the Circuit Court will be affirmed.

**Annotation—Devise or bequest to one described as “husband,” “wife,” or “widow,” as affected by illegality or nonexistence of marriage.**

This note assumes to collate only cases of the type indicated by its title, in which the fact that the beneficiary is described as the husband, wife, or widow, either of the testator or of a third person, or the fact that the provision for the beneficiary is during widowhood, raises the question whether the gift is conditioned upon the lawfulness or existence of the relation of husband and wife.

It will be noted that the question is entirely distinct from the question as to which of two persons who have at different times answered, or might have answered, to the description of “husband,” “wife,” or “widow,” and who are not designated otherwise than by such relationship, is to be taken as the intended beneficiary of a testamentary gift, or of an insurance policy or benefit certificate; for a treatment of which, reference may be made to the note to *Meeker v. Draffen*, 33 L.R.A.(N.S.) 817. It is also distinct from the question as to whether the gift is conditioned upon the continuance of the relation. For treatment of the latter question, see note in 69 L.R.A. 940, on “Effect of divorce to revoke gift by will;” also the later cases of *Rogers v. Hollister* (1914) 156 Wis. 517, 146 N. W. 488, and *Re Brown* (1908) 139 Iowa, 219, 117 N. W. 260. As to the effect of divorce on the rights of a beneficiary under an insurance policy or benefit certificate, see notes to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A.(N.S.) 478; *Green v. Green*, 39 L.R.A.(N.S.) 370; and *Filley v. Illinois L. Ins. Co.* L.R.A.1915D, 130.

Mere wrong description of the legatee will not defeat a legacy; but, if a legacy is given on account of the character involved in the description, and that character has been imposed by fraud on the testator, the legacy will be bad. *Giles v. Giles* (1836) 1 Keen, 685, 48 Eng. Reprint, 471, 5 L. J. Ch. N. S. 46, s. c. sub nom. *Penfold v. Giles* (1836) 6 L. J. Ch. N. S. 4; and see also, as supporting this statement, the cases cited throughout this note.

The cases hereinafter reviewed appear to warrant the statement that where testator knows that his marriage to a

woman is, or may prove to be, bigamous, by reason of the existence of a former wife or husband, a gift to such woman during widowhood, or so long as she shall remain unmarried, will entitle her to the property so long as she remains in the same state as at the time of his death; but that where testator was unaware of the circumstances rendering the marriage void, the gift will not take effect.

It also appears to be true that a mistake on the part of the testator with respect to the status of a legatee—as where he erroneously believed her to be unmarried, or supposed her marriage to be legal—will not prevent a gift to her “so long as she shall remain single and unmarried,” or “if she shall become a widow,” from taking effect,—at least where such supposed status is not the motive for the gift.

It has been held that a direction that a provision made for testator’s “wife” shall be in lieu and satisfaction of any dower or other rights in the estate is not a declaration of any particular purpose for which the legacy is given, but is only a direction that she shall take nothing besides the legacy, and does not really amount to an expression of purpose or intent. *Re Boddington* (1883) L. R. 22 Ch. Div. (Eng.) 597, affirmed in (1884) L. R. 25 Ch. Div. 685, 53 L. J. Ch. N. S. 475, 50 L. T. N. S. 761, 32 Week. Rep. 448, 20 Eng. Rul. Cas. 489; *Klein v. Hayek* (N. Y.) *infra*; but compare *Collard v. Collard* (1907) — N. J. —, 67 Atl. 190, hereinafter set forth.

A case of possible collateral interest is *Brack v. Boyd* (1903) 202 Ill. 440, 66 N. E. 1073, in which it was held that the language employed in a will by which a testator devised property to “my adopted daughter Mary Jane Ralls (whose name before her said adoption was Mary Jane Singleton)” sufficiently identified the beneficiary and vested the estate in her, irrespective of the sufficiency of the adoption proceedings.

**Where no marriage ceremony has been performed between testator and his reputed wife.**

In *Klein v. Hayek* (1881) 5 Redf. (N.

Y.) 210, where a testator who had been divorced, and who was forbidden to marry again, bequeathed certain property to a woman with whom he had cohabited without a marriage from the time of his divorce until his death, designating her as "my beloved wife, Maria Klein," and declaring, "the above provisions in favor of my wife to be in lieu of dower," it was held that the error in designating the legatee as his wife, not being occasioned by any fraud practised upon the testator, did not render the legacy void; and that the fact that the legacy was stated to be in lieu of dower did not affect the validity, the testator being presumed to know that the legatee had no legal claim upon his estate for dower.

In *Re Brown* (1910) 26 Times L. R. (Eng.) 257, 54 Sol. Jo. 251, it was held that the woman with whom testator had been living, and whom he called his wife, and to whom he had made plans to be legally married, which were thwarted by his illness and death, was entitled to a provision made in his will for his "wife," although she was not named.

**Where testator knew, or had equal means of knowing, the illegality of his own marriage.**

In *Pratt v. Mathew* (1856) 22 Beav. 328, 52 Eng. Reprint, 1134, 4 Week. Rep. 418, affirmed on another point in (1857) 25 L. J. Ch. N. S. 686, 2 Jur. N. S. 1055, 4 Week. Rep. 772, it was held that a woman whose marriage to testator was illegal, she being his deceased wife's sister, might take under a testamentary gift of all his real and personal estate "to my wife" for life, in a will made while testator was living with her as his wife.

In *Dicke v. Wagner* (1897) 95 Wis. 260, 70 N. W. 159, it was held that a provision in the will of a testator whose marriage to a woman within the prohibited degree of consanguinity was a nullity, that a bequest therein made to his "wife" should not be considered as part payment of her dower interest or thirds, but that "she shall be entitled besides the above bequeath to all under the law in such case made and provided as my widow if she shall survive me," was equivalent to a devise to the woman named as his wife, of such interest in his lands and homestead as she would have been entitled to by statute had she been his lawful wife.

In *Doe ex dem. Gains v. Rouse* (1848) 5 C. B. 422, 136 Eng. Reprint, 942, 17 L. J. C. P. N. S. 108, 12 Jur. 99, where L.R.A.1917B.

testator, who had a lawful wife living, went through the ceremony of marriage with a woman whose Christian name was Caroline, and devised certain property to "my dear wife Caroline," it was held that Caroline took the property, notwithstanding the misdescription.

In *Giles v. Giles* (1836) 1 Keen, 685, 48 Eng. Reprint, 471, s. c. sub nom. Penfold v. Giles (1836) 6 L. J. Ch. N. S. 4, it was held that the legatee's right to a provision made for her by testator, who designated her as his wife, was not defeated by the fact that she had another husband living, where it did not appear that she had a guilty knowledge which the testator did not share, the court saying: "In the present case the testator, as well as Mrs. Penfold, had both an actual knowledge of the existence of John Penfold in the year 1815; and it was not more the duty of Mrs. Penfold than it was the duty of Thomas Giles, the testator, to ascertain that John Penfold was dead before they ventured to proceed to the ceremony of a marriage between themselves. There is no more reason why I should impute to the plaintiff a fraud upon the testator than to the testator a fraud upon the plaintiff; which of them was guilty, if either of them, must depend upon circumstances which are not before the court. If both had a guilty knowledge, no fraud was committed upon the testator; and however immoral the conduct of the parties, it is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights."

In *Re Petts* (1859) 27 Beav. 576, 54 Eng. Reprint, 228, 1 L. T. N. S. 153, 29 L. J. Ch. N. S. 168, s. c. sub nom. Pitt's Will (1859) 5 Jur. N. S. 1235, 8 Week. Rep. 157, where testator made certain provisions for his "wife," not mentioning her by name, and it appeared that the woman to whom testator was married was not lawfully his wife, she having a husband living whom she had left nineteen years before, and whom she believed to be dead, it was held that the testator intended to benefit her, and that she had not done anything to forfeit the provision by going through the ceremony of marriage with the testator after so great a lapse of time, although the inquiries made by her as to whether her former husband was still living were not very carefully prosecuted.

In *Lepine v. Bean* (1870) L. R. 10 Eq. (Eng.) 160, testator gave property upon trust for his wife Margaret "for and during the term of her natural life (pro-

vided she shall so long continue my widow and unmarried) . . . and from and immediately after the decease or second marriage of my said wife" upon trust to divide among testator's children, who had been born to him by the said Margaret. As a matter of fact Margaret was not legally his wife, he having a wife living. It was contended that Margaret could not take, as the gift was to be so long as she was the testator's widow, and not having been legally married to the testator, she could not be his widow; but it was held that testator meant her to take the property so long as she was unmarried.

For a like decision upon a similar state of facts, see *Dilley v. Matthews* (1863) 2 New Reports (Eng.) 60, 8 L. T. N. S. 762, 11 Week. Rep. 614.

In *Re Burlinson* (1899), the only account of which seems to be a note of unreported decisions in 107 L. T. Jo. (Eng.) 82, a testator gave his estate in trust to pay the net income to one who had lived with him as his wife, but who had another husband living, during such time as she should remain unmarried, and upon her death or marriage upon trust for his son and daughter, and further directed his trustees to permit her to have the use and enjoyment of his furniture and other household effects during her lifetime, or so long as she should remain unmarried. The question being raised whether, under the circumstances, the gift to such woman during such time as she should remain unmarried was valid, or had failed, it was held that, on the true construction of the will, those words meant during such time as she should remain in the same state as she was in while living with testator, and that the gift was valid.

In *Re Wagstaff* [1908] 1 Ch. (Eng.) 162, 4 B. R. C. 50, 77 L. J. Ch. N. S. 190, 98 L. T. N. S. 149, 24 Times L. R. 134, it was held that a woman espoused by a testator with the knowledge that she had a husband living was entitled during her life, or until she should marry again, to a gift to her, under the name of "wife," of the net income of testator's residuary estate "during her life if she shall so long continue my widow for her own use and benefit."

In *Re Hammond* [1911] 2 Ch. (Eng.) 342, 80 L. J. Ch. N. S. 690, 105 L. T. N. S. 302, 27 Times L. R. 522, 55 Sol. Jo. 649, where a woman whose husband had disappeared and was supposed to be dead, six years thereafter went through a ceremony of marriage with testator, who was fully aware of the circum-

stances, and who made certain bequests to her "during her widowhood, and after her decease or second marriage," to his daughters, she was held entitled to enjoy the property until her death or remarriage, notwithstanding her legal husband proved to be still alive; the words, "during her widowhood," being held, under all the circumstances, and having regard to the terms of the will, not to import a condition, but to define the period during which she was to enjoy the gift.

In *Prentice v. Achorn* (1830) 2 Paige (N. Y.) 30, where a testator who, whether he was imposed on at the time of his marriage to a woman who had a husband still living, knew previously to the execution of the will that her former husband had been heard of since her marriage to the testator, it was held that the expressions in the will in which he designated her by the title of "my wife Jemima," and gave her the use of one fourth of the property while she remained his widow, must be taken with reference to the fact that he knew that they were not legally married.

In *McGuire's Will* (1867) 1 Tucker (N. Y.) 196, where the testator, who, representing himself as a widower, had gone through a marriage ceremony, devised property to his putative wife, designating her as "my beloved wife, Isabella Phillips McGuire," it was held that, whether or not the testator was under a misapprehension as to the death of his lawful wife, such misapprehension would not invalidate the will and disentitle it to probate, where it appeared probable, in view of the circumstances, that, had testator known that his legal wife was alive, he would have made no different disposition.

**Where testator was unaware of circumstances rendering his marriage void.**

In *Kennell v. Abbott* (1799) 4 Ves. Jr. 802, 31 Eng. Reprint, 416, 4 Revised Rep. 351, 25 Eng. Rul. Cas. 480, it was held that if a legacy is given to a person under a particular character which he has falsely assumed, in which alone one can suppose the motive of the bounty, the law will not permit him to avail himself of it; and therefore that where a legacy was given by a woman to a man in the character of her husband, whom she supposed to be and described as such, but who, at the time of the marriage ceremony with her, had a wife living, he could not demand the legacy.

In *Wilkinson v. Joughin* (1866) L. R. 2 Eq. (Eng.) 319, 35 L. J. Ch. N. S. 684,

12 Jur. N. S. 330, 14 L. T. N. S. 394, where testator, who had married a woman representing herself as a widow, but having, to her knowledge, a husband living, made a provision for her under the designation of "my wife Adelaide," it was held that, as she had imposed upon the testator, the bequest was wholly void.

In *Collard v. Collard* (1907) — N. J. —, 67 Atl. 190, where testator devised property to a woman whom he designated as "my wife Emily M. Collard," "for the term of her natural life, so long as she remains my widow," not knowing at the time that she had a husband living, and also providing that the legacy given to her should be in lieu of her dower in his estate, thereby indicating that she was to take in the character and capacity of wife and widow, it was said that at the death of the testator the devisee was not, and could not be, his widow, because she had never been his lawful wife; and that the estate given was also void because the conditions upon which it rested did not, and could not, exist.

**Where contemplated marriage did not take place.**

In *Schloss v. Stiebel* (1833) 6 Sim. 1, 58 Eng. Reprint, 495, where testator, having become engaged to marry a lady, made a codicil in which, after mentioning her by name and alluding to his intended marriage with her, he provided, "in case of my death I leave to my wife" a sum of money and other personal property, it was held that the legacy was not given to the testator's betrothed on the condition of his marrying her, and that she might claim it notwithstanding that, at the testator's death, the marriage had not yet taken place.

But in *Steen v. Steen* (1905) 68 N. J. Eq. 472, 58 Atl. 675, where a testatrix, knowing of her son's engagement to marry one Margueritte J. Irwin, devised and bequeathed "to my daughter, Margueritte J. Irwin Steen, wife of my son, John A. Steen, all of my estate, real personal and mixed, during the lifetime of my said daughter, and, after her decease, to her heirs, as would by law inherit the same, being the issue of said marriage of my said son, John A. Steen," and the marriage had not taken place at the time of testatrix's death, it was held that the devise was void for want of a person in being answering the description of the devisee. The vice chancellor said: "There was not, at the time of the making of the will, nor at the death of the testatrix, any person in esse

answering to that name and description. It was most strenuously insisted on the argument that it was simply a misdescription of a person in being, and that all of the language used, following the words 'Margueritte J. Irwin,' were surplusage, and should be rejected. To this argument I cannot give my assent. I am fully persuaded that it was not the intention of this testatrix to devise this property to Margueritte J. Irwin as distinct from her status as the wife of John A. Steen, and the legatee, not answering that description at the time the will took effect, the gift failed. I am strengthened in my conviction regarding the intention of the testatrix by the fact that the gift over is to the issue of the marriage of John and Margueritte, and am satisfied that she never intended to give this property to a person who was not her daughter,—who was not the wife of her son, John A. Steen,—and who could by no possibility leave issue of her marriage with John A. Steen. . . . My construction of the devise under consideration is that the words used by the testatrix were intended to describe the character or capacity in which the legatee should take, and that for want of such capacity or status the defendant Margueritte J. Irwin took no estate under the will, and I will advise accordingly."

**Where marriage has been annulled since making of will.**

In *Re Boddington* (1884) L. R. 25 Ch. Div. 685, 20 Eng. Rul. Cas. 489, affirming (1883) L. R. 22 Ch. Div. 597, it was held that a woman who, after the date of the will, had procured the annulment of her marriage to the testator, could not claim the benefit of an annuity to her "so long as she shall continue my widow and unmarried," on the ground that the reference to widowhood constituted a condition which did not exist at the time the will took effect, and that likewise she could not take under a provision giving her "in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2,000;" though she was held entitled to take a gift to her under the description of "wife," since, looking to the facts, it did not appear that the word "wife" was such a part of the description as to amount to a condition that she should not take unless she filled the character of wife, Lord Selborne saying: "De facto she was his wife when the will was made, so there is no ground for imagining that he intended to do more than describe her as at that time she

would be naturally and commonly described.”

**Mistake as to status of legatee.**

In *Turner v. Brittain* (1863) 3 New Reports (Eng.) 21, where a testator bequeathed the income of a certain sum to his son for life, and after his decease “unto Harriet, the present wife of” said son, should she survive him, during her life, it was held that Harriet, with whom the son had lived as his wife, might claim the benefit of such provision, there being no evidence that the false representation made by the son and herself to the testator that they were married had been made for the purpose of obtaining the legacy.

In *Re Lowe* (1892) 61 L. J. Ch. N. S. (Eng.) 415, 40 Week. Rep. 475, testator, believing his brother to be legally married to the woman with whom he was living as his wife, left property in trust to pay the income to the brother for life, and after his death to “the present wife of my said brother Joseph, if she shall become his widow,” during her life. It was held that the wife was entitled to the provision, the phrase, “if she shall become his widow,” being held equivalent to, “if she shall survive him.”

In *Anderson v. Berkley* [1902] 1 Ch. (Eng.) 936, where a son had written to his father that he had married a lady named Letitia, who was then his reputed wife, it was held that the lady was entitled to a provision made in the father's will for the son's “wife Letitia,” although she was never lawfully married to testator's son, there being no question of any fraud by the legatee in obtaining the bequest. The court said: “If entitled to conjecture upon the subject, it is possible and probable that what induced the testator to confer any benefit by his will upon this lady was the belief that she was the wife of his son. It is not, however, a legacy to anyone under the simple description of ‘the wife of my son Francis,’ without any reference to a particular individual. If it had been, any person claiming must, I suppose, have shewn that she really sustained that character. The bequest is ‘to my son's wife Letitia if she shall survive him,’—that is, to a legatee named, with an additional description which is not satisfied, inasmuch as there was not any lawful wife of the testator's son Francis in the strict legal sense of the term, though, perhaps, in a secondary sense, Letitia Berkley or Cumberland might be called his wife. . . . The legacy is intended for some person of whom the name, with a description, is

given for the purpose of ascertaining and identifying the individual. We have a compound designation, consisting of the name ‘Letitia’—there is no doubt to whom that refers—and the description ‘wife of my son Francis.’ It is a rule, however, that, where the description is made up of more than one part, and one part is true, but the other false, then, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected, and will not vitiate the gift.

. . . It is impossible to say positively what the testator in the present case would have done if he had known the precise facts in reference to the relation between his son and this lady.”

In *Rishton v. Cobb* (1839) 5 Myl. & C. 145, 41 Eng. Reprint, 326, 9 Sim. 615, 59 Eng. Reprint, 495, 9 L. J. Ch. N. S. 110, 4 Jur. 261, a woman was held entitled to a gift of dividends to her “so long as she shall remain single and unmarried,” though she had been married and deserted by her husband, of which fact testator was unaware.

The foregoing case was adversely criticized in *Re Boddington* (1884) L. R. 25 Ch. Div. 685, 53 L. J. Ch. N. S. 475, 50 L. T. N. S. 761, 32 Week. Rep. 448, 25 Eng. Rul. Cas. 489, by Lord Selborne, who said that the respect he felt for the great judge who decided it prevented his saying more of the judgment than that he did not understand it, and that if it were applicable to the case then before him, he should hesitate for some time before following it.

**—where status is presumably the motive for the gift.**

In *Re Davenport* (1852) 1 Smale & G. 126, 65 Eng. Reprint, 56, where testator gave a sum of money in trust for his nephew for life, and from and immediately after his decease, in case the nephew's wife should survive him, to her for life, and afterward in trust to pay the capital among his nephew's children, it was held that a woman with whom the nephew had cohabited for many years, and who was supposed by the testator to be his nephew's wife, although she was not such in fact, was not entitled to the income of the trust fund, there being nothing to indicate that she was personally known to the testator, or known to him in such a way as to lead to the inference that she was intended by the reference to the nephew's wife, or to justify the court in arriving at the conclusion that no other person but her was in the testator's mind when he framed the gift. The vice chancellor

said: "Suppose, for example, the nephew had survived the testator, and married, and afterwards died; there would, in that case, be in existence a person exactly answering in every respect the legatee described in the will, namely, the nephew's wife. Could there be a doubt that, under these circumstances, that wife would be entitled to the legacy? Yet, according to the construction I am invited to put upon this will, I should be bound to declare that the wife of G. C. Davenport did not answer the description contained in the will, but that this poor lady, who, it is conceded, was not the wife of the testator's nephew, is, nevertheless, accurately de-

scribed as his wife. Much as I regret the result, I am bound to declare that she is not entitled under these words to the testator's bounty."

In *Miller v. Miller* (1894) 79 Hun, 197, 30 N. Y. Supp. 116, it was held that a woman claiming to be the wife of testator's son, who, during the period of such alleged matrimonial relation, had a wife living, could not claim the benefit of a provision made for the "wife and children" of such son, where the evidence failed to establish that the testator recognized her as his son's wife, or knew of his son's relations with her.

E. S. O.

#### KANSAS SUPREME COURT.

G. B. McADOW, Appt.,

v.

KANSAS CITY WESTERN RAILWAY  
COMPANY.

(96 Kan. 423, 151 Pac. 1113.)

#### Evidence — contract to pay wages.

1. The evidence examined, and held sufficient to take to the jury the question whether a railroad company had contracted with an employee to pay him half wages during any disability resulting from an injury received in the course of his service.

*For other cases, see Trial, II. b, in Dig. 1-52 N. S.*

#### Judgment — for injury — action for wages.

2. An action by an employee to recover upon a contract that he should receive half wages during disability resulting from an injury occurring in the course of his service is not barred by a judgment in his favor for damages on account of the same injury, based on the theory that it was the result of his employer's negligence.

*For other cases, see Judgment, II. d, in Dig. 1-52 N. S.*

#### Corporation — powers — contract to pay wages.

3. A railroad corporation has incidental powers to contract with its own employees to pay them half wages during disability resulting from service accidents.

*For other cases, see Corporations, IV. d, 1, in Dig. 1-52 N. S.*

(October 9, 1915.)

Headnotes by MASON, J.

Note. — On employer's agreement to pay employee during disability, or his contribution to insurance, as affecting, or affected by, recovery against him for personal injury, see annotation following this case, post, 1159.  
L.R.A.1917B.

**A**PPEAL by plaintiff from a judgment of the District Court for Wyandotte County in defendant's favor in a suit upon a contract for the recovery of half wages during disability resulting from an accident while in defendant's employ. Reversed.

The facts are stated in the opinion.

Messrs. J. O. Emerson, David J. Smith, and Atwood & Hill, for appellant: Damages sought in the Missouri action were not a bar to the damages sought in the present action.

*Gatzweiler v. Milwaukee Electric R. & Light Co.* 136 Wis. 34, 18 L.R.A.(N.S.) 211, 128 Am. St. Rep. 1057, 116 N. W. 633, 16 Ann. Cas. 633; *Ætna L. Ins. Co. v. Parker*, 30 Tex. Civ. App. 521, 72 S. W. 621, 96 Tex. 287, 72 S. W. 168, 580.

The causes of action in the present case and in the Missouri case are not the same.

*Clifton v. Meuser*, 88 Kan. 408, 43 L.R.A.(N.S.) 124, 129 Pac. 159; *Stroup v. Pepper*, 69 Kan. 241, 76 Pac. 825; *Hudson v. Remington Paper Co.* 71 Kan. 300, 80 Pac. 568, 6 Ann. Cas. 103; *Tracy v. Kerr*, 47 Kan. 658, 28 Pac. 707.

The defendant company has no right to raise the question of ultra vires, because it never pleaded that defense; and it is estopped from pleading such a defense, since the plaintiff has fully performed the contract and the defendant has had all its benefits.

*Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; *Hanna v. Chicago, R. I. & P. R. Co.* 89 Kan. 503, 132 Pac. 154; *Emporia v. Emporia Teleph. Co.* 88 Kan. 452, 129 Pac. 187; *Arkansas Valley Town & Land Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Harris v. Independence Gas. Co.* 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123; *Union Trust Co. v.*

Kendall, 20 Kan. 615; Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 637.

Messrs. C. F. Hutchings and McCabe Moore for appellee.

Mason, J., delivered the opinion of the court:

G. B. McAdow brought an action against the Kansas City Western Railway Company upon an oral contract of insurance which he alleged had been made at the time of his employment as a motorman, by which the company agreed, in consideration of 50 cents a month being deducted from his pay, that if he should be injured in its service, he should receive half wages during the time (not exceeding a year) of his resulting disability. At the conclusion of the evidence the court directed a verdict for the defendant, and a judgment was rendered accordingly, from which the plaintiff appeals.

That the plaintiff was disabled for a time by an injury received in December, 1911, in the course of his employment, was not contested. The defendant maintains that the decision was justified upon the ground that the evidence conclusively showed that its contract with the plaintiff was that the 50 cents a month referred to should be used to pay for accident insurance to be procured to the amount stated from a company in that business, the plaintiff's claim in the event of an injury to be against the corporation issuing the policy; that a similar amount was deducted from the wages of all employees and used for that purpose, the insurance company, in case of an injury, making payment to the railway company, which turned the money over to the person injured. The suggestion is also made that the action was barred by a judgment for \$7,500 which the plaintiff had already obtained against the defendant on account of the same injury, on the theory that it was due to his employer's negligence.

The oral evidence as to the character of the contract was conflicting. The plaintiff's version was supported by his testimony, and the defendant's by that of its superintendent. No written contract of insurance of any character was produced. Two circumstances are relied upon by the defendant as establishing its contention in this regard by the evidence of the plaintiff himself. In 1908 he received a minor injury, as a result of which he was paid \$8.40 in virtue of the arrangement regarding the insurance. The payment was made to him by the defendant by means of a voucher in the form of a bill or statement of account, audited and approved by the officers of the company, the statement of the item read-

ing: "For amount of insurance collected from Travelers' Insurance Company, account of injuries received September 3, 1908, \$8.40."

The plaintiff testified that he signed the receipt attached to the voucher, acknowledging payment of the amount; that he might have read the part referring to the Travelers' Insurance Company, but that he knew nothing about it; that he had not applied for accident insurance, nor authorized it to be taken for him in that or any other insurance company; that he did not know whether the defendant insured itself, nor what it did with the 50 cents deducted from his pay checks. We do not regard the language of the voucher as affording conclusive evidence of the terms of any contract between the defendant and the insurance company, or of any contractual relations between the company and the plaintiff. The superintendent of the railway company, who attended to the employment of the plaintiff and other motormen, testified that he never explained to them orally about the deduction of 50 cents a month, but that he wrote orders concerning it. The plaintiff was asked on cross-examination if he always read all the notices that were posted by the superintendent. He answered: "Yes; that was our orders." The defendant introduced in evidence a notice signed by the superintendent, dated December 19, 1910. The plaintiff testified that he supposed it had been posted, but did not remember it. It was addressed to all employees of the railway company, and began thus: "The company has renewed the workmen's collective insurance policy for 1910 and 1911. This is the policy where the employee pays the insurance company 50 cents per month and receives half pay if injured from the insurance company."

Whether the plaintiff ever saw and read this notice would seem to be a question of fact to be determined by the jury. But, assuming that he did, we cannot say, as a matter of law, that the notice changed the character of whatever contract already existed between the plaintiff and the defendant, or that it affords conclusive evidence of what the contract was.

The defendant relies largely upon the doctrine applied in *Carpenter v. Chicago & E. I. R. Co.* 21 Ind. App. 88, 51 N. E. 493, 494, where it was held that no action would lie against a railway company upon a contract relating to deducting amounts from the wages of its employees to pay for accident insurance. The contract there involved was in the form of a certificate given to the employee, signed by his employer and by the insurance company, the part which is material for present purposes reading:



"This is to certify that Emanuel Carpenter, sec. 25, Coal Bluff, is insured by the American Casualty Insurance & Security Company of Baltimore, Maryland, against accident resulting in bodily injury or death. By the terms of the policy the above-named person, so long as he remains an employee of the Chicago & Eastern Illinois Railroad Company, will receive through the paymaster of that railroad company in case of accident, however and whenever happening between the date hereof and the 1st day of May, 1893, the following benefits: . . . This certificate is issued in accordance with the policy of insurance issued by the American Casualty Insurance & Security Company to the Chicago & Eastern Illinois Railroad Company for the benefit of its employees." (p. 89.)

The language quoted makes it entirely clear that the employee was a party to a contract under which the insurance company had written an accident policy for his benefit, any payments under it to be made to him through the railroad paymaster. Here the plaintiff did not testify to such an arrangement, nor did the defendant introduce any incontestable proof of its existence. That the evidence as a whole may have tended strongly in that direction does not affect the question now under consideration. A Canadian court, however, has reached a conclusion contrary to that arrived at in the Indiana case cited, upon a contract quite similar to the one there interpreted. *McKenzie v. Garth*, Rap. Jud. Quebec, 9 B. R. 224, cited in note in 11 L.R.A. (N.S.) 194.

We do not regard the recovery of a judgment against the defendant for the plaintiff's loss of time, on the theory that his injury was due to its negligence, as barring an action upon the contract of insurance, if it actually existed. A contract for insurance against the loss of time as the result of accidental injury is not regarded as one of mere indemnity; and therefore the insurer is not entitled to a reduction of liability on account of any circumstance which diminishes the actual loss of the insured, such as aid or compensation he may have received from another source. 1

C. J. 517. Nor is the insurer subrogated to the insured's rights to recover damages from the person whose negligence caused the injury. 1 C. J. 518. The question is fully treated in *Gatzweiler v. Milwaukee Electric R. & Light Co.* 136 Wis. 34, 18 L.R.A. (N.S.) 211, 128 Am. St. Rep. 1057, 116 N. W. 633, 16 Ann. Cas. 633, which is reprinted in the three series of selected cases. The latest decision on the subject is *Suttles v. Railway Mail Asso.* 156 App. Div. 435, 141 N. Y. Supp. 1024, where the earlier ones are reviewed. The cause of action on the contract and that on the tort are entirely different and are independent of each other. The one is founded upon an agreement to pay a fixed amount (or an amount to be arrived at by a fixed standard) if disability is occasioned by an injury; the other is founded upon the obligation of a wrongdoer to make amends for the result of his misconduct. The circumstance that the same corporation happens to be charged both upon the contract and upon the tort does not affect the essential character of its liability in either aspect, or take the case out of the operation of the general rule. Many courts have considered the validity and effect of a contract that, upon the happening of an accident, the employee shall elect between accepting the benefits of a relief fund provided by his employer, and the prosecution of an action for damages. Note in 11 L.R.A. (N.S.) 182. Such a question could hardly arise if there were an inconsistency between the two remedies.

It is urged that the defendant had no power to bind itself by a contract for accident insurance. Doubtless it could not enter into a general business of writing policies of that character. But a railway corporation has the incidental power to make various arrangements for the protection of its own employees (10 Cyc. 1143), and no reason is apparent why it might not embody in its contracts of employment a provision that it would pay partial wages in case of disability, in consideration of a deduction to be made from each pay check.

The judgment is reversed, and the cause remanded for a new trial.

**Annotation—Employer's agreement to pay employee during disability, or his contribution to insurance, as affecting, or affected by, recovery against him for personal injury.**

This note is intended to include only cases where, as in *McAdow v. Kansas City Western R. Co.* ante, 1157, there was no agreement by the employee that, in case of injury, he would elect whether he would accept the benefits of an in-

surance policy or of a relief association, or whether he would bring an action against the employer for the injury.

As to contract requiring servant to elect between acceptance of benefit out of the relief fund and a prosecution of

his claim in an action for damages, see notes to *Frank v. Newport Min. Co.* 11 L.R.A.(N.S.) 182, and *Koeller v. Chicago, B. & Q. R. Co.* 48 L.R.A.(N.S.) 440.

*MCADOW v. KANSAS CITY WESTERN R. Co.* finds support in *Dover v. Mississippi River & B. T. R. Co.* (1903) 100 Mo. App. 330, 73 S. W. 298, which holds that an employee who is injured, by accepting the benefit of an accident policy, the premiums of which were paid partly by the employee and partly by the employer, is not precluded from bringing an action against the employer for personal injuries, in the absence of an express agreement between the employer and employee that the acceptance of such insurance shall constitute a release of any claim for damages against the employer on account of the injuries.

In *Coots v. Detroit* (1889) 75 Mich. 628, 5 L.R.A. 315, 42 N. W. 1124, it was held that the provision of the Detroit

charter that a fireman totally disabled by the discharge of his duties may be placed on the retired list with a pension, by a vote of the fire commission, is not mandatory, but gives the commission only an option to do so; and such provision is no bar to recovery by a fireman for injuries received by him in the discharge of duty, for the damages for which the city is otherwise liable.

So, also, it was held in *Kansas City v. McDonald* (1899) 60 Kan. 481, 45 L.R.A. 429, 57 Pac. 123, 6 Am. Neg. Rep. 67, that the purchase of an accident policy by a city for a fireman, under Kansas Laws 1895, chap. 363, out of a fund created by a tax on foreign fire insurance companies, and the payment of the policy to the widow of the fireman, after his death, was no defense to her action against the city, under Kansas Code, § 422, for negligence in causing his death. J. H. B.

# KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

JOHN W. LAWSON, JR., by Next Friend.

(161 Ky. 39, 170 S. W. 198.)

**Railroad — licensee drawn under train — liability.**

A railroad company is not bound to modify the speed of its train in passing a licensee walking along its track with knowledge of the approach of the train, to prevent his being drawn under the train. For other cases, see *Railroads*, 11. d, 2, in *Dig. 1-52 N. S.*

(November 13, 1914.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Warren County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. B. D. Warfield, Charles H. Moorman, and Sims & Rodes, for appellant:

There was no evidence tending to show negligence on the part of the defendant

**Note.** — As to liability for injury to person near track in consequence of suction from passing train, see annotation following this case, post, 1162. L.R.A.1917B.

proximately causing the injury to the plaintiff.

*Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685; *Louisville & N. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722; *Hoback v. Louisville, H. & St. L. R. Co.* 30 Ky. L. Rep. 476, 99 S. W. 241; *Louisville & N. R. Co. v. Bays*, 142 Ky. 400, 34 L.R.A.(N.S.) 678, 134 S. W. 450; *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 686, 50 L.R.A. 153, 57 S. W. 276, 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246; *Chesapeake & O. R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947, 8 Am. Neg. Cas. 651; *Hunter v. New York, O. & W. R. Co.* 116 N. Y. 615, 6 L.R.A. 246, 23 N. E. 9; *Elliott, Railroads*, 2d ed. § 1703; *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408, 40 N. E. 8; *Johns v. Northwestern Mut. Relief Asso.* 90 Wis. 332, 41 L.R.A. 587, 63 N. W. 276; *Lake Erie & W. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Re Harriot*, 145 N. Y. 540, 40 N. E. 246; *Butero v. Travelers' Acci. Ina. Co.* 96 Wis. 536, 65 Am. St. Rep. 61, 71 N. W. 811; *Louisville, H. & St. L. R. Co. v. Jolly*, 28 Ky. L. Rep. 989, 90 S. W. 977; *American Brewing Asso. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679; *Adkins v. Big Sandy & C. R. Co.* 147 Ky. 30, 143 S. W. 764.

Plaintiff's witness was the proximate cause of the injury to him.

*Louisville & N. R. Co. v. Fox*, 20 Ky. L. Rep. 81, 42 S. W. 922; *Rupard v. Chesapeake & O. R. Co.* 88 Ky. 280, 7 L.R.A. 316, 11 S. W. 70.

Messrs. Bradburn & Basham for appellee.

Clay, C., filed the following opinion:

On November 19, 1912, John W. Lawson, Jr., a boy fifteen years of age, and weighing about 100 pounds, was run over and injured by a train operated by the Louisville & Nashville Railroad Company. The large toe of his left foot and his right foot and ankle were crushed. Suing by his father as his next friend, he brought this action against the railroad company to recover damages. From a verdict and judgment in his favor for \$5,500, the railroad company appeals.

The accident occurred just inside the limits of Smith's Grove, an incorporated town of about 800 inhabitants. Defendant's tracks run northeast and southwest through the town. Plaintiff resided with his father near what is known as "Lawson's Crossing," some distance north of the depot. There was testimony to the effect that a pathway along defendant's tracks north of its depot and up to the second crossing above was used by the residents of the town of Smith's Grove living in that section and by others who lived three miles north of Smith's Grove. There were about a half dozen houses in that section of the town near the railroad right of way, and these houses were on macadamized streets. There were sidewalks on these streets leading to the town. Briefly stated, plaintiff's account of the accident is as follows:

Late in the afternoon on the day of the injury his mother sent him out to look for his father, who was expected to return home with a wagon and team. He went upon defendant's right of way at the second crossing north of its depot. He then started south along the pathway on defendant's right of way. After walking south for some distance, he retraced his steps toward the crossing, where he entered the right of way. He was walking for the purpose of keeping warm. He then turned and started south for the second time. After he walked some distance, he saw a train approaching about 100 feet from him. About 6 feet from the track was a small ditch. As the train approached he moved to the edge of the ditch. While walking along the edge of the ditch, he was drawn under the train and engine. The train was going very fast. After receiving the injuries he called for help. A neighbor responded and took him to his home.

Mr. Witherspoon, a resident of Smith's Grove, stated that he saw a freight train leave the station about the time the boy claims to have been injured, and this train was going very fast; in his opinion its speed was 25 or 30 miles an hour. Some railroad postal clerks and others testified that they had seen mail bags and packages of papers L.R.A.1917B.

which had been thrown from the train drawn under it. With the exception of one witness, none of them had ever seen a live object drawn under the train. That witness stated that upon one occasion he saw a man on a railroad platform sucked under a train. He refused to say who it was. Other witnesses testified that there was no suction toward a train until the train itself had passed and the air rushed in to fill the vacuum made by the passing train. Defendant's witnesses testified that the speed of the train it is claimed struck plaintiff was not greater than 8 or 10 miles an hour. The train consisted of an engine and about 33 freight cars, and it was impossible, within the short space lying between the depot where it was stopped and the place of the injury, to have gotten up its speed of 25 or 30 miles an hour. These witnesses all testified that they had never heard of any live object being sucked under a train. The engine of the train was examined at Rowletts, a station north of Smith's Grove, and there were no marks on it indicating that anyone had been struck by it.

Briefly stated, plaintiff contends that the recovery in the lower court is proper for the following reasons: The evidence shows that defendant's right of way was used as a footpath by a large number of persons with the knowledge and acquiescence of the railroad company. The accident occurred in an incorporated town. Plaintiff, therefore, was not a trespasser, but a licensee. In approaching the place where plaintiff was injured, it was the duty of the defendant to keep a lookout and give timely warning of the approach of its trains, and to use ordinary care in the operation of its trains not to injure anyone walking along its right of way. Plaintiff's case, however, is not based on a failure to keep a lookout or to give proper signals of the approach of the train. Though plaintiff says he did not hear the signals, he admits that he saw the train approaching. No signals were therefore necessary to apprise him of that which he already knew. The sole ground of negligence relied on is that defendant failed to moderate the speed of the train so as to prevent plaintiff's being drawn thereunder.

In discussing defendant's liability we shall assume that plaintiff was a licensee, and that there was evidence tending to show that the freight train in question was moving about 25 or 30 miles an hour. The question sharply presented, then, is: Does a railroad company owe to a licensee walking near its tracks, and who knows of the approach of the train, the duty of slackening the speed of its trains in order to prevent him from being sucked under the train?

While it may be true that evidence of

witnesses that they had never heard of a particular accident does not show that such an accident had never happened, or that it should not have been anticipated (*Trinity & B. V. R. Co. v. McDonald*, — Tex. Civ. App. —, 160 S. W. 984), yet this rule, we take it, is not without qualification. Every day hundreds of trains are run at the rate of 25 or 30 miles an hour. These trains pass hundreds and perhaps thousands of persons standing within 5 or 6 feet of the track. If the suction from trains were great enough to draw persons under the trains, there would have been innumerable accidents of the kind under consideration. Notwithstanding this fact, several railroad men, who certainly had an opportunity to speak from long experience, say that they never heard of a live object, capable of resisting, being sucked under a train. Not only so, but the only two cases that have ever come before the courts, so far as we know, are the case under consideration and the case of *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276, where a recovery was denied on the ground that the accident, even if it took place as claimed by plaintiff, was not one that might have been reasonably anticipated. Where in a case like this it is contended that the accident was the result of the negligence of the railroad company, combined with the operation of a natural law, and where not only the character of the accident, but the conditions attending the everyday operation of trains, are such that the accident would have frequently happened if the natural law were such as to make it possible, we conclude that evidence to the effect that no such accident had ever happened has a strong and important bearing on the question whether or not it should have been reasonably anticipated.

We deem it unnecessary, for the purposes of this case, to pass on the question of the possibility of such an accident. We content ourselves with saying that, even if possible, the probability of its occurrence is so remote that it cannot be said to be an accident which should, in the exercise of ordinary care, be reasonably anticipated by those operating railroad trains. That being true, a railroad company does not owe the licensees walking along the side of its tracks, and who know of the approach of its

trains, the duty of moderating the speed of the trains so as to prevent their being sucked under the trains. This court has adopted a very liberal rule with respect to licensees on tracks of a railroad company. Where in populous or thickly settled communities the tracks are used by such large numbers of persons that the presence of persons on the tracks may be reasonably anticipated, we are committed to the doctrine that it is the duty of the company under such circumstances to keep a lookout, to give warning of the approach of the train, and to have the train under reasonable control. *Illinois C. R. Co. v. Murphy*, 123 Ky. 787, 11 L.R.A.(N.S.) 352, 97 S. W. 729. The reason for requiring trains to be under reasonable control is to make the lookout effective; that is, to enable those in charge of the trains to stop them when persons are seen on the tracks or so near them as to be in danger of being struck by the trains. Here we are asked to go a step further, and to say that the speed of the train must be reduced, not only to avoid striking persons on or near the tracks, but to prevent persons otherwise in a place of safety from being sucked under the train. Even in the *Murphy Case* the court said: "To compel the railroad trains to creep along under full control, in anticipation of what probably would not occur, viz., the meeting or overtaking a stray trespasser, would not be reasonable, because most likely wholly unnecessary."

The danger of striking a trespasser is infinitely greater than the danger of injuring a licensee by suction. Trespassers are frequently killed. The number of persons actually sucked under trains, even if such cases ever occur, is so infinitesimally small it would certainly be unreasonable to require railroad companies to reduce the speed of their trains for the purpose of avoiding such accidents. If there be any danger from suction, certainly a licensee, who knows of the approach of a train and has a reasonable opportunity to do so, must get away from the track a sufficient distance to avoid being injured in that way. In our opinion, the trial court erred in not directing a verdict in favor of defendant.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

### **Annotation—Liability for injury to person near track in consequence of suction from passing train.**

The decision in *LOUISVILLE & N. R. Co. v. LAWSON*, ante, 1161, that a railroad company is not bound to modify the speed of its train in passing a licensee L.R.A.1917B.

walking along its track, with knowledge of the approach of the train, to prevent his being drawn under it, appears sound. It should be observed, however, that

while the decision is apparently placed, in part at least, on the ground that such an occurrence, if possible, is nevertheless so improbable as not to be reasonably anticipated by the exercise of ordinary care; yet, apart from this, the decision is sustainable on the ground that those in charge of the train have a right to assume that a licensee walking along the track, who sees the train approaching, will get far enough away from the track to avoid being drawn under the train, if there is danger from suction, as they have a right to assume that a trespasser who sees the train approaching will leave the track; and in the latter part of the opinion the court intimates that its conclusions rest partly, at least, on the latter ground.

Whether or not the danger of a person beside the track being sucked under a rapidly moving train is such an occurrence as should reasonably be anticipated by the railroad company, so as to render it liable for the injury, is an interesting question, as to which there seems to be a difference of opinion among the authorities. In the majority of the cases, it has been apparently assumed that an injury of this kind is one which should be reasonably anticipated. Attention is called in this connection to the note appended to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A.(N.S.) 684, on the question of anticipation as an element of proximate cause, and to the general statement therein that by the great weight of authority it is as necessary for the plaintiff to establish the fact that the injury was one which might have been reasonably anticipated by the doer of the negligent act, as it is to show that there was no other efficient intervening cause; and that the rule that an injury which could not have been foreseen or reasonably anticipated as the natural and probable result of a negligent act is not actionable because it is not the proximate cause is followed by the great majority of cases involving the question.

In accord with the view expressed in *LOUISVILLE & N. R. Co. v. LAWSON*, ante, 1161, that the danger of one beside the track being drawn by suction under a passing train is not one which should be reasonably anticipated by those operating the train, is the Missouri decision cited therein, *Graney v. St. Louis, I. M. & S. R. Co.* (1900) 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276. However, on an earlier appeal in this case (1897) 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246, the majority of the court were appar-

ently of the contrary opinion on this point. The action was for the death of a boy nearly twelve years old, who, while attempting to cross a railroad track, waited on a street crossing for a train to pass, standing about 2 or 3 feet from the rail, and was apparently thrown down by the force of the current of air from the train and rolled under it. On the first appeal, the majority of the court apparently considered that there was sufficient evidence of negligence on the part of the railway company in operating the train at a rate of speed exceeding 6 miles an hour, in violation of an ordinance, that the injury was one which might reasonably have been anticipated, and that the question of contributory negligence was for the jury. On the later appeal, however, as indicated above, a majority of the court were of the opinion, it appears, that if the injury occurred by the boy's being sucked under the train, it was not an occurrence which should have been reasonably anticipated, and hence there was no liability therefor.

In cases of injury to persons lawfully on station platforms as a result of suction or wind from a rapidly passing train, the courts have generally held that the questions of negligence and contributory negligence were for the jury, and have assumed apparently that recovery for such an injury is not precluded on the ground that it should not reasonably be anticipated.

Thus, where a man was waiting at night on a station platform for a train, and a belated express train, without notice of any kind, dashed by at the rate of a mile a minute, creating a suction which drew him along the platform and toward the train, so that he fell and received injuries from which he died, it was held that the question whether the deceased by standing within 3 feet of the edge of the platform at the time the train approached was guilty of contributory negligence was a question of fact for the jury, and that a nonsuit directed on that ground was erroneous. *Munroe v. Pennsylvania R. Co.* (1914) 85 N. J. L. 688, 90 Atl. 264, Ann. Cas. 1916A, 140. The decision assumes that there was sufficient evidence of negligence on the part of the railway company to require the submission of that question to the jury. And it should be observed that, although the deceased was not drawn under the train as the result of the suction, the court apparently assumed that the proximate cause of the death, in the absence of contributory

negligence, was the suction produced by the train, and that the railway company would be liable for injuries so caused by the negligent running of a train past a station at a high rate of speed, without warning.

And in *Crotshin v. Pennsylvania R. Co.* (1915) 87 N. J. L. 11, 93 Atl. 110, the plaintiff recovered for injuries received by being drawn against an express train passing a station, or by having been thrown to the platform of the station, by the suction of the passing train. The court in sustaining the judgment dismissed the point, with the observation that under the authority of *Munroe v. Pennsylvania R. Co.* (N. J.) supra, it was not error to submit to the jury the question of fact upon which the liability of the defendant was rested, and that the verdict was not against the clear weight of the evidence.

Also, in *Schulz v. New York, S. & W. R. Co.* (1915) 87 N. J. L. 659, 94 Atl. 579, where there was evidence that the death of the plaintiff's husband was due to his being drawn by suction under a train which, without warning or notice, at a rate of from 55 to 60 miles an hour, passed a station platform on which he was standing 3 feet from the track, it was held that the questions of negligence of the railway company and of contributory negligence of the deceased were for the jury, and that it was error to direct a verdict for the defendant. In this case, one of the witnesses testified that she felt the effect of the passing train and held on to the platform to prevent being drawn under it. The court cited *Munroe v. Pennsylvania R. Co.* (N. J.) supra, as holding that it is the duty of the railroad company to give reasonable warning to persons lawfully on the platform, of the approach of a belated train traveling at a high rate of speed.

It was held also in *Schulz v. New York, S. & W. R. Co.* (N. J.) supra, that the complaint was sufficient to warrant recovery on the suction theory, where, after stating that the train passed at a high rate of speed, without notice or warning to the passengers on the platform, and that the train was of such width as to strike any person standing near the edge of the platform, it alleged that the train did, with great force and violence, "strike, draw to it, and drag along," the deceased.

And in *Paulding v. New York C. & H. R. R. Co.* (1909) 132 App. Div. 68, 116 N. Y. Supp. 518, it was held that evidence tending to show that a twelve year old girl who had gone to a post-

office in a railway station stepped from the station onto the platform, which was less than 5 feet wide, and was caught in the suction of a train which, without warning of its approach, passed at a rate of 35 miles an hour, and was drawn under the train and killed, was sufficient to warrant a finding of negligence on the part of the railway company and of freedom from contributory negligence on the part of the deceased. It was said: "No one saw the accident. . . . However, the evidence indicates that the train must have been very near when the child stepped out upon the platform, and the jury might infer, from the facts and circumstances disclosed, that she did not walk heedlessly into the pathway of this train. . . . It is plain that the decedent had not left the platform, that she had not stepped upon the track; for it is not claimed by anyone that she was struck by the engine. The platform was less than 5 feet in width in front of the door. She had only just stepped out a moment before the accident, and it is unthinkable that a girl of twelve years of age would have deliberately walked into collision with a passing train running at the rate of speed testified to by the witnesses. The inference might, therefore, be properly drawn that this child was drawn into contact with the train by the force of the suction of the passing train, and that the accident occurred without any act of negligence on her part; for it was not negligent of her to step out upon this platform in the performance of her errand to the station, and she was not bound to look and listen for an approaching train."

So, there being no eyewitnesses of the accident, but it being conceded that the deceased was killed by a train, it was held in *Richardson v. Detroit & M. R. Co.* (1913) 176 Mich. 413, 142 N. W. 832, that the question of contributory negligence was properly submitted to the jury, especially in view of the presumption that the deceased was in the exercise of due care, where there was evidence from which it might be inferred that she was at the depot and might have mistaken the train by which she was killed for the train which she was expecting, that the train was running at a rate of from 30 to 40 miles an hour, and that the suction from it might have drawn her clothing into the wheels of the engine and caused her death.

However, in *Kozlowski v. Rochester, S. & E. R. Co.* (1911) 142 App. Div. 245, 126 N. Y. Supp. 609, it was held that a

person standing on a platform at a country station of an interurban electric railway about 20 inches from a passing car could not recover damages due to the effect of wind from the car, the court considering that negligence on the part of the railway company was not shown, and that the injury was due to the negligence of the injured party in standing so near the track, while the car approached at nearly 50 miles an hour without slackening its speed or other indication that it would comply with his signal to stop. It was said: "While the story of the plaintiff as to the manner of the accident seems to be incredible, yet, assuming it to be truthful, it establishes no actionable negligence on the part of the defendant. The place was in a country district and on the defendant's right of way. The car was intended to run rapidly, and not to stop at stations in the country. . . . A fast railroad train passing a local station is not required to slow down unless there is something to indicate to the engineer that it is prudent to do so. If two or three people are standing on the platform, he is not to assume that they

will step in front of the train or approach dangerously near it. The same rule should obtain in the operation of rapidly running cars on a street surface railway. Even if the motorman saw the plaintiff and his companion, and if vigilant he should have seen them, their presence on the platform would not suggest that they were in any danger from the car. The plaintiff was on the second plank from the track, and more than 20 inches from the extreme overhang of the car. He was looking at the car, and the motorman would be warranted in believing he would step back as it approached. It was not negligence in the circumstances to run the car rapidly. . . . The plaintiff's story proves that his own lack of caution contributed to his injuries. . . . The car was in the plain view of the plaintiff for at least 1,200 feet. He knew that it was coming very rapidly and without any slackening of its speed. There was no indication that it was to stop. His signals received no response or recognition. He kept his position unchanged, when a step back would have placed him beyond the possibility of danger." R. E. H.

#### NEVADA SUPREME COURT.

H. LOOSE, Respt.,

v.

LILLIAN LARSEN, Appt.

(— Nev. —, 161 Pac. 514.)

#### Sales — encouraging immoral business — recovery of purchase price.

One is not prevented from recovering the purchase price of liquors sold for resale to one having a license to deal in them by the fact that the resale will incidentally encourage the business of a house of ill-fame conducted by the buyer on the premises where the liquors are to be sold.

*For other cases, see Contracts, III. g, 2, in Dig. 1-52 N. S.*

(December 15, 1916.)

**A**PPEAL by defendant from an order of the District Court for Humboldt County denying a motion for new trial of an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Salter & Robins, for appellant:

**Note.** — As to sale of goods to keeper or inmate of house of ill-fame, see annotation following this case post, 1168. L.R.A.1917B.

If the contract is illegal, it will not be enforced.

*Drexler v. Tyrrell*, 15 Nev. 115.

Where goods are sold for the express purpose of enabling the buyer or beneficiary to accomplish an unlawful purpose, the agreement is void, and there can be no recovery.

9 Cyc. 573, note 66; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 146; *Ballerino v. Ballerino*, 147 Cal. 544, 82 Pac. 199; *Otis v. Freeman*, 199 Mass. 160, 127 Am. St. Rep. 476, 85 N. E. 168.

Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it.

*Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468.

Mr. R. M. Hardy for respondent.

*Coleman, J.*, delivered the opinion of the court:

This is an appeal from an order denying a motion for a new trial.

The judgment in this case is in favor of respondent, who was the plaintiff in the trial court, and is based upon an action to recover judgment upon a certain promissory note executed by appellant. For defense to the cause of action mentioned, the

answer alleged that the note described in the complaint was given to cover a balance of an indebtedness due plaintiff for liquors sold and delivered by him to defendant, who was engaged in conducting a house of ill-fame within the restricted distance from a church edifice which was used for religious worship, knowing that said liquors would be resold by the defendant upon said premises to the inmates of said house of ill-fame and the visitors thereto, in order to encourage patronage of said house, that the same might be made more profitable.

Appellant contends that, since a contract which is founded upon an immoral or illegal consideration is void, and since it is against the law of Nevada to conduct a house of ill-fame within a certain distance of a church edifice which is used for religious worship, as did appellant, and since the sale of the liquors mentioned encouraged such violation of the law by appellant, there is no valid consideration for the note sued upon, and hence the order refusing to grant defendant a new trial was error.

It is the general rule of law that where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for the price of the goods sold; but where the vendor merely has knowledge that the purchaser intends to use the goods for an immoral or illegal purpose, and does nothing to aid in carrying out the immoral or illegal purpose, the vendor is entitled to recover. We quote from Cyc. as follows: "It is held in England that, where the agreement is innocent in itself, but the intention of one of the parties is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the mere fact that the other party knows of such purpose renders the agreement illegal and void. . . . In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that the mere knowledge of the seller of goods or services . . . that the buyer intends an illegal use of them is no defense to an action for the price or for rent." 9 Cyc. 571, 572.

Ruling Case Law says: "A question which is apparently involved in some obscurity is whether a contract is rendered illegal by the fact that one party knows of the other's intention to further an illegal purpose by means of the contract; as, for instance, to use the subject-matter thereof for an unlawful purpose. That there is some difference of opinion on the subject there would seem to be no doubt. From some decisions the rule is deducible that knowledge of the other party's illegal object may, at least under some circumstances, indicate

an intention to aid the unlawful object, or constitute participation in an unlawful act. However, in a majority of the decisions dealing with particular contracts, mere knowledge by one of the parties of the other's intention to use the subject-matter for an unlawful purpose has been held not to render the contract illegal." 6 R. C. L. pp. 696, 697.

The supreme court of South Carolina, in *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516, uses the following language: "We are not disposed, however, to rest the case here, but are rather inclined to adopt the rule laid down by Lord Mansfield in *Hodgson v. Temple*, 5 Taunt. 181, 1 Marsh. 5, 14 Revised Rep. 738, that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase money. There must be something more; something to show that the vendor was to participate in the illegal transaction, or that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to aid or promote the illegal or immoral purpose for which the article was bought."

Again we quote: "One who has received the benefits of the complete performance by the plaintiff of a contract which was neither *malum in se* nor *malum prohibitum* cannot successfully defend an action for the payment of his indebtedness which has accrued therefrom on the ground that either he or another intended to do some unlawful act which was no part of the consideration nor of the performance of the agreement." *Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 483, 109 Fed. 422.

The supreme court of New Hampshire, in *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205, after reviewing all of the decisions which had been rendered at the time that case was before the court, reached the conclusion that mere knowledge that goods sold are intended by the purchaser to be used unlawfully was not sufficient to prevent recovery for the purchase price of the goods.

It would serve no useful purpose to here review the cases at length which sustain this view, and we content ourselves by calling attention to the authorities which appear in the notes to the citations to Cyc. and Ruling Case Law, *supra*.

The Supreme Court of the United States, in *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439, said: "Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract and those in which it will not may be difficult. Perhaps it cannot be done by exact definition."



While no doubt it is difficult in many cases to know just where to draw the line where the purchaser intends to make an unlawful use of the goods bought, we do not think this is such a case, because appellant intended to make a lawful use of the goods. There was certainly nothing unlawful or immoral in the sale by respondent to appellant of the liquors, nor is there anything in the laws of this state which prohibited the sale of liquors at the house which was occupied by appellant. In fact, she had a license from the duly constituted authorities to sell liquor upon the premises in question. The use to which appellant intended to put the liquors, and to which in fact they were put, being perfectly legal, we are unable to see that the doing by respondent's grantee, with the goods purchased, that which she had a legal right to do, though done with a bad motive, as was known by respondent, could

in any way affect respondent's right of recovery. No authority has been called to our attention, nor have we been able to find one, which holds that a person who sells goods to another who intends to resell them in a legitimate manner, though such legitimate resales may incidentally encourage an illegal or immoral business, and all with the knowledge of the vendor, cannot recover. Yet that is what we are asked to hold in this case. While we are anxious to maintain every rule of law which tends to promote civic decency, we are of the opinion that to sustain appellant's contention would be to take a step which neither the law nor sound business principles will justify.

It is ordered that the order denying appellant's motion for a new trial be affirmed.

Norcross, Ch. J., and McCarran, J., concur.

### Annotation—Sale of goods to keeper or inmate of house of ill-fame.

As to insurance on bawdyhouse or furniture therein, see notes to *Conithan v. Royal Ins. Co.* 18 L.R.A.(N.S.) 214, and *Aetna Ins. Co. v. Heidelberg*, L.R.A. 1917B, 253.

As to effect of landlord's knowledge that tenant intended to use premises in violation of law, see notes to *Harbison v. Shirley*, 19 L.R.A.(N.S.) 663, and *Ashford v. Mace*, 39 L.R.A.(N.S.) 1104.

In harmony with the decision in *LOOSE v. LARSEN*, ante, 1166, that a vendor of goods who does not participate in the running of a house of ill-fame, or do anything in furtherance thereof, may recover the purchase price of the goods, though he knew that the vendee intended them to be kept and used in such a house, are: *Hollenberg Music Co. v. Berry* (1907) 85 Ark. 9, 122 Am. St. Rep. 17, 106 S. W. 1172 (sale of piano); *Belmont v. Jones House Furnishing Co.* (1910) 94 Ark. 96, 140 Am. St. Rep. 112, 125 S. W. 651 (sale of furniture); *Schankel v. Moffatt* (1893) 53 Ill. App. 382 (sale of furniture); *Hubbard v. Moore* (1872) 24 La. Ann. 591, 13 Am. Rep. 128 (sale of furniture); *Sampson Bros. v. Townsend* (1873) 25 La. Ann. 78 (sale of furniture); *Anheuser-Busch Brewing Asso. v. Mason* (1890) 44 Minn. 318, 9 L.R.A. 508, 20 Am. St. Rep. 580, 46 N. W. 558 (sale of liquor); *Washington Liquor Co. v. Shaw* (1905) 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153 (sale of liquor).

And the mere knowledge of the seller of clothing that the purchaser is a prostitute will not defeat his recovery for the price, unless he expects to be paid L.R.A.1917B.

out of the profits of her prostitution, or does something in aid of it. *Bowry v. Bennet* (1808) 1 Campb. (Eng.) 348, 10 Revised Rep. 697.

So, also, in *Lloyd v. Johnson* (1798) 1 Bos. & P. 340, 126 Eng. Reprint, 939, 4 Revised Rep. 822, one employed to wash clothes for a prostitute, knowing her to be such, was not precluded from recovering for the work and labor by the use to which the clothes might be applied, the court stating that the unfortunate woman must have clean linen, and it is impossible for the court to take into consideration which of these articles were used by the defendant to an improper purpose and which were not.

And in *Mahood v. Tealza* (1874) 26 La. Ann. 108, 21 Am. Rep. 546, it was held that the rule followed in the Louisiana cases of *Hubbard v. Moore*, (1872) 24 La. Ann. 591, 13 Am. Rep. 128, and *Sampson Bros. v. Townsend* (1873) 25 La. Ann. 78, applied even to a sale by one keeper of such a house to another, of the furniture of such house.

In a well reasoned opinion, however, *Morgan, J.*, in dissenting, pointed out that the *Sampson* and *Hubbard Cases* (La.) supra, were cases of sales by dealers in furniture, while the *Mahood Case* was the case of a woman who rented a house and sold the contents thereof to another, with the knowledge that it had been, and that it was the avowed intention that it should continue to be, used as a public house of prostitution, the business of which was encouraged by her presence and assisted with her means, and so was a case where the law leaves

such people where it finds them, and takes no interest in their dispute.

In *Hubbard v. Moore* (La.) supra, in denying the contention of defendant that plaintiff promoted the interest of defendant by supplying her with furniture on terms of credit to facilitate her success in a career of vice and infamy, in order thereby that he himself might be benefited, the court said: "We cannot attribute such a motive to him. Clearly a distinction ought to be drawn between acts done manifestly in derogation of public morals, and purposely to promote vice and immorality, and acts not having such manifest purpose or tendency, but which might remotely and indirectly be auxiliary to that object. In acts of the latter class there would be no absolute violation of public morals. A turpis causa would not arise in such a case to vitiate a contract in which the offense against morals would be merely conjectural. To the vicious and depraved as well as to the good and virtuous belong the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion that 'there is to be no more cakes and ale.' The fair dealer who, by lawful contract, furnishes the dissolute with the necessities and conveniences of life, should not be debarred the right of enforcing payment for his goods by the effrontery of his vendee asserting in a court of justice that the things furnished were obtained for the express purpose of putting them to disreputable uses. The seller who furnishes an article adapted to a legitimate and proper purpose is not responsible in a court of morals, and much less in a court of law, for a subsequent perversion of its use by the buyer. In the case at bar it is shown that the furniture was sold at cash prices, with time given for payment. The seller, there is no doubt, knew that it was to be used in a house of ill-fame, but how his knowledge of that fact involves him in the guilt of the inmates of that house, as an aider and abettor of lewdness and depravity, we think is not apparent. Although it is not shown that when he delivered the furniture he told the defendant to go her way and sin no more, it is not thence to be inferred that he encouraged her in continuing in her immoral course of life. That he contributed to enable her to continue it by selling her the furniture is too vague, hypothetical, and remote to form an impediment to his recovery on the contract."

L.R.A.1917B.

And in *Sampson Bros. v. Townsend* (La.) supra, the court said: "The defendant seeks to avoid the payment of a debt by pleading her own infamy. The furniture was bought and several instalments paid on the debt. She wishes now to pay the balance by lending her aid to the elevation of the morals of the community, and invokes the maxim, 'contra bonos mores.' To permit her to succeed by using a good maxim in so bad a cause would not, in our opinion, work good to the morals of the community, certainly not to defendants. Much refinement was indulged in in argument on the broad question. The interests of society are better subserved by adhering to plain, well-defined rules of bargain and sale. To desert these upon the plea of elevating morals, when the means used open wide the door for other evils, is at least an experiment which courts should be slow to make. We prefer to leave the correction of evil to the legislative branch of the government."

So, also, in *Anheuser-Busch Brewing Asso. v. Mason* (1890) 44 Minn. 318, 9 L.R.A. 508, 20 Am. St. Rep. 580, 46 N. W. 558, the court said: "The agent who made the sales, upon whose testimony the defendant saw fit to rest her case, knew that she was engaged in the unlawful business of keeping a house of ill-fame, and admits also that he supposed the beer would be used or sold in her place of business. Nothing further was shown which connected the plaintiff or its agent with any violation of the law. The burden was upon the defendant to show that an enforcement of the contract would be in violation of the settled policy of the state, or injurious to the morals of its people, and no court should declare a contract illegal on doubtful or uncertain grounds, and it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee's unlawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale; but this difficulty is not apparent in the case at bar."

And in *Washington Liquor Co. v. Shaw* (1905) 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153, the court said: "Where property is sold absolutely and unconditionally, mere knowledge on the part of the vendor that the property will thereafter be sold illegally, or applied to some illegal or immoral use, will not bar an action to recover the purchase price unless it is a part of the contract of sale that the property shall be so sold or used, or unless the vendor aids or par-

ticipates in the illegal objects otherwise than by the mere act of making the sale."

There have been a few cases that have denied the recovery for goods sold to a prostitute. In some of the cases, however, it will be seen that the vendor was considered to have participated in the running of the house of ill-fame, or to have done something in furtherance thereof. Such was the case in *Burns v. Seep* (1879) 6 *Ohio Dec. Reprint*, 847, which denied recovery upon notes given by defendant for furniture purchased of plaintiff, the evidence showing that defendant and her sister were earning a livelihood in a certain place by sewing, and that, on the suggestion of plaintiff that, by receiving company, they would make a better living,—in other words, by keeping a house of prostitution,—they moved to another place and rented a house, and that, to enable the defendant to carry on the business of prostitution, the plaintiff sold furniture to her which was the consideration of the note sued on.

And in *Pearce v. Brooks* (1866) *L. R.* 1 *Exch.* 213, 35 *L. J. Exch. N. S.* 134, 12 *Jur. N. S.* 342, 14 *L. T. N. S.* 288, 14 *Week. Rep.* 614, 6 *Eng. Rul. Cas.* 326, action to recover for brougham sold to a prostitute, it was held that there could be no recovery, as the evidence showed that the vendor knew that such brougham was for the purpose of display,—that is, for the purpose of enabling such prostitute to pursue her calling.

Also in *Hamilton v. Grainger* (1859) 5 *Hurlst. & N.* 40, 157 *Eng. Reprint*, 1092, 5 *Jur. N. S.* 1108, action for goods sold and delivered, it was held that defendant was entitled to a plea, *inter alia*, that the goods were wines and supper supplied to defendant in a brothel kept by the plaintiff, for the purpose of being consumed there by the defendant and divers prostitutes in a debauch, to incite them to riotous, disorderly, and immoral conduct.

So, too, in *Abbott Furniture Co. v. Mobley* (1914) 141 *Ga.* 456, 81 *S. E.* 196, a bail-trover action to recover furniture sold on a retention-of-title contract, the denial of the right to recover seems to have been based upon the fact that plaintiff knew that the goods were to be used in a house of ill-fame, and intended the use to be in aid of the maintenance of such a house.

However, it is doubtful whether recovery in the *Abbott Case* could have been had in any event, as the court cited with approval and as authority *Harris L.R.A.* 1917B.

*v. Barfield Music Co.* (1916) — *Ga. App.* —, 89 *S. E.* 592, action of bail trover to recover for an electric piano sold upon a retention-of-title contract, for use in a house of prostitution, which denied the right to recover on the ground that, as the keeping and maintaining of a lewd house is penalized by statute, one who sells goods for use in such house will not be assisted in a recovery therefor. Further to support its decision the court quoted from *Ralston v. Boady* (1856) 20 *Ga.* 449, an action by a landlord against the keeper of a lewd house to recover rent for the place, where, referring to the inmates of such house, the court said: "As women they are entitled to eat and drink, to dress and be sheltered as others, but no one, at the risk of loss to themselves, must furnish any of these comforts or supplies for the purpose of exciting, encouraging, or aiding these harlots to commit a crime; for if they do, and the jury so find, they will and ought to lose their money. For the maxim *ex turpi causa non oritur actio* is as old as the law."

In *Reed v. Brewer* (1896) 90 *Tax.* 144, 37 *S. W.* 418, recovery on a series of promissory notes given for furniture used by defendant to refurnish her house of prostitution was denied on the ground that the plaintiff aided and abetted defendant in the furtherance of her venture. To support this contention the court said: "We are of the opinion that from the facts: (1) that so large an amount of furniture was sold by Erastus Reed to defendant on open account, apparently without security, with the knowledge on his part of the very purpose for which it was to be used, and that the money to pay for same 'had to come out of prostitution'; (2) that the payments were to be made weekly or monthly in such small sums as defendant might be able to realize from such business, conducted with the aid of the furniture, extending over a number of years; (3) that thereafter defendant 'at the request of Erastus Reed, and in order to enable him to raise money at the bank,' executed the notes and the instrument securing same; (4) that said instrument provided that, until all the money was paid, the title to the furniture was to remain solely in Reed, defendant to retain possession, but not to remove same from the house of prostitution where it was being illegally used, nor sell same; the trial court might properly have found not only that Erastus Reed sold the furniture to defendant knowing that she was to use it for the

purpose of putting up and carrying on a house of prostitution, and that his pay must come from the revenues derived therefrom, but also that Erastus Reed, at the time of the sale, contemplated and subsequently was actually aiding and abetting her in the venture. We are not informed, however, whether or not it did so find, as there are no conclusions of fact by the trial court in the record. Under these circumstances we must, in support of the judgment, presume that the court found every fact fairly deducible from the evidence, as we have seen this was necessary to its rendition." The court further said that it expressed no opinion as to the legality of the transaction had the evidence, as contended by plaintiff, only justified the conclusion that Reed sold the furniture with knowledge of the purpose to which it was to be applied, and that defendant had no other means of paying for same than the proceeds of her immoral vocation.

Also in *Anderson v. Freeman* (1907) — *Tex. Civ. App.* —, 100 S. W. 350, enforcement of note given for furniture to be used in a house of prostitution was denied on the ground that "the conclusion and inference to be drawn from the undisputed evidence in the record is to the effect that the transactions that culminated in taking up the Sadie Beard note and mortgage was to enable the appellant to continue the unlawful and immoral business, and this fact must have been known to the appellee, and also that he knew that from the continuation of the business appellant expected to obtain money by which she would be enabled to pay off and discharge the note and mortgage sued upon."

In *Hayes v. G. A. Stowers Furniture Co.* (1915) — *Tex. Civ. App.* —, 180 S. W. 149, in denying recovery for furniture sold for use in a house of prostitution, the decision being based upon the fact that there was more than a mere knowledge that the goods were to be used in such a place, the court said: "We are of the opinion that a contract for the sale of the household goods, made with a knowledge of the unlawful use to which the goods were to be put, contemplated by the parties at the time of their sale and delivery, and an agreement made and entered into between the parties to the contract of sale that the goods should be so used, and that, during the time of such use, the goods to be kept at such place and in such unlawful use, as found by the jury, whose finding

we approve, coupled with the contract pleaded by the appellee, which shows that, in the meantime, the title to the goods to remain in the seller and the unpaid balance of the contract price to be paid in monthly instalments, is affected by such vice as to render the contract unenforceable in the courts. We are aware of the decisions that hold that a mere knowledge that the goods may be put to an unlawful use is not sufficient to prevent the collection of the claim. But the facts of this case go far beyond a mere knowledge of an unlawful use. Here is an agreement that the goods to which appellee retains title should be put to the unlawful use, thereby necessarily participating in the wrong. The appellant was furnishing a house to be used as a bawdyhouse. The house to be so used must necessarily be furnished. It could not have been used without the aid rendered her by the appellee. The furniture was necessary to the use of the house. With the house furnished, she could and did make unlawful use of both house and furniture, and that with full knowledge of and agreement with appellee as to the character of its use. The rule is well established that any contract, promise, or agreement 'calculated to encourage immorality is void.'"

The court in the *Hayes Case*, it will be seen, takes the view that one who sells goods on a retention-of-title contract of necessity aids and abets the venture, and in this view the court finds support in the decision in *Standard Furniture Co. v. Van Alstine* (1900) 22 Wash. 670, 51 L.R.A. 889, 79 Am. St. Rep. 960, 62 Pac. 145, which held that a vendor of goods with knowledge that they are to be used in a house of ill-fame must be deemed to aid and participate in the immoral and illegal use, so as to defeat its right of action to recover the goods from a purchaser thereof on sale under execution against the vendee, where the sale reserves title, ownership, and possession of the property, with the right to take possession even before the maturity of the deferred payments whenever the vendor deemed himself insecure. The court in this case said: "It is true that it is held in many well-considered cases, and it is, perhaps, the weight of authority, that mere knowledge on the part of the vendor of goods, that the vendee designs to and will put them to an immoral or illegal use, is not, of itself, sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule, which have been brought to our atten-

tion, the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor, with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all the cases, even those which announce the rule contended for by the appellant, that if the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover.

Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of his contract. It is clear that the relation between the parties to the contract in

the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership, and possession of the property,' but reserved the right to 'take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity' of the deferred payments. This practically left the control of the use of the property with the appellant; and as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use and participating in that unlawful intent is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts."

In making a distinction between sales on a conditional contract and sales where the vendor does not retain title, the Van Alstine Case is in conflict with *Hollenberg Music Co. v. Berry* (1907) 85 Ark. 9, 122 Am. St. Rep. 17, 106 S. W. 1172, and *Belmont v. Jones House Furnishing Co.* (1910) 94 Ark. 96, 140 Am. St. Rep. 112, 125 S. W. 651, cited supra, in both of which cases there were retention-of-title contracts. J. H. B.

#### TENNESSEE SUPREME COURT.

W. H. MURRAY, by Next Friend,  
v.

JOHN THOMPSON et al.

(— Tenn. —, 188 S. W. 578.)

#### Bills and notes — indorsement by infant — disaffirmance.

1. An infant is not precluded from disaffirming his indorsement of a promissory note by the provision of the Negotiable Instruments Act that his indorsement passes title to the instrument.

*For other cases, see Infants, I. d., 2, b, in Dig. 1-52 N. S.*

Note. — Upon the right of an infant to disaffirm transfer of note by indorsement, see annotation following this case, post, 1174. L.R.A.1917B.

Same — indorsee as bona fide holder.

2. An indorsee of a note is not a bona fide holder as against an infant indorser, but the latter may disaffirm and recover possession of the note.

*For other cases, see Bills and Notes, V. b, 1, in Dig. 1-52 N. S.*

(October 7, 1916.)

**P**ETITION for a writ of certiorari to review a decree of the Court of Civil Appeals reversing a decree of the Chancery Court for Hamilton County in complainant's favor in a suit to disaffirm a contract of indorsement of a note of which he was payee, and to recover the note from defendant Thompson, indorsee. Reversed.

The facts are stated in the opinion.

Messrs. Tatum, Thach, & Lynch, for petitioner:

Section 22 of the Negotiable Instruments Law does not affect the right of a minor to disaffirm and recover back a note indorsed and transferred by him during minority.

Norton, Bills & Notes, 4th ed. p. 90, note, p. 286; Brannan, Neg. Inst. 2d ed. pp. 28-214, 244; Huffcut, Neg. Inst. p. 17.

A deed of an infant to his real estate transfers the title and right of possession to the purchaser.

Bingham, Infancy, pp. 2-8; 22 Cyc. 531; Matherson v. Davis, 2 Coldw. 443; Scott v. Buchanan, 11 Humph. 468; White v. Flora, 2 Overt. 426.

Even if complainant, during minority, acquiesced in the act of his father, he would not be bound thereby, because an infant cannot appoint an agent, and can at any time disaffirm the act of any such agent.

22 Cyc. 514; Mechem, Agency, § 51; 31 Cyc. 1208; Semple v. Morrison, 7 T. B. Mon. 298.

Messrs. Cantrell & Moon, for defendants:

Since the enactment of the Negotiable Instruments Act, defendant is clearly entitled to the entire proceeds of the note in question, interest upon the same, and the cost of this cause.

Huffcut, Neg. Inst. 17; Mason v. Westmoreland, 1 Head, 555; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655; Edwards v. Hambly Fruit Products Co. 133 Tenn. 142, 186 S. W. 163; Roach v. Woodall, 91 Tenn. 206, 30 Am. St. Rep. 883, 18 S. W. 407; Crawford, Anno. Neg. Inst. Revised ed. p. 55; Jefferson Bank v. Chapman-White Lyons Co. 122 Tenn. 416, 123 S. W. 641.

Williams, J., delivered the opinion of the court:

This is a suit by complainant, a minor, to disaffirm a contract of indorsement of a note of which he was payee, and to recover the note from Thompson, indorsee.

Complainant while in the employ of a brick company received personal injuries, and the company executed to him a note of \$1,750 in satisfaction of his claim to damages. The note was made payable June 1, 1915, which was the date on which complainant would arrive of age. On October 16, 1914, W. A. Murray, the father of complainant, with the knowledge and authority of the latter, sold the note to Thompson, indorsing the name of the son without apprising Thompson of the fact that he himself was not the payee. The proceeds of the note L.R.A.1917B.

were deposited to complainant's account in bank, and later were invested in a saloon business in the name of the father and son, and in a short time lost. There was no actual fraud on the part of complainant in the transaction with Thompson.

The chancellor decreed that complainant was entitled to disaffirm and recover; but the court of civil appeals reversed the ruling.

The last-named court was of opinion that complainant would have been entitled to the relief awarded by the chancellor under the rules of law in force before the passage of the Negotiable Instruments Law (Acts 1899, chap. 94); but that said act, by its § 22, so changed the law as to deny complainant the remedy sought. The section thus relied on is as follows: "The indorsement or assignment of the instrument by a corporation, or by an infant, passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

The question to be ruled seems never to have been passed on by any court of last resort. In its solution light may be afforded by a reference to the history and object of the Negotiable Instruments Law. It was drafted for the purpose of codifying the principal rules of the law merchant as announced in numerous decisions which were deemed to embody the best doctrine. It was not the purpose to change such of those rules as had been uniformly accepted, but rather to make the law certain and uniform by the adoption of that one of two or more rules, arising out of discordant decisions in different jurisdictions, which was thought to be the best pronouncement of commercial law.

One of the questions on which judicial decisions were in conflict was whether an infant's indorsement of a negotiable instrument was void, or only voidable. This is demonstrated by what was said in Roach v. Woodall, 91 Tenn. 206, 212, 30 Am. St. Rep. 883, 18 S. W. 408.

"Mr. Story, in his work on Promissory Notes, §§ 77-80, puts upon the same ground the minor's incapacity to indorse and make a promissory note, and shows that there is a conflict of opinion as to whether such act is void or voidable. . . .

"Mr. Story thought the weight of authority preponderated in favor of holding promissory notes given or indorsed by an infant voidable only. § 78."

The lack of uniformity in the authorities on that point is also commented on and demonstrated in 3 R. C. L. p. 1086, § 292.

It was to make certain and uniform the law on this point that § 22 was embodied in the Negotiable Instruments Act. In stipu-

lating that the indorsement of the instrument by an infant "passes property therein," it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties.

It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one.

The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words, "passes the property therein," if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such assumed case. It must be admitted that the legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law.

The Negotiable Instruments Law, in this section, is not to be treated as going further than did the corresponding section of the English Bills of Exchange Act, § 22, which provides: "Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto." 45 & 46 Vict. chap. 61.

The English act was before the National Conference of State Boards of Commissioners when the American act was drafted, and that there is such correspondence in meaning is the view expressed by Judge Brewster, president of the conference. The American

act went no further. 10 Yale L. J. 84; Brannan, Neg. Inst. 2d ed. 185, 224; Norton, Bills & Notes, 4th ed. 90, 285.

The act having no effect on the right of an infant to disaffirm, the precedents in relation to that right govern. This court in *Roach v. Woodall*, supra, held that the minor might disaffirm and avoid the act of indorsement, and an opinion was intimated (the facts did not call for a decision), that one who became holder of the note was chargeable with knowledge of the indorser's incapacity. The court used language that has pertinency to the facts of the pending case: "A transferee who receives by delivery merely from bearer a note with the name of another indorsed upon it, ought to be charged with notice who that indorser was, and whether a person who could in law bind himself by an indorsement. If he does not in fact know the indorser, he would hardly predicate anything of an indorsement, or rely on it without inquiry. Such inquiry would disclose the minority of the indorser, and, consequently, it might well be holden that the transferee was chargeable with notice of the invalidity of the indorsement."

The common-law rule is that the purchaser and indorsee of such a note is not a bona fide holder as against an infant indorser, and that the latter may disaffirm and recover the note from the possession of the former, who takes with constructive notice of the incapacity. *Hosler v. Beard*, 54 Ohio St. 398, 35 L.R.A. 161, 56 Am. St. Rep. 720, 43 N. E. 1040; *McClain v. Davis*, 77 Ind. 419; *Case v. Espenschied*, 169 Mo. 215, 92 Am. St. Rep. 633, 69 S. W. 276, 3 R. C. L. p. 1028, § 285; id. p. 1086, § 292; 1 Dan. Neg. Inst. 6th ed. 806a; 1 Parsons, Notes & Bills, 276.

The chancellor made a proper disposition of the case in his decree. The decree of the Court of Civil Appeals is therefore reversed, and that of the chancellor affirmed.

### Annotation—Right of an infant to disaffirm transfer of note by indorsement.

It has frequently been stated in the books dealing with indorsements by an infant prior to the Negotiable Instruments Act, that there is some doubt whether such an indorsement is void or only voidable.<sup>1</sup> The authorities, however, are speaking of an indorsement generally and this includes not only the

transfer of the paper, but the implied contract to pay the bill at maturity if it be not duly paid by the acceptor or maker. It seems evident that when the authorities speak of the doubt as to whether the indorsement is void or merely voidable, they are considering the indorsement in the latter aspect.<sup>2</sup>

<sup>1</sup> See *MURRAY v. THOMPSON*, ante, 1172, and authorities cited. The statement as to the doubt about the indorsement is sometimes contained in a statement in which the writer is considering not alone the

indorsement, but the making of an instrument.

<sup>2</sup> Story in his work on Promissory Notes, § 80, makes it clear that he is thus considering the indorsement.

None of the authorities have cited any cases in which the indorsement of an infant has been held void as to the passing of title, nor does a search disclose any. The cases uniformly hold that an indorsee of the infant may recover on the note against prior parties, where there has been no disaffirmance.<sup>3</sup> Recovery may be had by the indorsee even though the maker has paid the amount of the note to the father of the infant with knowledge of the indorsement.<sup>4</sup> It is stated: "That an infant may indorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to an indorsee for a valuable consideration, seems to be well settled in the law mer-

chant and is no ways repugnant to the principles of the common law."<sup>4</sup>

The right of an indorsee to recover is put in some cases on the theory that the defense of infancy is a privilege personal to the infant.<sup>5</sup> Other cases do not consider it necessary to decide whether the infant might avail himself of his infancy to avoid the indorsement.<sup>6</sup> Again, it is stated that by making the note the makers asserted the competency of the payee to negotiate and assign it, and cannot be permitted to gainsay the assertion so made.<sup>7</sup>

But the infant is entitled to disaffirm, and thereafter there can be no recovery by his assignee, indorsee, or a purchaser from such assignee or indorsee;<sup>8</sup> pay-

<sup>3</sup> *Frazier v. Massey* (1860) 14 Ind. 382, sustaining a demurrer to an answer of the maker setting up the infancy of the payee, the indorser of the complainant in the action.

*Blake v. Livingston County* (1871) 61 Barb (N. Y.) 149, holding that the assignee of the obligee in a bond issued by a county to pay bounty to volunteers enlisted in the Civil War could recover thereon, although the obligee was an infant. The bond in this case is determined by the court to belong to that class of obligations in the nature of commercial paper negotiable by delivery under an assignment in blank.

In *Dulty v. Brownfield* (1845) 1 Pa. St. 497, the indorsee of a promissory note payable to the order of a firm was held entitled to maintain an action against the maker although the name of the firm had been indorsed by an infant partner.

In *Grey v. Cooper* (1782) 3 Dougl. K. B. 65, 99 Eng. Reprint, 541, 1 Selw. N. P. 306, the drawer of a bill of exchange was held liable to an indorsee of the same although the payee of the bill was an infant.

An indorsee of a bill of exchange drawn payable to an infant who was the first indorser thereon was held entitled to recover against the acceptors thereof, where they accepted it knowing that the payee was an infant and that he had in fact indorsed the bill before they accepted it, and it further appeared that the acceptors had been in the practice of raising money by means of such bills. *Jones v. Darch* (1817) 4 Price, 300, 146 Eng. Reprint, 471.

The indorsee of a bill of exchange was held entitled to recover thereon against the acceptor in *Taylor v. Croker* (1803) 4 Esp. (Eng.) 187, although it was drawn by infants in their own favor and indorsed by them. Apparently the infants were of age at the time the suit was brought, and the court states that infants may make themselves liable by a promise after full age, and that the infant parties may have made a new promise in the case at bar. It is stated, however, that though the plaintiff derived title through infants, the bill L.R.A.1917B.

was not void in his hands and he may recover.

In *Garner v. Cook* (1868) 30 Ind. 331, an action upon a note payable to an infant was sustained in favor of one who had possession of the note without indorsement, the court stating that the maker could not avail himself of the minority of the payee.

In *Hardy v. Waters* (1853) 38 Me. 450, the indorsement was made by one authorized by the infant to make it for him, and the claim was that no such power could be conferred by the infant upon another. It was admitted that the infant might transfer a promissory note payable to himself by indorsement.

<sup>4</sup> *Nightingale v. Withington* (1818) 15 Mass. 272, 8 Am. Dec. 101, the indorsee of the note knew the payee and indorser to be under age.

<sup>5</sup> *Frazier v. Massey* (1860) 14 Ind. 302; *Grey v. Cooper* (1782) 3 Dougl. K. B. 65, 99 Eng. Reprint, 541, 1 Selw. N. P. 306.

<sup>6</sup> *Nightingale v. Withington* (Mass.) supra.

<sup>7</sup> *Frazier v. Massey* (Ind.) and *Grey v. Cooper* (Eng.) supra.

<sup>8</sup> *Willis v. Twambly* (1816) 13 Mass. 204; the note involved in this case was a non-negotiable note. After the sale by the infant, he disaffirmed the sale and notified the purchaser, demanding the note, which was refused; thereupon he forbade the purchaser to dispose of the note, and the maker was informed of all the circumstances. Subsequently the purchaser from the infant for a valuable consideration passed the note over to the plaintiff in the action, assuring him that it was due and would be paid by the maker. The plaintiff was ignorant of the attempt of the infant to annul the bargain, and instituted the action in the name of the infant against the maker. In holding that there could be no recovery, the court states that the note ceased to be the property of the purchaser from the infant, from the time he was notified by the infant that he considered the bargain void and was tendered the property received, which was the consideration of the bargain. The settlement made by the maker when he



ment by the maker to the indorsee or assignee thereafter does not protect him.<sup>9</sup> Recovery may be had by the minor after such disaffirmance.<sup>9</sup>

It thus appears that, prior to the Negotiable Instruments Law, the rule was settled that the indorsement of an infant passed title to the instrument, but that the infant might disaffirm. The construction put upon the provision of the Negotiable Instruments Law that the indorsement by an infant passes title to the instrument, in *MURRAY v. THOMPSON*, ante, 1172, results in making that provision a codification of the law as it theretofore existed. The authorities relied upon in *MURRAY v. THOMPSON* as showing that there was some doubt as to whether the indorsement by an infant was void or merely voidable were, as stated above, speaking not alone of the indorsement of the instrument as effecting a transfer of title, but of the contract implied from the indorsement to pay the bill at maturity if not duly paid by the acceptor or maker. And

some of the writers were speaking also of the liability of an infant as maker of an instrument. But *MURRAY v. THOMPSON* had nothing to do with these matters. That case was confined to the indorsement as effecting a transfer of the title. Notwithstanding these considerations, the conclusion reached in *MURRAY v. THOMPSON* as to the effect of the provision of the Negotiable Instruments Law now under consideration seems a correct one, for if the framers of that law had intended to change the law as it theretofore existed by depriving an infant indorser of the right to disaffirm his transfer, it seems probable that this purpose would have been plainly expressed.

This provision of the Negotiable Instruments Law, so far as it relates to the right of an infant indorser to disaffirm, seems not to have been construed in any other adjudicated case. It has been the subject of decision as to other matters, and these are set out in the note.<sup>10</sup>

gave a new note discharged him from liability on the contract, for, although he then knew that the note had passed to the purchaser from the infant, yet he had the right to consider the property of it as still remaining with the infant, it not being negotiable in its nature and the transfer having been vacated. It was then held that the purchaser from the assignee ignorant of the rescission stood in no better light, and accordingly relief was denied. The court states, however, that "whether the indorsement by an infant of a negotiable promissory note, or other mercantile instrument, can be avoided so as to prejudice a bona fide indorsee who is ignorant of the minority of the indorser, is a different question from the one now presented and may require further consideration."

<sup>9</sup> *Briggs v. McCabe* (1866) 27 Ind. 327, 89 Am. Dec. 503, assignee of non-negotiable note.

<sup>10</sup> In *Williard v. Crook* (1903) 21 App. D. C. 237, the last indorser of a note

was sued by an indorsee defending on the ground that the prior indorser, a corporation, had not the power to make an accommodation indorsement. In answer to this defense, the court says that if it was conceded that the corporation's indorsement of the paper was beyond its powers and it incurred no liability thereby, nevertheless, the effect of such indorsement was to pass the property therein under this provision of the Code.

In *Oppenheim v. Simon Reigel Cigar Co.* (1904) 90 N. Y. Supp. 355, an action against a corporation, which was payee and indorser of the notes on which the action was brought, the notes being shown to have been executed for accommodation, and not within the powers of the corporation, it is held that the provision of the Negotiable Instruments Law in question does not affect this power, since the section in question provides for the passing of the title by indorsement, not the incurring of liability.

W. A. E.

## IOWA SUPREME COURT.

POLK COUNTY, IOWA,

v.

JAMES PARKER, Appt.

(— Iowa, —, 160 N. W. 320.)

Officer — ownership of maps prepared by him.

A city assessor owns maps and plats pre-

Note. — As to right of public to benefit of discoveries, inventions, devices, data, etc., of officer or employee, see annotation following *Robison v. Fishback*, post, 1183. L.R.A.1917B.

pared by him from public records when working out of office hours, although they are upon paper taken from discarded books belonging to the public and are used to facilitate the work of his office.

For other cases, see *Officers*, II. a, in *Dig.* 1-52 N. S.

(Preston, J., dissents.)

(December 16, 1916.)

APPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to

recover possession of certain maps and plats of real estate prepared by defendant and used by him to facilitate the work of his office as city assessor. Reversed.

Statement by Deemer, J.:

Action of replevin to recover something like 601 maps and plats of real estate in the city of Des Moines, showing the location of buildings and other improvements thereon, which said maps and plats it is claimed were used in the office of and by the city assessor of the city of Des Moines. The defendant denied plaintiff's ownership of the maps and plats, claimed that they were his individual property, planned, executed, and drafted by him while he held the office of city assessor, during a time when he was not engaged in official duties for his own use and purposes; that he used the same to facilitate the work of his office, but that they were no part of the records thereof; and that he is entitled to the possession thereof. On these issues the case was tried to the court, without a jury, resulting in a judgment finding the county entitled to the property in controversy, and defendant appeals.

Mr. J. L. Witmer, for appellant:

When one obtains property of little or no value with the consent of the owner, upon which he performs labor in good faith which converts such property into something substantially different, and the value of the original article is insignificant as compared to the value of the new product, the title to the property in its converted form passes to the person by whose labor in good faith the change has been wrought.

1 Cooley, Torts, 3d ed. p. 74; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; 2 Bl. Com. (Hammond) p. 623, ¶ 6.

A public official, or servant, does not breach his duty to his employer where he does extra or outside work not injurious to the interests of his employer and not impairing the value of his services; nor does the official or servant, by using his individual property thus created or produced, in his employer's behalf and benefit, forfeit his ownership or title thereto.

Hillsboro Nat. Bank v. Hyde, 7 N. D. 400, 75 N. W. 781; 1 Mechem, Agency, 2d ed. § 1230; Geiger v. Harris, 19 Mich. 209; Wallace v. De Young, 98 Ill. 638, 38 Am. Rep. 108; Jaffray v. King, 34 Md. 217; Stone v. Bancroft, 139 Cal. 82, 70 Pac. 1017, 72 Pac. 717; Brownell v. Enrich, 43 App. Div. 369, 60 N. Y. Supp. 112; 26 Cyc. 1020, 1021.

Messrs. George A. Wilson and Ward C. Henry, for appellee.  
L.R.A.1917B.

Deemer, J., delivered the opinion of the court:

From some time in the year 1889 and down until April of the year 1908, defendant was employed in the tax department of the county auditor's office of Polk county, Iowa. On the last named date he was appointed city assessor for the city of Des Moines, and served in that capacity until the fall of the year 1911. During his employment with the county, he became convinced that a new city map was needed, and concluded that as soon as he had leisure he would prepare the necessary data, plats, and maps to that end. He accepted the city assessorship on the theory that he would have the time while in that office to make the preparation necessary to the getting out of a new city map. Soon after entering upon the work as assessor he began the preparation of this material, and obtained from the county auditor some leaves from the pages of an old discarded county plat book, upon which to make his maps and plats. From his own funds he purchased the ink and other materials necessary to the making of the maps and plats, and did all the work upon them himself. He claims that he did this work before and after office hours, and at times when it did not in any way interfere with his official duties. He did not make the maps or plats primarily to facilitate the work of his office, and the blue prints required by law were furnished his office, and by him returned to the county auditor's office. It was discovered that the maps and plats made by defendant in the manner stated were of material assistance to defendant and his deputies in making assessments, and with defendant's permission they were used by the entire force, the blue prints being practically disregarded. The maps and plats were not made pursuant to any requirement of law, and they do not belong to the county, unless it be found that they were so made as to make them county property. In other words, there is no statute which requires the assessor to either make or file any such maps and plats. Defendant resigned his office, and took the maps and plats with him. Thereafter the county sued out a writ of replevin, and secured the possession of the maps and plats, and since that time they have been used by the city assessors in the performance of their work. The county claims that it is entitled to the possession of this property because it is upon paper belonging to it, was made by an official in the performance of his duty, or at a time when it was entitled to the services of Parker, and from the records in the county offices, and that defendant has no title or right to the possession thereof.

On the other hand, defendant insists that the property does not belong to the county, but to him individually; that he made the maps and plats outside of office hours, used time which belonged to him alone in their preparation; that he was not required to do this work as a part of his official duties, and that the county has no right thereto; that they are his private property, which should not be taken from him. It will be remembered that defendant was a county or city official, and not a mere servant who was required to give his entire time to his master. As an official he had certain specific duties to perform, and none other could be required of him, save as the legislature might direct or authorize. Like other officials, he had certain office hours, and these he observed. According to the testimony, he did all the work upon these maps and plats outside of office hours, and what he did in no manner interfered with his official duties. In fact, the testimony shows that by the use of these maps and plats the work was expedited. Under the facts, which are practically undisputed, the only question is, Who owns and is entitled to the possession of these maps and plats?

The rules applicable here differ a little from those obtaining where the relation is purely that of master and servant. An official is entitled to his salary as a matter of law, and the relation does not grow out of contract. His duties are fixed by statute, and when these are performed, he is not required to do more. If he does do more, he is entitled to the profit thereof on his own account. *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835, 7 N. E. 787; *Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315; *Mechem*, Pub. Off. §§ 855, 872.

As already pointed out, the law did not require the making of these maps and plats, and consequently there was no provision for their return to any office or officer. They were not made primarily to assist in the performance of the work of the office, and they were not made pursuant to any duty owing either city or county. The mere fact that they were made on paper taken from an old book belonging to the county will not authorize the county to take them from the defendant after he has expended his time and labor thereon. In this connection it is to be noted that several witnesses testified that these maps and plats are worth something like \$1,500. Surely the county cannot be permitted to avail itself of this work of the defendant simply because it owned an old discarded plat book from which the paper was taken to make the maps and plats. See, as sustaining this view, 1 Cooley, Torts, 3d ed. p. 74; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653. L.R.A.1917B.

We are constrained to hold that as defendant did not make the maps and plats in controversy because of any statutory duty, and was not required to do so as a part of his official duties, and as he made them at such times and during such periods as not to interfere with his official duties, the maps and plats are his, and he is entitled to recover the same.

II. Aside from the question of defendant's right as a public officer to retain the maps and plats, we are constrained to hold that, even were he nothing more than a servant or ordinary employee, he would, under the facts, be entitled to the property. The rule with reference to ordinary servants and employees in this connection is announced by *Mechem* in his work on Agency, 2d ed. vol. 1, §§ 1230, 1232, as follows:

"Even if the rule were that the principal is entitled to the outside earnings of an agent who has undertaken to give him his entire time and efforts, it would not, of course, apply to earnings made in time not fairly belonging to the principal and in no way affecting his interests. As has been pointed out in one case (*Geiger v. Harris*, 19 Mich. 209), there must, in practically every business, be seasons of leisure and circumstances under which the principal's business cannot be done. What the agent earns at such times in no way competing with the principal or injuring the service, the principal will not be entitled to recover. . . .

"The amount of time which an agent is required to devote to his principal's interests in order to satisfy the requirement of loyalty must, of course, depend upon the circumstances of the case. . . . Where there is no such agreement [i. e., to give 'entire time'], a general rule is difficult to state, other than that it shall be a fair and reasonable devotion to the business of the principal."

In *Hillsboro Nat. Bank v. Hyde*, 7 N. D. 400, 75 N. W. 781, the supreme court of North Dakota said: "The utmost scope of the contract, as they swear to it, is that defendant was to give all of his time to the bank. Such an agreement is widely different from that which plaintiff has set forth in its complaint. A contract to give all of one's time to the employer does not mean that outside earnings of the employee are to belong to the employer. The servant cannot devote himself to his own business at the expense of his master without violating his contract. But his personal earnings are his own. There is no evidence in the case that the defendant neglected his duties as cashier, in the performance of the work in which such outside earnings were made. . . . What his testimony means

is that defendant was to give the bank the benefit of his whole time in and about the legitimate business of the bank. We do not think that he intended to say that it was understood that if defendant, in spare moments, wrote a book, or taught a night school, or sang in the church choir, the fruits of his extra toil on his own behalf should be swept into the tills of the bank."

In *Geiger v. Harris*, *supra*, the supreme court of that state said: "The claim of the plaintiffs in error is placed upon the assumption that an agent, employed as Harris was, is during the agency so bound to his employers that all of his time belonged to them, and all of the profits and fruits of his labors or occupations, of whatever kind, belonged to them, and not to him, so that any use of his time for any but them is a violation of duty. This is a doctrine that cannot be admitted in regard to free persons. The charge of the court below was correct, and the rule laid down is sensible and fair. An agent violates his duty if he neglects to use all reasonable and thorough diligence to further the interests of his employers. He also violates it still more plainly by doing or furthering any business which can in any way hinder or compete with theirs. But there must be seasons of leisure, and there may be circumstances under which their work cannot be done. And in doing their work, he may find it profitable for them to secure bargains or advantages by civilities and serv-

ices which can in no way prejudice them. They have no claim against him except for faithful service. In everything else, subject to this, he is his own master, and may do what he pleases, so long as they are not prejudiced."

See also *Wallace v. De Young*, 98 Ill. 638, 38 Am. Rep. 108; *Jaffray v. King*, 34 Md. 217.

The trial court thought the case was ruled by *Dempsey v. Dobson*, 174 Pa. 122, 32 L.R.A. 761, 52 Am. St. Rep. 816, 34 Atl. 459. In that case a servant employed as a color mixer in a carpet factory kept a record in a color book of the mixtures used in the manufacture of carpets, the recipes belonging to the master. It was held that the servant could not, on the termination of his employment, carry away the recipe books. Manifestly this case was correctly decided, for the master had the right to protect its own formulas, and the work done by the servant who made the book was a part of his duty as a servant.

Other cases relied upon by appellee are not in point, because the servant acquired his claim of right while in the performance of his duties to his employer. In our opinion, the trial court erred in entering judgment for plaintiff, and the judgment must be, and it is, reversed.

Evans, Ch. J., and Weaver and Ladd, JJ., concur. Preston, J., dissents.

## INDIANA SUPREME COURT.

EDWARD J. ROBISON et al., Appts.,  
v.  
FRANK S. FISHBACK.

(175 Ind. 132, 93 N. E. 666.)

**Courts — jurisdiction — patented device — action to control.**

1. A state court is not deprived of jurisdiction to compel a public officer to leave behind a device which he has installed to facilitate the discharge of the duties of the office upon the expiration of his term, by the fact that he has secured a patent upon it from the Federal government.

For other cases, see *Courts*, IV. d, 1, in *Dig. 1-52 N. S.*

**Officer — patented device — dedication to public use.**

2. A public officer who, to facilitate the discharge of his duties, prepares at his own expense an index to the public records,

Note. — As to right of public to benefit of discoveries, inventions, devices, data, etc., made or prepared by officer or employee, see annotation following this case, post, 1183. L.R.A.1917B.

which he is not required by law to keep but which becomes indispensable to the discharge of the duties of the office and for which he applies for a patent, may, upon the expiration of his term of office, be enjoined from removing it without unconstitutionally depriving him of his property without due process of law, or of his privileges and immunities, since he has clothed it with a public use.

For other cases, see *Constitutional Law*, II. b, 2, a, in *Dig. 1-52 N. S.*

(January 27, 1911.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Marion County in plaintiff's favor, and from an order denying a motion for new trial in an action brought to enjoin defendants from removing, destroying, or taking away a card-index system alleged to be in use in the treasurer's office. Affirmed.

The facts are stated in the opinion.

Messrs. Merrill Moores and Walter Myers, for appellants:

A patent right is property, so exclusive that not only citizens and residents, but also

the government itself, may not use it without the license of the patentee.

Walker, Patents, § 157; James v. Campbell, 104 U. S. 356, 26 L. ed. 786.

A card-index system, if it possesses the required novelty, may be patented.

Gunn v. Bridgeport Brass Co. 148 Fed. 230, 81 C. C. A. 576, 152 Fed. 434.

In the absence of a statute or ordinance requiring indexing of Barrett law assessments, a card-index system paid for by an officer is not a public record.

Painter v. Hall, 75 Ind. 208; Gaines v. Relf, 12 How. 472, 13 L. ed. 1071; Chaffee v. United States, 18 Wall. 516, 540, 21 L. ed. 908, 912; Carrington v. Potter, 37 Fed. 767; Cruse v. McCauley, 96 Fed. 369; Hegler v. Faulkner, 153 U. S. 109, 116, 38 L. ed. 653, 655, 14 Sup. Ct. Rep. 779; Taylor v. Jackson, 151 Mich. 639, 115 N. W. 977.

Where indispensable public necessity renders work necessary to be done in an office, and where the officer is employed to do that work under a contract by which he gets extra compensation, such a contract is legal, and the officer can collect the money due him under the contract even though he draws a salary as the incumbent of the office in which the work was done.

Tippecanoe County v. Mitchell, 131 Ind. 370, 15 L.R.A. 520, 30 N. E. 409; State ex rel. Tippecanoe County v. Flynn, 161 Ind. 554, 69 N. E. 159; State ex rel. Dearborn County v. Shutts, 161 Ind. 590, 69 N. E. 397.

A record not authorized by law does not even constitute notice.

Brown v. Budd, 2 Ind. 442; Sanders v. Muegge, 91 Ind. 214.

Mr. Henry Warrum, for appellee:

The card indexes, together with their predecessor, being purchased by the city for the use in its treasure's office for collecting municipal assessments, and containing information received in the transactions of that office, and inscribed by the officer and his clerks, constitute property of the city and part of its public records.

The condition and accumulation of the duplicates specified by the statutes render such indexes indispensable to the discharge of the duties of the office.

Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711; Miller v. Indianapolis, 123 Ind. 196, 24 N. E. 228.

While the statute specifically designates only the "book" in which shall be entered these assessment rolls as they are received, by fair intentment it must be held that the law contemplates some sort of indexing as would make the use of these books practical.

24 Am. & Eng. Enc. Law, 170; Greenl. Ev. p. 610, §§ 483, 496.  
L.R.A.1917B.

The cards in the case are stock cards admittedly without new features, and the only novelty possible to claim for them is the new manner of arranging information on the card.

Gunn v. Bridgeport Brass Co. 81 C. C. A. 576, 152 Fed. 434.

The copyright law was enacted for the protection of those who devised new methods of tabulating or arranging information, but under the copyright law the deposit of copies with the Librarian of Congress would have been required on the day of publication.

7 Am. & Eng. Enc. Law, 530.

If the defendants can claim compensation from the city for rendering this work because it was of indispensable public necessity, their claim must be regularly presented to the city, and cannot be realized or guaranteed by a claim upon these public records.

Kerr v. Register, 42 Ind. App. 375, 85 N. E. 790.

Myers, Ch. J., delivered the opinion of the court:

Appellant Robison was treasurer of Marion county, Indiana, and ex officio treasurer of the city of Indianapolis, from January 1, 1908, to January 1, 1910. Appellant Share was in the employ of said treasurer. When the latter went into office, there was a card-index system in the office which furnished a partial index to the assessment rolls for public improvements in the city of Indianapolis. There are some forty-three volumes of public improvement assessments, involving more than 10,000 names of different persons and assessments. The card index in use prior to January 1, 1908, so far as the mechanical features of it were concerned, was the ordinary form of cards adjusted to a case, with rods to hold the cards in position, and each card had the name of a person at the top thereof, and under the name vertical, ruled spaces for indicating the property assessed, and the folio and page in which the assessment was to be found, and a like space for designating the improvement. These were arranged in alphabetical order in the cases. There was an index to the improvement in each folio, and a general index to all folios, of the improvements, but the names of property owners were not indexed. There is no express statute requiring the keeping of any index of any kind. The only other reference to assessments against any property for public improvements was upon the general tax duplicates, where, opposite any parcel of land against which there was such assessment, a letter "B" was placed to indicate that there was a so-called Barrett law assessment against the property, and in case a property owner should not

know upon what improvement an assessment had been made, there was no way of discovering it, without running through the general index or the indexes in the various folios. Appellant Share had had long experience in the conduct of the treasurer's office, and especially with the collection of municipal assessments, and, at the suggestion and under the pay of appellant Robison, set about devising a card-index system to public improvement records. Appellant Robison personally visited a number of the larger cities of the country, examined the methods employed in keeping trace of public improvement assessments, and directed Share to work out a system of card indexes, and procured at his personal expense the cases and cards. Share thereupon devised a card system in which, under the name of one owner, all improvements assessed in that name appear. The only practical difference between the two systems of cards was that in the one employed when Robison came into office but one improvement appeared upon a single card, though the cards were arranged for separate improvements, while in the system devised by Share all improvements assessed under the name of any one person or owner were designed to be shown by such card. Robison directed Share to obtain the necessary cards and cases to install the system in the treasurer's office, and, in the absence of the treasurer and without his knowledge, payment for the supplies was made out of the public funds. As soon as Robison discovered this fact, he covered the money into the treasury. The card system which was in vogue when Robison took office was not thereafter kept up, but the system devised by Share was completed at an expense of about \$3,000 to Robison, and proved to be a great success in expediting the work of referring to assessments, and highly essential, if not indispensable, to the conduct of the office. Share applied for letters patent upon the device, and claims to be the owner of the system, while Robison claims to own the particular cards and the cases in which they are contained. Upon going out of office January 1, 1910, Robison claimed the cases and cards as his individual property and the right to remove them, and appellee, as treasurer-elect and resident taxpayer, successfully maintained an application for an injunction against their removal, on the ground that they were parts of the public records, from which judgment both defendants appeal and assign joint and separate errors upon the action of the court below in overruling their motion for a new trial.

Jurisdiction is lodged in this court by the contention of appellants that the judgment is in violation of the 14th Amendment to the Federal Constitution, in abridging the privileges or immunities of citizens of the United States, and depriving them of their property without due process of law, and in violation of § 21 of art. 1 of the state Constitution, in taking their services and property without just compensation first assessed and tendered. As to the first proposition, it is to be said that the privileges and immunities clause of the Federal Constitution refers to the privileges and immunities arising out of the nature and character of the Federal government, granted or secured by that Constitution. It operates upon state action solely, and not upon individual action, and simply requires that all persons similarly situated be treated alike, in privileges conferred or liabilities imposed. *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Appellants contend that the device is patentable, and that a patent right is property, and that the judgment constitutes a taking without due process or just compensation. Whether it is patentable or not is immaterial, for there is some value in the cases and cards. While the state courts have no jurisdiction to determine rights under an alleged patent, they are not ousted of jurisdiction by the fact that rights claimed or denied as growing out of the patent are incidentally involved. Exclusive Federal jurisdiction applies only to cases arising under the patent laws upon a bill, complaint, or declaration of a plaintiff setting up a right under the patent laws, as a ground of recovery. *Pratt v. Paris Gaslight & Coke Co.* (1897) 42 L. ed. 458, and notes (188 U. S. 255, 18 Sup. Ct. Rep. 62); *Riverside Mills v. Atlantic Coast Line R. Co.* (1909; C. C.) 168 Fed. 987; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Pittsburgh, C. C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

The real point in this case turns on the question whether the particular cards and cases have become so essential to the conduct of the office that appellants in installing them must be considered as having intended that they should become so much a part of the indispensable accessories of the operation of the office that the public interest requires that they be not removed. It appears from the record that the former system of card indexing was abandoned; had that been kept up by appellants at their own expense, and for their own convenience, though less efficient than the plan installed,

though less efficient than the plan installed,

though possibly involving quite as much labor as the new scheme, it could hardly be claimed that appellants could remove it, or even those cards added by their labors, or at their own expense. This index is not required by any specific law, and it is wholly optional with treasurers whether they keep indexes to these records, but they are so far authorized that the public authorities might contract and pay for their making as conveniences for the use of the officers and the public, and, if so procured, while they may not, in the strict sense, be public records, they are undoubtedly authorized to be made and kept. They are not less public by reason of being made by an officer in the course of his administration of the office. The public have a direct interest in them not only during the term of office of the incumbent, but indefinitely. *State ex rel. Dearborn County v. Shutts*, 161 Ind. 590, 69 N. E. 397; *State ex rel. Tippecanoe County v. Flynn*, 161 Ind. 554, 69 N. E. 159; *Tippecanoe County v. Mitchell*, 131 Ind. 370, 15 L.R.A. 520, 30 N. E. 409; *Hoffman v. Lake County*, 96 Ind. 84; *Garrett v. Boone County*, 92 Ind. 518; *Hubler v. Cass County*, 19 Ind. App. 464, 49 N. E. 832.

It has been held that an index is simply a facility for learning the contents of a record, but not a part of the record itself, unless required by the law to be kept. *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692; *Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 174. These cases arose upon a conflict of interest between third parties, because of the failure of an officer to keep an index, owing to which fact some of them were misled, in cases where no index was required as a part of the record.

We are not called upon to determine whether they are so far public records as to constitute primary evidence without regard to any other fact than their existence in a public office, though it is manifest that conditions might arise where they might become secondary evidence, as in case of the loss or destruction of the assessment rolls, though there is authority for their being regarded as public records. *Coleman v. Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Herron v. McEnery*, *McGloin* (La.) 108; *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868; *Kyburg v. Perkins*, 6 Cal. 674.

The following statement in *Coleman v. Com.* *supra*, though obiter, so aptly phrases the matter as to commend itself to our approval and judgment, at least as applied to the facts in this case: "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate

mode of discharging the duties of his office, it is not only his right, but his duty, to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer—it is the property of the state, and not of the citizen, and is in no sense a private memorandum."

It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. *Miller v. Indianapolis*, 123 Ind. 106, 24 N. E. 228; *Com. v. Rodes*, 1 Dana, 595; *Cyclopedic L. Dict.* The evidence in this case is all to the point that the indexes are indispensable to the discharge of the duties of the office.

It is said in *People v. Peck* (1893) 138 N. Y. 386, 20 L.R.A. 381, 34 N. E. 347, involving the question of the collection of statistical matter from which compilations are made and reports required to be made: "He is not to collect the facts merely to enable him to discharge his duty, but in the discharge of a duty." Here the treasurer did not prepare the indexes in the discharge of a duty imposed upon him to make them, but to aid him, and those succeeding him, to discharge the duties of the office; but in the discharge of his duties he did invest the office with facilities for the discharge thereof which are highly essential in the efficient discharge thereof, and in which the public, whose servant he was, are deeply interested. The injury to the public from their removal would be greater than the benefit accruing to appellants, and we think it would be inequitable, when appellants have themselves created the situation, to allow them to disturb it. Because appellants were prevented from removing the cases and cards, it does not follow that their property is taken without just compensation, nor are they deprived of their property without due process of law. They cannot complain of a condition of their own creating.

The city has assumed to retain the property under circumstances rendered reasonable by the course of appellants respecting it, and in which the public interest is deeply affected and concerned, and it would be inequitable to allow them to take it.

The judgment is affirmed.

Writ of error dismissed by the Supreme Court of the United States, December 4, 1914, 235 U. S. 714, 59 L. ed. 437, 35 Sup. Ct. Rep. 207.

**Annotation—Right of public to benefit of discoveries, inventions, devices, data, etc., made or prepared by officer or employee.**

Cases on the question as to an implied promise to pay compensation for the use of inventions patented by the employees of the government will be found in the note to *May v. Western Lime Co.* 44 L.R.A.(N.S.) 333, 337.

Cases relating to literary work done in connection with official duties are cited at page 1193 of the note to *Barber v. National Carbon Co.* 5 L.R.A.(N.S.) 1154, on the subject of the rights of employer and employee with respect to things produced by the labor of the employee.

Cases involving the right of an official reporter to the benefit of the copyright of headnotes, digest propositions, etc., present distinctive questions which are not within the scope of this note.

The decision in *ROBISON v. FISHBACK*, ante, 1179, that a card-index system installed by the county treasurer could not be removed by him, is based upon the fact that such system had become indispensable in the conduct of the office, and was in a sense a public record. And that would seem to be the only ground upon which the decision could be based, as an index was not required by any law. As the only question involved was the right to remove the card-index system, this case would not be authority on either the question as to implied right to compensation or of the right to obtain a patent on the device.

In *Polk County v. Parker*, ante, 1176, a case analogous in many respects to the *ROBISON CASE*, it was held that maps and plats made by a city assessor outside of office hours and at his own expense, and which were of material assistance in the conduct of the office, were the individual property of such assessor, and could be taken with him when his term of office expired, although they were made upon paper belonging to the county, which for that reason claimed to be entitled to the possession of them.

It is to be observed, and this will probably serve to distinguish it from the *ROBISON CASE*, that in *Polk County v. Parker*, the maps and plats, while of material assistance in the conduct of the assessor's office, were not indispensable, as assessments could, as was previously done, be made from blueprints which were furnished to the city assessors.

*ROBISON v. FISHBACK* finds support, however, in *Herron v. McEnery* (1881) L.R.A.1917B.

*McGloin (La.)* 108, which held that researches, consisting of memoranda showing the mortgages recorded against certain persons, were not the private property of the recorder of mortgages although such researches had been made by clerks paid by the different incumbents of the office, each recorder paying his predecessor the value thereof. In answer to the contention that because of the manner of their acquisition, and that though useful to facilitate the discharge of the duties of the office yet they were not indispensable, therefore such researches were private property, the court said: "The fallacy of this position lies in the assumption that the mortgage office exists for anything else than the benefit of the public. The law gives to the recorder certain fees, and provides that he shall pay his clerks, buy his own stationery, etc.; the presumption is that out of the fees he collects he pays the expenses of properly conducting his office, leaving a reasonable compensation for himself. If the making and filing away of these researches materially hastens the work of the office, thus accommodating the public, it is the duty of the recorders to make them, for it is their duty to do everything necessary to a prompt, faithful, and intelligent discharge of the duties imposed upon them by law; and, having made them, they become a portion of the records and archives of the office. The labor of the clerks in the mortgage office does not belong to the recorder personally; the money that he pays them with comes from the public in the shape of fees paid to him, and the public is entitled to any facility of public business which their labor may create. The fact that plaintiff paid his predecessor for the researches is irrelevant, as such payment could not have been legally demanded of him, and the force of the plaintiff's argument that it is customary to pay for the researches is broken by the fact that such payment is only proved for about ten years back, whereon the researches have been in existence nearly thirty years."

However, in *Leffingwell v. Miller* (1905) 20 Colo. App. 429, 79 Pac. 327, under a city ordinance requiring that "the city engineer shall inspect and pass upon the construction of all public works ordered by the city, shall make out plans, specifications, and estimates



thereof; he shall do the surveying and engineering ordered by the city, and shall perform such other duties not inconsistent with his employment as the city council may require. He shall preserve all plans, maps, notes, surveys, books, papers, and documents pertaining to his office, which shall be open to inspection at all reasonable hours, and shall be delivered to his successor in office," it was held that field notes made by a city engineer in surveying lots of individual owners upon their application, under their employment and at their expense, were the private property of such engineer, and not required to be turned over to his successor. The court stated that "the duty of preserving and delivering to his successor in office all plans, maps, notes, surveys, books, papers, and documents pertaining to his office must have been intended to apply only to such plans, maps, etc., of 'public works' and surveying and engineering ordered by the city for which the city would be bound to compensate him, and thereby acquire ownership thereof. By the ordinance, no duty was imposed upon the city engineer to survey lots for individual owners. Such work might have been performed, was and is performed, by other competent engineers, and when performed by the city engineer is performed by him in his individual, and not official, capacity. Therefore, the field notes made and kept by him in such work are his individual property, and do not pertain to the office of city engineer."

So, also, in *Butte v. Nevin* (1912) 46 Mont. 380, 128 Pac. 600, a copy of the report of an auditing company employed to audit the financial condition of the city, which copy such company made for the mayor at his request, the original being filed with the city clerk, was held to be the private property of the mayor. The auditing company, the court said, "discharged their contract with the city when they delivered to it one document embodying the result of their investigations, in the form in which they agreed to make it. If they chose to make carbon copies for themselves or for the accommodation of other persons, as was the case here, the title to such copies did not vest in the city, but in the persons for whom they were made, there being nothing in their contract prohibiting" them "from furnishing as many of such copies as they chose. The mayor of a city in this state is not required to keep a record of his official acts. The duty to keep the files and records of the city appertains to the clerk, who is bound to deliver them to his successor. . . . If the mayor chooses to keep a record including copies of documents which must be preserved in the files of the clerk's office, they are his private property, and title to them does not vest in the city by virtue of the fact that he is acting as its chief executive at the time. Having delivered the copy to the city council, and having seen that it found its way into the records of the city, his duty was fully discharged."

J. H. B.

#### OKLAHOMA SUPREME COURT.

L. B. BROWN et al., Pliffs. in Err.,  
v.

M. S. WILSON et al.

(— Okla. —, 160 Pac. 94.)

#### Mines — oil and gas lease — forfeiture.

1. Where an oil and gas lease was made, executed, and delivered for the consideration of \$1 in hand paid the lessor, and the covenants and agreements hereinafter contained on the part of the lessee, and leased and let to him a certain tract of land for a term of ten years and as long thereafter as oil and gas or either were produced there-

from by the lessee, he to yield to the lessor certain royalties from the oil and gas produced, and where the lessee agreed to complete a well on the premises within four months from the date thereof, or pay at the rate of \$80 in advance for each three months such completion was delayed, held, that the \$1 supported the four months' period in which the lessee had to complete a well, and supported no other stipulation in the lease; that the prospective royalties were the sole consideration for the execution of the lease on the part of the lessor; that the agreements on the part of the lessee to complete a well on the demised premises within four months, or pay for delay, conferred an option on the lessee to drill or pay; and that a failure to do either forfeited the lease at the option of the lessor, who thereafter was entitled to have the same judicially declared forfeited and canceled as a cloud upon his title.

For other cases, see *Mines*, II. 3, 4, 5, in Dig. 1-52 N. S.

#### Headnotes by TURNER, J.

Note. — For surrender clause in oil or gas lease as rendering it unilateral, see annotation following this case, post, 1206. L.R.A.1917B.

**Same — want of mutuality — validity.**

2. Where such lease reserves to the lessee and his assigns the right at any time after four months, on the payment of \$1 and all payable obligations then due the lessor or his assigns, to surrender the lease, if not tested, for cancellation, held that, as said lease, construed as a whole, confers on the lessee an option to complete a well within four months or pay for delay, and a further option to surrender at any time after four months, and thereby avoid doing both, it was voidable at the option of the lessor at any time after four months for lack of mutuality, in that it imposed no legal obligation on the lessee; that, as prospective royalties were the sole consideration for the execution of the lease on the part of the lessor, payment of which could be defeated by a surrender thereof by the lessee, the lease was nudum pactum; and that, as the same reserves to the lessee the right to surrender the lease at any time after four months before development, a corresponding right exists in the lessor to compel a surrender.

For other cases, see *Contracts*, I. d, 2, in Dig. 1-52 N. S.

**Evidence — forfeiture of lease.**

3. Where said lease as to 80 acres of the demised premises was assigned to the S. S. Co., and where, on July 17, 1914, \$20 delay money fell due and payable thereon from the lessee to the lessor, assuming that the lessor and all parties in interest under the lease agreed to the substitution of said company as lessee of said 80 acres so assigned, evidence examined, and held, that said company defaulted in said payment, and that time was the essence of the contract, that the court erred in refusing to so hold, and that said lease was forfeit as to the holding of said company under the lease, and to cancel the lease accordingly.

For other cases, see *Mines*, II. b, 4, b, in Dig. 1-52 N. S.

**Same — forfeiture.**

4. Where said lease as to 240 acres of the demised premises was assigned to W. and C., and where, on April 17, 1914, \$60 delay money fell due and payable thereon from them to the lessor, evidence examined, and held, that they defaulted in said payment, that time was the essence of the contract, that the court erred in refusing to so hold, and that said lease was forfeit as to their holdings thereunder and to cancel the same accordingly.

For other cases, see *Mines*, II. b, 4, b, in Dig. 1-52 N. S.

**Forfeiture — suit to enforce.**

5. Where the lessor, after forfeiture incurred, brought suit, to have the same judicially declared and to clear his title, and thereafter executed a second lease on the same premises and thereafter parted with his interest as lessor in the demised premises, evidence examined, and held, that the court erred in refusing to grant such

relief to him, and to all parties in interest under the second lease.

For other cases, see *Mines*, II. b, 4, b, in Dig. 1-52 N. S.

(Kane, Ch. J., and Thacker, J., dissent.)

(January 11, 1916.)

**E**RROR to the Superior Court for Muskogee County to review a judgment in defendants' favor in an action brought to enjoin them from interfering with plaintiffs' possession of an oil well. Reversed.

The facts are stated in the opinion.

Messrs. Gubser & Means, Thomas H. Owen, and Joseph C. Stone, for plaintiffs in error:

The nonpayment of rentals (the lessees not having developed the property) operated as an abandonment of the lease and authorized forfeiture by the lessor.

Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 905; Mitchell v. Probst, — Okla. —, 152 Pac. 597; McKee v. Grimm, — Okla. —, 167 Pac. 308; Conkling v. Krandsusky, 127 App. Div. 761, 112 N. Y. Supp. 13; Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 504; Dill v. Frazee, 169 Ind. 53, 79 N. E. 973; Cowan v. Radford Iron Co. 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453; Archer, Oil & Gas, p. 239, § 4.

Time is of the essence of the contract.

Mitchell v. Probst, — Okla. —, 152 Pac. 597; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 905; Conkling v. Krandsusky, 127 App. Div. 761, 112 N. Y. Supp. 13; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Alleghany Oil Co. v. Bradford Oil Co. 21 Hun, 31; Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557; Beabe v. Worth, 146 N. Y. Supp. 146; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 504; Wiswall v. McGowan, 2 Barb. 270; Dill v. Frazee, 169 Ind. 53, 79 N. E. 973; Bullock v. Adams, 20 N. J. Eq. 367; King v. Ruckman, 20 N. J. Eq. 352; Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213.

The lessee will be held to a strict performance, equity favoring a forfeiture in such a matter.

Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Kolachny v. Galbreath, 26 Okla. 772,

38 L.R.A.(N.S.) 451, 110 Pac. 905; Superior Oil & Gas Co. v. Mehlh, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 547; Mitchell v. Probst, — Okla. —, 152 Pac. 597; Deming Invest. Co. v. Lanham, 36 Okla. 773, 44 L.R.A.(N.S.) 50, 130 Pac. 260; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Conkling v. Krandsky, 127 App. Div. 680, 112 N. Y. Supp. 13; Huggins v. Daley, 99 Fed. 606, 48 L.R.A. 320, 40 C. C. A. 12, 20 Mor. Min. Rep. 377; Bryan, Petroleum & Natural Gas, p. 146; Alleghany Oil Co. v. Bradford Oil Co. 21 Hun, 31; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Dill v. Frazee, 169 Ind. 53, 79 N. E. 973; Soaper v. King, 167 Ky. 121, 180 S. W. 46; Flanagan v. Marsh, 32 Ky. L. Rep. 184, 105 S. W. 424; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 504.

Forfeiture of a lease of this character (just here disregarding the surrender clause) is favored and permitted on slight default, though there is no express provision in the lease for forfeiture, time being the essence of such a contract, unless the contract itself expressly provides otherwise.

Mitchell v. Probst, — Okla. —, 152 Pac. 597; McKee v. Grimm, — Okla. —, 157 Pac. 308; Thornton, Oil & Gas, § 797, p. 895; Conkling v. Krandsky, 127 App. Div. 761, 112 N. Y. Supp. 13; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 504; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145.

The April, 1914, transaction was a valid contract for the surrender and forfeiture of the lease if the lessees failed either to drill the well or to pay the notes promptly, and is controlling evidence that time was material,—the essence of the contract, and that the parties construing the lease so regarded it.

Thornton, Oil & Gas, 2d ed. ¶ 142, p. 213; McKee v. Grimm, — Okla. —, 157 Pac. 308; 27 Cyc. 740; Hooks v. Forst, 165 Pa. 238, 30 Atl. 846, 18 Mor. Min. Rep. 139; Bartley v. Phillips, 165 Pa. 325, 30 Atl. 842, 18 Mor. Min. Rep. 145, s. c. 179 Pa. 175, 36 Atl. 217, 18 Mor. Min. Rep. 542; Frankfort & C. R. Co. v. Jackson, 153 Ky. 534, 166 S. W. 103; Clark v. Dales, 20 Barb. 64; Homer v. Guardian Mut. L. Ins. Co. 67 N. Y. 479; Wiswall v. McGowan, 2 Barb. 270; King v. Ruckman, 20 N. J. Eq. 316; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 481; Bullock v. Adams, 20 N. J. Eq. 367.

L.R.A.1917B.

The lease was voidable at the option of the lessor.

Owens v. Corsicana Petroleum Co. — Tex. Civ. App. —, 169 S. W. 193; J. M. Guffey Petroleum Co. v. Oliver, — Tex. Civ. App. —, 79 S. W. 884; Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557; National Oil & Pipe Line Co. v. Teel, — Tex. Civ. App. —, 67 S. W. 545; Long v. Sun Co. 132 La. 601, 61 So. 684; Caddo Oil & Min. Co. v. Producers' Oil Co. 134 La. 701, 64 So. 684; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 502; Murray v. Barnhart, 117 La. 1023, 42 So. 492; Tennessee Oil, Gas & Mineral Co. v. Brown, 65 C. C. A. 524, 131 Fed. 703; Berry v. Friable, 120 Ky. 337, 86 S. W. 558; Bay State Petroleum Co. v. Penn Lubricating Co. 121 Ky. 637, 87 S. W. 1104; Killebrew v. Murray, 151 Ky. 345, 151 S. W. 665; Young v. McIlhenny, — Ky. —, 116 S. W. 728; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25, 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Knight v. Indiana Coal & I. Co. 47 Ind. 105, 17 Am. Rep. 692; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Cowan v. Radford Iron Co. 83 Va. 547, 3 S. E. 121, 16 Mor. Min. Rep. 453; Conkling v. Krandsky, 127 App. Div. 761, 112 N. Y. Supp. 13; Reese v. Zinn, 103 Fed. 97; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Trees v. Eclipse Oil Co. 47 W. Va. 107, 34 S. E. 933, 20 Mor. Min. Rep. 260; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 96 Fed. 179; O'Neill v. Risinger, 77 Kan. 63, 93 Pac. 340; Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 201; Smith v. Guffey, 120 C. C. A. 436, 202 Fed. 106; Glasgow v. Chartiers Oil Co. 152 Pa. 48, 25 Atl. 232, 17 Mor. Min. Rep. 523; Frank Oil Co. v. Bellevue Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Superior Oil & Gas Co. v. Mehlh, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; Hill Oil & Gas Co. v. White, — Okla. —, 151 Pac. 1051; McKee v. Grimm, — Okla. —, 157 Pac. 309.

The \$1 paid at the time of the execution of the lease supported only the four months' development period named in the lease, within which the lessee had the right to enter and commence development, and it was so intended by the parties.

Frank Oil Co. v. Bellevue Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119

*Pac.* 260; *Owens v. Corsicana Petroleum Co.* — *Tex. Civ. App.* —, 169 S. W. 193; *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 428, 121 Fed. 677, 22 *Mor. Min. Rep.* 429; *National Oil & Pipe Line Co. v. Teel*, — *Tex. Civ. App.* —, 67 S. W. 545, affirmed in 95 *Tex.* 586, 68 S. W. 979, 22 *Mor. Min. Rep.* 263; *Dill v. Frazee*, 169 *Ind.* 53, 79 N. E. 971.

The payment of quarterly rentals provided for in the lease prior to the landowner's declarations of forfeiture was no part performance of the contract.

*Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 428, 121 Fed. 677, 22 *Mor. Min. Rep.* 429; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 981, 19 *Mor. Min. Rep.* 315; *Murray v. Barnhart*, 117 La. 1023, 42 So. 489.

*Messrs. Noffsinger & Broome and Sumner J. Lipscomb* also for plaintiffs in error.

*Messrs. Samuel W. Hayes, George S. Ramsey, Edgar A. de Meules, Malcolm E. Rosser, J. R. Cottingham, Robertson, Bailey, Nelson, & Bailey, and James L. Powell*, for defendants in error:

Under the terms of this lease Ruhl's lessees could not, by formally surrendering the lease after April 17th, defeat or nullify their obligation to pay him the \$60 note given by Wilson and Cameron for the rentals covering the period from April 17th to July 17th, nor could any of the owners of the lease formally surrender the lease or any part thereof and defeat or nullify their fixed obligation and liability to pay the rentals due and accruing July 17th.

*Bettman v. Shadle*, 22 *Ind. App.* 542, 53 N. E. 662; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, 19 *Mor. Min. Rep.* 326; *Hays v. Forest Oil Co.* 213 Pa. 556, 62 *Atl.* 1072; *Dexter v. Phillips*, 121 *Mass.* 178, 23 *Am. Rep.* 261; *Perry v. Aldrich*, 13 N. H. 343, 38 *Am. Dec.* 493.

There was no forfeiture or abandonment of the lease, either as to the Seven Sand's 80, or to the Cameron and Wilson 240 acres.

*Garrett v. South Penn Oil Co.* 66 W. Va. 587, 66 S. E. 745; *Smith v. Root*, 64 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1007; *Phillips v. Hamilton*, 17 Wyo. 41, 95 *Pac.* 846; *Archer, Oil & Gas, p. 501*; *Fisher v. Crescent Oil Co.* — *Tex. Civ. App.* —, 178 S. W. 908; *McMillin v. Titus*, 222 Pa. 500, 72 *Atl.* 244; *Laing v. Price*, 75 W. Va. 192, 83 S. E. 497; *Sayers v. Kent*, 201 Pa. 38, 50 *Atl.* 296; *La Fayette Gas Co. v. Kealey*, 164 *Ind.* 563, 74 N. E. 7; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, *Ann. Cas.* 1912B, 360; *Friend v. Mallory*, 52 W. Va. 53; 43 S. E. 117; *Monford v. Lanyon Zinc Co.* 67 *Kan.* 310, 72 *Pac.* 784.

Assuming, however, that this lease is equivalent to the "unless" lease, the execution

of the note for \$60 by Wilson and Cameron, and Ruhl's acceptance of the same on April 17th, 1914, constituted a purchase by Wilson and Cameron of an extension of the lease for three months.

*Frank Oil Co. v. Bellevue Gas. & Oil Co.* 29 *Okla.* 719, 43 L.R.A.(N.S.) 487, 119 *Pac.* 260; *Deming Invest. Co. v. Lanham*, 36 *Okla.* 773, 44 L.R.A.(N.S.) 50, 130 *Pac.* 260; *Mitchell v. Probat*, — *Okla.* —, 152 *Pac.* 597; *Clark v. O'Toole*, 20 *Okla.* 332, 34 *Pac.* 547; *Hartford Wheel Club v. Travelers Ins. Co.* 78 *Conn.* 355, 62 *Atl.* 207; *Morrison v. Smith*, 90 *Md.* 76, 44 *Atl.* 1032.

Failure to plead waiver does not defeat the rights of defendants to insist that forfeiture of the lease, if any occurred, was waived by the lessor.

*St. Paul Fire & M. Ins. Co. v. Griffin*, 33 *Okla.* 178, 124 *Pac.* 300; *Carson v. Vance*, 35 *Okla.* 584, 130 *Pac.* 946; *Homeland Realty Co. v. Robison*, 39 *Okla.* 591, 136 *Pac.* 585; *First Bank v. Terrell*, 44 *Okla.* 719, 145 *Pac.* 1140.

Assuming that this lease contains an express forfeiture clause, the failure to pay the rental did not operate ipso facto to terminate the lease,—the lease did not end automatically upon failure to pay the rental.

*Cohn v. Clark*, — *Okla.* —, L.R.A.1916B, 686, 150 *Pac.* 467; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, 19 *Mor. Min. Rep.* 326; *Hancock v. Diamond Plate Glass Co.* 162 *Ind.* 146, 70 N. E. 140; *Thornton, Oil & Gas*, 2d ed. § 151; *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 *Atl.* 220; *Archer, Oil & Gas, p. 283*; *Reserve Gas Co. v. Carbon Black Mfg. Co.* 72 W. Va. 757, 79 S. E. 1002; *Marshall v. Forest Oil Co.* 198 Pa. 83, 47 *Atl.* 927, 21 *Mor. Min. Rep.* 179; *Rose v. Lanyon Zinc Co.* 68 *Kan.* 126, 74 *Pac.* 625.

The lessor elected to waive the supposed forfeiture.

1 *Underhill, Land. & T. p. 654*; *Ward v. Day*, 5 *Best & S.* 360, 122 *Eng. Reprint*, 865, 33 L. J. Q. B. N. S. 254, 10 L. T. N. S. 578, 12 *Week. Rep.* 829; 1 *Pom. Eq. Jur.* § 516; *Max Meadows Land & Improv. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Campbell v. Eastern Bldg. & L. Asso.* 98 Va. 729, 37 S. E. 350; 3 *Elliot, Contr.* § 2050; *Conrow v. Little*, 115 N. Y. 387, 5 L.R.A. 693, 22 N. E. 346; *Cole v. Smith*, 26 *Colo.* 506, 58 *Pac.* 1086; *Mettner v. Northwestern Nat. L. Ins. Co.* 127 *Iowa*, 205, 103 N. W. 112; *Stewart v. Leonard*, 103 *Me.* 128, 68 *Atl.* 638; *Charlotte Harbor & N. R. Co. v. Burwell*, 56 *Fla.* 217, 48 So. 213; *Francis v. Supreme Lodge, A. O. U. W.* 150 *Mo. App.* 347, 130 S. W. 500; *Cole v. Hines*, 81 *Md.* 476, 39 L.R.A. 455, 32 *Atl.* 196.

Demanding the rentals after April 17th

for the quarter ending July 17th constituted an election upon the part of the lessor to affirm the lease.

Archer, Oil & Gas, p. 284; Camp v. Scott, 47 Conn. 366; Jones, Land. & T. § 496; Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 341, 26 N. E. 301; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; 1 Underhill, Land. & T. p. 648; Stewart v. Leonard, 103 Me. 128, 68 Atl. 638; Farlow v. Ellis, 15 Gray, 229; Nagel v. League, 70 Mo. App. 487; Allen v. Dent, 4 Lea, 680; Barrasso v. Tennessee Brewing Co. 1 Tenn. C. C. A. 662.

In the absence of an express forfeiture clause in an "or" lease, there can be no forfeiture for nonpayment of rental.

Reserve Gas Co. v. Carbon Black Mfg. Co. 72 W. Va. 757, 79 S. E. 1002; Thompson v. Christie, 138 Pa. 230, 11 L.R.A. 236, 20 Atl. 934; Marshall v. Forest Oil Co. 198 Pa. 83, 47 Atl. 927, 21 Mor. Min. Rep. 179; Rose v. Lanyon Zinc Co. 68 Kan. 126, 74 Pac. 625; Davis v. Chautauqua Oil & Gas. Co. 78 Kan. 97, 96 Pac. 47; Castle Brook Carbon Black Co. v. Ferrell, — W. Va. —, 85 S. E. 544; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; 27 Cyc. 716; Gale v. Oil Run Petroleum Co. 6 W. Va. 200, 9 Mor. Min. Rep. 1; Buckner v. Warren, 41 Ark. 532; Brown v. Bragg, 22 Ind. 122; Hodgkins v. Price, 137 Mass. 13; Beal v. Bass, 86 Me. 325, 29 Atl. 1088; Johnson v. Gurley, 52 Tex. 222; Ewing v. Miles, 12 Tex. Civ. App. 19, 33 S. W. 235; Bartlett v. Greenleaf, 11 Gray, 98; De Lancey v. Ganong, 9 N. Y. 9.

Courts of equity generally will not declare forfeitures of contracts or property rights.

Indiana Oil, Gas & Development Co. v. McCrory, 42 Okla. 136, 140 Pac. 610; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Thornton, Oil & Gas, § 187; Keller v. Craig, 61 C. C. A. 306, 126 Fed. 632; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 261, 22 Mor. Min. Rep. 680; South Penn Oil Co. v. Egdehl, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 21 Mor. Min. Rep. 106; Edwards v. Iola Gas Co. 65 Kan. 302, 69 Pac. 350, 22 Mor. Min. Rep. 293; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Halla v. Rogers, 109 C. C. A. 626, 187 Fed. 778; La Fayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 10; Consumers Gas Trust Co. v. Ink, 163 Ind. 174, 71 N. E. 477; Consumers Gas Trust Co. v. Worth, 163 Ind. 141, 71 N. E. 489.

A lease for ten years "and as long thereafter as oil or gas, or either of them, is produced," is not only a lease for ten years, but beyond ten years, providing the lessee L.R.A.1917B.

finds and produces oil during the ten-year term.

McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 28 L.R.A.(N.S.) 959, 64 S. E. 1027; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 36 S. E. 923, 20 Mor. Min. Rep. 234; South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 48 L.R.A.(N.S.) 848, 76 S. E. 961; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Young v. Forest Oil Co. 194 Pa. 243, 45 Atl. 121, 20 Mor. Min. Rep. 345; Chaney v. Ohio & I. Oil Co. 32 Ind. App. 193, 69 N. E. 477; Eaton v. Allegany Gas Co. 122 N. Y. 416, 25 N. E. 981; Dickey v. Coffeyville Vitriified Brick & Tile Co. 69 Kan. 106, 76 Pac. 398; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; Tucker v. Watts, 25 Ohio C. C. 320; Thornton, Oil & Gas, §§ 134, 135; Graves v. Key City Gas Co. 83 Iowa, 714, 50 N. W. 233; Whiteman v. Fayette Fuel-Gas Co. 139 Pa. 492, 20 Atl. 1062; Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147.

One dollar is a sufficient cash bonus consideration to bind the lessor in a surrender clause lease.

Guffey v. Smith, 237 U. S. 101, 116, 59 L. ed. 856, 855, 35 Sup. Ct. Rep. 526; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Pittsburg Vitriified Paving & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; Lovett v. Eastern Oil Co. 68 W. Va. 667, 70 S. E. 707; Ann. Cas. 1912B, 360; South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 48 L.R.A.(N.S.) 848, 76 S. E. 961; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 782; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219; Eyre v. Potter, 15 How. 42-69, 14 L. ed. 692-600; Lawrence v. McOalmont, 2 How. 426, 429-453, 11 L. ed. 326-336; Davis v. Wells, F. & Co. 104 U. S. 159, 166, 26 L. ed. 686, 690; Olds v. Marshall, 93 Ala. 138, 8 So. 284; Grimball v. Mastin, 77 Ala. 553.

This lease contract, having been partly performed by the lessee, is taken out of the so-called rule that contracts unperformed, optional as to one party, are therefore optional as to the other.

Smith v. Root, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; Kolachny v. Gelbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; O'Neil v. Sun Co. 58

Tex. Civ. App. 167, 128 S. W. 172; *Priddy v. Thompson*, 123 C. C. A. 277, 204 Fed. 955; *Kansas Natural Gas Co. v. Neosho County*, 75 Kan. 335, 89 Pac. 760; *Dickey v. Coffeyville Vitrified Brick & Tile Co.* 69 Kan. 106, 76 Pac. 398; *Eastern Ohio Oil Co. v. McEvoy*, 75 Kan. 515, 89 Pac. 1048; *Phillips v. Springfield Crude Oil Co.* 76 Kan. 783, 92 Pac. 1119.

The surrender clause oil lease for a cash bonus of \$1, containing an agreement of the lessee to drill for oil or pay a specified rental, is as fair as well as a valid contract.

*Dickey v. Coffeyville Vitrified Brick & Tile Co.* 69 Kan. 106, 76 Pac. 398; *Eastern Ohio Oil Co. v. McEvoy*, 75 Kan. 515, 89 Pac. 1048; *Phillips v. Springfield Crude Oil Co.* 76 Kan. 783, 92 Pac. 1119; *Beardsley v. Kansas Natural Gas Co.* 78 Kan. 571, 96 Pac. 859; *Pittsburg Vitrified Paving & Bldg. Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *Allagheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Stahl v. Illinois Oil Co.* 45 Ind. App. 211, 90 N. E. 633; *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 493; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Reserve Gas Co. v. Carbon Black Mfg. Co.* 72 W. Va. 757, 79 S. E. 1002; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281.

Turner, J., delivered the opinion of the court:

On June 17, 1912, John S. Ruhl and Lena, his wife, being the owners and in possession of the land therein described, made, executed, and delivered to M. S. Wilson an oil and gas mining lease, which was duly recorded, the pertinent part of which reads:

" . . . That the said parties of the first part, for and in consideration of the sum of \$1 in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part, to be paid, kept, and performed, have granted, demised, leased, and let, and by these presents do . . . grant, demise, lease, and let, unto the second party, his heirs, successors, or assigns, for the sole and only purpose of mining and operating for oil and gas: . . . The southeast quarter ( $\frac{1}{4}$ ) of section fifteen (15) and the southwest quarter ( $\frac{1}{4}$ ) of section fourteen (14), both in township 14 N., of range 16E., containing three hundred and twenty (320) acres, more or less.

It is agreed that this lease shall remain in full force for the term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, his heirs, successors, or assigns.

"In consideration of the premises the said party of the second part covenants and agrees:

"First. To deliver to the credit of the first parties, their heirs and assigns, free of cost, in tank or the pipe line to which he may connect his wells, the equal one-eighth ( $\frac{1}{8}$ ) part of all oil produced and saved from the leased premises.

"The party of the second part agrees to complete a well on said premises within four months from the date hereof, or pay at the rate of eighty (\$80) dollars in advance, for each additional three (3) months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. The above rental shall be paid to the first parties in person or to the credit of the first parties at the First National Bank of Beynton, Oklahoma, and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

"The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

"The party of the second part, his heirs and assigns, shall have the right at any time after four months on the payment of \$1 and all payable obligations then due to the parties of the first part, their heirs and assigns, to surrender this lease, if not tested, for cancellation, after which all payment and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

"All covenants and agreements herein set forth between the parties heretofore shall extend to their successors, heirs, executors, administrators, and assigns. . . ."

Thereafter C. B. Wilson and D. A. Cameron became and now are the assignees of the southeast quarter of section 15; the Seven Sands Oil & Gas Company, the assignee of the east half of the southwest quarter of section 14; John A. Sheppard, the assignee of an undivided half interest in the west half of the southwest quarter of said section; and said Wilson and Cameron, the assignee of the remaining undivided one-half interest therein, all of whom will be hereinafter called lessees.

Thereafter, to wit, on August 29, 1914, said Ruhl and wife made, executed, and delivered a second lease of the same land to one Leidecker; and later parted with their interest therein as lessors to one Humphreys, who later acquired the lease and thereafter conveyed his entire interest in the property to the plaintiffs in error, who, later, leased the entire 320 acres to John A. Sheppard, one of their number, and who is the same Sheppard who also owns, but who claims no interest in, an undivided 80 acres contained in the first lease, as stated.

Prior to the execution of the lease to Leidecker, to wit, on August 1, 1914, John S. Ruhl and wife brought suit to establish, as a matter of record, the forfeiture of the lease of June 17, 1912, and to cancel the same upon the ground that the same was unilateral, unperformed, optional as to the lessees and his assigns, and therefore optional as to the lessor, and that there was default in the payment of the rentals or delay money on the part of the lessees. Pending this suit, Cameron and Wilson, without leave, on September 3, 1914, entered and took possession of the southeast quarter of section 15, and thereupon erected a rig and commenced to drill a well, and thereafter struck oil in paying quantities, whereupon they brought suit to cancel the second lease as a cloud upon their title and to restrain plaintiffs in error from claiming thereunder and from interfering with their possession. Before being restrained, however, plaintiffs in error took possession of the well and thereafter enjoined defendants in error, or those claiming under the first lease, from interfering with their possession. After issue joined, the two cases were consolidated, and there was trial to the court and general judgment for defendants in error sustaining the validity of the first lease and clearing the title of all parties in interest thereunder as prayed, to reverse which it is assigned that the same is contrary to the law and the evidence.

No well was ever commenced nor possession yielded of the demised premises to the lessees under the first lease, but up to July 17, 1914, some \$420 had been paid by them, from time to time, as delay money. It is contended that the Seven Sands Company defaulted in the payment of the \$20 delay money due that day on its 80 acres and thereby incurred a forfeiture of that part of the lease. Assuming that all parties in interest agreed to the substitution of said company as lessee of the 80 acres assigned it, as contended by said company, on this point there is no conflict in the evidence. It discloses that on the next preceding rent-paying day, i. e., April 17, L.R.A.1917B.

1914, Wilson and Cameron took from Ruhl this receipt:

April to July 17, 1914.

Boynton, Okla., April 17, 1914.

Received from C. B. Wilson, by D. A. Cameron, Atty., the sum of \$20 for rental on lease on the E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , of Sec. 14 Twp. 14, Rg. 16 E., recorded in Muskogee county, Muskogee, Oklahoma. John S. Ruhl.

But that in fact no money was paid Ruhl at that time; that instead, it seems, Wilson and Cameron executed to him their promissory note for \$20 payable in thirty days, which they afterwards met with the check of the Seven Sands Oil Company for \$20 drawn on the First National Bank of Chelsea, "by H. H. Lindley, Sec.," which was paid and its proceeds placed to his credit by the bank of Boynton on April 28, 1914. At that time, some delay in payment of delay money having theretofore occurred on the part of the lessees and their assigns, in consequence of which Ruhl had made complaint, he told the bank to go ahead and accept further rentals and give them another chance. This closed that incident so far as the Seven Sands Company was concerned until the next rent-paying day. This fell on July 17, 1914. To meet this payment, said Lindley, at Chelsea, registered a letter addressed to Ruhl at Boynton, Oklahoma, containing a like check for a like amount, which arrived at Boynton on the 17th. On the next day the postmaster mailed Ruhl a rural delivery notice that there was a registered letter in the postoffice for him. Ruhl came to Boynton August 3, 1914, and there received the letter and the check, both of which he immediately returned to the sender, because, he says, he, being unlearned, did not understand its contents. At no time had the Seven Sands Oil Company funds in the bank to pay the check, and never had an account there. On August 12, 1914, or twenty-five days after it was due, said company caused \$20 delay money to be deposited to the credit of Ruhl in the First National Bank of Boynton, which was the bank named in the lease as authorized to receive it. Ruhl never knew of this deposit until the fall of 1914, and, in the meantime, had, on August 1, 1914, commenced his action to cancel the lease, as stated, and on August 29, 1914, had executed the Leidecker lease.

It is sufficient to say that sending a worthless check to the lessor for the amount of the delay money is not payment thereof, and that placing the amount due to his credit in bank long after that time was not payment in advance or indeed payment at all, especially after he had declared a for-

feiture and begun suit to cancel the lease on the ground, among others, of failure to pay. When the lessee and his assigns agreed in the lease, as they did, to complete a well on the premises within four months from the date thereof, or pay at the rate of \$80 in advance for each additional three months such completion was delayed after the expiration of the four months, the Seven Sands Oil Company, by accepting an assignment of 80 acres thereof, was, on July 17, 1914, no well having been completed, possessed of an option to pay the lessor \$20 delay money and thereby keep the lease alive until another rent-paying period, or not pay, and thereby forfeit or abandon its rights under the lease. This \$20 was, by express terms of the lease, not only due on that day, but was payable in advance, or as a condition precedent to the continued life of the lease. And time was the essence of this contract. *Cooper v. Ft. Smith & W. R. Co.* 23 Okla. 130, 99 Pac. 785. In *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260, although an "unless" lease was under construction, what we said there as to that lease is equally applicable here to an "or" lease. There, in the syllabus, we said: "A gas and oil lease giving the lessee the option to pay a certain sum, and thus extend the lease, is operative against the lessor during such extension only upon the payment of such sum; contract rights being correlative and mutual. . . . When contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound, and against the party that is not bound."

See also *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902.

In *Mitchell v. Probst*, — Okla. —, 152 Pac. 597, we said: "Where an oil and gas lease provided 'that, if a well is not drilled on said premises in one year from date hereof, then this lease and agreement shall be null and void, unless the party of the second part, within each and every year in advance, after the expiration of the time above mentioned for the drilling of a well, shall pay a rental of \$2.50 per acre for the first year,' etc., held, that such provision amounts to an option, and gives the lessor the right to cancel unless the conditions are complied with. . . . Where, in such case, the sum agreed to be paid for the option is not paid at the time agreed upon, nothing else appearing, the lessor has the right to cancel the lease. . . . In case of an option, time is of the essence of the contract, unless the contract expressly provides that it shall not be."

It will not do to say that, as the leases in those cases contain express provision that

they shall be void if no well is completed within a certain time, "unless" the lessee pay a certain sum for delay, what we said there has no application here, where the lease contains no such provision, but binds the lessee to complete a well within a certain time "or" pay for delay, without providing that the lease shall be void on failure so to do. This for the reason that the leases there and the lease here alike give to the lessee the same kind of an option. In other words, although not couched in the same terms, the option in both leases, to pay or not to pay for delay, amounts to the same thing and works the same result; that is, if exercised it prolongs the life of the lease, if not, the lease is abandoned by the lessee and is forfeitable at the option of the lessor, and, after forfeiture declared, being a cloud upon his title, the lessor has a right to come into a court of equity and have it declared forfeit, and canceled and removed.

We said the option was substantially the same in an "unless" lease as in an "or" lease. What the option is in an "unless" lease we have just shown by quotations from former opinions of this court. That it is substantially the same in an "or" lease is shown in *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220. There the court said: "The lessee had covenanted to do one of two things: To begin a well within sixty days and complete it within three months thereafter, or pay \$25 per month as rental for the privilege of doing so afterward, and within the three years which limited his term, unless oil or gas was found in paying quantities. . . . He may drill the well and so pay no rental, or he may pay the rental and not be compelled to drill the well. It is not for the lessor, but it is for the lessee, to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it part of the contract."

*Jennings-Heywood Oil Syndicate v. Housiere-Latreille Oil Co.* 119 La. 793, 44 So. 481, treats the obligation of the lessee to drill or pay delay money as an option substantially the same as in an "unless" lease, and that too in construing an "or" lease, as here. The court said: "If he merely secured an option, then, by failing to make the fourth quarterly payment within the time fixed for the exercise of the option, he, or his assigns, forfeited all rights under the contract; and there is an end of the matter. *Escoubas v. Louisiana Petroleum & Coal Oil Co.* 22 La. Ann. 280, 12 Mor. Min. Rep. 343. It is clear that if I agree to be bound on the condition, or provided you do a certain thing within a certain time, for ex-



ample, if I agree that you shall have the exclusive right to exploit my land for minerals, provided you begin operations within six months, or pay me in advance of the expiration of the six months \$50 for a prolongation of the term, and you fail to do the thing thus stipulated to be done, I am not bound."

And after quoting from Pothier (vol. 6, p. 217, § 209), said: "It would seem to be a plain proposition that if I agree to lease you my house on condition that you pay me the rent in advance, and you fail to do so, I am under no obligation to you. 'An option must be exercised within the time limit, or the right will be lost.' 21 Am. & Eng. Enc. Law, 931; Richardson v. Hardwick, 106 U. S. 252, 27 L. ed. 145, 1 Sup. Ct. Rep. 213; Litz v. Goosling, 93 Ky. 185, 21 L.R.A. 129, 19 S. W. 527; Waterman v. Banks, 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. Rep. 646."

And it makes no difference whether the lease contains a forfeiture clause or not, or whether it is an "unless" lease or an "or" lease, as both leases afford to the lessee the same option.

In *Cohn v. Clark*, — Okla. —, L.R.A. 1916B, 686, 150 Pac. 470, there was an oil and gas lease under construction, as here, and, as here, it was an "or" lease, and again, as here, it contained no forfeiture clause. The "or" clause of the lease read: "Second party agrees to commence operations on said premises within, on, or before January 1st, 1910, from this date, or thereafter pay to the first party \$1 per acre per annum annually until a well is drilled, or the property hereby granted is conveyed to the first party." Reversing the rule and construing it most strongly against the lessor, the court said: "We will treat this clause as meaning that, upon failure of the lessee to begin operations or to pay rent as the contract provides, that within itself works a forfeiture."

*Mitchell v. Probst*, supra, was an "unless" lease containing a forfeiture clause, in effect, that the lease would be void on failure of the lessee to drill or pay "unless." There the court said: "Where, in such case, the sum agreed to be paid for the option is not paid at the time agreed upon, nothing else appearing, the lessor has the right to cancel the lease."

In *Conkling v. Krandsusky*, 127 App. Div. 761, 112 N. Y. Supp. 13, the lease was for oil and gas. It was an "or" lease and contained no forfeiture clause. The sixth syllabus reads: "An oil lease provided that the lessee should begin operations at a specified time, or, in lieu thereof, pay a rental of \$10 per month from that date, with the option at any time to surrender his lease and be released from all unfulfilled con-

ditions. The lessee failed to commence operations at the time specified, and paid the first month's rental of \$10, but thereafter for more than two months he ceased to pay and made no attempt to bore for oil. Held that; as in the lease time was the controlling factor, the failure to enter the premises or to pay the \$10 per month was an abandonment of the lease."

In the body of the opinion the court said: "He must keep his own lease alive, either by the monthly payments or by drilling for oil, if the provisions for his benefit were to be operative. . . . He paid the \$10, . . . expecting possibly to go on with the venture. After that, and more than two months before Galletts entered, he ceased paying and made no attempt to bore for oil. In this lease time was the controlling factor, and when he failed either to enter the premises or to pay the \$10 each month, one or the other of which was essential to keep his right effective, he manifested his purpose to abandon the project."

In *Thornton's Oil & Gas*, § 797, it is said: "If the lessee has only a mere option to enter and explore, then he must do some act toward the development of the property or pay the rent or commutation money for delay, and in one of these ways exercise his option before the lessor gives notice of his election to revoke and cancel the lease."

It is unnecessary to cite authority in support of what appears to us to be so clear. But see *Smith v. Guffey*, 120 C. C. A. 436, 202 Fed. 106, where the learned circuit judge compared an "unless" lease and an "or" lease substantially the same as here, and held the difference between the two "negligible." And so we say the Seven Sands Oil Company, having failed to pay the delay money in advance, pursuant to the terms of the lease, abandoned and made subject to forfeiture at the option of the lessor all its rights thereunder so far as the 80 acres held by it were concerned. And it makes no difference in our conclusion that H. H. Lindley, who sent the check dated July 15, 1914, signed "Seven Sands Oil & Gas Co., by H. H. Lindley," testified that he, personally, had sufficient money in the bank upon which it was drawn to pay the check, and further that, although he had no arrangement with the bank to do so, yet, as the bank had paid the previous check so drawn, and charged it to his personal account, he was of the opinion that the bank would pay the check in question and also so charge it. As the check, had it been good, would not have been cash in advance as demanded by the lease (*Kolachny v. Galbreath*, 26 Okla. 772, 88 L.R.A. (N.S.) 451, 110 Pac. 902), it goes without saying that a worthless check was not equivalent to

placing the money in the hands of Ruhl, or depositing that amount to his credit in the bank designated in the lease. We are therefore of the opinion that the court was wrong in holding, as counsel say he did, that the lease in question was not subject to forfeiture, and in failing to hold that, in so far as the Seven Sands Oil Company was concerned, it had abandoned, and made subject to forfeiture at the option of the lessor, its rights under the lease, by failing to pay the delay money in question pursuant to the terms thereof.

It is further contended that Wilson and Cameron defaulted in the payment of the \$60 delay money due and payable in advance April 17, 1914, and thereby abandoned and made subject to forfeiture the lease as to the remaining 240 acres of the demised premises. Assuming said amount was all that was due from them to Ruhl on that day, which seems to be the construction placed upon the lease by all parties in interest, the facts disclose that on said day Ruhl executed to Wilson and Cameron a receipt which reads:

April to July 17, 1914.

Boynton, Okla., April 17, 1914.

Received in full \$60 for rent according to terms of lease recorded in Muskogee county, Okla., given by me to the S. E.  $\frac{1}{4}$  of Sec. 15 and S. W.  $\frac{1}{4}$  of Sec. 14 of Twp. 14, Rg. 16 E.

John S. Ruhl.

But that in fact no money was paid him at that time. Instead, Wilson executed to Ruhl his promissory note for \$60 payable sixty days thereafter with interest from date, which was not paid when due, and not until November 3, 1914, at which time said amount with interest was placed to the credit of Ruhl in the bank designated in the lease, long after he had brought suit to cancel the same and had parted with all interest in the demised premises, as stated. There is no evidence tending to prove that Ruhl agreed to take the note in absolute payment of the debt. On the contrary, the evidence discloses that Ruhl accepted it reluctantly, stating that he was tired of taking notes, as they did not pay them on time, and that he could not cash them, but was finally induced to accept the note on the strength of the promise of Wilson that he would pay it before due if Ruhl would notify him that he needed money. This Ruhl did, and later, before and after it was due, insisted on payment up to the time he brought suit to cancel the lease. But the note was not paid when due, and not until after said suit was brought, to wit, on November 3, 1914, was the amount of the note L.R.A.1917B.

and interest placed to his credit in the bank named in the lease.

Among other things, it is contended that, owing to the absence of a forfeiture clause therein, the lease was not subject thereto, and, if it was, inasmuch as Ruhl had theretofore accepted the checks of the Seven Sands Company and the notes of Wilson and Cameron for delay money, which was afterwards paid, that he thereby waived the forfeiture, if any, and is estopped to assert it. But, as we have just held that an "or" lease without a forfeiture clause and an "unless" lease with a forfeiture clause alike vests an option in the lessee to drill or pay, and as we have seen that a failure to drill or pay, as here, forfeits, or, in other words, operates as an abandonment by the lessee of, an "unless" lease, so we hold that the same result would follow a failure to drill a well or pay pursuant to the terms of this "or" lease, and that there is no merit in the contention that the lease in question is non-forfeitable. And as we have repeatedly held that in order for defendant to avail himself of an estoppel he must plead it (*Sapulpa v. Sapulpa Oil & Gas Co.* 22 Okla. 347, 97 Pac. 1007), and such has not been done, and it nowhere appearing that, if true, such conduct misled the lessee to his injury, we pass to the next contention, which is, in effect, that, by accepting the \$60 note of April 17, 1914, for the delay money then due, and attempting to collect it, which he did, Ruhl evidenced his intent to and did waive the forfeiture (or rather his option to declare a forfeiture), if any accrued, and elected to affirm the lease. In support of this contention, counsel cite *Archer on Oil & Gas*, p. 284, where it is said: "If lessor declares a forfeiture, the lease is terminated, and thereafter no recovery can be had for rentals thereunder; if he claims the rentals, he affirms the continuation of the lease for the period for which he claims." And 40 Cyc. 268, note 45, where the annotator says: "The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive it."

He cites many cases, some of which undoubtedly support his contention. But such is not the rule in this jurisdiction, where, in *Kolachny v. Galbreath*, supra, quoting approvingly from the *Mehlin Case*, 25 Okla. 800, 138 Am. St. Rep. 942, 108 Pac. 545, we said: "Oil and gas leases are construed most strongly against the lessee and in favor of the lessor."

And in *Deming Invest. Co. v. Lanham*, 36 Okla. 773, 44 L.R.A. (N.S.) 50, 130 Pac. 260: "By failing to drill a well or to pay the rent, the lease became forfeited, and no rent was due thereunder. Ordinarily forfeitures

are not favored, but gas and oil leases furnish exceptions to this general rule. Thus, in paragraph 148, Thornton's 2d ed., the law relating to oil and gas provides: "Forfeitures, however, on the part of the lessee in a gas or oil lease, which arise by reason of his neglect to develop or operate the leased premises, are rather favored by the law, because of the peculiar character of the product to be provided,"—which means that we will not be astute to seize on circumstances indicating a waiver of forfeiture on the part of the lessor. Whether the lease is an "unless" lease or an "or" lease, or whether the "or" lease contains a provision that the same "shall be null and void" on failure to drill or pay, as is contained in the "unless" lease, or not, the option available to the lessor to forfeit the lease (on failure of the lessee to do either), being for his benefit only, may be waived by him. But there is no evidence reasonably tending to prove that the lessor waived the forfeiture here.

On this point, aside from any question of pleading, the evidence discloses that, at the time the \$60 note of April 17, 1914, was taken for the delay money due that day from Wilson and Cameron, Ruhl took the note under protest for the reason that their notes theretofore given by them for the same purpose had not been paid promptly; that Ruhl then and there told them in effect that if he took the note they must start a well within three days, which they declined to do, but promised to start a well within ten days, after which, it appears, he took the note, saying that he would not allow the lease to run longer if they did not, and that it was the last chance he was going to give them; that thereupon they agreed upon those terms, and, in addition, Cameron told Ruhl that if he needed the money "bad" he would send it to him at any time; that thereafter, before the note fell due, he pressed them for payment, which was refused, and when due remained unpaid, whereupon he placed the matter in the hands of his attorneys, who, on July 20, 1914, caused written notices to be served on defendants that he had declared a forfeiture of the lease. Of course, Ruhl could have waived the forfeiture by acts from which an intention so to do might fairly be inferred (St. Paul, F. & M. Ins. Co. v. Cooper, 25 Okla. 38, 105 Pac. 198); but there was nothing in his acts from which to infer such intention, but, on the contrary, everything to lead us to believe that he intended to insist on a forfeiture.

It will not do to say that a forfeiture of the lease should not be enforced for the reason that both the \$60 note of Wilson and the \$20 check of the Seven Sands Company, given Ruhl for the delay money due

from them to him on April 17, 1914, and July 17, 1914, respectively, were on November 3, 1914, and August 12, 1914, respectively, paid by depositing the money in the bank named in the lease, and hence the lessee should be relieved of the forfeiture by reason of Rev. Laws 1910, § 2844, which reads: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, wilful or fraudulent breach of duty."

This for the reason that, as said lessees stood on their lease in the trial court and denied a forfeiture, and there prevailed upon the theory that the lease was not forfeited, if indeed it was forfeitable at all, they will not be permitted to change front in this court and for the first time urge that, under the facts, they should be relieved of the forfeiture, if any occurred. Having failed there to plead in confession and avoidance in virtue of the statute invoked, and there put in issue the question of whether or not they had made "full compensation to the other party," as required by statute, and whether their breach of duty was or was not "grossly negligent, wilful or fraudulent," we can give them no relief here, especially in view of the fact that the rights of the second lessees have intervened and had intervened at the time of the rendition of the judgment complained of. Besides, as stated in *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971: "There is little or no reason for the interference of a court of equity to prevent a forfeiture before operations have begun, where the operator has sinned away his opportunity under the contract."

We are therefore of opinion that by non-payment in advance of the delay money, as stated, this entire lease was subject to forfeiture, that is, as to the 240 acres thereof held by the Camerons and also as to the 80 acres held by the Seven Sands Company, that, being so subject, the same was not waived by Ruhl and, not being waived, was by him duly declared; that the jurisdiction of the court was properly invoked to have the same declared forfeit and canceled as a cloud upon his title; and that the court erred in refusing to grant relief to him and those claiming under the second lease as prayed, and in granting relief in effect, sustaining the validity of the first lease.

But let all we have said be as it may. Was Ruhl, together with the owners and holders of the second lease and those claiming under them, entitled to cancel the first lease on other grounds? They contend, in

virtue of the general surrender clause contained therein, they were, because, they say, the lease is a "contract," the performance of which is optional on the part of the lessee, and hence is optional on the part of the lessor, and, being unperformed, the lessor had the right to terminate the same at any time and sue to set aside, as he did. This contention must be sustained. Although the lease recited a consideration to Ruhl of \$1 paid, "and the covenants and agreements hereinafter contained on the part of the second party, to be paid," the real and only consideration for the lease, as a whole, was development by the lessee or his assigns. *Jennings-Heywood Oil Syndicate v. Housiere-Latreille Oil Co.* 119 La. 793, 44 So. 481; *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 560, 90 Fed. 178; *Dill v. Frazee*, supra; *National Oil & Pipe Line Co. v. Teel*, — Tex. Civ. App. —, 67 S. W. 545. After which they were "to deliver to the credit of the first parties, their heirs and assigns, free of cost in the tank or the pipe line to which he may connect his wells, the equal one-eighth ( $\frac{1}{8}$ ) part of all oil produced and saved from the leased premises." Now, while there is authority to the contrary (*Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801, and others), we hold that the dollar paid Ruhl at the time of the execution and delivery of the lease was the sole and only consideration paid to hold the lease for the four-month term within which the lessee had to enter and complete a well, and that such consideration did not extend to uphold any other stipulation in the lease; and, further, that the agreement on the part of the lessee to pay delay money after that time was a provision made for the sole purpose of prolonging the lease.

In *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545, speaking to the \$1 consideration, the court said: "It was only intended to hold the grant for two years, and after that time a further consideration to prevent forfeiture was provided."

Or, as stated in the headnote to *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764: "The consideration recited (\$1) supported not only the grant for the two-years term, but as well the privilege of extending the time for drilling by paying the stipulated price therefor."

In *National Oil & Pipe Line Co. v. Teel*, — Tex. Civ. App. —, 67 S. W. 545, the court said: "The real consideration of these instruments was not the recited \$1, nor the \$100 that after the two years might be paid, in order that they might keep it going from year to year, but the beginning and prosecuting with due diligence of wells for oil or minerals upon the land; in other

words, the development of the property for oils and minerals in the near future. This was the clear purpose of the grant." See also *Owens v. Corsicana Petroleum Co.* — Tex. Civ. App. —, 160 S. W. 192.

Now, if the \$1 paid the lessor was earned at the expiration of the four months in which the well was agreed to be, but was not, completed, and thereafter, under the terms of the lease, there remained to the lessee the option to pay for delay, and thus keep the lease alive, or not pay and thereby let it die, with the further option to surrender it for cancelation at any time and thereby terminate the contract and defeat both payment and development, the lease not only lacked in mutuality, in that it imposed no legal obligation on the lessee to do anything, but, in addition thereto, for the reason that it imposed no such legal obligation and left the lessor powerless to compel the lessee to develop and thereby perform the contract, and thus yield the lessor the prospective royalties which constituted the sole consideration for which the lease was given, the lease was also nudum pactum and nothing more than a mere option on the part of the lessee, or rather two options: To drill or pay, or surrender (and thereby avoid doing either); or, in other words, an option to develop or not to develop, or rather to perform or not to perform the lease contract, as he saw fit.

That such lease is an option is contrary to the holding in Illinois and other jurisdictions where it is held to vest a freehold estate in the land. Or, as stated in *Guffey v. Smith*, 237 U. S. 101, 50 L. ed. 856, 35 Sup. Ct. Rep. 526: "It is settled by the decisions of the supreme court of Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—a freehold interest—in the premises; that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will, or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. *Bruner v. Hicks*, 230 Ill. 536, 540, 542, 120 Am. St. Rep. 332, 82 N. E. 888; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 13, 122 Am. St. Rep. 144, 84 N. E. 53; *Poe v. Ulrey*, 233 Ill. 56, 62, 64, 84 N. E. 46; *Ulrey v. Keith*, 237 Ill. 284, 298, 86 N. E. 696; *People ex rel. Carroll v. Bell*, 237 Ill. 332, 339, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Daughette v. Ohio Oil Co.* 263 Ill. 518, 524, 105 N. E. 308. These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights."

But where the lease vests no such interest, but only an option, as here, the great weight of authority supports the rule announced by us in the Mehlin Case, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545. There we said: "An executory contract which, under its terms, leaves it optional with one party whether or not he will proceed with the contemplated enterprise, makes the same likewise optional with the other,"—the application of which leads to a rule precisely contrary to the Illinois rule, and that is the rule that, where the lessee has the option to surrender the lease at any time, the lessor has the corresponding option to compel a surrender, and that the lease is void for want of mutuality, or rather voidable, before performance, at the option of the lessor.

In the Jennings Case, *supra*, the lease involved was an "or" lease, as here, in which the lessee agreed to commence development within six months or pay \$50 quarterly in advance for each three months' delay, and to deliver to the owner a royalty of one eighth of the production. The lease contained a clause that the lessee might at any time cancel and surrender the lease on the payment of a sum certain. After certain payments were made for delay, the lessor refused to accept the next payment, which was tendered after the date on which it was due, on the ground that the lease had thereby become forfeit. In a suit to enforce the forfeiture, it was held that such it had become for the reason that the option of the lessee had not been exercised within the time limit, and "that, since the sole object and purpose of the contract was to exploit the land for oil and gas, and the contract left the lessee at liberty to do so or not at his option, there was in reality no contract binding on the lessee."

Owens v. Corsicana Petroleum Co. *supra*, was a suit to cancel an oil and gas mining lease, the provisions of which were substantially as here. It was an "or" lease and contained a general surrender clause. Therein the lessee agreed to complete a well on the demised premises one year from the date thereof, or pay to the lessor \$28.20 each three months in advance for delay. In construing that clause as operated on by the general surrender clause, the court said: "If appellants could neither recover damages, require the completion of a well, nor recover \$28.20 rent without the consent of appellee, the contract is clearly unilateral and void. Any attempt to do either of these things could be instantly defeated by appellee by interposing that term of the contract whereby it is permitted to surrender the L.R.A.1917B.

grant upon the payment of \$5." And in the syllabus: "A contract between an owner of oil lands and an oil company, giving the company the right to bore for oil, or to pay quarterly rentals, which, upon acceptance by the owner, extended the contract for another quarter, or to surrender the lease at any time upon the payment of \$5 to the owner, was a unilateral contract, void for want of mutuality; the \$5 being merely a nominal consideration and no consideration for the grant." See also Long v. Sun Co. 132 La. 601, 61 So. 684.

Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557, was also a suit to cancel an oil and gas lease in effect as here. It was executed in consideration of \$25 and certain royalties, and provided if operations were not commenced with diligence within sixty days from a certain date the grant should immediately become void, except that lessee might prevent such forfeiture by paying \$25 every sixty days until an oil well was commenced; construing which, it was held that, since the instrument did not bind the lessee to do anything, it was a unilateral contract and nothing more than an option, which terminated on the failure of the lessee to perform the conditions. It seems that such was the conclusion of the court independent of the general surrender clause in the lease. In the opinion the court said: "This contract was likewise a unilateral one, in that it did not bind or obligate the lessee to perform any of the conditions thereof, and was therefore lacking in mutuality. See National Oil & Pipe Line Co. v. Teel, 95 Tex. 591, 68 S. W. 979, 22 Mor. Min. Rep. 263, — Tex. Civ. App. —, 67 S. W. 545; Forney v. Ward, 25 Tex. Civ. App. 448, 62 S. W. 109; Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 111; Hodges v. Brice, 32 Tex. Civ. App. 358, 74 S. W. 590; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955, 3 Mor. Min. Rep. 291; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315. See also Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 670; Cowan v. Radford Iron Co. 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453."

Young v. McIlhenny, — Ky. —, 116 S. W. 728, was a suit for delay money due on two certain oil and gas leases, alike in all essential particulars. They were "unless" leases, and each provided: "If no well is commenced on the premises hereby

leased, within one year from this date, then this grant shall become null and void, unless the party of the second part shall pay to the first party (\$75 in one lease and \$50 in the other) for each year thereafter such commencement is delayed,"—and contained a general surrender clause as here.

Without any particular note of the effect of the surrender clause, in construing the lease, the court said: "These leases are simply options given by the lessor to the lessee for one year with the right to renew the options at the end of the year upon the payment of \$125, if the lessee has not commenced operation thereunder within the twelve months. There is nothing in either the leases or the contract binding the lessee to do anything. He has the exclusive right to bore for oil or gas upon the premises described in the leases for twelve months, and if he fails to exercise his right, such failure, of itself, operates to cancel the leases. The right to bore for either oil or gas is purely optional with the lessee; the lessor is bound, but the lessee is not. There is nothing in the leases or the contract upon which the lessor could base an action for specific performance; under neither the leases nor the contract could he compel the lessee to commence operations, or to continue them after he had commenced. In the case of *Steinwender-Stoffrogen Coffee Co. v. F. T. Guenther Grocery Co.* 26 Ky. L. Rep. 270; 89 S. W. 1170, this court, in speaking of a contract similar to the one under consideration, said: 'Contracts which are valid must be mutual and binding upon both parties. As we have said, it is a fundamental principle of law that there must be mutuality in every contract.'

*Reese v. Zinn* (C. C.) 103 Fed. 97, was a suit for the cancellation of a lease. It does not appear whether the same was an "unless" or an "or" lease, or whether it contained a general surrender clause or not. But therein the court was of opinion that the plaintiff was entitled to the relief sought, first, for the reason that the parties claiming thereunder had by the terms and provisions of the lease forfeited their right, and not only that, but had abandoned the lease; and, "second, because the contract is void for want of mutuality, for the reason that it puts it in the power of the lessee to terminate the lease at will, and thereby confers the same power upon the lessor. This principle is well settled by numerous decisions, both in our own courts, as well as courts of other states. 12 Am. & Eng. Enc. Law, 767; *Kelly v. Waite*, 12 Met. 300; 2 Bl. Com. 148; *Guffy* L.R.A.1917B.

*v. Hukill*, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, 19 Mor. Min. Rep. 326; *Eclipse Oil Co. v. South Penn. Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234." See also *National Oil & Pipe Line Co. v. Teel*, — Tex. Civ. App. —, 87 S. W. 545.

In *Steelsmith v. Gardlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 325, the question was, as here, whether the first lease was at an end at the time the second lease was executed. The lease was an "unless" lease and was for and in consideration of \$1. It contained a general surrender clause, substantially as here. Referring to the first lease, the court said: "Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either. *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65." See also *Foster v. Elk Fork Oil & Gas Co.* 82 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178.

*Eclipse Oil Co. v. South Penn. Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234, was a suit in equity by the owner of the first lease against the owner of the second lease on the same property, who had entered and commenced development, to test the validity of the first lease, although nothing had been done thereunder except the payment of the annual rental therein provided for. The lease was for and in consideration of "the covenants and agreements hereinafter mentioned," which was a royalty on production. It provided for the drilling of a well upon the demised premises "within six months from the date of the execution of the lease," or "in lieu thereof" the lessee agreed to pay \$1 an acre per annum until the well was completed. The lease also contained a general surrender clause, which, if exercised, would defeat development as here, construing which the court said: "Under the provisions of the lease in controversy, there was no obligation upon the lessee to explore or pay rent; but he reserved the voluntary option to surrender it at any time, without legal obligation to do anything or pay anything. Hence the lessor had the right to vacate it at any time while in an executory state. . . . The only considerations mentioned

in the lease are the royalties and rentals on oil and gas to be produced, and the commutation for failure to complete a well. The plaintiff was not bound to complete a well in any given time, or during the life of the lease, so as to produce oil royalties or gas rentals, but in lieu thereof might pay a commutation, which he reserved the right to defeat at any time before payment enforced by surrender of the lease. It was entirely optional with him to bore or not, or pay or not. He was not bound to do either, but could decline to do both. This lease is not capable of any other construction. A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much a nudum pactum as if no consideration were mentioned."

In *Petroleum Co. v. Coal, Coke & Mfg. Co.* supra, Lurton, J., said: "If the compensation to be paid the lessor depends upon the profit to result from the development and working of a mine, and the lessee is not bound, either expressly or impliedly, to explore and discover, or, when discovered, to work such mine, then no consideration for the lease exists. It is a mere option based upon no consideration, and may be withdrawn at any time before money is expended in doing what is optional upon the part of the lessee. Taylor, Land. & T. § 152."

We are therefore of opinion that, as the lease in question conferred on the lessee the right to surrender the lease at any time after four months before development, and thereby terminate the same, a corresponding right existed in the lessor to compel a surrender and terminate the same before development, which he did by making the second lease and yielding possession of the land to the second lessee (*Eclipse Oil Co. v. South Penn Oil Co.* supra), and by commencing his action to cancel the same, and that the court was wrong in refusing to grant him relief upon this ground and in granting relief to the lessees sustaining the first lease.

In so holding, we refuse to follow *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801, which counsel for the lessees in the first lease contend should be considered as establishing a rule of property in this state. That was a suit in equity to establish a forfeiture of an oil and gas lease as a matter of record, and to cancel the same as a cloud on plaintiffs' title, as here. A demurrer was sustained to the petition, from which plaintiff appealed. The lease provided, among other things, that the lessee "may at any time remove all his property and reconvey the premises hereby granted, L.R.A.1917B.

and thereupon this instrument shall be null and void," and that, "if no well shall be drilled upon said premises within five years from this date, second party agrees to reconvey, and thereupon this instrument shall be null and void." No well was drilled during the first four years of the lease, delay money being paid during the third and fourth years. During the fifth year a well was drilled from which gas was obtained in paying quantities. In refusing to cancel the lease, the court, in effect, refused to apply the doctrine we have applied here, for the reason that the court took an entirely different view of the nature of the lease. The court said that the position taken by reason of the surrender clause that the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally terminable at the will of the lessor, was not sound, for the reason that the lease was in the nature of a grant in presenti of all the oil and gas in the land described, with the right to enter and search for them, and to mine and remove them when found. From which premise the court concluded that the surrender clause did not make the estate a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other, and hence denied the relief. Besides, it will be seen that the contract there had been in part performed by boring, but not so here. Here we are not attempting to make application of the doctrine announced after the lease contract has been performed in whole or in part by the lessee, but are applying it where there has been no performance. Although the last case cited came from Kansas, the rule there applied was substantially the Illinois rule, which we have never followed, but refused to follow in the *Mehlin Case*, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; the *Frank Oil Case*, 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260; the *Kolachny Case*, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; and the *Mitchell Case*, — Okla. —, 152 Pac. 597. For the same reason we refuse, on this point, to follow *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46. Also *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53, where an oil and gas lease is held to convey a "freehold interest."

Neither will we follow *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46. That was a suit in equity against the appellants, the object of which was to enforce a forfeiture and cancellation of an oil and gas lease providing substantially as here. The lessor urged his

corresponding right to compel a surrender of the lease in virtue of the surrender clause contained therein giving such right to the lessee; but the court held that such he could not do for the reason that the consideration of \$1 mentioned in the lease as paid to the lessor by the lessee was sufficient to sustain every covenant in the lease, including the surrender clause, and hence the same was not void for want of mutuality. We say we will not follow that case in holding that the dollar was sufficient to uphold the stipulation contained in the surrender clause, for the reason that such holding is not in keeping with reason or the weight of authority, and, besides, we have just held the contrary, and that it was sufficient consideration to hold the lease for the four months during the time the lessee had to enter and complete a well only, and that such consideration did not extend to uphold any other stipulation in the lease. Besides, it would be incongruous with what we have just held, which is that, after the expiration of the four months in which the lessee had the right to enter and complete a well, it is not the dollar paid as consideration to hold the lease during that time which thereafter keeps alive the lease, but the payment of delay money only in advance as a condition precedent to that end. It would also be incongruous with what we have just held, in keeping with what we believe to be the weight of authority, that development is the sole consideration moving the lessor to execute the lease, that is, the lease as a whole; while the dollar, we repeat, is consideration to sustain the four months' term for drilling.

It is perhaps unnecessary to say, but we will, in the language of the headnote in *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 78 N. E. 906: "Where the lessee has lost his rights under a lease and the lessor has commenced an action to quiet his title, the lessee, by re-entering over the lessor's objections, cannot revive any rights to the premises." See also *Zeigler v. Dailey*, 37 Ind. App. 240, 78 N. E. 819.

We are therefore of opinion that, as the surrender clause in this lease rendered the performance thereof optional as to the lessee, being unperformed, it was also optional as to the lessor; that, as the clause under consideration gave the lessee the right to surrender the lease at any time after four months, a corresponding right existed in the lessor to compel a surrender; and that the court erred in holding that such right in him did not exist, and in refusing to decree a cancellation thereof pursuant to his prayer and the prayer of those claiming under the second lease.

Let the cause be reversed and remanded, L.R.A.1917B.

to be proceeded with pursuant to the views herein expressed.

Sharp and Hardy, JJ., concur.

Kame, Ch. J., dissenting (October 10, 1916):

I am unable to concur in the conclusion reached by the majority of the court, and, on account of the importance of the questions involved, I deem it necessary to set out the grounds of my dissent in a separate opinion.

This is a controversy between the lessors of a tract of undeveloped oil land and certain of their lessees and their sublessees on one side, and subsequent purchasers from the lessors and another group of lessees and their sublessees on the other, John S. Ruhl and Lena Ruhl, his wife, are the common lessors and grantors.

On the 17th day of June, 1912, they executed an oil and gas lease for the entire tract of land in dispute to the defendant in error M. S. Wilson. The lease, which did not contain a forfeiture clause, recited, in substance, that it was made for and in consideration of the sum of \$1 in hand paid by the lessee, and "for the covenants and agreements hereinafter contained on the part of the party of the second part, to be paid, kept, and performed." The habendum clause provided that "this lease shall remain in force for ten years from this date, and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part, his heirs, successors, or assigns."

The lease also contained a clause which obligated the lessee "to complete a well on said premises within four months from the date hereof, or pay at the rate of \$80 in advance, for each additional three months such completion is delayed," and another clause which conferred upon the lessee the right "at any time after four months, on the payment of \$1 and all payable obligations then due to the parties of the first part, their heirs or assigns, to surrender the lease, if not tested, for cancellation." In April, 1914, the lessors attempted to declare a forfeiture of the Wilson lease, for failure on the part of the lessee or his assigns to complete a well or pay in accordance with the terms of the lease. On the 1st day of August, 1914, the lessors commenced a suit in equity to cancel the Wilson lease, upon various grounds, which later will be noticed more in detail; and on the 29th day of August, 1914, they made another lease of the same premises to other parties, who, with their sublessees, constitute the other group of lessees. Subsequently the lessors conveyed their entire interest in the land to still other



parties. Although the numerous parties coming into the case from the initial sources above indicated filed voluminous pleadings, praying for such relief, legal or equitable, as their varying circumstances seemed to them to warrant, essentially the cause of action amounted to a suit in equity to declare a forfeiture of the Wilson lease (1) for failure to drill or pay; and (2) because, on account of the forfeiture clause, the lease was unilateral and void.

Upon trial to the court the validity of the Wilson lease was upheld, and a decree was entered in favor of the group of lessees and sublessees who claimed thereunder; whereupon the lessors, their grantees, and the other group of lessees and sublessees, instituted this proceeding in error for the purpose of reviewing the action of the trial court.

In this court the lessors, the subsequent purchasers of their interest in the land, and all lessees and sublessees claiming under the second lease, are plaintiffs in error, whilst all parties claiming under the first or Wilson lease are defendants in error. This brief general outline of the record sufficiently states the facts to clearly indicate the line of cleavage between the contending parties, and that the case upon its merits turns upon the validity or invalidity of the Wilson lease.

As many of the most serious objections urged against the validity of the Wilson lease by counsel for plaintiffs in error turn upon the construction of the clauses thereof hereinbefore set out, it will not be necessary to set out in full the remaining parts thereof in this opinion.

Before reviewing the important questions of law arising out of the various assignments of error presented for review, it will be helpful to notice briefly a few of the preliminary circumstances in which the Wilson lease was given, upon which the parties all agree. Whether the leased tract contained oil and gas was not known at the time the lease was executed. It was in "wild cat" territory wherein the drilling of test wells would be attended with great expense and the many hazards naturally incident to proving and developing a new oil field. The lease itself is free from ambiguity, and no fraud, deception, or overreaching was practised in procuring it. All the parties were competent to contract with each other and, presumably, entered into the lease because its terms were satisfactory to them. Ordinarily, contracts arising out of such circumstances are not prolific of either suits in equity or actions at law; but counsel for plaintiff in error and a few of the courts seem to have discovered some subtle distinction between oil and gas leases

or contracts and other contracts, which, they say, requires the former to be placed in a class by themselves and construed strictly in favor of the lessor and against the lessee, the practical effect of which upon the contract involved herein is stated by counsel for plaintiff in error in their brief as follows: "The lease at bar is merely a working agreement for four months with the further provision that the parties might by mutual consent extend the same quarter by quarter upon payment of rentals upon the same terms without further formality or other written agreement. This renewal or continuation of the working agreement could have been accomplished by tender of the delay money on the one hand and acceptance on the other."

The first assignment of error presented by counsel for plaintiff in error in their brief is stated as follows: "The Ruhl-Wilson contract is unilateral, and, having been unperformed when Ruhl declared a forfeiture, the same was optional as to Ruhl because optional as to the lessee. Contracts unperformed optional as to one of the parties are optional as to both."

A great many authorities are cited as supporting this doctrine, among them the following cases decided by this court, which counsel contend are controlling: Frank Oil Co. v. Bellevue Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Superior Oil & Gas Co. v. Mehlin, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; Hill Oil & Gas Co. v. White, — Okla. —, 157 Pac. 710.

The theory of counsel on this point is further disclosed by the following excerpt from their brief: "The lease of June 17, 1912, by Ruhl to Wilson, covering the 320 acres involved, was executed for the nominal consideration of \$1, the real consideration being the development which Ruhl expected as a result of the contract. The surrender clauses in the lease hereinafter quoted made the same entirely optional with the lessee. He was not required to do anything. The lessee might drill a well on the premises within four months, or he had the option to delay drilling for three-month periods by paying in advance for each quarter \$80 for such delay, and he had the further option to surrender the lease, if not tested, at any time, upon the payment of the nominal sum of \$1 and thereby relieve himself from the payment of rentals. He had the further option, even after entering upon the premises, to abandon the same any time and to remove all machinery and fixtures placed by him on the premises, including the right to draw and remove casing. These terms of the contract bring it clearly within the

equitable rule so often announced by this court with particular reference to oil and gas mining leases, that contracts unperformed, optional as to one of the parties, are optional as to both. In the case of *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 119 Pac. 902, this court said, as if writing to cover this very case, and as if to declare this very lease voidable at the option of the lessor, citing the case of *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545: 'The general rule in such cases is that contracts unperformed, optional as to one of the parties, are optional as to both. *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; *Huggins v. Daley*, 48 L.R.A. 320, 49 C. C. A. 12, 99 Fed. 606; *Reese v. Zimm* (C. C.) 103 Fed. 97; *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429.' The foregoing quotation is a conclusion drawn by the learned justice in answer to a question which he himself had put, as follows: 'Does the surrender clause, as hereinbefore set out, render the lease such a contract as a court of equity will refuse to enforce?' Referring to a surrender clause in the following words: 'It is hereby further agreed that the party of the second part shall have the right at any time to surrender and terminate this grant and demise by serving written notice upon the parties of the first part of such intention, after which all payments or liabilities to accrue shall cease and determine.' This authority is conclusive on this case, for the court says that such a surrender clause, giving the lessee the right to surrender, also gives the lessor the right to surrender, and that therefore a court of equity will not enforce such a contract."

From an examination of a great number of authorities cited by counsel for the respective parties, as supporting their view of the various questions of law arising out of the foregoing general assignment of error, it is apparent that many of the courts, in citing authorities and discussing the proper construction to be given oil and gas leases, have assumed that such instruments have become standardized, and therefore have not attempted to distinguish with clearness between the varying terms of the contracts involved in the various cases. It is true that there is a general vein of similarity running through all contracts of this nature, and that at present a large majority of them may be embraced within two general classes which, for convenience, have sometimes been designated "unless" leases and "or" leases.

I am aware, of course, that the words "or" and "unless," of themselves, have no particular potency in determining the character of an oil and gas lease; but, in the

leases I have examined, the following essential differences between "or" leases and "unless" leases are uniformly found to exist: The "unless" lease by its terms confers upon the lessee the option to continue or renew the lease by payment of rental for certain fractional periods at a time. The payment of the rental is a necessary condition precedent to the renewal of the lease for the fractional times specified in the lease contract. In fact, it is a lease from year to year, or quarter to quarter.

On the other hand, under the "or" lease containing a surrender clause the payment of the rentals from time to time is not necessary to renew the lease by fractional periods from time to time; the failure to pay under the "or" lease not operating automatically to terminate the lease. It is true that under the "or" lease containing a surrender clause the lessee may accelerate the termination of the lease and his liability thereunder, by payment of the amount which the parties have stipulated in the surrender clause he shall pay for the privilege of being released from the contract; but such leases scarcely, if ever, by their terms, become null and void by failure to pay rentals in advance. In this respect, the two leases are diametrically opposed. The "unless" lease by its terms automatically terminates by failure to pay rentals; whereas, the "or" lease remains in force in the event the lessee does not elect to accelerate the ending of the lease by paying the stipulated consideration for the privilege of surrendering, and by surrendering it. Under the "or" lease (with surrender clause), even though it contains an express forfeiture clause, the lessor may waive the default and sue the lessee and recover the rentals; the lessee being bound as the lessor's debtor for the rentals until the lessee surrenders. *Cohn v. Clark*, — Okla. —, L.R.A.1916B, 686, 150 Pac. 467; *Burrees v. Diem*, 23 Okla. 776, 101 Pac. 1116.

But in addition to these general classifications, in considering cases upon rental clauses, care should be taken to distinguish between leases containing (a) an "or" clause and a forfeiture clause; (b) containing an "or" clause and a provision to the effect that a failure to complete a well or pay will render the lease null and void,—in effect, a forfeiture clause; or (c) containing an "unless" clause, from leases which provide, as in the case at bar, for a definite term of years, and the lessee agrees either to drill or pay, and which contains no forfeiture clause.

The majority of the court, it seems to me, have fallen into error by not distinguishing the "or" lease, herein involved, from the "unless" leases, construed in the former

Oklahoma cases, and failing to observe that, when the "unless" lessee fails to drill or pay, the lease, by its terms, becomes null and void; whereas, failure to either drill or pay under the "or" lease, even though it contains a surrender clause, does not terminate or end the rights and powers of both lessor and lessee, because the lessor still has the right to elect to keep the lease alive and hold the lessee for the rentals. Before the lessor's right to keep the "or" lease alive by claiming the rental ends, the lessee must do something more than fail to drill or pay; he must affirmatively surrender the lease and pay the lessor the \$1 and all unpaid rentals, pursuant to the terms of the surrender clause. Mere failure on the part of the lessee under the "or" lease to drill or pay does not constitute an abandonment or surrender of his rights under the lease. If it did, this court could not have sustained an action by the lessor against the lessee for the unpaid rentals, as was done in *Cohn v. Clark* and *Burress v. Diem*, supra.

That this court in at least one opinion recognized these distinctions between the "or" lease and the "unless" lease is apparent from the following excerpt from *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260. "We have been unable to find a single case where a court of chancery ordered the specific performance of a lease at the instance of the lessee where there had been no development and the lease provided only that it should be forfeited unless the lessee paid a certain sum of money for delay, such contract being merely optional; but, where the contract provided that there should be certain development or the lessee should pay a certain specific sum of money, then, in the event of delay or failure of development, an obligation was incurred on the part of the lessee to pay a certain sum of money."

Observing these fundamental differences in the terms of the two classes of contracts, it is not necessary to notice in detail the distinctions which might be drawn between the form of the actions and the nature of the relief prayed for in the former Oklahoma cases cited, and the form of the action and relief prayed for in the case at bar, or the distinguishing features of each case, for the reason that the contract now under consideration is so different in the essential features just pointed out, from the contracts formerly construed, as to render the former class of cases wholly inapplicable to the case at bar.

When these differences between the "unless" leases construed in *Kolachny v. Galbreath*, supra, and the other cases of that class, and the "or" lease herein involved, L.R.A.1917B.

are considered, it is apparent to me that this court has never held, in a suit of this nature, that the surrender clause in an "or" oil and gas lease, supported by an independent consideration, renders such lease void or unilateral, nor that it creates a tenancy at the will of either party, nor that such a lease is optional as to the lessor. On the contrary, it seems to me that to so hold would overrule in principle *Frank Oil Co. v. Belleview Gas & Oil Co.* supra; *Deming Invest. Co. v. Lanham*, 36 Okla. 773, 44 L.R.A.(N.S.) 50, 130 Pac. 260; *Mitchell v. Probst*, — Okla. —, 152 Pac. 597, and other cases of that class.

Having reached this conclusion, which I have shown is not in conflict with any former decision of this court, it does not seem necessary to distinguish the case at bar from cases from other jurisdictions cited by the majority of the court and counsel, as supporting the rhythmic doctrine that "contracts unperformed, optional as to one of the parties, are optional as to both." It is sufficient to say of such cases that in none of them do I find any support for the contention that the effect of a surrender clause in a lease expressly agreed upon between the parties, which by its terms, grants the lessee the right to surrender, and for which privilege the lessee obligates himself to pay an adequate independent consideration, is to confer a corresponding right upon the lessor to forfeit the lease at his option, without any agreement to that effect, or the payment or promise of payment of any consideration whatever. *Legg v. Benion*, Willes, 43, 125 Eng. Reprint, 1047; *Brewster v. Lanyon Zinc Co.* 72 U. C. A. 213, 140 Fed. 801; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; note to *Pacific Warehouse Co. v. McKenzie-Hunt Paper Co.* Ann. Cas. 1916B, 308.

And it also may be added that the value as authorities of the cases from Louisiana, principally relied upon by counsel for plaintiffs in error upon this point, will be greatly minimized when it is considered that in that jurisdiction, which derives its jurisprudence from the civil law, \$1 is not considered an adequate consideration to support a contract; that the rule as herein stated in cases wherein the consideration is deemed to be adequate is clearly established by the recent case of *McClendon v. Busch-Everett Co.* 138 La. 722, 70 So. 781.

Being unhindered by the decisions of our own court, it seems to me that, in construing these contracts, it would be more consonant with right and justice and sound business principles to follow the familiar trend of authority from the other great oil producing states of the Union, and particularly the doctrine approved by the Supreme Court of

the United States and the circuit court of appeals for the eight circuit, the Federal circuit in which this state is situated. Many of the operators within this state have come from states where the surrender clause has been sanctioned by law for the past half century, and, finding the same to be the rule in the circuit court of appeals for the eighth circuit, the court of last resort, in many instances, for this jurisdiction prior to statehood, they, and the vast number of citizens of this state who joined them in the development of the oil industry, were justified in assuming that the surrender clause would not be stricken down by the courts of the state.

The following cases hold that the presence of a surrender clause in an oil and gas mining lease does not render it void and subject to cancellation in a suit in equity: *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Pittsburg Vitriified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; *Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 So. 932; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Prairie Oil & Gas Co. v. Morton* (No. 2064) — Pac. —, equity opinion; *Guffey v. Smith*, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; *Cohn v. Clark*, — Okla. —, L.R.A.1918B, 686, 150 Pac. 467.

And the following authorities hold that \$1 is a sufficient cash bonus consideration to bind the lessor in a surrender clause lease: *Guffey v. Smith*, 237 U. S. 101, 116, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Pittsburg Vitriified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Pyle* L.R.A.1917B.

*v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 188, 86 N. E. 219.

The next assignment of error which would follow in logical order, as well as importance, is stated by counsel in effect as follows: There was default in payment of rentals due April 17, 1914, whereupon the lessor, as he had a right to do, declared a forfeiture because of default in payment. This assignment of error is based upon the assumption by the plaintiffs in error that, notwithstanding the absence of a forfeiture clause, a slight default in the payment of the rentals, as provided for in such a lease contract, authorizes the lessor to declare the lease forfeited. *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260, and several other Oklahoma cases are cited in support of this doctrine. I have pointed out some of the distinctions between "unless" and "or" leases, and that it was an "unless" lease which, by its terms, became null and void if delay money was not paid in advance, that was under discussion in the *Frank Oil Co.* Case, whilst the contract in the case at bar is an "or" lease, which contains no forfeiture clause, nor provision which expressly or impliedly provides that time is of the essence of the contract. By express statute (Rev. Laws, 1910, § 968) in this jurisdiction, "time is never considered as of the essence of a contract, unless by its terms expressly so provided." *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222; *Standard Lumber Co. v. Miller & V. Lumber Co.* 21 Okla. 617, 96 Pac. 761; *Edwards v. Iola Gas Co.* 65 Kan. 362, 69 Pac. 350, 22 Mor. Min. Rep. 293.

It is true that mining and oil leases often contain provisions for a forfeiture in case of cessation of the work in the development of the lands, and such provisions in proper cases the courts have unhesitatingly enforced. 18 Am. & Eng. Enc. Law, 372. But in the absence of a forfeiture clause, the common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term. 18 Am. & Eng. Enc. Law, 369.

The following cases support the doctrine that, in the absence of an express forfeiture clause in an "or" lease, there can be no forfeiture for nonpayment of rentals. *Reserve Gas Co. v. Carbon Black Mfg. Co.* 72 W. Va. 757, 79 S. E. 1002; *Thompson v. Christie*, 138 Pa. 230, 11 L.R.A. 236, 20 Atl. 934; *Marshall v. Forest Oil Co.* 108 Pa. 83, 47 Atl. 927, 21 Mor. Min. Rep. 179; *Rose v. Lanyon Zinc Co.* 68 Kan. 126, 74 Pac. 625; *Davis v. Chautauqua Oil & Gas Co.* 78 Kan. 97, 96 Pac. 47; *Castle Brook Carbon Black*

Co. v. Ferrell, — W. Va. —, 85 S. E. 544; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; 27 Cyc. 716; Gale v. Oil Run Petroleum Co. 6 W. Va. 200, 9 Mor. Min. Rep. 1.

Counsel seek to avoid the force of these decisions and the general rule governing forfeitures, by the application of a rule of construction hereinbefore adverted to, which they state as follows: "Forfeiture of such a lease is favored. The lease must be construed strictly in favor of the lessor, and against the lessee and his assigns."

The application of this doctrine to oil and gas leases is based upon the theory that, because of the peculiar character of oil and gas as property, and the violent fluctuations in the value of lands and leaseholds incident to the discovery of these substances, the courts have placed contracts of this kind in a class by themselves, and, in the light of the known character of the business of oil mining, construed them most strictly against the lessee, and favorable to the lessor.

Without questioning the soundness or justice of this doctrine, it is still but a rule of construction to be invoked only for the purpose of aiding the court in determining the intention of the parties when the contract under consideration is not free from ambiguity. Section 949, Rev. Laws 1910, provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article."

Here the contract upon its face is clear and unambiguous. The parties to it have not seen fit to incorporate a forfeiture clause, or words equivalent to a forfeiture clause, into its terms, and I find no justification for writing one into it, in any proper application of the canon of construction invoked. Moreover, the instant case has developed into a controversy between two distinct groups of claimants, each deriving its interest from a common lessor who has parted with his own interest, and therefore the reason for the rule that the lease must be construed strictly in favor of the lessor and against the lessee has wholly failed.

Having reached the conclusion that there was and could have been no forfeiture of the lease at the option of the lessor for default in the payment of rentals in strict conformity with its terms, the next question which presents itself is whether there was an abandonment of the lease by any of the first group of lessees. Generally, whether a contract is abandoned is a question of fact to be determined by the court or jury from all the facts and circumstances of the partic-

ular case. *Martin v. Spaulding*, 40 Okla. 191, 187 Pac. 882.

In *Garrett v. South Penn Oil Co.* 66 W. Va. 596, 66 S. E. 745, the supreme court of appeals of West Virginia pointed out the distinction between "abandonment" and "forfeiture" as follows: "Abandonment . . . rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury; while a forfeiture does not rest upon an intent to release the premises, but is an enforced release. . . . Whether or not a lease has been abandoned is a matter of defense, and need not be negated by the plaintiff in an action for the rent."

Again in *Smith v. Root*, 66 W. Va. 638, 30 L.R.A. (N.S.) 176, 66 S. E. 1007, the supreme court of appeals of West Virginia said: "A lessee may abandon the premises notwithstanding there is no forfeiture clause. His failure to pay the cash rentals stipulated in the contract may alone be sufficient to prove abandonment; but his failure to pay, taken in connection with other facts and circumstances evincing a clear intention to abandon the enterprise, coupled with the fact that no operations were ever begun upon the land, is sufficient to prove relinquishment of lessee's right."

In that case the lessees had drilled no well and had defaulted in the payment of five quarterly rentals; also, they had drilled on the adjoining tract, become insolvent, and gone out of business. All these facts were held to constitute abandonment.

In *Phillips v. Hamilton*, 17 Wyo. 41, 95 Pac. 846, the court held that "in determining whether one has abandoned his property or rights, the intention is a paramount object of inquiry, as there can be no abandonment without an intention to do so, and where plaintiff leased certain land to defendant for the purpose of boring for oil and gas, operations to be commenced within a year, and operations were begun within that time and the well drilled, and some seven months after drilling the first well the lessee returned to erect another rig and drill another well, when plaintiff revoked the lease, there was no intention by the lessee to abandon the lease."

*Archer, Oil & Gas*, p. 861, says: "To constitute abandonment by the lessee of a lease for oil and gas purposes, there must be both an intention to abandon and an actual relinquishment of the leased premises."

In *Fisher v. Crescent Oil Co.* — Tex. Civ. App. —, 178 S. W. 908, the court of civil appeals of Texas said: "Abandonment is the relinquishment of a right. If the owner sees proper, he may so abandon and evidence his intention by any act legally suffi-

cient to vest or divest the ownership. *Phillips v. Watkins Land Mortg. Co.*, 90 Tex. 195, 38 S. W. 270-274(3), 470. The existence of the intent to waive or abandon the right on the land was a question of fact for the court trying the case, and, if the facts would authorize the conclusion that there was no such intention, we would not be warranted in setting aside the judgment. *Missouri, K. & T. R. Co. v. Hendricks*, 49 Tex. Civ. App. 314, 108 S. W. 748, 749; *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 22 Mor. Min. Rep. 276.

In *McMillin v. Titus*, 222 Pa. 511, 72 Atl. 244, the Pennsylvania supreme court said: "Abandonment ordinarily is a question of fact to be determined by the jury under all the circumstances of the case."

It is true that the nonpayment of the rentals under an "unless" lease may well be found to constitute an abandonment, in the absence of circumstances tending to show a contrary intention. If the failure to pay is voluntary, and not caused by some accident, mishap, or mistake, then, under the "unless" lease, the presumption is that the lessee chose that method of surrendering the lease. But, in this case, the evidence shows almost without dispute, and the trial court found, that the original lessees neither intended to abandon the lease on the 80 acres, nor the Cameron and Wilson 240 acres.

At this point it may be well to observe that every issue of fact, where an issue of fact was joined by the evidence, necessary to sustain the judgment rendered below, has been settled in favor of the defendants in error by the findings of fact of the trial court. In such circumstances, not finding the findings of fact made by the trial court to be clearly against the weight of the evidence, we are not at liberty to disturb them.

The only remaining assignment of error which we deem it necessary to notice is stated by counsel in their brief as follows: "Development which Ruhl expected to be made under the terms of his lease was the real consideration for the contract. Wilson and Cameron held the contract in a speculative venture, without development, and there was therefore no consideration for the contract."

Whether the lease was unfair and inequitable must be determined in view of the circumstances in which it was given, which will be found quite fully set out elsewhere in this opinion. In my judgment, the consideration for the lease, viz., \$1 paid to the lessors and the covenants and agreements of the lessee, cannot, in view of the evidence, be said to be unreasonable. An examination of many of the cases and authorities here-

inafore cited will show that similar leases, resting upon like consideration, have been uniformly sustained by courts of the highest respectability.

The lease upon its face discloses a sufficient consideration to support such a contract, and in clear and unambiguous terms declares that it "shall remain in full force for the term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, his heirs, successors, or assigns." The intention of the parties being clear, no good reason appears why their contract should not be given effect in accordance with its terms. The authorities seem to be quite uniform to the effect that a lease for a specified term, "and as long thereafter as oil or gas, or either of them, is produced," is not only a lease for the specified period, but beyond it, provided the lessee finds and produces oil during the period named. *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 28 L.R.A.(N.S.) 959, 64 S. E. 1027; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Young v. Forest Oil Co.* 194 Pa. 243, 45 Atl. 121, 20 Mor. Min. Rep. 345; *Chaney v. Ohio & I. Oil Co.* 32 Ind. App. 193, 69 N. E. 477; *Eaton v. Allegany Gas Co.* 122 N. Y. 416, 25 N. E. 981; *Dickey v. Coffeyville Vitriified Brick & Tile Co.* 69 Kan. 106, 76 Pac. 398; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 546; *Tucker v. Watts*, 25 Ohio C. C. 320; *Thornton, Oil & Gas*, §§ 134, 135; *Graves v. Key City Gas Co.* 83 Iowa, 714, 50 N. W. 283; *Whiteman v. Fayette Fuel-Gas Co.* 139 Pa. 492, 20 Atl. 1062; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

If there is one thing more than another which would tend to add stability to the oil and gas business, and a sense of security to those entering into oil and gas leases and contracts, it would be strict adherence to the salutary rule that men of full age and competent understanding shall be allowed the utmost liberty of contracting with each other, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice in strict accordance with their plain terms. The statute (Rev. Laws 1910, § 946), as well as the rules of construction, enjoin that "a contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

There are many elements of hazard and uncertainty for the operator, which naturally inhere in the business of exploring for oil

and gas in undeveloped territory; but, if the foregoing fundamental rules are strictly observed by the parties to oil and gas contracts and the courts, it seems to me this element of uncertainty would not be carried into the contracts or leases necessary to carry on this important branch of the great oil industry.

From an examination of the entire record, I am convinced that the trial court correctly found the facts, where issues of fact were

joined by the evidence; deduced therefrom proper conclusions of law, and on the whole decided the case in accordance with right and justice.

I am authorized to state that Mr. Justice Thacker joins me in this dissenting opinion.

Petition for rehearing denied October 10, 1916.

### **Annotation—Surrender clause in oil or gas lease as rendering it unilateral.**

It is not intended to include herein cases involving the liability of the lessee for rental or delay money after the lease has been terminated. For such cases see note appended to *Deming Invest. Co. v. Lanham*, 44 L.R.A.(N.S.) 50.

And as to rights of parties to oil or gas leases forfeited for default in payment to be made in lieu of development, see note in 43 L.R.A.(N.S.) 487.

The cases are not in harmony as to the effect of a clause in an oil or gas lease entitling the lessee to surrender the lease and terminate his obligation thereunder at any time, to render the lease unilateral. In part, the conflict among the cases may be explained by the different views entertained as to the effect of such a lease. In some jurisdictions, as in Oklahoma, an oil or gas lease, while executory, does not operate to create any interest or estate in the land to which it relates; it more nearly resembles a license than it does a lease. In other jurisdictions, however, a lease of this character is deemed to create a freehold interest in the real estate to which it relates.

The essential parts of a lease of this character are the grant by the lessor of the oil or gas to be produced from the lands by its development for a designated consideration, frequently \$1, and the agreement by the lessee to develop the premises and pay a royalty for the oil or gas procured therefrom, or give the lessor a portion of the product, and the further agreement to make such development within a designated time, or pay a stated sum of money, generally referred to as "delay money," or pay a sum of money for the privilege of surrendering the lease and relieving himself from further obligation thereunder.

Of course, the money consideration of \$1 is not the real consideration for the lease. This is the agreement of the lessee to develop the premises for the mutual profit of both parties. In view of L.R.A.1917B.

the real consideration for the lease, a serious question presented is whether the recited consideration of the nominal sum of \$1 goes to the entire contract, or is confined merely to the original term. It is, of course, true as a principle of law that a stated sum may be the consideration for the entire contract and sustain each particular clause or covenant, although some of these covenants would otherwise be clearly unilateral. It is also true that, where a nominal money consideration is recited in a contract to be the consideration thereof, and there are different covenants on the part of each party to be performed, it does not necessarily follow that the \$1 will be construed to support the contract as a whole; it may be limited in its scope, and the other clauses may be tested as to their unilateral character with reference to the specific consideration relating thereto. This is true even though it be conceded that \$1 is a valuable consideration,—a matter as to which the courts are also in conflict, and which does not enter into this discussion.

The doctrine of *BROWN v. WILSON*, ante, 1184, limiting the \$1 consideration recited in the lease to the original term, and holding that there is no consideration to support the clause entitling the lessee to surrender the premises after the expiration of the original term of four months on the payment of \$1 and any rental then due, and that this provision renders the contract unilateral and unenforceable after the expiration of the term specified, or any extension thereof secured by the payment of delay money as provided in the lease, finds but little, if any, support by the holding of other cases, even those which do not construe an oil or gas lease to create an interest in the land to which it relates before it has been executed by the development of the premises and it finds no support in the principles of law above referred to; for as hereafter pointed out the surrender clause is based upon an in-

dependent valuable consideration. Thus, it has been held that where the lessee is not bound to comply with any of the covenants or stipulations of the lease with regard to the boring for oil and gas, or the payment of rent, but has reserved the right to vacate the land at any time and thus wholly escape any future obligation under the lease, the lessor is entitled to do likewise. Hence the lease is a right of entry, and is subject to be terminated at the will of either party thereto while it remains in an executory condition. *Trees v. Eclipse Oil Co.* (1899) 47 W. Va. 107, 34 S. E. 933, 20 Mor. Min. Rep. 260; *Eclipse Oil Co. v. South Penn Oil Co.* (1899) 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234. The lease involved in the foregoing cases, however, differed from the one involved in *BROWN v. WILSON*, in that the only recited consideration was the covenants by the lessee to develop the premises and give to the lessor a portion of the product obtained. The leases were similar, however, in that each reserved the right to surrender or terminate the lease at any time, but this reservation was not based upon any recited consideration in the West Virginia cases.

And it has been held that where the \$1 consideration named in the lease was not in fact paid, and the only consideration for the lease was the agreement to develop and deliver a portion of the product secured thereby, and the lessee retained the right to surrender the lease at any time, and the amount paid the lessor was to be full compensation for any injury sustained, the lease was unilateral and void. *Roberts v. McFadden* (1903) 32 Tex. Civ. App. 47, 74 S. W. 105. It is not believed that the question as to whether or not the recited consideration of \$1 had in fact been paid was material on the question under consideration. And it does not seem to have been the distinguishing point on this question in this jurisdiction. Thus, in *J. M. Guffey Petroleum Co. v. Oliver* (1904) — Tex. Civ. App. —, 79 S. W. 884, it is held that, in view of the great value of the leased premises as oil bearing land, the sum of \$2 to be paid by the lessee as a condition to the right reserved to surrender the lease and have it canceled cannot be considered more than a nominal consideration, and hence the lease comes within the principle of law that, when it is provided in a lease that it is terminable at the will of one of the parties, it becomes terminable at the will of the other. And in *Great Western Oil Co. v. Carpenter* (1906) 43 L.R.A.1917B.

*Tex. Civ. App.* 229, 95 S. W. 57, it is asserted that where the consideration of an oil and gas lease is \$1, even though it is in fact paid, it is merely nominal, and will not of itself support the contract.

It is also held in this state that, where the recited consideration was \$28 28/100 and the lessee reserved the right to surrender the lease and be released from further obligation thereunder upon paying the sum of \$5, this latter sum was a mere nominal consideration and did not support the surrender clause, since the original sum was the consideration for the right to develop the premises for the first period, and the other sums of the same amount were merely the consideration for delay in development, for a specified term. It is pointed out that there was no obligation on the part of the lessee to pay the delay money, and no binding obligation to pay any other sum than the \$5 to be paid on surrendering the lease, and any overdue rent therefor. Hence the lessor was not bound to accept delay money when tendered at the beginning of any quarterly period, unless in the meantime the lessee had in good faith begun to explore and develop the land. *Owens v. Corsicana Petroleum Co.* (1914) — Tex. Civ. App. —, 169 S. W. 192. It is to be noted, however, that, according to *Pierce Fordyce Oil Asso. v. Woodrum* (1916) — Tex. Civ. App. —, 188 S. W. 245, the supreme court of Texas granted a writ of error in *Owens v. Corsicana Petroleum Co.* (Tex.) supra, with the notation that it was of the opinion that the holding in that case, that the leased contract was void because unilateral, was erroneous. The court said: "It appears to have been supported by a valuable consideration paid, though it be regarded as a contract for an option and as unilateral in character. The contract to give an option is valid if supported by an independent consideration. We think it questionable, however, whether a contract by which the opposite party agrees to do a definite thing within a limited period, or in lieu of it to pay a specified amount, can be regarded as unilateral."

This last suggestion seems to point out an apparent inconsistency in the holding in *BROWN v. WILSON*, ante, 1184. In that case the court conceded that the recited consideration of \$1 was sufficient to support the lease for the period expressly designated therein. If the dollar consideration was sufficient in this respect, then it would seem to follow that



the surrender clause, which the court held to render the contract unilateral, was also supported by a valuable consideration, since it required the payment by the lessee of the sum of \$1 as a condition to the surrender of the lease.

If the consideration for the right to surrender the lease and have it canceled was a substantial sum, it would seem to be clear that the covenant would not be unilateral. And in this regard it has been held that where, as a condition to the surrender of the lease and have it canceled, the lessee was required to pay the sum of \$100, the provision was not unilateral, and where it was construed in connection with the other covenants by the lessee it had the effect of sustaining the entire lease, for there was thereby imposed upon the lessee the obligation to develop the premises, or pay in lieu thereof a substantial sum as delay money, or pay a substantial sum to be relieved from the foregoing obligation. *Houssiere Latreille Oil Co. v. Jennings-Haywood Oil Syndicate* (1905) 115 La. 107, 38 So. 932, *infra*.

If it is assumed that the \$1 required to be paid as a condition to surrendering the lease is not a valuable consideration, it does not follow that the lease involved in *BROWN v. WILSON* was unilateral at the time its validity was assailed by the lessor, for the lessee had paid upwards of \$400 in consideration of delay in development. Of course, these payments would not operate to cure the defect in the lease of lack of mutuality of obligation, if they were construed to be limited to the particular term for which they operated to relieve the lessee of the obligation to develop the premises, and this was apparently the theory adopted in the majority opinion in *BROWN v. WILSON*. Adopting this view, however, it does not necessarily follow that the lease was unilateral, for this defect might well be held to have been cured by a part performance by the payment of delay money. And the validity of a lease of this character was sustained on this ground in *Busch-Everett Co. v. Vivian Oil Co.* (1911) 128 La. 886, 55 So. 564, *infra*. And the defect might also be held to have been cured on the ground that, after receiving this large sum of money under the lease, the lessor was precluded from denying its validity. This is the doctrine of *Pittsburg Vitri-fied Paving & Bldg. Brick Co. v. Bailey* (1907) 76 Kan. 42, 12 L.R.A. (N.S.) 745, 90 Pac. 803. In so holding the court said that the lessee "exercised its option by paying the rent for two successive

years, and the lessors acquiesced in the part performance of the contract by accepting. The lessors will not therefore be heard to say, when the third year's rent is tendered, that the contract is unilateral and revocable by them because the company might have then exercised its option to surrender the lease."

It is to be noted, however, that these points were apparently not presented to or passed upon by the court in *BROWN v. WILSON*. Neither does it appear that the court considered the lease from the view point that by its terms it imposed upon the lessee the alternative obligations to develop the premises, to pay a substantial sum in lieu thereof, or to pay a valuable consideration to be relieved from these obligations; in other words, that the lease imposed upon the lessee an absolute obligation to pay to the lessor something of value, of which he could not be relieved. Such a contract, of course, is not unilateral.

In *Erie Crawford Oil Co. v. Meeks* (1907) 40 Ind. App. 156, 81 N. E. 518, it is said that construing the lease as granting for the consideration of \$1 an option for one year to enter upon, explore, and develop the leased premises for oil and gas, and considering it in connection with the nature and migratory habits of oil and gas, impel the belief that a consideration more substantial than that mentioned induced its execution, and justifies the court in construing the instrument with the fact in view that a more substantial reason or reasons prompted the making of the contract, following upon this point, *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* (1903) 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680. In this state, upon this point it has been held that, where, the recited consideration for such a contract is \$1 duly paid, the lessor cannot deny the receipt of the money, and the contract is valid. *Dill v. Frazee* (1907) 169 Ind. 53, 79 N. E. 971. But it is nevertheless held that, where the lease is to become null and void unless the lessee pays an agreed sum at a certain time as delay money, and there is a clause permitting him to surrender and have canceled the lease, equity will not relieve against a forfeiture by the lessor for failure of the lessee to make the agreed payment. *Ibid*.

And see *Soaper v. King* (1915) 167 Ky. 121, 180 S. W. 46, involving a lease which did not contain a surrender clause, and asserting that, where the recited consideration is merely the sum of \$1

and the contract imposed upon the lessee no duty, it is unenforceable because unilateral.

In Louisiana the rule prevails that a valuable consideration is not sufficient to support a contract unless it is also a serious consideration, and it is there held that a gas and oil lease cannot be sustained where the recited consideration was \$1, and it contained a provision entitling the lessee to surrender the lease at any time upon payment of the further sum of \$2. *Murray v. Barnhart* (1906) 117 La. 1023, 42 So. 489. To the same effect, see *Long v. Sun Co.* (1915) 132 La. 601, 61 So. 684. In this case there was no recited consideration for the provision entitling the lessee to surrender the lease, and the recited consideration for the lease itself, including the option to cancel, was \$1. But a provision that the lessee shall have the right at any time to remove from the leased premises all machinery, fixtures, and improvements placed thereon, and thereby terminate his rights and liabilities under the contract, does not render the contract invalid after the lessee has in part, at least, developed the premises. *McClendon v. Busch-Everett Co.* (1916) 138 La. 722, 70 So. 781. And where the lessee agreed to pay a substantial sum for a delay in developing the premises, the fact that there is also a provision entitling him to surrender the lease by paying the sum of \$1 will not render it unilateral, if the lease has been partly performed and the lessor has received substantial sums thereunder. *Busch-Everett Co. v. Vivian Oil Co.* (1911) 128 La. 286, 55 So. 564. So, where the stipulation authorizing the lessee to surrender the lease requires the payment of \$100 to the lessor, the contract is to be construed as imposing upon the lessee the obligation to pay at least this amount, and the consideration is sufficient to sustain the contract. *Houssiere Latreille Oil Co. v. Jennings-Haywood Oil Syndicate* (1905) 115 La. 107, 38 So. 932.

In Illinois a lease of the character under consideration is held to vest the lessee with a freehold interest in the land, and it is held that an oil or gas lease based upon a nominal money consideration and covenants of the lessee to develop the premises, although also containing a provision entitling him to surrender the lease and be released from further liability thereunder, is not unilateral in a court of law. *Bruner v. Hicks* (1907) 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; *Watford Oil & L.R.A. 1917 B.*

*Gas Co. v. Shipman* (1908) 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *Ulrey v. Keith* (1908) 237 Ill. 284, 86 N. E. 696; *People ex rel. Carrell v. Bell* (1909) 237 Ill. 532, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Danghette v. Ohio Oil Co.* (1914) 265 Ill. 518, 105 N. E. 308. But such a provision in the lease will preclude the lessee from invoking the aid of equity to secure the specific performance of the lease, either directly or indirectly. *Watford Oil & Gas Co. v. Shipman* (1908) 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Ulrey v. Keith* (1908) 237 Ill. 284, 86 N. E. 696. However, in a late United States Supreme Court decision applying the Illinois rule that such a lease creates an estate in the lessor's land, it was held that the lessee was entitled to invoke also the aid of equity although the contract would thereby be enforced, since the purpose was not the specific enforcement of the contract, but the protection of the lessee in his interest in the land vested by the lease. *Guffey v. Smith* (1914) 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526. The court points out that the Illinois decisions as to the remedy are not binding on it; but, as suggested, the decision is based upon the holding that giving relief is not specifically enforcing the contract, but is protecting the lessee in the freehold estate he had in the land under the lease.

In *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46, supra, where the lease recited a consideration of \$1 as the consideration for the execution of the lease, the court said that the lessee had paid the dollar for the right to explore for oil or gas, and where the lessee had agreed to develop the premises and pay a royalty for all oil or gas produced, and was to have the right to surrender the premises upon the payment of \$1, the lease could not be canceled for want of consideration. And in *Gillespie v. Fulton Oil & Gas Co.* (1908) 236 Ill. 188, 86 N. E. 219, referring to the recited consideration of \$1, it is said that it is unbelievable that the money consideration stated was the real consideration upon which the lease rested, and that undoubtedly the real consideration was the exploitation of the mineral resources of the property to which the lease related. It is, however, held in this state that a lease of land to be developed for oil and gas, requiring the lessee to pay certain royalties in the event of successful development, but containing no express agreement or obligation of any kind to be performed by

the lessee, may be revoked by the lessor where the lessee has failed to act upon it. *Cortelyou v. Barnsdall* (1908) 236 Ill. 138, 86 N. E. 200.

In *Brewster v. Lanyon Zinc Co.* (1905) 72 C. C. A. 213, 140 Fed. 801, involving a bill in equity to establish as a matter of record the forfeiture of an oil and gas lease, and to cancel it as a cloud on the complainant's title, it is held that a provision entitling the lessee to reconvey the premises at any time and relieve himself from further obligation under the lease does not make the estate created a mere tenancy at will, within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other, since the rule is without application to a lease for a definite term, which reserves to the lessee an option to terminate it before the expiration thereof.

And according to the holding of the foregoing case, a consideration in a lease of this character of the nominal sum of \$1 and the covenants of the lessee to develop the premises is sufficient to make

the lease effective and support every stipulation in it favorable to the lessee, including the option to surrender it at any time. And the recited consideration of \$1 and the agreement to pay a rental or develop the premises have been held to be a good consideration to support an option given the lessee to surrender the premises and avoid further obligation under the lease. *Central Ohio Natural Gas & Fuel Co. v. Eckart* (1904) 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler* (1901) 65 Ohio St. 507, 63 N. E. 76. In the former case it is said that such a lease does not create a mere tenancy at will. There is a good and valid consideration for the option granted by such instruments, and it is immaterial whether they are called leases, deeds, or written agreements. The intention of the parties is to control, and it is manifest that it was not the intention of either party that the right granted by the instrument should be a mere license that could be terminated by the grantor at any time. A. G. S.

#### OKLAHOMA SUPREME COURT.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES et al.,  
Plffs. in Err.,

v.

J. T. WEIGHTMAN, Admr., etc., of Thomas J. Gentry, Deceased, Intervener.

(— Okla. —, 160 Pac. 629.)

**Insurance — murder of assured — effect.**

1. A beneficiary in a policy of life insurance, who murders the assured, is thereby barred from collecting the insurance money. *For other cases, see Insurance, VI. b, 2, a, in Dig. 1-52 N. S.*

**Same — rights of assignee.**

2. The insurance policy being a non-negotiable instrument, the assignee of such a beneficiary has no better claim upon the insurance money than his assignor. *For other cases, see Insurance, IV. a, in Dig. 1-52 N. S.*

**Same — on two lives — construction.**

3. Provisions of a life insurance policy upon the lives of two persons, providing for the payment of the insurance fund to the survivor of the first decedent, examined, and

Headnotes by JOHNSON, C.

**Note.** — For murder of insured by beneficiary as affecting right to proceeds of policy, see annotation to *Sharpless v. Grand Lodge*, A. O. U. W. ante, 670, and other notes there referred to. L.R.A.1917B.

held, that the policy in question, so far as the insurance fund payable on such contingency is involved, is a several policy upon the life of each of the assured, and that the interest of the assured persons in such expectancy is not a joint tenancy, by reason of which one takes by the right of survivorship upon the death of the other, but that the survivor takes, if at all, under the contract.

*For other cases, see Insurance, VI. d, 2, a, in Dig. 1-52 N. S.*

**Same — incompetency of beneficiary — effect.**

4. Where no alternative beneficiary is designated in a contract of life insurance, and the designated beneficiary becomes barred from taking the benefits of the policy by reason of the fact that she has murdered the assured, in the absence of a statute which provides an alternative beneficiary, by operation of law a trust arises in favor of the estate of the assured, by virtue of which the representative of the assured is entitled to recover the insurance fund.

*For other cases, see Insurance, VI. d, 2, c, in Dig. 1-52 N. S.*

(October 17, 1916.)

**E**RROR to the District Court for Cleveland County to review a judgment in favor of intervener in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Alexander & Green, Stephen C. Treadwell, and Locke & Locke, for plaintiff in error Equitable Life:

Alverta B. Gentry murdered her husband and by that act she forfeited her right to collect insurance on his life.

Richards, Ins. 3d ed. p. 81; Cooley, Briefs on Ins. p. 3153; *Filmore v. Metropolitan L. Ins. Co.* 82 Ohio St. 208, 28 L.R.A. (N.S.) 675, 187 Am. St. Rep. 778, 92 N. E. 26; *Metropolitan L. Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836; *Joyce*, Ins. p. 2802, § 2851; *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Schreiner v. High Court*, C. O. F. 35 Ill. App. 576; *Prather v. Michigan Mut. L. Ins. Co. Fed. Cas. No. 11,368*; *Prince of Wales Assn. v. Palmer*, 25 Beav. 605, 53 Eng. Reprint, 768; *Supreme Lodge, K. L. H. v. Menkhausem*, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; *Anderson v. Life Ins. Co.* 152 N. C. 1, 67 S. E. 53; *Metropolitan L. Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836; *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; *Lundy v. Lundy*, 24 Can. Sup. Ct. 650.

The plaintiff, Ben F. Williams, as assignee of Alverta B. Gentry, has no better claim upon the insurance money than she has. He cannot take the money because of her crime.

*Amicable Soc. v. Bolland*, 4 Bligh, N. R. 194, 5 Eng. Reprint, 70, 2 Dow. & C. 1; *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180; *Cooley, Briefs on Ins. p. 3811*.

Under the laws of Oklahoma a man and his wife may own property as joint tenants and upon the death of either that property will be owned by the survivor, not by inheritance, but by survivorship.

*Bone v. Pollard*, 24 Beav. 288, 53 Eng. Reprint, 369; *Re Harris*, 160 Cal. 725, 147 Pac. 967; *Re Heiser*, 85 Misc. 271, 147 N. Y. Supp. 657; *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919; *Holmes v. Holmes*, 70 Kan. 892, 79 Pac. 163.

Messrs. Lydick & Eggerman, for plaintiff in error Williams:

If Thomas J. Gentry and Alverta B. Gentry were joint tenants, then plaintiff as assignee of the rights of Alverta B. Gentry must be permitted to recover in this action.

*De Graffenreid v. Iowa Land & T. Co.* 20 Okla. 688; 95 Pac. 624; *McAllister v. L.R.A.* 1917B.

*Fair*, 72 Kan. 533, 3 L.R.A. (N.S.) 726; 116 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; *Carpenter's Estate*, 170 Pa. 203, 29 L.R.A. 145, 50 Am. St. Rep. 745, 32 Atl. 637.

Messrs. Kittle C. Sturdevant, Dorset Carter, and J. B. Dudley, for defendant in error:

J. T. Weightman as administrator of the estate of Thomas J. Gentry, deceased, is entitled to recover from the insurance company the trust fund created by the moneys paid by the deceased in his lifetime, since public policy precludes the beneficiary named in the policy from recovering.

*Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Ryan v. Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Pom. Eq. Jur.* § 1031; *McCoy v. McCoy*, 30 Okla. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; *Fleener v. Cooper*, 39 Okla. 133, 134 Pac. 379; *Smith v. Metropolitan L. Ins. Co.* 223 Pa. 226, 20 L.R.A. (N.S.) 928, 128 Am. St. Rep. 799, 71 Atl. 11; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *National L. Ins. Co. v. Haley*, 78 Me. 208, 57 Am. Rep. 807, 4 Atl. 415; *John Hancock Mut. L. Ins. Co. v. Lawder*, 22 R. I. 416, 48 Atl. 383; *Cooley, Briefs on Ins. pp. 3753-3760*.

Joint tenancies are not favored and no instrument will be construed as creating a joint tenancy unless by its very terms a contrary holding cannot possibly be forged from the language of the contract.

7 R. C. L. p. 813; *Johnston v. Johnston*, 173 Mo. 91, 61 L.R.A. 166, 96 Am. St. Rep. 486, 73 S. W. 202; *Rodney v. Landau*, 104 Mo. 259, 15 S. W. 964; *Telfair v. Howe*, 3 Rich. Eq. 235, 55 Am. Dec. 637.

*Johnson, C.*, filed the following opinion:

This action was filed upon January 4, 1913, in the district court of Cleveland county, by Ben F. Williams as plaintiff, against the Equitable Life Assurance Society of the United States as defendant, for the recovery of \$2,000 upon a policy of life insurance on the life of Thomas J. Gentry, deceased, the plaintiff having become the owner by assignment of the rights of the beneficiary in the policy. The defendant resisted recovery upon the ground that, as contended by it, there was no liability under the policy for the reason that the beneficiary, Alverta B. Gentry, had murdered the insured, who was her husband, and thereby forfeited her right to the insurance and terminated all liability of the insurance company. J. T. Weightman, as administrator of the estate of the insured, Thomas J. Gentry, deceased, intervened in the cause, alleging that Alverta B. Gentry,

the beneficiary named in the policy, had murdered the insured, and thereby forfeited her right to the insurance, but that he, as such administrator, was entitled to the insurance. The case was tried to the court upon the pleadings and an agreed statement of facts. The lower court rendered judgment in favor of the intervener, J. T. Weightman, administrator of Thomas J. Gentry, and against the plaintiff and defendant, awarding the insurance to the administrator. Plaintiff and defendant bring the case here on appeal.

The policy in question was issued upon April 7, 1910, covering and insuring the lives of both Thomas J. Gentry and Alverta B. Gentry, husband and wife, respectively, in the sum of \$2,000. The principal insuring clause of the policy reads as follows, to wit: "In consideration of the payment in advance of sixty-nine  $7\frac{1}{100}$  dollars, and the payment annually thereafter of a like sum upon each fifteenth day of March until the death of either Thomas J. Gentry, of Oklahoma, Oklahoma, or his wife, Alverta B. Gentry of Oklahoma, Oklahoma (hereinafter jointly called the insured) the Equitable Life Assurance Society of the United States agrees to pay at its home office in the city of New York two thousand dollars upon receipt of due proofs of the death of either one of the insured, provided this policy is then in force and is then surrendered properly released, to the survivor of the said Thomas J. Gentry and Alverta B. Gentry, beneficiaries, with the right on the part of the insured to change the beneficiary."

The policy also contained the further clause, with reference to change of beneficiary, as follows, to wit: "Change of Beneficiary. If the right to change the beneficiary has been reserved, and there is no written assignment of this policy on file with the society, the insured may from time to time during the continuance of this policy, change the beneficiary or beneficiaries by a written request (upon the society's blank) filed at its home office, but such change shall take effect only upon the indorsement of the same hereon by the society."

And the policy contained the further clause, as follows, to wit: "Incontestability. This policy shall be incontestable after one year from its date of issue, provided premiums have been duly paid. Self-destruction, sane or insane, within one year from said date of issue is a risk not assumed under this policy."

The policy contained other provisions usual in such instruments. There was no provision specifically affecting liability in the event of the murder of either of the insured by the beneficiary of his or her in-

surance. The instrument provided for certain cash values after the payment of specified numbers of annual premiums.

It was agreed between the parties that, on or about the 6th of January, 1912, the said Alverta B. Gentry had wilfully, unlawfully, and feloniously caused the death of the said Thomas J. Gentry by murdering him with malice aforethought, and had been legally convicted of murder, under a charge therefor, and sentenced to the Oklahoma State Penitentiary for the term of her natural life. It was also conceded that the premiums on the policy had been duly paid, and that the plaintiff Ben F. Williams by assignment was the owner of the rights of Alverta B. Gentry in the policy, whatever such rights may be; and it was agreed that the intervener was the duly qualified administrator of the estate of Thomas J. Gentry, and had properly intervened in the cause, and that the said Thomas J. Gentry died intestate, leaving as his sole heirs at law the said Alverta B. Gentry, his wife, and Theodore R. Gentry, the minor son of both of such insured. The insurance company made no contest upon formal grounds, and relied upon the contentions herein mentioned.

Plaintiff in error the insurance company contends (1) that Alverta B. Gentry, the beneficiary in the policy, having murdered her husband, by that act forfeited her right to collect the insurance on his life; (2) that the plaintiff Ben F. Williams, as assignee of Alverta B. Gentry, has no better claim upon the insurance than she would have, and cannot take the money because of her crime. (3) That under the laws of Oklahoma a man and his wife may own property as joint tenants and upon the death of either that property will be owned by the survivor, not by inheritance, but by survivorship, and that the insurance policy prior to the death of Thomas J. Gentry was a chose in action owned by him and his wife as joint tenants, and on the death of Thomas J. Gentry the benefits accruing under the policy vested, if at all, in Alverta B. Gentry (a) by the terms of the policy itself; (b) by survivorship. That Alverta B. Gentry forfeited the right to take this benefit by her crime, and the law, at the time the murder was committed, failed to designate who should take it in her stead. (4) That Alverta B. Gentry, being the survivor of the two lives insured, was the only person entitled by the terms of the contract to collect the insurance. That her right and that of her assignee were forfeited by her crime, and, there being no trust created by statute or contract, and there being no alternative payee according to the terms of the contract, there could be

no resulting trust in favor of the estate of Thomas J. Gentry, deceased, and that it necessarily follows that the administrator, J. T. Weightman, has neither statutory nor contractual right to recover. And (5) that the court erred in rendering judgment for intervener and in overruling its motion for a new trial.

Plaintiff in error Ben F. Williams in his brief states that he is inclined to believe, without so confessing, that the law is as contended for by defendant in error, but contends that, if this court finds that Thomas J. Gentry and Alverta B. Gentry were joint tenants as to the policy and liability thereunder, as contended by the insurance company, in that event the benefits of the policy went to Alverta B. Gentry, as the survivor of such joint tenancy, and that he, as the assignee of such survivor, should take such benefits.

Defendant in error, the administrator of Thomas J. Gentry, deceased, admits that, by her act of murdering insured, the beneficiary forfeited her right and the right of her assignee to take and hold the benefits of the policy, and contends that the policy was not joint, but a several policy upon the lives of each of the insured, and that for this reason no rule of joint tenancy and survivorship can be invoked; and that, when the right of the nominal beneficiary, Alverta B. Gentry, to take under the policy was forfeited by her act of murder, a resulting trust arose by operation of law, under which the rights of the beneficiary were vested in the estate of Thomas J. Gentry.

Since the accrual of the rights of these parties, the legislature of this state has enacted a statute (Sess. Laws [Okla.] 1915, p. 225) which provides that in such a case as this the benefits of the policy would go to the decedent's heirs, who are innocent of the murder. However, this statute has no application to these facts, which occurred before its enactment.

We shall take up the various propositions involved here in the order above set forth.

1. Did Alverta B. Gentry, the beneficiary, forfeit or lose the contractual right to take and keep the benefits of the policy by her act of murdering the insured? We are of an affirmative opinion:

It is an established rule in this court that, in the absence of a statute to the contrary, one does not lose his right of inheritance from a decedent by reason of his having murdered the decedent. However, a beneficiary in a policy of life insurance takes the benefits of the policy by reason of the contract of insurance constituted by the policy, and not by inheritance from the

insured decedent; and this principle is conceded by all of the parties in this cause. This being true, the rights of the plaintiff as the assignee of the beneficiary must necessarily be determined from the effect of the legal and contractual relations which have been sustained by the beneficiary toward the policy, and without reference to the laws of inheritance.

The policy itself made no provision for a disposition of the liability, nor of its benefits, in the event of the murder of the insured by the beneficiary. In the absence of such a specific provision by the parties in their contract, the status of the parties must be ascertained by reference to the rules of law and equity applicable to the situation. The inherent essence and vitality of every contract are drawn from the legal and equitable atmosphere surrounding it. The law writes between the lines of every contract its own innumerable inhibitions and requirements. Where the contracting parties fall short in expression the law goes on, and where the parties go too far it calls a halt. When one person becomes the beneficiary of the contract of others, such beneficiary is an implied party to the agreement. Before he may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations. In this case, Alverta B. Gentry was an express party. It is our conception of the law that, when she accepted the position of beneficiary in the life insurance of Thomas J. Gentry, the law infused into the contract; as an essential part of it, an implied obligation upon her part that she would respect the intentions of the contract. The very strongest implied inhibition of the law was that she should not mature the benefits by her own criminal act. Every moment of the life of the contract, obedience to this inhibition was her obligation. When she criminally destroyed the life of her husband, she violated every intent of the contract. She abandoned the contract, and cannot claim its benefits. In the strict sense, she does not forfeit these benefits,—she abandons them. Human law is the offspring of divine law. One of the strongest principles of that law is compensation. Every man compensates his own wrong. He cannot claim the benefits of it.

It is a matter of universal judicial interpretation that one may not insure his house against fire, mature the risk by his own criminal act of arson, and collect his insurance. It would be no less a violation of the infinite spirit of the law that the beneficiary of a life insurance policy might murder the insured, by his own criminal act mature the risk, and then collect from an innocent party the fruits and benefits of his own wrong.

The following authorities support the theory that, by her act of murdering insured, the beneficiary has forfeited or surrendered any right to take the benefits of the policy, viz.: 25 Cyc. 195 (d); *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 599, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Richards, Ins. p. 81*; *Vance, Ins. p. 392*; *Kerr, Ins. p. 685*. In the *Armstrong Case*, supra, the Supreme Court of the United States used this expression: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

In the *Schmidt Case*, 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, the supreme court of Iowa made this language its own, and said: "Indeed, the unbroken voice of authority is to the effect that a beneficiary in an insurance policy who murders the insured forfeits his rights thereunder."

In the *Schmidt Case*, and in the textbooks above cited, long lists of authorities are cited in support of this principle, which it is not necessary to more than refer to here. We find no authority to the contrary, and must hold to the theory that, by her act of murder, Alverta B. Gentry is barred from claiming the benefits of the policy. Under a later assignment, we quote from additional authorities on the subject.

2. It is contended by the insurance company and administrator that the plaintiff, as the assignee of Alverta B. Gentry, has no better claim to the insurance than she had. The policy in its terms is a non-negotiable instrument; and it is unquestionably the law, that the assignee takes no greater interest than the assignor has. 25 Cyc. 765; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Stevens v. Germania L. Ins. Co.* 26 Tex. Civ. App. 156, 62 S. W. 824; *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 599, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Cooley, Briefs on Ins. p. 3811*, and cases there cited.

3. Plaintiff in error the insurance company further contends: That the insurance policy was a chose in action, owned by Thomas J. Gentry and Alverta B. Gentry as joint tenants. That on the death of Thomas J. Gentry the benefits of the policy vested, if at all, in Alverta B. Gentry (a) L.R.A.1917B.

by the terms of the policy itself; (b) by survivorship. That Alverta B. Gentry, by her crime, forfeited the right to take by survivorship. That as the law, at the time of the murder, failed to designate who should take in her stead, the policy lapsed to the insurer.

Under the discussion of this assignment, we shall deal with the questions of the alleged joint tenancy, survivorship, and forfeiture of rights of survivorship, leaving to a discussion of the next assignment the question of what ultimate disposition the law may make of the benefits of the policy.

Upon this proposition we find no exact precedent, and none is cited in the briefs before us. The insurance company contends that the policy was a joint one; that the interest of the insured was joint; that the policy was expressed as being a joint policy; that under the terms of the policy the ownership of cash values which might have accrued during the lifetime of both insured would have been joint, and that this condition creates such a joint tenancy between husband and wife as would put in operation the law of survivorship, so that the wife could only take by survivorship; that she forfeited this right by the murder, causing a complete termination of liability of the company. With this contention we are unable to agree. In the insuring clause of the policy, the Gentrys were referred to as "hereinafter jointly called the insured," and they are thereafter jointly referred to as "the insured." The policy provides for certain benefits which might have accrued during the lifetime of both insured, providing a joint enjoyment of such lifetime benefits; for instance, cash values on the policy to accrue during the lives of both of the insured. And yet, while it insured both lives, and for the purposes of convenience adopted a joint expression by which to designate both of the insured without circumlocution, and provided for joint enjoyment of the benefit intermediate to the maturity of the principal liability, the very essence and gist of the contract was that it was a separate policy upon the life of each of the insured, for the wholly separate benefit of each of the insured.

To the existence of a joint tenancy, it is conceded by all of the parties, and is the law, that four unities must exist in the tenants, viz.: (1) Unity of interest; (2) unity of title; (3) unity of time; and (4) unity of possession. These unities do not coincide in this matter, particularly as to the principal subject matter of the contract, the insurance fund, or the right of expectancy in it. The interest of Alverta B. Gentry in the ultimate and principal benefit was wholly dependent upon the happening

of one contingency, viz., the death of Thomas J. Gentry; and the interest of Thomas J. Gentry was just as dependent upon another and entirely different contingency, viz., the death of Alverta B. Gentry. The interests of both could not be the same, and could not vest at the same time, for the vesting of one interest would terminate the expectancy and interest of the other; and the unities would necessarily be broken.

It seems to us that the four unities might concur in the benefits which might have arisen under the policy during the lives of both parties, aside from the benefit of expectancy, but the expectancies, which constituted the principal subject matter, were wholly contrary, each to the other, and different in the essentials. To technically analyze the contract, as to the estates created by it, it brought into being at least two entities of ownership: (1) An ownership or estate in the benefits which might have accrued during the lives of both parties exclusive of the principal expectancy in the insurance fund, which was a present, joint estate, which would lapse on the death of either of insured; and (2) an estate severally to each of the insured in the principal expectancy in the insurance fund of \$2,000, which was in the nature of a contingent remainder, depending upon a contingent determination of the preceding estate, it remaining uncertain whether the estate limited in the future would ever vest. In the orderly course of events, if the premiums had been kept paid, it was certain that one or the other estates designated as being in the nature of an estate in remainder, was certain to vest, and yet neither owner possessed any certainty that his particular interest would vest.

If the contention of the insurer that the two insured persons owned all rights under the policy as joint tenants be correct and Alverta B. Gentry succeeded to such rights as survivor, by virtue of the provisions of the statute, then such taking would have come by virtue of the statute; and then, following out our rule that, in the absence of a statute, the murderer did not forfeit his inheritance, Alverta B. Gentry would recover the insurance fund. Thus, it will be seen that the contentions of the insurance company, in this particular, are in themselves not consistent.

It is our conclusion that the estates in the expectancy were not a joint tenancy, and that she did not take as survivor.

4. It is contended by plaintiff in error the insurance company that Alverta B. Gentry, being the survivor of the two lives insured, was the only person entitled by the express terms of the contract to collect the insurance; that her right, and those of her

assignee, being forfeited by her crime, no trust was created by statute or contract, and, there being no alternative payee according to the terms of the contract, there could be no resulting trust in favor of the estate of Thomas J. Gentry; that it necessarily follows that the administrator, J. T. Weightman, has not the right to recover; and that, as a consequence of this situation, liability of the insurer is at an end. The administrator of the estate of Thomas J. Gentry, deceased, contends that, as a result of the existing situation, a resulting or constructive trust has arisen by operation of law, under which the beneficial rights of the policy are vested in the said estate of Thomas J. Gentry, deceased. There is no question of fraud in the inception of the contract raised, and the policy is expressly incontestable after one year from its date, which time had expired. The policy contains no provision for an alternative beneficiary, in the event of the disqualification of either beneficiary. It has no provision that it should be forfeited, in the event of the murder of the insured, and no condition of any kind against murder. Neither the beneficiary nor her assignee can recover, because of the wrong perpetrated by her; but does her wrong absolve the insurer from liability? We are of a contrary opinion. To so hold would avoid the policy, and sweep out of existence the obligations which the contract created as between the insurer and Thomas J. Gentry, who has committed no wrong, but who has been the victim of the utmost wrong. Thomas J. Gentry paid the premiums upon this policy, and was as essentially a party to the contract of insurance upon his own life as either the insurer or the beneficiary. He is as innocent of the crime against himself and against the contractual relations of the parties as is the insurer. His murder was an event over which he had no more control than did the insurance company. His homicide was the highest degree of murder, which means that he was wholly without fault in bringing it about. So far as he is concerned, the event which matured the policy, if it be held to have so done, was as free of his fault as if he had been stricken down by the germs of some deadly disease, instead of by the hand of his wife. Can it be gainsaid that he had rights under his contract? Can we hold that those rights have been obliterated without his consent, without his fault? We do not think that the law of contracts, public policy, or equity would demand such a consummation.

If Alverta B. Gentry had inflicted the fatal injury upon her husband, and he had lingered, and she had died of natural causes prior to his death, her act, resulting in the



death of her husband, would have been none the less murder because she preceded him in death; and yet could we say that her act could have deprived her husband of the insurance upon her life, she having died first of natural causes, and at the same time have deprived the husband's estate of the insurance upon his life? Again, let us assume that the policy may have been an expressly separate one upon the life of the husband, for the benefit of the wife; that after the fatal injury at the hands of the wife the husband lingered for some time, too weak to consider making a change in beneficiary; that during the lingering of the assured the annual premium on the policy had become due; and that during a moment of consciousness the assured had called to some one at his bedside to take his money and attend to his insurance premium: Would we say that the criminal act of the beneficiary had already terminated the policy, and that insurer could refuse the premiums of the stricken man? Could the wife abandon the rights of the husband for him? These illustrations serve to show us that the rights of the murdered man are wrapped up in this litigation.

We have found no decisions from other courts involving this question under a policy exactly like this one, one policy upon two lives. However, we have concluded in this opinion that this policy partakes of the nature of two separate policies upon the life of each of the insured. As to individual policies, there is abundant authority from other courts, and it seems almost unanimous, to the effect that if the insured be murdered by his beneficiary, or if for any other reason the beneficiary be disqualified, the policy and the law not specifically providing an alternative beneficiary, a resulting or constructive trust arises by operation of law, by which the benefits of the policy vest in the insured, or in his estate in event of his death. 25 Cyc. 895 (d) and authorities in footnote 6; Richards, *Ins.* 3d ed. p. 81; Vance, *Ins.* p. 393; Kerr, *Ins.* p. 685; Cooley, *Briefs on Ins.* pp. 3753-3760; Schmidt v. Northern Life Assn. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; Continental L. Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 531; Smith v. Metropolitan L. Ins. Co. 222 Pa. 226, 20 L.R.A. (N.S.) 928, 128 Am. St. Rep. 799, 71 Atl. 11; Cleaver v. Mutual Reserve Fund Life Assn. [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180 (Eng.); Standard Life Assur. Co. v. Trudeau, Rap. Jud. Quebec 9 B. R. 499 (Can.); Ryan v. Rothweiler, 50 Ohio St. 595, 35 N. E. 679. All of the text-writers whose works we have been able to survey have writ-

ten this theory into their books, and those above referred to furnish in their notes most extensive citations of cases supporting this doctrine. Richards on Insurance, *supra*, lays down the rule thus:

"It need hardly be stated that the beneficiary will not be permitted to recover if he intentionally brings about the death of the insured. But in such an event, if the insured has committed no breach of contract, a resulting trust in the insurance money is inferred in favor of his estate, since it would be harsh indeed to adjudge the contract void when the contracting party himself has violated none of its terms."

Vance on Insurance, *supra*, states the rule thus:

"But while the felonious act of the beneficiary will defeat his rights under the policy, it seems that it will not serve as a defense to the insurer, who must pay the amount of the insurance to the representatives of the insured, to whom the property in the policy is deemed to revert."

Kerr on Insurance, *supra*, says:

"A beneficiary in an insurance policy, who murders the insured, forfeits all rights under the policy, but the liability of the company is not thereby terminated. The benefits revert to, and become a part of the estate of the insured, and his administrator can recover them, for the benefit of those who would have been entitled to the insurance, had no beneficiary been designated."

In Ryan v. Rothweiler, *supra*, the beneficiary died before the death of the insured, and the supreme court of Ohio said:

"The question is not governed so much by the principle of choses in action and vested rights as by the principles, aims, and well-known objects of life insurance. The cases which hold the insurance money to be a trust fund, which reverts to the estate of the assured in case of the death of all the named beneficiaries during the lifetime of the assured, give different reasons for the result arrived at. . . . The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action, so strongly urged by . . . plaintiff in error. We regard the doctrine of choses in action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. . . . On principle, therefore, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig [the assured] and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all of the parties interested, and that the result is just and equitable."

The case of Schmidt v. Northern Life Assn. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St.

Rep. 323, 83 N. W. 800; by the Supreme Court of Iowa, is one of the best-reasoned cases upon this subject, and contains an extensive citation of precedents. In that case, which was a case in which the wife as beneficiary in the policy had murdered her husband, who was the insured, the court said:

"Defendant obligated itself to pay on the death of the assured, and it ought not to be held that the act of the beneficiary forfeited all claim under the policy. The wife cannot recover, because it is contrary to public policy to allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy. We have seen that when there has been no designation, or an illegal designation, or a designation of a person as a beneficiary who dies before the death of the assured, the association holds the money in trust for the . . . estate of the assured. Following this doctrine to its logical conclusion, it seems to us that, when the beneficiary named is prohibited from taking because of her own wrong, a trust arises that will be enforced in a proper case. This trust is created in favor of the husband's estate, and takes effect by reason of the crime of the wife, which destroys the trust in her favor. In so far as she is concerned, the trust is destroyed by her crime, and in consequence a resulting trust in favor of the husband's estate is allowed. If we treat the designation of the beneficiary as akin to a bequest, the same result follows; for a lapsed legacy descends to the heirs of the testator."

Plaintiff in error has cited several cases, which held to the theory that if the assured is murdered by the beneficiary, the liability is terminated; but the great burden of authority, including the cases which we have cited and quoted from, and the cases listed in the authorities we have cited, holds to the contrary doctrine, which seems to us consistent with every principle of right and equity, as well as of law. We cannot reason ourselves away from the rights of the assured. The insurer assumed the risk of death, without any reservation, and death has occurred. The company received every consideration for its unreserved risk, received them from Thomas J. Gentry, who has done no wrong and has received no return. If such rights exist, the law does not strike down the rights of an innocent person, but finds a way, if one there be, to sustain these rights. .

Plaintiff in error contends that, to hold that the liability does not cease, but vests in the estate of the assured, would be to hold that the law reads this contingency

into the original contract, and that this would be putting a premium upon murder and contrary to public policy. The Supreme Court of Illinois, in the case of Supreme Lodge, K. L. H. v. Menkhause, 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 230, 70 N. E. 567, upon a similar contention, said:

"The only reason in favor of appellant's contention that seems to us of weight is found in the fact that the beneficiary might be incited to commit murder by the fact that, if unable to collect the benefit himself, it would be payable to some other person or persons in whose welfare he was interested. Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential. But, even were it otherwise, if the rule suggested by appellant were established, it is perceived that the society would then profit by the murder, and an incentive be created for the destruction of the life of the insured that the interest of the insurer might be advanced."

It is thus seen that the rule, contended for by plaintiff in error, would be just as susceptible of perversion as the rule it contends against, and, in addition, would be too harsh for application by equity, in that it would harshly eliminate from consideration the rights of an assured person, who is without wrong.

It happens that, in this case, if the insurance money is adjudged to the administrator of the assured, Alverta B. Gentry will inherit a part of it as his heir, if it is not otherwise disposed of by the administrator; for, under the laws in force at the time of the murder, her criminal act would not bar her rights of inheritance. But, this coincidence cannot interfere with the reason of the general rule. We are of the opinion that, when, by her act of murder, Alverta B. Gentry forfeited her rights as beneficiary under this contract of insurance, a resulting trust arose by operation of law in favor of the estate of the assured, and that the administrator has properly recovered judgment for the insurance.

5. The last proposition of plaintiff in error is that the lower court erred in rendering judgment for intervener and in overruling its motion for a new trial; but this proposition involves only the matters hereinabove considered.

The judgment of the lower court is affirmed.

Per Curiam:  
Adopted in whole.

## UNITED STATES SUPREME COURT.

JAMES CLARK DISTILLING COMPANY,  
Appt.,  
v.  
WESTERN MARYLAND RAILWAY COM-  
PANY et al. (No. 75.)

SAME, Appt.,  
v.

AMERICAN EXPRESS COMPANY et al.  
(No. 76.)

(242 U. S. 311, 61 L. ed. —, 37 Sup. Ct.  
Rep. 180.)

**Constitutional law — due process of law  
— forbidding shipments of liquor.**

1. A state may, consistently with the due process of law clause of U. S. Const. 14th Amend., forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise.

*For other cases, see Constitutional Law, II. b, in Dig. 1-52 N. S.*

**Commerce — transporting intoxicating  
liquor — Webb-Kenyon Act.**

2. Any immunity from the prohibitions of a state statute against the shipment without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise give, was taken away by the provisions of the Webb-Kenyon Act forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the state law.

*For other cases, see Commerce, II. in Dig. 1-52 N. S.*

**Same — power of Congress.**

3. Congress did not exceed its power under the commerce clause in enacting the provision of the Webb-Kenyon Act, forbidding the interstate shipment or transportation of intoxicating liquors which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

*For other cases, see Commerce, II. in Dig. 1-52 N. S.*

**Constitutional law — due process — for-  
bidding shipments of liquor.**

4. There is nothing repugnant to the due process of law clause of U. S. Const. 5th Amend., in the provisions of the Webb-Kenyon Act, under which an interstate shipment of intoxicating liquor, though intended

for personal use, may be subjected to the state prohibitory laws.

*For other cases, see Constitutional Law, II. b, in Dig. 1-52 N. S.*

(Mr. Justice Holmes and Mr. Justice Van  
Devanter dissent.)

(January 8, 1917.)

**A** PPEALS by plaintiff from decrees of the District Court of the United States for the District of Maryland, dismissing its bills filed to compel defendants to accept shipments of intoxicating liquor for interstate transportation, forbidden by the laws of the state into which the liquor was to be transported. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph S. Graydon, Lawrence Maxwell, Walter C. Capper, and J. Philip Roman, for appellant:

West Virginia cannot constitutionally make it an offense for a liquor dealer at Cumberland, Maryland, to solicit by mail orders from citizens of West Virginia for the sale of liquors at Cumberland, and their transportation in interstate commerce.

*R. M. Rose Co. v. State*, 133 Ga. 353, 36 L.R.A.(N.S.) 443, 65 S. E. 770.

West Virginia cannot constitutionally make the place of delivery in West Virginia, of an interstate shipment for personal use, the place of sale, and prohibit the interstate carrier from delivering such shipments.

*Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

A citizen of West Virginia has the constitutional right to order and have delivered to him, in interstate commerce, liquors for his personal use.

*State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *State v. Williams*, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; *Martin v. Com.* 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870; *Calhoun v. Com.* 154 Ky. 70, 156 S. W. 1077; *Adams Exp. Co. v. Com.* 154 Ky. 471, 48 L.R.A.(N.S.) 342, 157 S. W. 908; *Com. v. Smith*, 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; *Vance v. W. A. Vandercook Co.* 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

The Webb-Kenyon Law does not authorize the application of a state statute to an interstate shipment for lawful personal use.

*Van Winkle v. State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104;

**Note.** — For constitutionality, construction, and effect of Webb-Kenyon Act, see annotation following this case, post, 1229. L.R.A.1917B.

Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 343, 157 S. W. 908; Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603; Palmer v. Southern Exp. Co. 129 Tenn. 116, 165 S. W. 236; Theo. Hamm Brewing Co. v. Chicago, R. I. & P. R. Co. 215 Fed. 672; Ex parte Peede, — Tex. Crim. Rep. —, 170 S. W. 749; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 115; Southern Exp. Co. v. High Point, 167 N. C. 103, 83 S. E. 254; Bristol Distributing Co. v. Southern Exp. Co. 117 Va. 7, 83 S. E. 1084.

The Webb-Kenyon Law, as construed and applied by the lower court, would be unconstitutional.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Re Rahrer, 140 U. S. 555, 35 L. ed. 574, 11 Sup. Ct. Rep. 865.

There is nothing in the amendment to the law of West Virginia, adopted at the extraordinary session of 1915, and incorporated into the statute as § 34, nor in any other section of the statute, which makes it an offense for the citizen to have in his possession for personal use, and to use, intoxicating liquors.

State v. Sixo, — W. Va. —, 87 S. E. 267.

Mr. Wayne B. Wheeler, for appellee state of West Virginia:

The Webb-Kenyon Law is authorized by the Federal Constitution.

Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A. —, —, 87 S. E. 136; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 115; Southern Exp. Co. v. Whittle, — Ala. —, L.R.A.1916C, 278, 69 So. 652; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; State v. Seaboard Air Line R. Co. 169 N. C. 303, 84 S. E. 283; State v. Doe, 92 Kan. 212, 139 Pac. 1169; State v. United States Exp. Co. 164 Iowa, 112, 145 N. W. 451; American Exp. Co. v. Beer, 107 Miss. 528, L.R.A. —, —, 65 So. 575, Ann. Cas. 1916D, 127; United States ex rel. F. Zimmerman & Co. v. Oregon-Washington R. & Nav. Co. 210 Fed. 378; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; Taylor v. Com. 117 Va. 909, 85 S. E. 499; Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595; State v. Missouri P. R. Co. 96 Kan. 609, 152 Pac. 777; Brennen v. Southern Exp. Co. — S. C. —, 90 S. E. 402.

The law in question is not a delegation of legislative power.

State v. United States Exp. Co. 164 Iowa, 112, 145 N. W. 451; People ex rel. Hill v. Hesterberg, 184 N. Y. 126, 3 L.R.A.(N.S.) L.R.A.1917B.

163, 128 Am. St. Rep. 528, 76 N. E. 1032, 6 Ann. Cas. 353.

Congress has power to eliminate deleterious commodities from interstate commerce.

Lottery Case (Champion v. Ames) 188 U. S. 356, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Buttfeld v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; State v. Missouri P. R. Co. 96 Kan. 609, 152 Pac. 777.

Alcohol or intoxicating liquor used as a beverage is a deleterious commodity, and may be excluded from interstate commerce.

Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Santo v. State, 2 Iowa, 190, 63 Am. Dec. 487; Goddard v. Jacksonville, 15 Ill. 589, 60 Am. Dec. 773; Our House v. State, 4 G. Greene, 172; Beebe v. State, 6 Ind. 542, 63 Am. Dec. 391; State ex rel. Vance v. Crawford, 28 Kan. 728, 42 Am. Rep. 186; Thurlow v. Massachusetts, 5 How. 504, 12 L. ed. 256.

The Federal Constitution gives no guaranty to a citizen to receive and possess intoxicating liquor for his own use.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Southern Exp. Co. v. High Point, 167 N. C. 103, 83 S. E. 254; Southern Exp. Co. v. Whittle, — Ala. —, L.R.A.1916C, 278, 69 So. 652; Re Crane, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006.

The Webb-Kenyon Law is valid as a police regulation.

Freund, Pol. Power, §§ 65, 66; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Phalen v. Virginia, 8 How. 163, 168, 12 L. ed. 1030, 1032; Hoke v. United States, 227 U. S. 309, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

Legislative power may prohibit acts innocent in themselves if the lawmaking body thinks the admitted evil cannot be prevented except by the enactment of such a law.

State v. Frederickson, 101 Me. 37, 6 L.R.A.(N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; Elder v. State, 162 Ala. 41, 50 So. 370; State v. George, 136 La. 906, 67 So. 953; Feibelman v. State, 130 Ala. 122, 30 So. 384; Dinkins v. State,

149 Ala. 49, 43 So. 114; *Lambie v. State*, 151 Ala. 86, 44 So. 51; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38; *Pennell v. State*, 141 Wis. 35, 123 N. W. 115; *State v. Walder*, 83 Ohio St. 84, 93 N. E. 531; *Com. v. Bloss*, 116 Mass. 56; *Com. v. Anthes*, 12 Gray, 29; *Com. v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *State v. Piche*, 98 Me. 348, 56 Atl. 1052; *Com. v. Snow*, 133 Mass. 575; *State v. Certain Intoxicating Liquors*, 76 Iowa, 243, 2 L.R.A. 408, 41 N. W. 6; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 202, 57 L. ed. 184, 187, 33 Sup. Ct. Rep. 44.

Unless there is such conflict between the law and the Constitution as cannot be reconciled, it should be sustained.

*United States v. Harris*, 106 U. S. 635, 27 L. ed. 292, 1 Sup. Ct. Rep. 601; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 10 Sup. Ct. Rep. 427.

The liquor business is of a character so menacing to the public welfare that no person can claim an inalienable right to engage in it. No one can complain if, having chosen this vocation, his business is regulated or prohibited by law, whatever the property loss to him may be, or whatever means are devised by the state to accomplish such regulation or prohibition, so long as such means are reasonable and necessary to effect the purpose designed.

*License Cases*, 5 How. 504, 12 L. ed. 256; *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 902; *State, Paul, Prosecutor, v. Circuit Judge*, 50 N. J. L. 595, 1 L.R.A. 86, 15 Atl. 272; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

The character of the liquor traffic is such that it cannot invoke those constitutional guaranties which protect other personal and property rights.

*Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; *Goddard v. Jacksonville*, 15 Ill. 589, 60 Am. Dec. 773; *Our House v. State*, 4 G. Greene, 172; *Beebe v. State*, 6 Ind. 542, 63 Am. Dec. 391; *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 L.R.A.1917B.

*Am. Rep.* 182; *Thurlow v. Massachusetts*, 5 How. 504, 12 L. ed. 256; *State v. Durein*, 70 Kan. 13, 15 L.R.A.(N.S.) 908, 78 Pac. 162, 80 Pac. 987; *Santo v. State*, 2 Iowa, 190, 63 Am. Dec. 487.

The state is now free to exercise its police power to the extent of prohibiting either the possession or receipt of intoxicating liquors. These are the incidents leading to its use which will produce the evil sought to be remedied.

*Re Crane*, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006; *Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652.

Transactions accessory or incidental to bringing liquors into the state, and to disposing of them, may be prohibited.

*Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; *Glenn v. Southern Exp. Co.* 170 N. C. 286, L.R.A. —, —, 87 S. E. 136.

The legislative policy of West Virginia is sustained by its supreme court.

*State v. Davis*, — W. Va. —, L.R.A. —, —, 87 S. E. 262; *State v. Sixo*, — W. Va. —, 87 S. E. 267.

Mr. Fred O. Blue, also for appellee state of West Virginia:

The court of last resort of appellee state, having considered the statute interpreted by it as applicable to interstate shipments and to intoxicating liquors when intended for personal use, although an interstate transaction, the meaning of the statute is no longer open to question.

*State v. Davis*, — W. Va. —, L.R.A. —, —, 87 S. E. 262. See also *West Virginia v. Adams Exp. Co.* L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; *State v. Cardwell*, 166 N. C. 309, 81 S. E. 630; *State v. Patterson*, 134 N. C. 612, 47 S. E. 808; *Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652; *Glenn v. Southern Exp. Co.* 170 N. C. 286, L.R.A. —, —, 87 S. E. 136.

The statute, so interpreted, violates no rights of the citizen under the state Constitution.

*West Virginia v. Adams Exp. Co.* L.R.A. 1916C, 201, 135 C. C. A. 464, 219 Fed. 794; *Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652; *Re Crane*, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006; *State v. Phillips*, 109 Miss. 22, L.R.A. 1916D, 530, 67 So. 651; *State v. Davis*, — W. Va. —, L.R.A. —, —, 87 S. E. 262; *State v. Sixo*, — W. Va. —, 87 S. E. 269; *Glenn v. Southern Exp. Co.* 170 N. C. 286, L.R.A. —, —, 87 S. E. 136.

The statute, so interpreted, violates no rights of the citizen under the Federal Constitution nor any of the amendments thereof.

*West Virginia v. Adams Exp. Co.* L.R.A.

1916C, 291, 135 C. C. A. 464, 219 Fed. 794; Southern Exp. Co. v. Whittle, — Ala. —, L.R.A.1916C, 278, 69 So. 652; Re Crane, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006; State v. Phillips, 109 Miss. 22, L.R.A. 1915D, 530, 67 So. 651; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; State v. Davis, — W. Va. —, L.R.A. —, —, 87 S. E. 262; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A. —, —, 87 S. E. 136.

The Webb-Kenyon Law is constitutional.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; State v. Cardwell, 166 N. C. 309, 81 S. E. 630; State v. United States Exp. Co. 164 Iowa, 112, 145 N. W. 451; Southern Exp. Co. v. Whittle, — Ala. —, L.R.A.1916C, 278, 69 So. 652; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A. —, —, 87 S. E. 136; State v. Davis, — W. Va. —, L.R.A. —, —, 87 S. E. 262.

Messrs. William L. Martin, Attorney General of Alabama, Wiley E. Jones, Attorney General of Arizona, Clifford Walker, Attorney General of Georgia, J. H. Peterson, Attorney General of Idaho, George Cosson, Attorney of Iowa, S. M. Brewster, Attorney General of Kansas, Ross Collins, Attorney General of Mississippi, T. W. Bickett, Attorney General of North Carolina, Henry J. Linde, Attorney General of North Dakota, S. P. Freehling, Attorney General of Oklahoma, George M. Brown, Attorney General of Oregon, Thomas H. Peebles, Attorney General of South Carolina, Frank M. Thompson, Attorney General of Tennessee, John Garland Pollard, Attorney General of Virginia, and W. V. Tanner, Attorney General of Washington, amici curiæ:

The Webb-Kenyon Act is valid.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 546, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 115; Southern Exp. Co. v. Whittle, — Ala. —, L.R.A.1916C, 278, 69 So. 652; State v. Seaboard Air Line R. Co. 169 N. C. 303, 84 S. E. 283; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A. —, —, 87 S. E. 136; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; State v. Doe, 92 Kan. 212, 139 Pac. 1169; State v. United States Exp. Co. 164 Iowa, 112, 145 N. W. 451; American Exp. Co. v. Beer, 107 Miss. 528, L.R.A. —, —, 65 So. 575, Ann. Cas. L.R.A.1917B.

1916D, 127; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; Taylor v. Com. 117 Va. 909, 85 S. E. 499; Adams Exp. Co. v. Com. 160 Ky. 66, 169 S. W. 603; State v. Grier, 4 Boyce (Del.) 322, 88 Atl. 579; Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; United States ex rel. F. Zimmerman & Co. v. Oregon-Washington R. & Nav. Co. 210 Fed. 378; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794.

The Webb-Kenyon Act is in the form of a prohibition against shipments of liquor in interstate commerce in defined cases; Congress may regulate commerce by adopting prohibitions excluding certain articles from the right to be transported from one state into another.

Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; State v. United States Exp. Co. 164 Iowa, 112, 145 N. W. 451; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 24 Sup. Ct. Rep. 387; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 523, 24 Sup. Ct. Rep. 349; United States v. Popper, 98 Fed. 423; State v. Cardwell, 166 N. C. 309, 81 S. E. 628; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794.

The Webb-Kenyon Act extended the prohibition against the introduction of liquors into a state by means of interstate commerce.

Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167.

The states, under the police power, have the right to regulate, restrain, or forbid the manufacture or sale of intoxicating liquors.

Re Rahrer, 140 U. S. 545, 35 L. ed. 556, 11 Sup. Ct. Rep. 865; Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Boston Beer Co. v. Massachusetts, 97 U. S.

25, 24 L. ed. 989; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

A state may constitutionally prohibit or regulate the receipt and possession of intoxicating liquors by a citizen even when for his own use; and, since the Webb-Kenyon Law, this principle will apply to such liquors moving into the state from another state.

*Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652; *Re Crane*, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006; *Glenn v. Southern Exp. Co.* 170 N. C. 286, L.R.A. —, —, 87 S. E. 136; *United States ex rel. F. Zimmerman & Co. v. Oregon-Washington R. & Nav. Co.* 210 Fed. 378; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 630; *Henderson v. Heyward*, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590.

The state may prohibit the solicitation of orders for intoxicating liquors, and also the advertising of such liquors, although the liquors, if purchased, are in another state, and would have to be brought into the state making the prohibition, in interstate commerce.

*Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; *State ex rel. Black v. Delaye*, 193 Ala. 500, L.R.A.1915E, 640, 68 So. 995; *State v. Davis*, — W. Va. —, L.R.A. —, —, 87 S. E. 262.

The real purpose of prohibition legislation is to prevent personal use of liquor.

*Lincoln v. Smith*, 27 Vt. 328; *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; *Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652; *State v. Phillips*, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651; *West Virginia v. Adams Exp. Co.* L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; *State v. J. P. Bass* Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 894; *Golden & Co. v. Justice's Ct.* 23 Cal. App. 802, 140 Pac. 49; *Crowley v. Christensen*, 137 U. S. 87, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Many decisions sustain recent state laws which are contrary to appellant's contention as to the right of a citizen to receive and possess liquors for personal use.

*Southern Exp. Co. v. Whittle*, — Ala. —, L.R.A.1916C, 278, 69 So. 652; *Williams v. State*, 179 Ala. 51, 60 So. 903; *Glenn v. Southern Exp. Co.* 170 N. C. 286, L.R.A. —, —, 87 S. E. 136; *Van Winkle v. State*, L.R.A.1917B.

4 *Boyce* (Del.) 578, 91 Atl. 381, Ann. Cas. 1916D, 104; *Atkinson v. Southern Exp. Co.* 94 S. C. 44, 48 L.R.A.(N.S.) 340, 78 S. E. 516; *Re Crane*, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006; *State v. Sixo*, — W. Va. —, 87 S. E. 267; *State v. Davis*, — W. Va. —, L.R.A. —, —, 87 S. E. 262; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Mr. Chief Justice White delivered the opinion of the court:

To refer to the principal state law relating to these suits, to the pleadings and the decision of the court below, will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition law to go into effect on July 1st of the following year. Code 1913, chap. 32A. Putting out of view the right of druggists, under stringent regulations provided by the statute, to sell for medicinal purposes, and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale," intoxicating liquors, and the intoxicants embraced were comprehensively defined. The statute contained many restrictions concerning hotels, restaurants, clubs, and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the state, (b) from the clause providing that every delivery made in the state by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the state at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor, and against the publication in the state of all circulars, advertisements, price lists, etc., which might tend to stimulate purchases of liquor.

Under this statute, and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8739), the state of West Virginia in one of its courts sued the Western Maryland Railroad Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In substance it was charged that very many shipments had been taken by the carriers contrary to the law, both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the state, subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use, and deliver it in West Virginia, on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry, and that, besides, the West Virginia prohibition law, when rightly construed, did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions and averred that to receive and carry the liquor would violate their provisions, and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use, and that, as there was no state prohibition, the Webb-Kenyon Law had no application, and that, as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia, by making herself a party to the suits, had submitted herself to the jurisdiction of the court. All questions concerning the power of the state of West Virginia to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. 333. Before the decrees entered became final, the circuit court of

appeals for the fourth circuit, in a case pending before it (*West Virginia v. Adams Exp. Co.* L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794), decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that, by operation of the Webb-Kenyon Act, there was no longer a right to ship liquor into the state in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision, the trial court recalled its opinion, heard a reargument, and although not changing its view, accepted and gave effect to the conclusions reached by the circuit court of appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. The correct meaning of the West Virginia law as to the subjects in dispute.

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and, if it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the state. But the possibility of dispute over these subjects no longer exists because, after the decision below, and since the cases were first argued (for they have been here argued twice), the state of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the state. The pertinent provisions of the amendments are placed in the margin.<sup>1</sup> As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the parties, since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. The power of the state to enact the prohibition law consistently with the due

<sup>1</sup> "Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and



process clause of the 14th Amendment and the exclusive power of Congress to regulate commerce among the several states.

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the 14th Amendment.

But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law, and cause its provisions to be applicable to shipments of intoxicants in interstate com-

wine as provided by §§ 4 and 24), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boathouse, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$100, nor more than \$500, and be imprisoned in the county jail not less than two nor more than six months; provided, however, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, provided, further, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure

merce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, . . . into any other state, territory, or district of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States . . . is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the state, whether from inside or out, and all receipt and possession of liquor so transported, without regard to the use to which

grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in §§ 4 and 24; and, provided, further, however that in case of search and seizure, the finding of any liquors shall be prima facie evidence that the same are being kept and stored for unlawful purposes." [Acts 1915, chap. 7, p. 34.]

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$200 and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in §§ 4 and 24." [Acts 1915, 2d Ex. Sess. chap. 7, p. 660.]

the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state," there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law, since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipt, and possession of liquor for a forbidden use, and hence, as individual use was not forbidden by the state law, the shipment, receipt, and possession for such use was not embraced by the Webb-Kenyon Act, and the state law, so far as it was outside of that Act, was repugnant to the commerce clause. This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidence by the debates on its passage and by a decision of this court, as well as decisions of state courts (which are in the margin<sup>3</sup>), which, it is insisted, have so construed that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the states to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have the effect of compelling the states to prohibit personal use, since, if all the prohibitions of state laws against manufacture, sale, receipt, and possession of intoxicants remained subject to the danger of indirect violation by permitting shipment, receipt, and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the states by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon

Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package, in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738), forbidding the sale of liquor in a state in the original package even although brought in through interstate commerce, when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin<sup>3</sup>) which upheld that law, and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced; that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decision of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the in-

<sup>3</sup> *Van Winkle v. State*, 4 *Boyce* (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; *Adams Exp. Co. v. Com.* 154 Ky. 462, 48 L.R.A. (N.S.) 342, 157 S. W. 908; *Adams Exp. Co. v. Com.* 160 Ky. 66, 169 S. W. 603; *Palmer v. Southern Exp. Co.* 129 Tenn. 116, 165 S. W. 236; *Ex parte Peede*, — Tex. Crim. Rep. —, 170 S. W. 749. L.R.A. 1917B.

<sup>3</sup> *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. Rep. 552; *Rosenberger v. Pacific Exp. Co.* 241 U. S. 48, 60 L. ed. 880, 36 Sup. Ct. Rep. 510.

dividual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears, since, if that be not true, the coming into being of the act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Exp. Co. v. Kentucky*, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1916D, 1187) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle v. State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants "only when liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. Did Congress have power to enact the Webb-Kenyon Law?

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Ops. Atty. Gen. 88; Veto Message of the President, 49 Cong. Rec. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, and therefore had prevented all movement between the several states, such action would have been lawful, because within the power to regulate which the Constitution conferred. *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things, was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since, if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact, the contention previously made, that the

prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act, is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself. But, aside from this, it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity, and which, although subject to the regulation of Congress, are, in the absence of such regulation, subject to the control of the several states (*Coolley v. Port Wardens*, 12 How. 299, 13 L. ed. 996), and the other embracing subjects which do require uniformity, and which, in the absence of regulation by Congress, remain free from all state control (*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so, permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the application of state power to any degree whatever, because, in the absence of the exertion by Congress of power to regulate, the subject matter would have been free from state control; and because, besides, the recognition of state power under such circumstances would be to bring about a want

of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy v. Hardin*, supra. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy v. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions, and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation, and would endure only until Congress had otherwise provided. Thus in that case, in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the state over the subject, it was said (p. 108): "Yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action." Again, referring to the uniform operation of interstate commerce regulations, it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress." Again, after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (p. 123): "But, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the

state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if, in its judgment, the end to be secured justifies and requires such action." And finally, after pointing out that the states had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the state, it was said that this limitation obtained "in the absence of congressional permission" to the state (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy v. Hardin*, we could not accept the contention which is now based upon that classification without in effect overruling that case, or, what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the ruling in *Leisy v. Hardin* by Congress in legislating when it adopted the Wilson Act, and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,—a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

L.R.A.1917B.

These considerations dispose of the contention, but we do not stop with stating them, but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: the mistaken assumption that the accidental considerations which cause a subject, on the one hand, to come under state control in the absence of congressional regulation, and other subjects, on the contrary, to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both state and nation, in their respective spheres of authority, possessed the supremest authority before the action of Congress which is complained of; and hence the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaporated.

It is only necessary to point out that the

considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the 5th Amendment, since what we have said concerning that clause in the 14th Amendment as applied to state power is decisive.

Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances

which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is that basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes and Mr. Justice Van Devanter dissent.

### **Annotation—Constitutionality, construction, and effect of Webb-Kenyon Act.**

The Webb-Kenyon Act is discussed in the note in L.R.A.1916C, 299 et seq. Since the date of that note it has been held, in accord with the rule of the earlier cases, that the act removes the protection of the interstate commerce clause only from shipments intended to be received, possessed, sold, or in any manner used, in violation of the local law. Accordingly, it being alleged in an action of replevin brought to recover the possession of intoxicating liquor which had been seized by a state officer, while still in the possession of the carrier, that the consignees did not intend to receive, possess, sell, or in any manner use the liquor in violation of a state law, but each would have used the same in compliance therewith, and there being no sufficient evidence to the contrary, it was held that the plaintiff was entitled to recover the liquor. *Chicago, B. & Q. R. Co. v. Giles* (1916) 235 Fed. 804. The only fact relied upon for the purpose of showing that the consignee intended to receive the liquor in violation of the state act was that there was a failure to place on each package an inscription that the package contained intoxicating liquor. The court further holds that the state had no power to enact a statute requiring the marking of interstate shipments, first, because Congress had enacted a law in regard thereto, and second independently of this, the sub-

ject was not a proper one for state action.

It is stated in *Brennen v. Southern Exp. Co.* (1916) — S. C. —, 90 S. E. 402, that while the Webb-Kenyon Act does divest of their interstate character intoxicating liquors shipped into a state in violation of its laws, and withdraw from them the protection of interstate commerce, it evidently contemplates the violation of valid state laws only. The court was accordingly of the opinion that in the case of a prosecution for importing liquor into the state in violation of a state law that was invalid, because it made injurious discriminations against the products of other states, the Webb-Kenyon Act had no application.

The court in *Brennen v. Southern Exp. Co.* (S. C.) supra, holds that a statute which, by implication, at least, prohibited the receipt for personal use of more than a certain quantity within a stated time, was invalid for unlawful discrimination, while the state was engaged in the dispensary business, selling intoxicating liquors in unlimited quantities to any person who desired to purchase, but that, after the repeal of the dispensary statute and the prohibition of the sale of intoxicating liquors, the statute thus preventing the importation became valid. (See, in this connection, the note to *Atkinson v. Southern Exp. Co.* 48 L.R.A.(N.S.) 349, as to the effect of the

removal of constitutional objections to a statute.)

It was held in the *Brennen Case*, in reviewing a prosecution under a state statute which prohibited the importation of liquor, but provided that a person might receive for personal use a quantity not exceeding 1 gallon within any calendar month, that the Webb-Kenyon Law is applicable to shipments intended only for personal use, provided such shipments and the receipt, possession, or use of the liquor be in violation of state law. In other words, the Webb-Kenyon Act removed any objection to the prohibition of importation for personal use, arising from the interstate commerce clause of the Federal Constitution. The court then considers the question of whether the state has the power to regulate and control the personal use of intoxicating liquor by its citizens, and concludes that it has such power. This latter question, of course, is not considered exhaustively in these notes.

In *State v. Selsor* (1916) — La. —, 73 So. 270, the Webb-Kenyon Act was held to authorize the application of a statute making it unlawful for any person to use the name of another in ordering or receiving shipments of intoxicating liquor in prohibited territory to shipments from without the state.

It not being shown that the defendant did not intend to use the liquor in violation of the laws of the state, the court in *State v. Selsor* (La.) *supra*, seems to have assumed that it was to be so used, in order to bring it within the operation

of the Webb-Kenyon Act. Such an assumption seems unnecessary in this case, in view of the fact that the "receipt" of the liquor was made an offense by the statute involved.

It was urged in *State v. Selsor* (La.) *supra*, that a citizen cannot constitutionally be prohibited from keeping intoxicating liquor for his own use, and that if the Webb-Kenyon Act is to be given a construction that will justify such a law, it is unconstitutional. It not being proved that the defendant ordered or received the liquor for his own use, the court states that the admission that he stands charged with six other similar offenses suggests the contrary. After stating this, the court overrules the argument that the Webb-Kenyon Act is unconstitutional, stating that the act is presumed to be constitutional, and no case is cited by defendant to sustain his contention to the contrary.

The holding in *Glenn v. Southern Exp. Co.* (1915) 170 N. C. 286, L.R.A. —, —, 87 S. E. 136, with reference to the validity of the Webb-Kenyon Act, is followed in *State v. Little* (1916) 171 N. C. 805, 88 S. E. 723.

The Webb-Kenyon Act is held not invalid as an attempt to confer upon the state the power to regulate interstate commerce, in *Brennen v. Southern Exp. Co.* (1916) — S. C. —, 90 S. E. 402.

The constitutionality of the act is now finally settled by the decision of the United States Supreme Court in *JAMES CLARK DISTILLING CO. v. WESTERN MARYLAND R. CO.* ante, 1218.

W. A. E.

## ARIZONA SUPREME COURT.

W. J. STURGEON, Appt.,  
v.

STATE OF ARIZONA.

(17 Ariz. 513, 154 Pac. 1050.)

### Intoxicating liquors — prohibiting introduction into state for personal use — validity.

1. A constitutional prohibition of the introduction of intoxicating liquor into the state, under penalty, cannot prevent its introduction for mere possession or personal use, where such possession or use is not otherwise made unlawful, under the Webb-Kenyon Act, prohibiting the trans-

porting from one state to another of intoxicating liquor intended to be received, possessed, sold, or in any manner used in violation of the state law.

For other cases, see *Commerce*, IV. a, in *Dig. 1-52 N. S.*

### Indictment — duplicity — words not in Constitution.

2. An information charging bringing and introducing intoxicating liquor into the state in violation of the Constitution is not bad for duplicity, although the Constitution merely prohibits the introduction of such liquor, since the words are synonymous.

For other cases, see *Indictment*, etc., II. d, in *Dig. 1-52 N. S.*

### Same — failure to negative exceptions.

3. An information for introducing intoxicating liquor into the state is not bad for failure to negative a lawful use, if no exception is made by the statute under which the prosecution is instituted.

For other cases, see *Indictment*, etc., II. c, in *Dig. 1-52 N. S.*

Note. — For constitutionality, construction, and effect of Webb-Kenyon Act, see *James Clark Distilling Co. v. Western Maryland R. Co.* ante, 1218, and annotation appended thereto.  
L.R.A.1917B.

**Intoxicating liquor — forbidding introduction into state — claim of proper use — liability.**

4. A mere claim that one bringing intoxicating liquor into the state in violation of a constitutional prohibition intended it for personal use will not defeat a prosecution, but the question of his liability vel non depends upon the use to which the liquor is actually intended to be put.

*For other cases, see Intoxicating Liquors, III. a, in Dig. 1-52 N. S.*

(February 12, 1916.)

**A** PPEAL by defendant from a judgment of the Superior Court for Yuma County, convicting him of bringing and introducing into the state intoxicating liquors. Reversed.

The facts are stated in the opinion.

Messrs. Wupperman & Wupperman for appellant.

Messrs. Wiley E. Jones, Attorney General, Leslie C. Hardy, George W. Harben, Assistant Attorneys General, John H. Campbell and S. L. Kingan, for appellee:

The amendment intended to prohibit the use of intoxicating liquors.

Southern Exp. Co. v. Whittle, 104 Ala. 406, L.R.A.1916C, 278, 69 So. 652; Re Crane, 27 Idaho, 671, L.R.A.—, —, 151 Pac. 1006; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A.—, —, 87 S. E. 136.

Prohibiting the use of intoxicating liquors is a valid police regulation.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Foster v. Kansas, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 897; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Crowley v. Christensen, 137 U. S. 91, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; State v. Phillips, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651; Lincoln v. Smith, 27 Vt. 328; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Booth v. Illinois, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425; Otis v. Parker, 187 U. S. 607, 47 L. ed. 326, 23 Sup. Ct. Rep. 168; Murphy v. L.R.A.1917B.

California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The bare introduction or attempted introduction of intoxicating liquors into the state of Arizona constitutes an offense, and, within the meaning of the Webb-Kenyon Act, is unlawful.

Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794.

The real purpose of prohibiting legislation is to prevent personal use of liquor.

Lincoln v. Smith, 27 Vt. 328; Marx v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; State v. Phillips, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651; West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; Golden & Co. v. Justice's Ct. 23 Cal. App. 778, 140 Pac. 49.

A citizen has no right to receive and possess liquors for personal use.

Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A.—, —, 87 S. E. 136; Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; Atkinson v. Southern Exp. Co. 94 S. C. 444, 48 L.R.A.(N.S.) 349, 78 S. E. 516; State v. Davis, — W. Va. —, 87 S. E. 262.

The taking in one's personal possession of liquors, onto an Indian Reservation, or into Indian country, is an "introduction," regardless of its use.

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; McSpadden v. United States, 140 C. C. A. 413, 224 Fed. 935.

**Per Curiam:**

The appellant was tried and convicted under an information that charged him with bringing and introducing into the state of Arizona from outside the limits of said state intoxicating liquor, to wit, one quart of wine. He demurred to the information on the ground that it did not negative that it was introduced for his personal use. The demurrer was overruled. On the trial he offered to prove that he brought the intoxicating liquor into the state for his personal use. This offer of proof was denied by the court. From the judgment of conviction this appeal is prosecuted, the appellant assigning as errors the order overruling his demurrer and the refusal of his offer of evi-



dence of intended personal use. The question, then, as to whether one may introduce into the state of Arizona intoxicating liquors for his personal use, is squarely presented for decision.

The prohibition amendment to the Constitution (article 23, § 1) reads as follows: "Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured in or introduced into the state of Arizona under any pretense. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, or who manufactures, or introduces into, or attempts to introduce into the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than \$25 and costs nor more than \$300 and costs for each offense; provided, that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol."

Three crimes are defined and denounced by this section: (1) The traffic in intoxicating liquors; (2) the manufacture of intoxicating liquors; and (3) the introducing or attempt to introduce into the state of intoxicating liquors.

The offense with which the appellant is charged falls within the third class. It is his contention that the provision of the constitutional amendment making it a crime to introduce into the state intoxicating liquors is unconstitutional as an attempt to regulate interstate commerce. There can be no mistaking the meaning of the language used in the amendment with regard to the introduction of intoxicating liquors: it plainly and clearly attempts to forbid and punish every person "who . . . introduces into, or attempts to introduce into the state of Arizona" intoxicating liquors.

In *Brown v. State*, 17 Ariz. 314, 152 Pac. 578, we had occasion to refer to the source from which our prohibition amendment to the Constitution was taken. It was found to be a rescript, with such modifications as to make it applicable to the state, from the act of Congress regulating trade and intercourse with the Indian tribes.

In *United States v. Holliday*, 3 Wall. 407-410, 18 L. ed. 182-185, Justice Miller, in searching for the meaning of the congressional act which we adopt said:

"The act in question, although it may partake of some of the qualities of those acts passed by state legislatures, which have been referred to the police powers of the states, is, we think, still more clearly entitled to

be called a regulation of commerce. 'Commerce,' says Chief Justice Marshall, in the opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, to which we so often turn with profit when this clause of the Constitution is under consideration, 'commerce undoubtedly is traffic but it is something more; it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

"If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indians tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provisions."

That feature of our constitutional amendment, therefore, that undertakes to make it a crime to introduce or attempt to introduce intoxicating liquors into the state, under the Federal decisions, pertains to commerce, the regulation of which with foreign countries and between the states and with the Indian tribes is exclusively lodged in the Congress.

It has been many times decided by the courts that intoxicating liquors are subjects of interstate commerce, to be regulated by congressional legislation, and exempt from state interference. 7 Cyc. 437, and authorities under note 19; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

Until 1890, when the Wilson Act was passed (Act Cong. Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, Comp. Stat. 1913, § 8738), the interstate character of intoxicating liquors had been considered and treated as that of other commodities of interstate traffic. Thus, it has been held that a state prohibition law did not reach or affect intoxicating liquors as long as they remained in the original package. *Leisy v. Hardin*; 135 U. S. 100, 34 L. ed. 128, 3

Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. The Wilson Act worked a radical change in the law, and therefore those decisions rendered by the United States courts prior to its enactment are no longer applicable and need not be considered in determining the power of the state to suppress the liquor traffic. Under the Wilson Act, intoxicating liquors when imported into one state from another, immediately upon delivery to the consignee, whether in the original package or not, become subject to the law of the state. As was said in *Delameter v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733: "In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson Act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package."

The Wilson Act did not devert, or attempt to devert, intoxicating liquors of their interstate commerce character further than to make them subject to the local laws, at an earlier date. Prohibition in one state was no impediment, under the Wilson Act, to the shipping or transporting of intoxicating liquors therein, and the interstate traffic in intoxicating liquors, it is well known, continued to thrive and prosper with little abatement in "dry" territory, notwithstanding the Wilson Act.

If it be held that the introduction clause of the amendment is effective, it can only be on account of decided changes wrought in the Federal laws in regard to interstate shipments of intoxicating liquors. Before the passage of the Webb-Kenyon Act, under all the decisions it would be ineffectual, and the question is: How far and to what extent does the Webb-Kenyon Act alter the law as it formerly existed? That act, including its title, passed on March 1, 1913, omitting extraneous words, reads as follows:

An Act Devesting Intoxicating Liquors of Their Interstate Character in Certain Cases.  
 . . . The shipment or transportation  
 . . . of . . . intoxicating liquor,  
 . . . from one state . . . into any  
 other state, . . . which . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, . . . is hereby prohibited. 37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, § 8730.

As to the purpose and meaning of the L.R.A.1917B.

Webb-Kenyon Act, we fall back upon the opinion of the United States Supreme Court, as expressed by Justice Day, in *Adams Exp. Co. v. Kentucky*, 238 U. S. 190-198, 59 L. ed. 1267-1270, 35 Sup. Ct. Rep. 826, L.R.A. 1916C, 273, Ann. Cas. 1915D, 1167:

"That the act did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the states is shown in its title, which expresses the purpose to devert intoxicating liquors of their interstate character in *certain cases*. What such cases should be was left to the *text of the act* to develop. . . .

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. *Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the state wherein they are received.* Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject matter of such interstate shipment is left untouched and remains within the *sole jurisdiction of Congress* under the Federal Constitution." (*Italics ours.*)

In *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94, we said, concerning the prohibition amendment: "Evidently the main purpose and controlling principle pervading the amendment is to prohibit the manufacture in Arizona, and to prohibit the disposal thereof to any person in Arizona in any way, of ardent spirits, ale, beer, wine, or intoxicating liquor of any kind. It is not questioned in this case that the state may, in the proper exercise of its police powers, enact such legislation. The power to regulate, restrain, or prohibit whatever is injurious to the public health and morals is universally recognized."

It being settled that traffic in intoxicating liquor in this state is a crime, it follows that the shipment, transportation, or introduction of intoxicating liquor into the state with the intention to sell, barter, exchange, give away, or dispose of, devert, under the Webb-Kenyon Act, such intoxicating liquor of its interstate commerce character, and

leaves the state free in the exercise of its police powers to denounce such introduction as a crime and to prescribe penalties for its commission. In other words, one who introduces intoxicating liquor into the state with the purpose and intention of violating the laws of the state by disposing of the same may not now interpose the defense that he is engaged in interstate commerce, for the reason that the article that he is handling has been divested of its interstate character by the Webb-Kenyon Act. Intoxicating liquor in the aspect of being "received, possessed, or sold, or in some way used in a manner prohibited by the laws of the state into which [it] is to be, or is in fact, imported," is an outlaw and divested of its interstate character and withdrawn from interstate protection at the hands of the Federal government. *Southern Exp. Co. v. State*, 188 Ala. 454, 66 So. 115. We quote further from the same case: "For the reasons above stated, we are of the opinion that interstate commerce cannot, since the passage by Congress of the Webb Law, be used as a subterfuge by common carriers or other corporations, firms, or persons for having in their possession or for delivering to any other person liquors intended to be used, not for lawful, but for unlawful purposes in the state. That which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. *Pierce v. New Hampshire*, 5 How. 504, 12 L. ed. 256; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. Intoxicating liquors and beverages intended for unlawful use in Alabama are, in so far as the state of Alabama is concerned, since the passage of the Webb bill, not articles of commerce, and cannot claim protection as such."

What is said by the Alabama court concerning the status of intoxicating liquor in that state fittingly applies and well defines its status in Arizona. We are of the opinion that, when any person introduces or attempts to introduce intoxicating liquor into this state with the purpose and intention of violating any law of the state, such liquor no longer "belongs to commerce" and "is within the jurisdiction of the police power of the state," and that such person may be punished for his act as for a crime.

The appellant sought to show by evidence that the liquor which he was charged with introducing into the state was for his personal use, upon the theory that the prohibition amendment to the Constitution does not denounce or define personal use of intoxicating liquors as a crime. He contends that it is not unlawful in this state L.R.A.1917B.

to have in possession or to drink intoxicating liquors; that the Webb-Kenyon Act does not divest or attempt to divest intoxicating liquors of their interstate character when shipped, transported, or introduced into the state from without the state, to be possessed or used for a lawful purpose.

Search the prohibition amendment as you will, there is no suggestion or intimation in any form contained therein prohibiting the possession or individual consumption of intoxicating liquors in Arizona. Indeed, it was freely admitted, upon the argument by counsel who appeared as *amici curiæ*, that it is not a crime to possess or drink intoxicating liquors in Arizona, and while the attorney general, at least in his brief, insists that the use or possession is a crime, he fails to cite us to a single instance where a prosecution has been begun in any county of the state against any person for drinking intoxicating liquor or having it in his possession. The records of the courts throughout the state evidence many prosecutions for the sale of intoxicating liquors since the prohibition amendment went into effect. It is common knowledge that personal use has been more or less prevalent throughout the state, and the effort has been, not to punish the user, but the seller thereof. The bootlegger, and not his patrons, have had the attention of the prosecuting officers of the state.

We think it is the consensus of opinion, not only of the legal profession, but of the general public, that it is not a crime to possess or drink intoxicating liquors in this state. This universal and, no doubt, correct construction of the prohibition amendment, may easily account for the lack of effort upon the part of the prosecuting officers of the state to punish for the mere drinking or possession of intoxicating liquors. So far as the enforcement of the prohibitory law is concerned, that this has been the general usage and practical construction of the law by the officers of this state may not be gainsaid and is so admitted by the attorney general. If it had been made a crime to use and possess intoxicating liquor in this state, its introduction for that purpose would relieve it of its interstate commerce character, so that its denouncement as a crime would fall within the police power of the state. Like sale and barter, then use and possession would be in violation of the laws of the state. The *amici curiæ* say in their brief: "Nor is there any doubt but that the people of the state by their Constitution may prohibit the use of intoxicants within the state."

Although there are some courts holding the contrary view, we are inclined to agree with counsel in this proposition. In *Re*

Crane, 27 Idaho, 671, L.R.A.—, —, 151 Pac. 1006, decided September 11, 1915, the court upheld a statute of Idaho making "possession" of intoxicating liquors a crime, and gave reasons in support of that judgment that appear to us to be pregnant with common sense and logic. However, it is not a question of what the law might be, but what it is. Counsel further say: "Its (the Webb-Kenyon Law) purpose was to enable the states to meet intoxicating liquors at their borders and to prevent such liquors from becoming a part of the general property of the state."

This proposition may be granted also, but the purpose of the state has so much to do with the effectiveness of the Webb-Kenyon Act as applied to its laws that the Webb-Kenyon Act may have no effect whatever, except as it may co-ordinate and dovetail with the state legislature concerning the liquor traffic. In other words, if the state takes no action towards suppressing the liquor traffic, the Webb-Kenyon Law can have no application; if it does take action, the Webb-Kenyon Law comes to its aid to the extent that the state's laws invoke its provisions and no further.

One of the cases most relied upon by the respondent is *West Virginia v. Adams Exp. Co.* 135 C. C. A. 464, 219 Fed. 794. However, the question we have to decide was not before that court, as will be seen from the following quotation: "We are not concerned in this case with the question whether the state legislature or the state legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery, and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state."

The real question involved in the *West Virginia Case* was whether the legislature of that state could change the common-law rule so as to make the place of delivery in the state the place of sale. That question was decided by the court in the affirmative.

*State v. United States Exp. Co.* 164 Iowa, 112, 145 N. W. 452, was an "action in equity to enjoin an alleged liquor nuisance; to enjoin defendant from distributing or delivering intoxicating liquors, or aiding in the distribution . . . thereof, contrary to law, from transporting, conveying, and carrying or distributing liquors, either in cars, wagons, or otherwise, contrary to law, L.R.A.1917B.

in Wapello county, Iowa. . . . The defendant answered, pleading in substance that it is a common carrier, engaged in interstate commerce." The injunction prayed for was granted, but, in the course of the opinion, the court said: "Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act."

*Palmer v. Southern Exp. Co.* 129 Tenn. 116, 165 S. W. 236, was a case involving the construction of the prohibition laws of Tennessee in conjunction with the Webb-Kenyon Act. The court said: "It is perceived that the thing which the act prohibits is the interstate shipment or transportation of the liquors mentioned therein, when 'intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of' the state, etc., into which the shipment is made.

"It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question."

*Adams Exp. Co. v. Kentucky*, 238 U. S. 194, 59 L. ed. 1268, 35 Sup. Ct. Rep. 824, L.R.A.1916C, 273, Ann. Cas. 1915D, 1167, was heard in the court of appeals of Kentucky upon a stipulation: "That the liquors were intended by said consignees for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them."

That court speaking of this stipulation, said: "This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. . . . 'It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in

violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not."

The Supreme Court of the United States, taking the above-recited facts found in the opinion of the court of appeals of Kentucky as true, made the following deduction: "It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the state of Kentucky, as such laws are construed by the highest court of that state, the Webb-Kenyon Law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate."

The Kentucky prohibitory statute made it unlawful to bring into, deliver, or distribute into local option districts intoxicating liquors. It can readily be seen that its features pertaining to interstate commerce are very similar to our constitutional amendment in that regard. The facts stipulated are identical with those that the appellant offered to prove as a defense in this case. The bearing of the Webb-Kenyon Act upon the two cases, it may be said, is identical. Counsel have not attempted to distinguish this case from the Adams Exp. Co. Case, but offer to suggest that, if this court determines that personal use or possession of intoxicating liquors in this state is unlawful, its decision will not be disturbed by the Supreme Court of the United States. If we had any predilection in the case, it would have to yield to the law. We must announce the law as we find it and may not judicially legislate. Legislation is the function of a separate department of the government.

In so far as the decision in Adams Exp. Co. v. Kentucky has influenced our determination, we wish it to be understood that it was not the announcement of the law of the highest court of Kentucky, but of the Supreme Court of the United States, to which we have given most credence. Upon the stipulation in that case that the liquor was shipped into Kentucky for the personal use of the consignees, and such use not being a crime under the laws of Kentucky, neither that court nor the Supreme Court of the United States could have reached a different conclusion. It was upon the ascertained fact that the liquor imported into Kentucky was to be put to a use recognized as lawful in that state that the highest court of the land held that the prohibition of the Webb-Kenyon Act did not apply, and the decision by the Kentucky court is in accord with and influenced by repeated ad-

judications on the subject by the Federal court.

It is true the court of appeals of Kentucky went further than was necessary in that case, and quoted a dictum taken from a prior opinion of that court in which it is observed that, under the Constitution of that state, the legislature was not competent to "prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public." We do not go so far in this case. It was not so decided in the Kentucky Case, and is not so decided here. We will say, however, that the Idaho court, in a well-considered case based on facts calling for a decision of the question, has held contrary to the dictum in the Kentucky Case; its decision being based, as we conceive it, upon sound, healthy, and convincing reasons and supported by a line of decisions.

We have not discussed the constitutionality of the Webb-Kenyon Act, as it was not raised by the appellant. We assume that it is constitutional; it has been so decided to be by many of the state courts and the Federal circuit and district courts.

The evil that all liquor laws are directed toward is the drink habit. But two states, so far as we have been able to discover, have taken decisive and drastic steps to that end by forbidding to their citizens the right to possess or drink intoxicating liquors. These two states are Idaho and South Carolina. The highest court of the former state has held the law a proper exercise of its police power. *Re Crane*, 27 Idaho, 671, L.R.A. —, —, 151 Pac. 1006. The South Carolina law was passed in 1915 and has not been before the courts to our knowledge. While legislation has been directed to suppress the traffic in liquor, it is apparent that a sale of liquor is in itself harmless; neither can possession hurt anyone,—it is the use of it that is deleterious to the individual and society, and thus sanctions prohibiting liquor laws as an exercise of police regulations established by the lawmaking power for the prevention of intemperance, pauperism, and crime.

It not being unlawful in the state of Arizona to have or personally use intoxicating liquor, its introduction into the state for personal use is not prohibited by the Webb-Kenyon Act, and the prohibition amendment, in so far as it attempts to interdict its shipment, transportation, or introduction into the state for a lawful purpose, is ineffectual as an attempt to regulate interstate commerce. It follows that the lower court committed error in refusing appellant's offer of evidence to show that he had brought the liquor into the state for his personal use.

The charging part of the information filed by the county attorney is as follows, to wit: "The said W. J. Sturgeon, on or about the 14th day of August, 1915, and before the filing of this information, at and in the county of Yuma, state of Arizona, did then and there wilfully and unlawfully bring and introduce into the state of Arizona, from outside the limits of said state, intoxicating liquor, to wit, one quart of wine, in violation of the provisions of the Constitution of the state of Arizona, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Arizona."

The defendant says that the information is bad for duplicity, because it charges the alleged offense of "bringing" with the offense of "introducing" intoxicating liquor into the state, the word "bring" not appearing in the prohibitory law. In answer to this, it is sufficient to say that the word "introduce," as used in the law, is not a technical word. It is one of ordinary meaning and common acceptance, and is used as such in the constitutional amendment. "Introduce" is a verb transitive, derived from the Latin words "intro," within, plus "ducere," to lead, meaning to lead or bring in. Webster's Dictionary. Introduce' (L. introduce, lead in, bring into practice, bring forward). To lead or bring in, conduct or usher in; as, to introduce foreign produce into a country. Century Dict. Introduce: To bring, lead, or put in. Standard Dict. The words "bring" and "introduce," as used in the information, are synonyms. It is a Code provision that "the words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning." Penal Code 1913, § 941.

It is urged against the sufficiency of the indictment that it does not negative any exemption of a lawful use to which intoxicating liquor may be put; that under the laws of Arizona it is not unlawful for one to drink intoxicating liquor, or have such liquor in his possession for his individual consumption; therefore the information is obnoxious to a demurrer because it does not negative such possession or lawful use. The constitutional amendment does not in terms relieve any specified acts or persons from the general operation of the prohibitory words of the law, and such not entering into a description of the offense, or as a qualification of the language defining or creating the offense, a negative averment of matter of exemption is not necessary. If an exemption exists, it is a matter of de-L.R.A.1917B.

fense which the prosecution need not anticipate. Ferrell v. State, 45 Fla. 26, 34 So. 220; Com. v. Davis, 121 Mass. 352; Com. v. Shannihan, 145 Mass. 99, 13 N. E. 347; Territory v. Burns, 6 Mont. 72, 9 Pac. 432; State v. Gallagher, 20 R. I. 266, 38 Atl. 655; Re Lieritz, 166 Cal. 298, 135 Pac. 1129; People v. Dial, 28 Cal. App. 704, 153 Pac. 970; Bishop's New Crim. Law, 2d ed. ¶¶ 513-631.

The information is not objectionable on this ground. If the point is available at all, it is a matter of defense, to be taken advantage of by evidence on the trial of the case. The information is entitled in a court having authority to receive it. It was returned and presented to the court by the county attorney of the county in which the court was held. The defendant is named, and the offense charged was committed at a place within the jurisdiction of the court, and before the filing of the information. The offense charged is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person to common understanding to know what is intended, and the offense charged is stated with such degree of certainty as to enable the court to pronounce judgment of conviction according to the right of the case. Under the provisions of the Code, these tests determine the sufficiency of the information. Section 943, Penal Code 1913. The Code further says: "No indictment or information is insufficient, nor can the trial, judgment of other proceedings thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Penal Code 1913, § 944.

From these provisions of the Code, and the views which we have expressed, it follows that the information is sufficient to state a public offense under the constitutional amendment, and the demurrer was properly overruled.

From what has been said it must not be understood that the mere claim that intoxicating liquor has been brought in by one for his personal use renders such a person immune from prosecution. Anyone bringing intoxicating liquor into Arizona from outside the limits of the state does so at his peril. Whether he subjects himself to punishment or not depends on the use to which the intoxicating liquor is intended to be put. If the jury, under appropriate instructions as to what use would be a violation of the law of this state, are convinced beyond a reasonable doubt, from all the evidence and circumstances in the case, that such intoxicating liquor is intended by any person interested therein to be "re-

ceived, possessed, sold, or in any manner used" in violation of any law of Arizona, it would be their duty to convict. If the use intended violates no law of this state, then no offense has been committed.

The guilt or innocence of a person so charged would become a question of fact in each case, to be determined as other disputed questions of fact are determined under the law.

The trial court erred to the prejudice of the defendant in rejecting the testimony offered as to the use to which he intended to put the liquor he is charged with unlawfully bringing into the state. The judg-

ment of conviction must therefore be reversed, and the cause remanded, with directions to grant the defendant a new trial.

Before concluding, it may be properly observed that, so long as the law accords to the citizen the privilege of possessing and using intoxicating liquors for his individual consumption, this privilege may not to be used as a license to violate the law by invoking that privilege as a subterfuge for an illicit introduction or use, nor should he consider it an invitation to pass the danger line, lest he find himself wrecked, for the way of the transgressor is hard.

Reversed and remanded.

### WISCONSIN SUPREME COURT.

BOB MOHA, Appt.,

v.

HUDSON BOXING CLUB.

(— Wis. —, 160 N. W. 266.)

#### Contract — preventing performance — forfeiture of compensation.

One contracting to box another ten rounds to a draw forfeits his right to compensation by disabling his opponent by a foul blow early in the contest, so that it cannot proceed, whether the blow was intentional or accidental.

For other cases, see *Contracts*, IV. c, 1, in *Dig. 1-52 N. S.*

(December 5, 1916.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for St. Croix County in defendant's favor in an action brought to recover the contract price of professional services as a boxer.

Affirmed.

#### Statement by Winslow, Ch. J.:

Plaintiff is a professional boxer, and sues the defendant to recover 22½ per cent of the gross receipts of a boxing contest held under the management of the club December 4, 1914, at Hudson, Wisconsin. The contract was in writing, and provided in substance that the plaintiff should box Mike Gibbons of St. Paul ten rounds "to a no decision" at the defendant's boxing arena, receiving as consideration therefor 22½ per cent of the gross receipts, together with certain transportation and hotel expenses, he to deposit with a named stakeholder \$100 to guarantee that he would make the weight specified in the contract, which sum, in case

of his failure to appear or enter the contest, was to belong to the defendant; that the revised Queensbury rules, as interpreted by the referee and in compliance with the laws of this state and the rules of the State Athletic Commission, should govern the contest; that the referee should be George Duffy, of Milwaukee; that if the referee should decide at any time that the plaintiff did not enter the contest in good faith, or if he discover bad faith on the part of either of the contestants, he may stop the contest, and the defendant should not pay to either contestant any part of their compensation, unless the referee believes that the other contestant was not a party to the fraud, in which case he may award to such innocent party such sum as he deems just; that the referee's decision shall be final as to fouls and as to frauds, and as to the amount he may award in case of frauds.

It appeared on the trial that the contest began, and that during the second round the referee decided that the plaintiff had struck a foul blow, i. e., a blow below the belt, and stopped the contest. Neither side introduced in evidence the revised Queensbury rules, nor the rules of the State Athletic Commission, but the referee testified that the rules prohibit the striking of a foul blow, and that he stopped the contest because the other man was disabled by the foul blow. There was some testimony by spectators to the effect that the referee decided that the plaintiff was disqualified for deliberate fouling, but the referee denied this, and the jury found in answer to the single question submitted to them that the referee did not decide and announce that the plaintiff was disqualified for a deliberate foul. The plaintiff attempted to prove by the referee that, in case a contest of this kind is stopped at any time, even as early as the second round, by one of the boxers being knocked out or being disabled by an accidental foul, it was customary among the boxing profession to com-

**Note.**—The general subject of intervening impossibility of performance of contract as a defense is treated in the annotation following *Runyan v. Culver*, L.R.A.1916F, 10. L.R.A.1917B.

sider it a contest notwithstanding that fact, but the testimony was not admitted. The trial court held that the plaintiff had failed to perform his contract, and hence could not recover. From this judgment, plaintiff appealed.

Messrs. Hannan, Johnson, & Goldschmidt for appellant.

Mr. Spencer Haven for respondent.

Winslow, Ch. J., delivered the opinion of the court:

Plaintiff sues to recover the contract price of his professional services. In order to succeed he must show at least substantial

performance of his contract. It is certain that there has been none here. He contracted to box ten rounds under certain rules. At the outset of the contest, in the middle of the second round, he violated one of the rules, and as a result thereof disabled his opponent, and thus by his own act made substantial performance impossible. Whether this act was deliberate or not cuts no figure. It was an act which he had contracted not to do, and it prevented performance. *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57. It does not seem necessary to consider other questions; the considerations suggested are decisive.

Judgment affirmed.

### CONNECTICUT SUPREME COURT OF ERRORS.

ARTHUR T. POPE, Admr., etc., of Ruth Lea Pope, Deceased, Appt.,  
v.

CITY OF NEW HAVEN et al.

(— Conn. —, 99 Atl. 51.)

Municipal corporation — injury by fireworks — liability.

1. The celebration under statutory authority by a municipal corporation of Independence Day is a public governmental duty so that it is not answerable for injuries caused by the negligent handling by its employees of fireworks forming part of the entertainment, but which, if properly used, were not intrinsically dangerous. *For other cases, see Municipal Corporations, II. g, 2, in Dig. 1-52 N. S.*

Same — public function.

2. Such advantage as a municipal corporation may receive from the pleasure and patriotic enthusiasm excited in its citizens by the celebration of Independence Day by a display of fireworks does not deprive the act of the municipality in giving the display, of the character of a public function. *For other cases, see Municipal Corporations, II. g, 2, in Dig. 1-52 N. S.*

(Wheeler and Roraback, JJ., dissent.)

(November 8, 1916.)

Note. — The liability of a municipal corporation for injuries by an exhibition conducted by its officers or employees is discussed in a note to *Kerr v. Brookline*, 34 L.R.A. (N.S.) 464. A search has disclosed no cases in point since the time of that note.

The liability of a municipality for personal injury on account of an exhibition permitted in a public street is treated in the notes to *Wheeler v. Ft. Dodge*, 9 L.R.A. (N.S.) 146; *Van Cleef v. Chicago*, 23 L.R.A. (N.S.) 636; and *Malchow v. Leoti*, L.R.A. 1915F, 568. Specifically as to liability for L.R.A. 1917B.

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County sustaining a demurrer of the defendant city to a complaint filed to recover damages for the death of plaintiff's intestate alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Frederick C. Russell and George E. Beers, for appellant:

The city was not performing a governmental duty.

*Jones v. New Haven*, 34 Conn. 1; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Weed v. Greenwich*, 45 Conn. 170; *Judd v. Hartford*, 72 Conn. 350, 77 Am. St. Rep. 312, 44 Atl. 510, 6 Am. Neg. Rep. 434; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 546, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Hourigan v. Norwich*, 77 Conn. 364, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Judson v. Winsted*, 80 Conn. 384, 15 L.R.A. (N.S.) 91, 68 Atl. 999; *Water Comrs. v. Manchester*, 87 Conn. 193, 87 Atl. 870, Ann. Cas. 1915A, 1105.

The form of authorization is immaterial. *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560; *Anderson v. Cloud County*, 77 Kan. 721, 95 Pac. 583; *Jones v. New Haven*, 34 Conn. 1; *Wallace v. Board of Revenue*, 140 Ala. 491, 37 So. 321; *Leeds v. Atlantic City*, 81 N. J. L. 230, 80 Atl. 23; *Farrell*

permitting the use of fireworks and explosives in public streets, see notes in 3 L.R.A. (N.S.) 759; 23 L.R.A. (N.S.) 643; and 42 L.R.A. (N.S.) 863.

Many specific phases of municipal liability as affected by the question whether the municipality acts in the exercise of a public or a private function are treated in annotation that may be found by consulting the Indexes to L.R.A. Notes, under the title "Municipal Corporations," subd. "Liability for damages."



v. Columbia, 50 Or. 169, 91 Pac. 546, 93 Pac. 254; *Mix v. Nez Perce County*, 18 Idaho, 695, 32 L.R.A.(N.S.) 534, 112 Pac. 215; *Sample v. Pittsburg*, 212 Pa. 533, 62 Atl. 201; *New London v. Brainard*, 22 Conn. 556; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Forget v. Montreal*, Montreal L. Rep. 4 S. C. 77; *Speir v. Brooklyn*, 139 N. Y. 6, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 727; *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709, 72 N. E. 631, 17 Am. Neg. Rep. 331; *Melker v. New York*, 190 N. Y. 481, 16 L.R.A.(N.S.) 621, 83 N. E. 565, 13 Ann. Cas. 544.

The city is liable on the facts alleged.

*Bradley v. Andrews*, 51 Vt. 530; *Fisk v. Wait*, 104 Mass. 71; *Stowe v. Miles*, 39 Conn. 426; *Haberlin v. Boston*, 190 Mass. 358, 4 L.R.A.(N.S.) 571, 76 N. E. 907; *Walker v. New York*, 107 App. Div. 351, 95 N. Y. Supp. 121, 18 Am. Neg. Rep. 578; *Hoadley v. M. Seward & Son Co.* 71 Conn. 646, 42 Atl. 997; *Burnham v. Hotchkiss*, 14 Conn. 311.

Messrs. Charles Kleiner and Henry H. Townsend, for appellee city:

The city was engaged in the performance of a public governmental function, under the authority of a public act, without any pecuniary benefit or advantage to itself; and no law or statute imposes any liability upon the city for any negligence in the performance of such governmental act.

*New London v. Brainard*, 22 Conn. 553; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Judge v. Meriden*, 38 Conn. 90; *Mead v. New Haven*, 40 Conn. 75, 16 Am. Rep. 14; *Perkins v. New Haven*, 53 Conn. 214, 1 Atl. 825; *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397, 4 Am. Neg. Rep. 15; *Dyer v. Danbury*, 85 Conn. 131, 39 L.R.A.(N.S.) 405, 81 Atl. 958, Ann. Cas. 1913A, 784; *Udkin v. New Haven*, 80 Conn. 296, 14 L.R.A.(N.S.) 868, 68 Atl. 253; *Salzman v. New Haven*, 81 Conn. 389, 22 L.R.A.(N.S.) 333, 71 Atl. 500; *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Jewett v. New Haven*, 38 Conn. 378, 9 Am. Rep. 382; *Judd v. Hartford*, 72 Conn. 353, 77 Am. St. Rep. 312, 44 Atl. 510, 6 Am. Neg. Rep. 434; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 549, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Colwell v. Waterbury*, 74 Conn. 572, 57 L.R.A. 218, 51 Atl. 530; *Judson v. Winsted*, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; *Kerr v. Brookline*, 208 Mass. 192, 34 L.R.A.(N.S.) 464, 94 N. E. 257; *Melker v. New York*, 190 N. Y. 490, 16 L.R.A.(N.S.) 621, 83 N. E. 565, 13 Ann. Cas. 544; *Crowley v. Rochester Fireworks Co.* 183 N. Y. 353, 3 L.R.A.(N.S.) 330, 76 N. E. 470, 5 Ann. Cas. 538, 19 Am. L.R.A.1917B.

*Neg. Rep. 441*; *Lincoln v. Boston*, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329; *Larrabee v. Peabody*, 128 Mass. 561; *Steele v. Boston*, 128 Mass. 583; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289.

The principle of the nonliability of the city is the same whether the duty is imposed upon it by a general law or is granted by charter,—liability is determined by the nature of the act performed, not by the manner in which the power is conferred.

*Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Mead v. New Haven*, 40 Conn. 75, 16 Am. Rep. 14.

The city is not liable on the ground of respondeat superior when it is engaged in the performance of a public duty.

*Colwell v. Waterbury*, 74 Conn. 572, 57 L.R.A. 218, 51 Atl. 530; *Jewett v. New Haven*, 38 Conn. 380, 9 Am. Rep. 382; *Judge v. Meriden*, 38 Conn. 97; *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397, 4 Am. Neg. Rep. 15; *Houigan v. Norwich*, 77 Conn. 364, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Hewison v. New Haven*, 37 Conn. 483, 9 Am. Rep. 342; *Howard v. Worcester*, 153 Mass. 420, 12 L.R.A. 160, 25 Am. St. Rep. 651, 27 N. E. 11; *Kerr v. Brookline*, 208 Mass. 191, 34 L.R.A.(N.S.) 464, 94 N. E. 257.

The city violated no duty that it owed the plaintiff's intestate.

*Scanlon v. Wedger*, 156 Mass. 464, 16 L.R.A. 395, 31 N. E. 642; *Frost v. Josselyn*, 180 Mass. 392, 62 N. E. 469.

Thayer, J., delivered the opinion of the court:

The complaint alleges that under authority conferred by its charter the city of New Haven made an appropriation for the purpose of the celebration of the day to be observed as Independence Day, July 5, 1915, and thereafter by way of such celebration sent up from the New Haven green in said city of New Haven certain bombs which were intended to explode in the air in such a way as to diffuse different colored lights. One of these, it is alleged, contained a fuse which was defective or damp, which fact was or ought to have been known to the city and its agents who were sending up the bombs, and was negligently sent up by them, and failed to explode in the air, but exploded after it reached the ground, and inflicted the injury complained of. The substantial ground of the city's demurrer is that the city in sending up the bomb was engaged in the performance of a public governmental duty from which it received no pecuniary benefit or advantage, and for negligence in the performance of which no statutory liability is imposed.

It is well settled in this state that municipal corporations are exempt from liability for the negligent performance of a purely public governmental duty, unless made liable by statute. *Hewison v. New Haven*, 37 Conn. 475, 483, 9 Am. Rep. 342; *Udkin v. New Haven*, 80 Conn. 291, 296, 14 L.R.A. (N.S.) 868, 68 Atl. 253. The question is: Was the city, in celebrating Independence Day, as alleged in the complaint, engaged in the performance of such a duty?

July 4th, or, when that date falls upon Sunday, July 5th, is made a public holiday, called Independence Day, by our statutes. All or nearly all of the other states have similar statutes. While there is no United States statute making a similar provision, the different departments of the government recognize, and have recognized since the government was established, July 4th as a national holiday. Throughout the country it has been recognized and celebrated as such. These celebrations, calculated to entertain and instruct the people generally and to arouse and stimulate patriotic sentiments and love of country, frequently take the form of literary exercises consisting of patriotic speeches and the reading of the Constitution, accompanied by a musical program including patriotic airs, sometimes preceded by the firing of cannon and followed by fireworks. That such celebrations are of advantage to the general public and their promotion a proper subject of legislation can hardly be questioned. From the nature of the case it is apparent that in the case in hand the city could derive no pecuniary or other special advantage from such a celebration. It might more nearly affect its own inhabitants and those of the immediate vicinity than the more remote public. So, would the erection of a public schoolhouse for the education of the children of the city, but no one would for that reason now claim the erection of the schoolhouse under authority of a charter or statute was merely for the profit or special benefit of the city. Still less can it be claimed that a celebration conducted under authority of charter or statute like the one in question was for the pecuniary or special benefit of the city, and not in performance of a public duty. When governmental functions are intrusted to the agency of municipalities they perform those functions within their territorial limits, but this does not deprive them of their public governmental character. The celebrations authorized by the defendant's charter are public ones only. A governmental duty may be imposed or authorized as well by charter as by general law. The latter may more clearly indicate the public policy, but where it appears that the duty referred to is a governmental one a private

as well as a public act may confer it. In *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382, where the city charter empowered the city to provide for the preservation of the city from fires, it was held that it imposed a public duty for the public welfare upon the city. In *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14, power was given the city by its charter to appoint a steam boiler inspector, and it was held that the city in making the appointment was discharging a public governmental duty. The present city charter is a public act, but we do not consider that as affecting the situation. The cases cited show that a public governmental duty may be imposed upon a municipality by its charter as well as by a public act. Nor does the fact that the charter does not impose an imperative duty upon the city to appropriate money to the purposes of the celebration, but merely permits it to be done, change the character of the act done. In each of the cases referred to the duty was not imposed, but was permissive only; and it was held that its exercise, when the city had acted under the authority, was the performance of a public duty. The same was held in *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, upon the authority of which this case was decided in the trial court. As there said, the motive and object are the same in such cases, though in the one the legislature determines the necessity and expediency of the act to be performed, and in the other the necessity and expediency are left to be determined by the municipality. That case in all respects parallels the one before us, except that the law under which the appropriation for the celebration was made was a public law applying to all towns. All the questions raised in this case are therein fully discussed.

That the city was engaged in the performance of a governmental duty in sending up the bombs as a part of the celebration would not excuse it from liability for injuries resulting therefrom if the act of discharging them was in itself, intrinsically dangerous. *Colwell v. Waterbury*, 74 Conn. 568, 573, 57 L.R.A. 218, 51 Atl. 530. But it is not alleged that the discharging of the bombs was in itself intrinsically dangerous. The allegation is that "a bomb of the character of that hereinbefore referred to, even with a perfect fuse, is intrinsically dangerous, and the act of discharging said bomb" (that is, the bomb with a damp and defective fuse) "was a negligent act." The injury is claimed to have been caused by the negligent act of sending up a bomb which was, and which the city and its servants knew or ought to have known was, defective. It appears from the complaint that the injury

was due to the fact that the defective bomb did not explode in the air as it was expected to do, but, because of the damp or defective fuse, failed to explode until it reached the ground near the place where the intestate was located viewing the celebration. Many things are intrinsically dangerous the use of which with proper care under proper circumstances is not intrinsically dangerous. Gunpowder, dynamite, firearms, the firecrackers, and other squibs used in celebrations may be said to be intrinsically dangerous, but the proper use of them, ordinarily, is not so. Where the master or principal orders the use of such agencies under such circumstances that their use is intrinsically dangerous to others, the master is responsible for injuries resulting from such use. If the act ordered as commonly performed with the dangerous instrumentalities is not in itself dangerous to others, injuries resulting from the servant's negligent use of such instrumentalities are not imputable to the master. It is alleged that the display of fireworks took place on the public green in the defendant city and in dangerous proximity to certain of the city streets, and it has been argued that this allegation shows that the act of discharging the bombs was intrinsically dangerous, and constituted a nuisance for which the city is responsible. As pointed out already, there is no allegation that the injury resulted from such a cause, and it appears that the intestate was not a traveler upon the streets, and that she was not upon the street when injured, but was a spectator at the celebration upon a vacant lot across the street from the place where the defective bomb was discharged. It is useless to discuss the question whether, if the plaintiff had alleged negligence in discharging bombs from the locality mentioned because the act was intrinsically dangerous, the facts alleged, if proved, would establish such negligence. The only negligence alleged is the sending up of the defective bomb and failure to notify the intestate of her danger.

After the demurrer had been decided in favor of the city the plaintiff moved to amend his complaint so that it should appear that the celebration, discharge of fireworks, and explosion of bombs, were for the corporate advantage of the city, and the motion was denied. The original complaint shows that the celebration was public; that, as before stated, the display was from the public green adjacent to two public streets. It thus appeared that the spectacle was open to the entire public, with no opportunity for the city to receive any pecuniary benefit in the way of admission fees or otherwise from the celebration. Any corporate advantage to the city from the celebration L.R.A.1917B.

could only consist in the pleasure and patriotic enthusiasm excited in the persons who attended it. This only can have been in the mind of the pleader when he moved for the amendment. Needless to say that such a benefit is not a pecuniary benefit, and would not deprive the city's act in carrying out the celebration of its character as the performance of a governmental function. The proposed amendment added nothing not covered by the original allegations, and was properly denied.

The court properly held that the alleged acts of negligence were committed while the city was engaged in the performance of a governmental duty, and that it was not liable for the negligence of its servants or agents while engaged therein.

There is no error.

Prentice, Ch. J., and Beach, J., concur.

Wheeler, J., dissenting:

The complaint alleges: That New Haven, under authority of its charter, made an appropriation for the celebration of Independence Day, on July 5, 1915, and by way of such celebration had a display of fireworks upon the New Haven green, which consisted or included the sending up by its agents of certain bombs which were intended to explode in the air. Among them was an 8-inch bomb, which, whether with a perfect fuse or not, was "intrinsically dangerous."

The display was in a central and populous part of New Haven, in close and dangerous proximity to certain of the principal streets of New Haven, upon which were large crowds of people, in ignorance of danger, witnessing the display upon invitation of the city. It is alleged: "Said display rendered the said public streets and thoroughfares unsafe and dangerous for the public thereon, and especially dangerous for the explosion of 8-inch bombs in such close proximity thereto."

Said 8-inch bomb contained a fuse which was defective or damp, which fact was or ought to have been known to the city, and the city was negligent in using such a bomb. Through the negligence of the city said bomb struck the ground in an open space adjoining the highway, and there exploded and did great havoc, and killed the plaintiff's intestate, who, in the exercise of due care, was viewing the celebration. The complaint sets up a case of negligence, and in my opinion one of wantonness and nuisance.

Under our system of pleading the story of the occurrence is told, and whatever cause of action arises out of the story is part of the case. We think that the complaint fairly states that the display of fireworks in such a locality was intrinsically danger-

ous to the spectators who had been invited to the display, and that the discharge of a bomb intrinsically dangerous in itself in such a locality in the midst of such a concourse of people constituted as matter of law such discharge a wanton act and a nuisance. We think it a too narrow reading of the complaint to hold that it does not allege that the discharge of an intrinsically dangerous bomb in that locality and in the midst of such a concourse of people was itself intrinsically dangerous.

The city demurred because: (1) It appears that the fireworks were discharged in the course of a public celebration of Independence Day, and it is not alleged that the celebration was for the corporate or pecuniary benefit of the city. (2) It appears that the injuries alleged occurred while New Haven was engaged in a public governmental function under authority conferred by a public act. (3) It does not appear that any liability is imposed by law for any act alleged.

When a city is engaged in the performance of a governmental duty, no liability attaches to it for injury resulting from the discharge of such duty through failure to use due care. The rule of municipal exemption does not apply to injury caused by the municipality in the discharge of a public duty for its corporate benefit. Such a duty is not a governmental duty, for it is not performed for the benefit solely of the public. Whether the municipality is discharging a governmental duty or not is to be determined upon consideration of the nature of the duty imposed or the privilege conferred, and of the character of the act done. We assume, for the present purposes, that New Haven, in conducting a celebration of Independence Day, might be engaged in the performance of a governmental duty. It might conduct such a celebration for its own corporate benefit, and this might be established by proof of an admission charge or by the terms of the vote of appropriation or by other corporate act. If this were established it would not be exempt from liability for its negligence in conducting the celebration.

The complaint did not allege that the city was engaged in an enterprise for its own corporate or pecuniary benefit. This was one of the grounds of demurrer. The plaintiff seasonably moved to amend by adding: "Such celebration, discharge of fireworks, and explosion of bombs, were for the corporate advantage of the defendant, and for the benefit of its residents and citizens."

The motion was denied. This we think was error, for the court could not say as matter of law that such a celebration might not have been undertaken for the corporate

benefit of New Haven. Moreover, the rule of municipal exemption for an act done by the municipality or its servants or agents when acting in the discharge of a public duty does not relieve the municipality from liability for the consequences of the particular acts which the municipality has directed to be performed, and which, from their character or the manner in which they are so ordered to be executed, will naturally work a direct injury to the property of others, or create a nuisance, or occasion a wanton injury to the property or rights of other persons. *Colwell v. Waterbury*, 74 Conn. 568, 573, 57 L.R.A. 218, 51 Atl. 530.

A wanton injury to the person of another, or a nuisance committed against his person, creates a liability in the municipality no less than when the wanton injury or nuisance is committed against his property. Governmental immunity does not exempt from liability for a personal injury resulting from a wanton act or a nuisance. *Ibid*; *Mootry v. Danbury*, 45 Conn. 550, 556, 29 Am. Rep. 703; *Feudl v. New Britain*, 88 Conn. 125, 128, 90 Atl. 35; *Morgan v. Danbury*, 67 Conn. 484, 491, 493, 35 Atl. 499; *Judd v. Hartford*, 72 Conn. 350, 354, 77 Am. St. Rep. 312, 44 Atl. 510, 6 Am. Neg. Rep. 434; *Salzman v. New Haven*, 81 Conn. 389, 22 L.R.A. (N.S.) 333, 71 Atl. 500; *Dill. Mun. Corp.* 5th ed. § 1703; *Willet v. St. Albans*, 69 Vt. 333, 38 Atl. 72. Whether a situation, a thing, or an act constitutes a nuisance is ordinarily a question of fact. *Burnham v. Hotchkiss*, 14 Conn. 318; *Stowe v. Miles*, 39 Conn. 428. But when the facts are clear the act in question, as a matter of law, may be held to be a nuisance. *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578.

In *Speir v. Brooklyn*, 139 N. Y. 6, 11, 21 L.R.A. 641, 36 Am. St. Rep. 664, 34 N. E. 728, the court said: "The discharge of fireworks in a city under any circumstances is attended with danger. . . . Under the circumstances, in view of the place, the danger involved, and the occasion, the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance."

In *Landau v. New York*, 180 N. Y. 48, 54, 105 Am. St. Rep. 709, 72 N. E. 633, 17 Am. Neg. Rep. 331, the court said: "There is a distinction, well recognized by law, between the discharge of fireworks upon private property and in a public highway. There is also a distinction in this regard between highways, depending on their location, the extent of the traffic upon them, and the danger involved in case of accident. Fireworks in certain streets may or may not be

a nuisance, according to the circumstances, which usually present a question of fact. . . . Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact."

In *Willett v. St. Albans*, 69 Vt. 333, 38 Atl. 72, the question at issue was whether the defendant in the erecting of a municipal building had created or participated in the creation of a nuisance. To constitute the structure a nuisance the court say: "The structure must have been inherently and imminently dangerous and a menace to the safety of the intestate. . . . The appellant must have created or participated in the creation of the dangerous and menacing condition. . . . The creation or participation in the creation of the dangerous condition must have been with the consciousness and understanding on the part of the appellant that it was creating it; or it must have been obvious and almost certain to a reasonably prudent man, while the acts were being performed on the part of the appellant, that these acts would create or help to create it. The condition must have been a purpose or object of the appellant; it must have intended to affect it; or its acts have been so reckless and unwarranted that that intention must be conclusively implied. . . . The wrongfulness must have been in the acts themselves rather than in the failure to use the requisite degree of care in doing them, and therein lies the distinction, under the facts of this case, between nuisance and negligence." *Joyce, Nuisances*, §§ 19, 384, 448; *Wood, Nuisances*, §§ 743, 744; *Cardwell v. Austin*, — Tex. Civ. App., 168 S. W. 387; *Smith v. Jefferson*, 161 Iowa, 245, 45 L.R.A. (N.S.) 792, 142 N. W. 220, Ann. Cas. 1916A, 97; *New Castle v. Harvey*, 54 Ind. App. 243, 102 N. E. 880; *Moser v. Burlington*, 162 N. C. 141, 78 S. E. 74; *Radford v. Clark*, 113 Va. 199, 38 L.R.A. (N.S.) 281, 73 S. E. 571; *Hines v. Rocky Mount*, 162 N. C. 409, 412, L.R.A. 1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132.

A satisfactory test for determining whether an act or acts constitute a nuisance is that stated by the court in *Melker v. New York*, 190 N. Y. 481, 488, 16 L.R.A. (N.S.) 621, 83 N. E. 567, 13 Ann. Cas. 544: "Without attempting a general definition we are of the opinion that as applied to the facts of the case before us, if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as L.R.A. 1917B.

matter of fact; but if the action in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law. . . . Locality, surroundings, methods, the degree of danger, and the custom of the country, are the important factors."

The display of fireworks in such a locality, intrinsically dangerous to the spectators whom New Haven had invited to witness the display, and the discharge of a bomb itself intrinsically dangerous, constituted as matter of law the display a nuisance. New Haven caused and created the nuisance, and her act caused this injury. Her liability must follow. But if these facts are not held to constitute a nuisance they must be held to present an issue of fact as to whether they constitute a nuisance, and, if so, the demurrer should have been overruled and the trier been permitted to pass on this issue of fact and determine whether the acts done under the circumstances present created a nuisance.

After the demurrer was sustained the plaintiff sought to amend by adding to his complaint: "The action of the city herein before set out . . . made said streets, thoroughfares, and other portions of said city near said public square unsafe and dangerous to the people lawfully thereon, and wrongfully exposed these persons to injury, and the same at all of said times was a nuisance."

The opinion of the majority finds the allegations of the complaint insufficient to sustain a cause of action for wantonness or nuisance. It would seem to follow such a holding that the denial of the amendment was error.

The record shows that the trial court decided the demurrer upon the authority of *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, and apparently did not then consider the question of wantonness or nuisance. This question of nuisance arose later in *Kerr v. Brookline*, 208 Mass. 190, 34 L.R.A. (N.S.) 464, 94 N. E. 257, and the conclusion of the court upon this question seems at variance with *Colwell v. Waterbury* and other authorities upon this subject in our state.

In my opinion the demurrer should have been overruled, and the amendment allowed.

**Roraback, J., concurs.**

Petition for rehearing denied, January 10, 1917.

## IOWA SUPREME COURT.

GEORGE EISENTRAGER, Appt.,  
v.  
GREAT NORTHERN RAILWAY COM-  
PANY.

(— Iowa, —, 160 N. W. 311.)

**Evidence — custom to show fact.**

1. Upon the question of the responsibility of a railroad company for ice on a walk which caused injury to a pedestrian, evidence is not admissible that its engine, both before and after the injury, cast water in some manner and some amount near the walk, possibly upon it.

*For other cases, see Evidence, XI. k, in Dig. 1-52 N. S.*

**Appeal — ignoring evidence.**

2. In reviewing a ruling directing a verdict for defendant, evidence erroneously admitted may be ignored.

*For other cases, see Appeal and Error, VII. c, in Dig. 1-52 N. S.*

**Nuisance — creation — ignorance — effect.**

3. A railroad company responsible for casting water on a walk, which forms ice upon which a pedestrian falls to his injury, cannot escape liability for the injury on the ground that it had no notice of the nuisance.

*For other cases, see Nuisances, II. b, in Dig. 1-52 N. S.*

**Appeal — directed verdict — erroneous grounds.**

4. If a verdict was rightly directed on any ground, the erroneous sustaining of other grounds is harmless error.

*For other cases, see Appeal and Error, VII. m, 7, d, in Dig. 1-52 N. S.*

**Evidence — res ipsa loquitur — responsibility for ice.**

5. The doctrine of res ipsa loquitur cannot be invoked to show that the negligence of a railroad company is responsible for ice upon a walk next its rails because of the shape and extent of the ice and the fact that it presents a straight edge next the rail.

*For other cases, see Evidence, II. h, 1, c, in 1-52 N. S.*

**Evidence — burden of proof — conflicting possibilities.**

6. One seeking to hold a railroad com-

pany liable for injury due to a fall on ice on a walk, because of its negligently casting water on the walk, is not entitled to go to the jury by merely showing a possibility that it is responsible for the condition, if there is nothing to exclude the equal possibility that the ice was due to an entirely different cause.

*For other cases, see Trial, II. b, in Dig. 1-52 N. S.*

(December 13, 1916.)

**A** PPEAL by plaintiff from a judgment of the District Court for Lyon County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Sallinger, J.:

Suit for personal injuries sustained. Through the town of Alvord the track of defendant runs north and south. Along its west rail lie two planks about 6 feet long and some 22 inches wide. Adjoining these planks and running west is a cement walk about 6 feet wide. During the evening of February 28, 1913, in freezing weather, some ice had formed upon this walk, and some 2 feet west of the west rail. The ice was some 2 feet wide, and at about that width lay across this walk. Plaintiff fell upon this ice at a point a little to the west of the planks, and sustained serious injuries. He contends that servants of the defendant created the ice by negligently causing water to be discharged by a locomotive and to flow upon the walk. From verdict directed against him, plaintiff appeals.

Mr. S. D. Riniker, for appellant:

The modern rule is that any inadvertent act or omission of a sane person in performing a lawful act, which immediately produces injury to another, not in fault, creates legal liability.

*Doyle v. Chicago, St. P. & K. C. R. Co.* 77 Iowa, 607, 4 L.R.A. 420, 42 N. W. 555; *Simson v. London General Omnibus Co. L. R. 8 C. P. 390*, 42 L. J. C. P. N. S. 112, 28 L. T. N. S. 560, 21 Week. Rep. 595.

**Note.**—Generally as to admissibility of evidence of condition before and after accident, of property whose defects are alleged to have caused injury, see note to *Alcott v. Public Service Corp.* 32 L.R.A.(N.S.) 1084. And for other notes on somewhat analogous questions, see the Indexes to L.R.A. Notes under the title "Evidence," subtitle "Similar acts and facts."

Many different phases of the rule or maxim, *Res ipsa loquitur* are discussed in notes indexed under the title "Evidence," subtitle "Care; negligence; res ipsa loquitur."

The liability of an abutting owner for an L.R.A.1917B.

injury caused by ice formed from water artificially turned across sidewalk is treated in the notes to *Brown v. White*, 58 L.R.A. 328; *Hynes v. Brewer*, 9 L.R.A.(N.S.) 598; *Maloney v. Hayes*, 28 L.R.A.(N.S.) 200; and *Striger v. Deickman*, 51 L.R.A.(N.S.) 309. Other phases of the question of liability for damage caused by ice or snow on streets or sidewalks are treated in notes that may be found by consulting the Indexes to L.R.A. Notes under the title "Highways," section heading, "Ice and snow on streets and sidewalks," and other sections there referred to.

Either the railway company or city is liable for obstructing the sidewalk to the damage of a person who, without knowledge of the danger, falls thereon or is injured thereby.

*Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638; *Calder v. Smalley*, 66 Iowa, 219, 55 Am. Rep. 270, 23 N. W. 638; *McDonald v. Toledo Consol. Street R. Co.* 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415, 9 Am. Neg. Cas. 411; *Landru v. Lund*, 38 Minn. 538, 38 N. W. 699; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Elliott v. Concord*, 27 N. H. 204; *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155.

The law is not more lenient to an individual who causes the streets or sidewalks of a city or town to become dangerous or defective than it is to the city or town itself which permits or allows dangerous agencies thereon or thereunder to remain unremoved or unabated.

*O'Hanlin v. Carter Oil Co.* 54 W. Va. 510, 66 L.R.A. 896, 46 S. E. 565; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638; *Pennsylvania R. Co. v. McTighe*, 46 Pa. 316; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33.

No person has the right to do any act which renders the use of the street or sidewalk hazardous or less secure than it was left by the municipal authorities; and whoever does so is at once liable to any person who, without fault on his part, sustains any special injury therefrom.

*Dill. Mun. Corp.* 1890 ed. §§ 1032, 1034; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638.

Whosoever places or is responsible for permitting an obstruction in the highway or on a sidewalk is liable to one injured.

*Tiborsky v. Chicago, M. & St. P. R. Co.* 124 Wis. 243, 102 N. W. 549, 17 Am. Neg. Rep. 755; *Thuringer v. New York C. & H. R. R. Co.* 71 Hun, 526, 24 N. Y. Supp. 1087, 82 Hun, 33, 31 N. Y. Supp. 419.

Anyone responsible for the artificial accumulation of ice on a sidewalk, whereby a traveler thereon sustains a special or peculiar injury, is liable therefor.

*Dahlin v. Walsh*, 192 Mass. 163, 6 L.R.A. (N.S.) 615, 77 N. E. 830, 20 Am. Neg. Rep. 367; *Hynes v. Brewer*, 194 Mass. 435, 9 L.R.A. (N.S.) 598, 80 N. E. 503; *Maloney v. Hayes*, 206 Mass. 1, 28 L.R.A. (N.S.) 200, 91 N. E. 911, 3 N. C. C. A. 137; *Benard v. Woonsocket Bobbin Co.* 23 R. I. 581, 51 Atl. 209; *Louis v. Eureka Club*, 37 App. Div. 628, 56 N. Y. Supp. 66, 5 Am. Neg. Rep. 702; *Thuringer v. New York C. & H. R. R. Co.* 82 Hun, 33, 31 N. Y. Supp. 419; *Ill. L.R.A.* 1917B.

*nois C. R. Co. v. Com.* 29 Ky. L. Rep. 754, 96 S. W. 467; *Brown v. White*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; 28 Cyc. 1437, 1438; *Davis v. Niagara Falls Tower Co.* 171 N. Y. 336, 57 L.R.A. 545, 89 Am. St. Rep. 817, 64 N. E. 4.

Defendant was bound to keep water from its locomotives off the sidewalk when by permitting it to run on the walk it would freeze and endanger the safety of pedestrians; and if it failed so to do negligence will be inferred.

*Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 33 L.R.A. (N.S.) 1061, 70 S. E. 126, 3 N. C. C. A. 1; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411.

If a railway company permits ice to form on the sidewalk from drippings or overflow from its tanks; or allows the walk to become less safe, by reason of being obstructed through its negligence,—it is liable to the traveler injured thereby.

*McGoldrick v. New York C. & H. R. Co.* 49 N. Y. S. R. 566, 20 N. Y. Supp. 914; *Thuringer v. New York C. & H. R. R. Co.* 71 Hun, 526, 24 N. Y. Supp. 1087, 82 Hun, 33, 31 N. Y. Supp. 419; *Tiborsky v. Chicago, M. & St. P. R. Co.* 124 Wis. 243, 102 N. W. 549, 17 Am. Neg. Rep. 755; *Canfield v. Chicago & W. M. R. Co.* 78 Mich. 356, 44 N. W. 385; *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89, 38 N. E. 560; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

Testimony to the effect that defendant had discharged water upon the sidewalk at the same, or substantially the same, place before and after the accident, is admissible, and makes it a jury question whether or not defendant was responsible for the ice that caused the injury.

1 *Elliott*, Ev. p. 109; *McKean v. Burlington, C. R. & N. R. Co.* 55 Iowa, 192, 7 N. W. 505; 3 *Elliott*, Ev. § 2505; *Carter v. Sioux City Service Co.* 160 Iowa, 78, 141 N. W. 26; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Auld v. Southern R. Co.* 136 Ga. 266, 37 L.R.A. (N.S.) 518, 71 S. E. 426; *Davis v. Corry City*, 154 Pa. 598, 26 Atl. 621.

The question as to whether a given act of negligence was the proximate cause of the injury complained of, where the character of the facts is such that different conclusions may be drawn from them, is a question for the jury.

*Weick v. Lander*, 75 Ill. 93; *Hill v. Winsor*, 118 Mass. 251; *Savage v. Chicago, M. & St. P. R. Co.* 31 Minn. 419, 18 N. W. 272; *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619; *Harriman v. Pittsburg, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Smethurst v. Independ-*

ent Cong. Church, 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387.

Messrs. J. L. Kennedy and E. C. Roach for appellee.

Salinger, J., delivered the opinion of the court:

I. Certain testimony was taken against the objection of the appellee. We have the question whether, though erroneously admitted, it still must be considered on the question of whether there was sufficient evidence to send the case to the jury.

A fair summing up of it is that both before and after the injury complained of locomotive engines of defendant cast water in some manner, and in some amount, near this walk; possibly, upon it. There is no testimony, at any rate none in terms, that this was done during freezing weather. Appellant contends this testimony establishes a custom, and that such custom is competent to go to the jury on whether the negligence charged was proved. The following citations are made in support: Kolsti's Case, 32 Minn. 133, 19 N. W. 655; Nadau's Case, 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; Cass v. Boston & L. R. Co. 14 Allen, 448; Holly's Case, 8 Gray, 133, 69 Am. Dec. 233; Jochem's Case, 72 Wis. 202, 203, 1 L.R.A. 178, 39 N. W. 383; Earl's Case, 61 Hun, 624, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770; Houston & T. C. R. Co. v. Cowser, 57 Tex. 293; Carter's Case, 160 Iowa, 78, 141 N. W. 26; Cleveland, C. C. & I. R. Co. v. Newell, 75 Ind. 545; Harri-man's Case, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; Chicago, M. & St. P. R. Co. v. Carpenter, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, 7 Am. Neg. Cas. 486; McGee's Case, 92 Mo. 208, 1 Am. St. Rep. 706, 4 S. W. 740, 4 Am. Neg. Cas. 578, citing Wood, Mast. & S. § 401; Lawson, Custom, 41, 42; International & G. N. R. Co. v. Gray, 65 Tex. 32; Tibby's Case, 82 Mo. 292, 299; Maynard's Case, 100 Mass. 40, 1 Am. Neg. Cas. 901; McKean's Case, 55 Iowa, 192, 7 N. W. 505; Auld v. Southern R. Co. 136 Ga. 266, 37 L.R.A. (N.S.) 518, 71 S. E. 426; Brassell's Case, 84 N. Y. 242, 5 Am. Neg. Cas. 231; Wood's Case, 49 Mich. 370, 13 N. W. 779, 4 Am. Neg. Cas. 35; Fuller's Case, 21 Conn. 576, 2 Am. Neg. Cas. 266; Schultz's Case, 44 Wis. 638; Sutherland v. Troy & B. R. Co. 74 Hun, 162, 26 N. Y. Supp. 237; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Chicago, R. I. & P. R. Co. v. Clark, 108 Ill. 113; Davis v. Corry City, 154 Pa. 598, 26 Atl. 621; Eureka Ins. Co. v. Robinson, 56 Pa. 264, 94 Am. Dec. 65; 1 Elliott, Ev. ¶ 109, resting on Shove's Case, 18 Pick. 558, 561; Vaughan's Case, 63 N. C. 11; Lynch v. Ashe, 8 N. C. (1 Hawks) 338. A large part of these hold, L.R.A. 1917B.

in effect, it may bear on negligence of contributory negligence that what is complained of was usual. Others, that one who establishes a usage must anticipate that others will act in reliance upon such usage. All have been carefully read, and it will serve no useful purpose to analyze them here. Suffice it to say none of them hold that negligent throwing of water by one engine at a stated time and upon a stated place may be proved by showing that other engines in some manner cast water at different times near and, by possibility, upon that place.

Then there is a dictum by way of argument in *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 172, 52 N. W. 119, that if the evidence had not disclosed a car door in question had been loose and swinging several times prior to the accident, and once after it on the same trip, there would have been no claim that its haap was the cause of the accident. Lastly, there is *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 471, 23 L. ed. 356, 362, in which language is used tending to sustain the contention of appellant. In effect the case is a holding that where an engine crosses a bridge shortly before that bridge is fired, then, evidence that, in passing, other engines had scattered fire, has some probative weight on the ultimate issue to be determined. The case seems to stand alone. It concedes some cases opposed its rule, that such evidence is "of course indirect evidence, if it be evidence at all;" and finally it is pointed out that the testimony was probably rebuttal, and that a special rule prevails as to rebuttal. As will presently appear, it makes some pronouncements which oppose the effect of its language. It holds that where a fire occurs which causes the destruction of a building in a dry time, when there is a high wind, and when more than ordinary vigilance is demanded, it is incompetent to show that the usual practice of railroad companies in that section of the country was not to employ a switchman for bridges like the one destroyed by fire and causing the burning of the building, and that the usual practice of others in that section of the country sheds no light on the duty of defendant when running locomotives over long wooden bridges in near proximity to a frame building, when danger was more than commonly imminent. It is said in *Brown's Case*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962, that, unless it be shown to have been necessary, it will not avoid liability for injury caused by draining water from the house of defendant over the sidewalk through an uncovered drain, and thus forming a ridge of ice; that in that borough it was customary thus to drain water. 3 Elliott, Ev. § 2506, p. 1001, citing Aiken's,



Case, 184 Mass. 269, 68 N. E. 238, and Kingston's Case, 112 Mich. 40, 40 L.R.A. 131, 140, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467, states that evidence that either the plaintiff or defendant was negligent at other times, or as to his habits concerning carefulness, is generally incompetent, and in § 2506, that the better rule is that evidence of previous accidents at the same place is, ordinarily at least, not admissible to prove negligence at the time in question; that while evidence of prior accidents may sometimes be admissible in some cases on the question of notice, it raises too many distinct and collateral issues; that evidence there were or were not prior accidents is of very little, if any, probative value, unless there be put in all the facts and conditions existing at such other times, and that this is usually unnecessary because the facts in regard to the conditions and circumstances at the time in question are susceptible of direct proof. In *Peoria & P. U. R. Co. v. Clayberg*, 107 Ill. 644, evidence was excluded to the effect that deceased charged with contributory negligence was in the habit of jumping on trains. In *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735, we said of evidence to the effect that a day or two after the accident the employees of defendant charged the crossing in such manner as to avoid the defect complained of, that it could have no other purpose than to establish an admission on the part of defendant of its own negligence at the time of the accident, and that this evidence was not admissible for any purpose, because it was one made by employees after the transaction which constituted the principal one. In *Matthews v. Cedar Rapids*, 80 Iowa, 466, 20 Am. St. Rep. 436, 45 N. W. 894, we felt constrained, by reason of the *Hudson* Case, to exclude evidence to the effect that other parties had fallen into the same opening into which plaintiff had, and that defendant had been informed of this. In *Croddy v. Chicago, R. I. & P. R. Co.* 91 Iowa, 605, 60 N. W. 214, on the authority of the *Hudson* Case, we sustain the exclusion of testimony that stock had frequently been killed at a certain crossing where the injury in that suit was claimed to have happened. In *Langhammer's Case*, 99 Iowa, 297, 298, 68 N. W. 680, plaintiff was injured by slipping on a step, and we held it was not permissible to show that others had slipped on the same step prior to the accident in suit, and said: "Whatever may be the rule in other jurisdictions, it is well settled in this state that in such a case evidence of similar disconnected acts is not admissible."

In *Kirchoff's Case*, 148 Iowa, 513, 123 N. W. 210, we ruled it was inadmissible to L.R.A.1917B.

show that during eighteen years no one had before been hurt by the planer involved in that suit. And see *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 6, and *Black, Law & Pr. Acci. Cases*, § 193.

(a) All said would be relevant if appellant had a stronger showing. But he does not have as much as evidence that the thing charged here was customarily done before, and at the same place. The effect of evidence of a general custom to have defendant's locomotive discharge water so that it would flow upon this walk is not here for decision. The most this jury had was a chance to guess at what point and in what manner other engines cast water. It follows that the objections made—incompetent, irrelevant, and immaterial—should have been sustained. This conclusion turns into academic inquiries certain contentions—even if these were well made.

It may be conceded that the directing of the verdict for defendant operated to change the ruling as to excluding this testimony. The trial court had power to change its trial rulings. *Standish's Case*, 21 Iowa, 369; *Jenkins's Case*, 36 Iowa, 526; *McClain's Case*, 98 Iowa, 145, 67 N. W. 102; *Van Werden's Case*, 99 Iowa, 623, 68 N. W. 892. In *Littleton's Case*, 95 Iowa, 320, 63 N. W. 666, a change of opinion was effected by directing a verdict. That all said decisions involve a change of front on rulings on demurrer is purely adventitious. They attach no weight to the fact that a particular ruling was changed, and the principle they established is that no matter what the first ruling is, the court is not concluded thereby "from holding otherwise at some subsequent time during the trial when the same question legitimately arises,"—is not required to follow the first ruling against his conviction. *Norton's Case*, 64 Iowa, 112, 19 N. W. 867; *Richman's Case*, 77 Iowa, 525, 526, 4 L.R.A. 445, 14 Am. St. Rep. 308, 42 N. W. 422. In *Brown's Case*, 82 Iowa, 514, 12 L.R.A. 583, 48 N. W. 1042, it is said: "Decisions are not to be regarded as unalterable without regard to their correctness. However desirable it may be to have consistency in the decisions of a court in the same case, it is better that the court correct its errors, if in its judgment any have occurred."

In *Campbell v. Park*, 128 Iowa, 181, 101 N. W. 861, 104 N. W. 799, we hold that if verdict should not have been directed had testimony not been erroneously rejected, we may consider the excluded testimony on reviewing the direction. It would seem to follow that if we find testimony was improperly received we may proceed as though it had never been put in. And we have settled in *Ford v. Dilley*, — Iowa, —, 156 N. W. 516, division II., that appellee may have us

determine now whether any error was committed against him, if now correcting such error will make the judgment below a right judgment. But, as said, all this is moot. Immaterial matter has no probative value. Present or out, immaterial matter cannot affect our investigation on the sufficiency of the testimony against a motion to direct verdict, and we shall resolve that question without considering said testimony.

II. Defendant's motion for a directed verdict was sustained generally, and this sustains the following grounds, among others: (a) Defendant is not shown to be charged with any duty with reference to the ice on the sidewalk. (b) There is no evidence that the ice had been there so long that defendant should and could have known of and removed it. (c) The town was not liable, and no greater degree of care is required of defendant than of the town. (d) The ice was not of such nature "that its presence on the sidewalk constituted negligence on part of defendant." (e) The evidence fails to show plaintiff was free from contributory negligence. These should have been overruled. It seems to us defendant was charged with a duty concerning ice on this walk. That is to say, it had no right negligently to put water there in freezing weather. If it did, the assertion that it lacked notice of a nuisance created by itself is no defense. Concede defendant was under no greater liability than the town would be for an accumulation of ice upon this walk. But the town would be liable without direct notice or notice through long continuance, if it put the ice upon the walk. We are unable to understand the claim that "Under the undisputed evidence the ice was not of such nature that its presence on the walk constituted negligence on the part of the defendant."

If defendant was responsible for the presence of the ice, there was nothing in the nature of the ice that absolved from such responsibility. We think, too, if defendant was negligent, the question of contributory negligence was for the jury. But if the motion was rightly sustained on any ground presented, the erroneous sustaining of other grounds is harmless error. Appelles has abandoned all these points in the motion. But they lead appellant into meeting them. This justifies many citations which accomplish nothing beyond meeting said points. However, they only demonstrate that an abandoned position is untenable, and are no longer of use.

III. The appellant cites *Scott's Case*, 13 L. T. N. S. 148, 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 Week. Rep. 410; *Louisville & N. R. Co. v. Simrall*, 127 Ky. 55, 104 S. W. 1011, 1199; L.R.A.1917B.

*Louisville & N. R. Co. v. Clark*, 32 Ky. L. Rep. 736, 106 S. W. 1184; *Dahlin v. Walsh*, 192 Mass. 163, 6 L.R.A.(N.S.) 615, 77 N. E. 880, 20 Am. Neg. Rep. 367; *Gulf C. & S. F. R. Co. v. Wood*, — Tex. Civ. App. —, 63 S. W. 164; *Kearney's Case*, L. R. 5 Q. B. 411; *Union P. R. Co. v. Erickson*, 41 Neb. 1, 29 L.R.A. 137, 59 N. W. 348; *Gee's Case*, 42 L. J. Q. B. N. S. 105, L. R. 8 Q. B. 161, 28 L. T. N. S. 282, 21 Week. Rep. 584; *Pennsylvania R. Co. v. McTigue*, 46 Pa. 319; *Hynes's Case*, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503; *Hill's Case*, 118 Mass. 251; *Carter's Case*, 160 Iowa, 78, 141 N. W. 26; *Savage's Case*, 31 Minn. 419, 18 N. W. 272; *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89, 38 N. E. 560; *Tiborsky's Case*, 124 Wis. 243, 102 N. W. 549, 17 Am. Neg. Rep. 755.

He claims for them that *res ipsa loquitur* may be invoked here because the extent and shape of the ice and the fact that it presented a straight edge next to the rail, in and of themselves make it a jury question whether the ice was not due to the negligence charged. It is a fair general analysis of the cases cited to say that if injury is suffered because a machine or other thing has done something unusual, it may therefrom be presumed that the machine or appliance was defective through negligence. For illustration, engines kept in proper repair do not usually explode, and if rails are kept in proper condition trains are not usually derailed. Therefore, an explosion or derailment raises a presumption that those charged with the care of engine or rails have failed in that duty. To apply these here is to beg the question. It would not be indulging a presumption that machinery which did a certain thing was negligently kept, but that the engine did that thing. If we must hold appellant has no evidence of what the locomotive of defendant did, he may not obtain that evidence by saying that if the locomotive did do a certain thing negligence will be presumed, and therefore we should presume it did that thing. The cases cited make plain this distinction or limitation. And see *Tiborsky's Case*, 124 Wis. 243, 102 N. W. 549, 17 Am. Neg. Rep. 755.

IV. Plaintiff was injured by falling upon ice which lay as a grassy sheet upon a cement walk which connected with the west rail of defendant's road at a point close to that rail. The petition alleges he was injured about 9:30 at night. His theory is the ice was formed from water discharged by one of defendant's locomotives. If that is so, it must have been done by the one attached to a train due to go south about 7:30, and which left about that time on the day of the injury. For the only other train

on the night of that day went north about 10; those who passed over the walk both shortly before and after that train left found no ice; plaintiff seems to have been injured before that train arrived; and if the engine going south could cast water to form the ice on which plaintiff fell, one going north could not thus cast it. There is much testimony from which it may be found that the engine going south is not to blame, because those passing over the walk both shortly before and after that engine came and went found no ice. The court below attached much importance to it that no one saw that engine cast any water that night. We think that though this is so, still the engine south bound might have been responsible for the formation of this ice. But defendant contends, and there is evidence to sustain the theory, that the ice may have been formed through the careless handling of water that people were in the habit of carrying from a near-by hydrant, and over this walk. In essence, the vital claim of appellant is the ice formation was of such shape, size, and so cleanly terminated where the walk joined the rail, as that, at the least, it was for a jury to say whether the ice was due to a negligently kept locomotive, carelessness of those who handled it, or both. The most we can find is that the theory of neither party presents an impossibility—that it is possible the ice was formed as appellant contends, and equally so that it was due to water spilled by those who brought it from the hydrant. Appellant has the burden; the burden of what? The petition charges negligence in that water was thrown or deposited "some time during the day or evening" of February 28, 1913. Also, that this was done by servants operating one of defendant's trains, and that these servants threw or deposited the water there "carelessly and negligently" or "carelessly or negligently." The essential ruling below was that the evidence wholly fails to show defendant was negligent as charged, and that, on the whole case, a verdict must be directed under the rule of *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235. The utmost appellant has done is to show it is possible that defendant was guilty as charged. He has nothing that excludes the equal possibility that at least one other cause for which defendant is not responsible may have been the cause of the injury.

We agree, of course, that when facts and circumstances are such that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, there is a case for a jury. But it is one thing to have a state of facts from which differing conclusions

may reasonably be drawn. Quite another, to hold that one who has the burden of proving a given conclusion has discharged the burden by showing that a theory which sustains him is a possible one, if it also appear that a theory upon which his adversary would not be liable is just as possible.

Any death may by possibility be due to murder, but no jury should find murder to be the cause of death merely because death is proved. Most deaths are not caused by murder, and something would be required upon which reasonable minds might base the conclusion that a murder had been done. We concede that, ordinarily, it is for the jury whether a claim is supported by a preponderance. But this is not so when all must agree that the case for him who has the burden is not as strong as, or at any rate is not stronger than, that of his opponent. We have in many cases where the proof for the one having the burden was stronger than here, or at least as strong, held there was no question for a jury, that the burden of proof was not discharged, because, at best, the testimony was in equipoise, and, therefore, as matter of law, the one having the burden should not prevail because his evidence did not preponderate. See *Asbach's Case*, 74 Iowa, 249, 37 N. W. 182; *Neal's Case*, 129 Iowa, 5, 2 L.R.A. (N.S.) 905, 105 N. W. 197, 19 Am. Neg. Rep. 213; *O'Connor's Case*, 129 Iowa, 636, 106 N. W. 161; *Gibson's Case*, 136 Iowa, 418, 113 N. W. 927; *Siglin's Case*, 161 Iowa, 290, 292, 130 N. W. 1057. The same view is taken in many well-considered cases decided in other jurisdictions. *Reynolds v. Burgess Sulphite Fibre Co.* 73 N. H. 126, 59 Atl. 615; *Smith's Case*, 118 N. Y. 645, 23 N. E. 990; *Bernhardt's Case*, 159 Pa. 360, 28 Atl. 140, 6 Am. Neg. Cas. 373; *Serviss v. Ann Arbor R. Co.* 169 Mich. 564, 135 N. W. 345; *Louisville & N. R. Co. v. Clark*, 32 Ky. L. Rep. 736, 106 S. W. 1184; *Larson's Case*, 43 Minn. 488, 45 N. W. 1096; *Louisville & N. R. Co. v. Binion*, 98 Ala. 570, 14 So. 619. Though the *Serviss Case*, 169 Mich. 564, 135 N. W. 345, approves the *Sholtz Case*, 48 Misc. 619, 95 N. Y. Supp. 557, the approval does not affect the question now before us. The *Sholtz Case* merely determines a correct rule concerning what is reasonable notice,—that it may be a jury question whether there was constructive notice, although a gate lying on a station platform is not shown to have been there for any considerable length of time. The general proposition declared by all these cases is fairly and typically stated in some of our own above mentioned. In *Gibson's Case*, 136 Iowa, 418, 113 N. W. 928, we say: "The burden was upon plaintiff to show not only that his

mare was killed by a passing train, but that this killing was due to the negligence of defendant's employees. It is not enough for him to show that this might perhaps have been the cause of the injury."

The Neal Case, 129 Iowa, 5, 9, 10, 2 L.R.A. (N.S.) 905, 105 N. W. 199, 19 Am. Neg. Rep. 213, declares on the authority of the Rhines Case, 75 Iowa, 597, 39 N. W. 912, the test is whether the conclusion sought to be drawn is or is not equally consistent with some theory other than the one advanced by him who has the burden of proof; that if one surmise that may be made is as tenable as the one insisted on, the theory relied on is not sustained by a preponderance. And it is further said: "A theory cannot be said to be established by circumstantial evidence, . . . unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may have no tendency to prove the theory."

Further, that this "is the well-settled law." Following the Asbach Case and the Rhines Case, *supra*, we say in the O'Connor Case, 129 Iowa, 638, 106 N. W. 162: "The law on this point is well settled. Proof of the defective condition of the car, and of the death of the intestate, due to his being run over by the car, is not sufficient to take the case to a jury. In other words, the burden of proof was upon plaintiff to show causal connection between the alleged negligence and the injury complained of. And where the proof is equally balanced, or the facts are as consistent with one theory as another, plaintiff has not met the burden which the law casts upon him. Of course, plaintiff is not required to produce more than a preponderance of the testimony; but if his evidence does no more than create a surmise or conjecture, he cannot recover. Proof of causal connection may be direct or circumstantial, but the evidence must be something more than consistent with plaintiff's theory as to how the accident occurred. These rules are well supported by our cases."

To like effect are Tibbitts' Case, 138 Iowa, 178, 186, 186, 115 N. W. 1021, and Helgeson's Case, 148 Iowa, 591, 592, 126 N. W. 769.

We think the ruling below is supported because, as matter of law, the plaintiff's case never got beyond, if it got as far as, proof in equipoise.

Related to this situation is the further fact that so far as the testimony speaks to the point, at all, the water projected from any of the defendant's locomotives came from a little pipe somewhere close to

the rails. As said, an engine southbound is to blame if any engine is. If facing south this pipe would be on what is then the east side of the engine, therefore, as there is evidence that the planks between the rails and the cement walk had a slope west and that there was no ice upon them, all of the evidence would not merely fail to prove that this particular engine cast the water complained of, but would furnish affirmative proof to the contrary. For, water starting on the east side of the track in freezing weather could not cross the track and the planks and freeze upon the cement walk to the west without leaving at least traces of ice upon the plank. As there is as much evidence the water came from a pipe on the east side of the engine southbound as there is that the pipe was on the west side of the engine, it is not only possible to find a theory which fails to sustain the plaintiff, but with like right to surmise one under which it would affirmatively appear defendant was not liable. All of which brings the case within the rule of *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119, which, while often cited for the proposition that equipoise will not discharge burden of proof, and so cited in the O'Connor Case, *supra*, is none the less no more than a decision that the evidence in the *Wheelan* Case shows, affirmatively, it was a physical impossibility for the defendant to have been negligent as is therein charged.

(a) Many of the cases cited by appellant fairly sustain the following of his propositions: (1) One may so do a lawful act as to be liable to another for injury thereby caused, because all must use their property in such manner as not to injure others. (2) Whoever makes a walk hazardous is liable to one thereby injured. (3) If a railroad negligently discharges water from its locomotive and so causes ice to form on a public walk it is liable to any who are injured by falling on ice so created. His fault lies in assuming for these cases not only a holding that whoever does these things is liable, but that they hold the evidence which appellant has proved that to have been done which under these cases imposes a liability, if done. *McGoldrick v. New York, C. & H. R. R. Co.* 66 Hun, 629, 49 N. Y. S. R. 566, 20 N. Y. Supp. 914, is typical. In that case it was said emphatically that there was a jury question where defendant permitted water to flow from its tank to a walk where it froze and caused plaintiff's injury. This determines that if there were evidence here that the engine of defendant had sent water upon this walk in freezing weather plaintiff was entitled to go to the jury. But, of course, the New York decision had no occasion to determine, and does not attempt

to determine, what evidence that water was so cast is required to make a jury question. It settles merely that where it is shown or conceded that the machinery of a party thus casts water it cannot be said as matter of law there is no liability. Other citations are of like ultimate effect. They hold in various ways that one may so handle surface or other water in freezing weather, and other weather too, and so obstruct by ice and other things as to become liable to those who are injured thereby. All of them declare what liability there is if the thing charged be done. They do not pass upon what sends it to the jury whether the thing charged was done. This disposes of *Illinois C. R. Co. v. Com.* 29 Ky. L. Rep. 754, 96 S. W. 467; *Maloney's Case*, 206 Mass. 1, 28 L.R.A.(N.S.) 200, 91 N. E. 911, 3 N. C. C. A. 137; *Benard's Case*, 23 R. I. 581, 51 Atl. 209; *Hynes's Case*, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503; *Leahan's Case*, 178 Mass. 566, 53 L.R.A. 891, 86 Am. St. Rep. 506, 60 N. E. 382; *Isham's Case*, 89 Minn. 397, 93 N. W. 224, 14 Am. Neg. Rep. 112; 28 Cyc. pp. 1438, 1439; *Davis's Case*, 171 N. Y. 336, 57 L.R.A. 545, 89 Am. St. Rep. 817, 64 N. E. 4; *McDonald v. Toledo Consol. Street R. Co.* 20 C. C. A. 332, 43 U. S. App. 79, 74 Fed. 104 (Ohio); *Fletcher's Case*, L. R. 3 H. L. 330, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129; *Brown's Case*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; *Shipley's Case*, 106 Mass. 199, 8 Am. Rep. 318. 28 Cyc. pp. 1438, 1439, supra, adds that a statute which limits the liability of municipalities to persons injured by snow or ice does not apply to abutting owners (*Leahan's Case*, *Isham's Case*, and *Hynes's Case*); that there can be no prescriptive right to maintain a nuisance created by dealing with surface water and accumulation of snow and ice. The *Hynes Case* holds, further, it is no defense that some of the ice formed from water coming from a source beyond the control of the defendant. *Brown's Case* and *Shipley's Case*, supra, add, in effect, it is no defense that what was done is customary.

Further light is thrown upon the position of appellant by a consideration of what he claims for some other cases cited, to wit, that they are decisive here. Of the cases for which this sweeping claim is made, that of *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339, holds that where a railway company turns its water from a tank upon the premises of another, where it spreads and freezes and so does damage to the property owner, it cannot escape on the ground that the freezing is an act of nature. *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89, 38 N. E. 560, rules that where a boy ten years old, while standing in a street near a railroad track L.R.A.1917B.

waiting for a train to pass by, stepped from the track to avoid the train, and thereby fell against a pile of ashes left in the street by a railroad company and slipped under the cars and was killed, there was sufficient evidence of the company's negligence and the boy's exercise of due care to justify submitting these issues to the jury. Appellant declares *Canfield's Case*, 78 Mich. 356, 44 N. W. 385, "is precisely in point,"—is a flat holding that a state of the evidence similar to the one at bar makes a case for the jury. The case holds, no more no less, that where the testimony shows defendant had a stand-pipe with an arm swinging around to supply locomotives, and this arm was swung so far as to make water fall upon the sidewalk where it froze and made very slippery ice, and plaintiff without fault was injured by falling on that walk, there was a proper case for the jury. Another "case in point" is that of *Thuringer v. New York C. & H. R. R. Co.* 71 Hun, 526, 55 N. Y. S. R. 87, 24 N. Y. Supp. 1087; *Id.* 82 Hun, 33, 63 N. Y. S. R. 860, 31 N. Y. Supp. 419. It decides this: Water from a water column used to supply engines dripped while the column was shut off, and the wind carried it to the sidewalk. The drain which usually carried off the water was allowed to become blocked by ice and snow, "and the water allowed to continue to flow upon the sidewalk, which became icy and dangerous." Plaintiff fell on the ice upon that walk, "which had been allowed to accumulate thereon." There was "a customary formation of ice there to a certain extent." The question submitted was "whether plaintiff was negligent in permitting water to flow upon the sidewalk and freeze so as to render it dangerous for persons to pass over it." It was left to the jury to say whether defendant was negligent, whether plaintiff's negligence caused or contributed to plaintiff's injury, and held it was no defense to claim that the city only was liable.

We are further told that in *Tiborsky's Case*, 124 Wis. 243, 102 N. W. 549, 17 Am. Neg. Rep. 755, the facts and principles of law involved here are as nearly like the facts and law in the instant case as they could well be. In a strong opinion by Judge Cassoday it is held that the district court erred in directing a verdict against the plaintiff, and that the supreme court of Wisconsin had gone much further than this one is asked to go, "and not further than good law and good sense require." The case was this: A truck owned by defendant railroad was found where the answer of defendant admitted it had been constantly used, and the only question was whether, after using it there, the defendant had left it there. As to a pedestrian who collided

with the truck on the sidewalk in front of the depot it is decided that *res ipsa loquitur* does not apply.

It seems that these "cases in point" do not warrant what is so urgently claimed for them. Surely the question in this case is, Has plaintiff any evidence defendant did what it is charged with? Cases which merely decide it is liable if or where it did these things have no relevance to that question, since there is no way to exchange citations for testimony. Other citations require even less exhaustive discussion. *Waltemeyer's Case*, 71 Mo. App. 354, and *Dahlin v. Walsh*, 192 Mass. 163, 6 L.R.A. (N.S.) 615, 77 N. E. 830, 20 Am. Neg. Rep. 367, involve whether and when the fact that the ice is due to natural causes operates as an excuse or defense. *Willard's Case*, 22 Vt. 458, Dill. Mun. Corp. 1890 ed. § 1034; *Elliott's Case*, 27 N. H. 204; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L.R.A. 554, 24 Atl. 638; *Batty's Case*, 24 Vt. 155; *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; *Calder's Case*, 66 Iowa, 219, 55 Am. Rep. 270, 23 N. W. 638; *Brown's Case*, 202 Pa. 297, 58 L.R.A. 321, 51 Atl. 962; *Congreve's Case*, 18 N. Y. 84, 72 Am. Dec. 495; *Landru v. Lund*, 38 Minn. 538, 38 N. W. 699; *Lillstrom's Case*, 53 Minn. 464, 20 L.R.A. 587, 55 N. W. 624, 12 Am. Neg. Cas. 131, and *McDonald's Case*, 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 108, 109, hold in various ways and from various angles that liability for creating a nuisance due to accumulation of snow and ice, or otherwise, cannot be shifted about between landlord and tenant, the municipality that authorizes the use of streets and the licensee, and between contractor and subcontractor. 28 Cyc. p. 1439, Dill. Mun. Corp. 1890 ed. § 1032, *Cahill's Case*, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184, *Hay's Case*, 2 N. Y. 160, 51 Am. Dec. 279, and *Shepherd's Case*, 160 Mass. 496, 36 N. E. 475, established between

them the general proposition that one who creates a nuisance is liable for injury caused thereby, without inquiry as to whether he was negligent. One application, the one in the *Shepherd Case*, being to a case where a building is put up in such manner and so close to the street that snow and ice will fall from it to the injury of passersby. *Savage v. Chicago, M. & St. P. R. Co.* 31 Minn. 419, 18 N. W. 272, *Hill v. Winsor*, 118 Mass. 251, *Weick v. Lander*, 75 Ill. 93, and *Carter v. Sioux City Service Co.* 160 Iowa, 78, 141 N. W. 26, deal with cases where it is manifest the question of negligence was for a jury, and so hold. The last-named case, for instance, is that in a case of injury by collision of a street car and a train it was a question for a jury whether the street car conductor was negligent in signaling his car to proceed before he had gone a sufficient distance ahead of it to reach the track on which the train collided with was running. *Hynes v. Brewer*, 194 Mass. 435, 9 L.R.A. (N.S.) 598, 80 N. E. 503, merely finds there was evidence that one injured by falling upon an icy crosswalk was in the exercise of due care, notwithstanding that he was able to see the ice at the place where he was injured as well as it could be seen on other walks in that vicinity; and *Tibby's Case*, 82 Mo. 299, decides that whether the defendant had actual knowledge of its own usages is not worthy of consideration. The cases upon which appellant relies do not aid him.

The case is a most serious one for the plaintiff, and we have given it commensurate consideration. We are clearly satisfied the trial court had no alternative but to direct a verdict against the plaintiff.

Wherefore the judgment below must be and is affirmed.

Evans, Ch. J., and Ladd and Gaynor, JJ., concur.

## OKLAHOMA SUPREME COURT.

LE ROY E. WAUGH, Plff. in Err.,  
v.

GUTHRIE GAS, LIGHT, FUEL, & IMPROVEMENT COMPANY.

(37 Okla. 239, 131 Pac. 174.)

Limitation of actions — personal injuries.

1. An action for damages for personal injuries, being an action for injury to the

Headnotes by SHARP, C.

Note. — For concealment or ignorance of cause of action as suspending Statute of Limitations against action for personal injuries or death, see annotation following this case, post, 1259.  
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rights of a person, not arising on contract, is governed by the 3d subdivision of § 5550, Comp. Laws 1909, and must be brought within two years after the cause of action shall have accrued.

For other cases, see *Limitation of Actions*, III. f, in *Dig. 1-52 N. S.*

Same — effect of fraudulent concealment.

2. Fraudulent concealment constitutes an implied exception to the Statute of Limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of the wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.

For other cases, see *Limitation of Actions*, II. e, in *Dig. 1-52 N. S.*

Same — failure to disclose — effect.

3. The mere failure to disclose that a cause of action exists is not sufficient to prevent the running of the statute. There must be something more,—some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent inquiry.

*For other cases, see Limitation of Actions, II. e, in Dig. 1-52 N. S.*

(January 7, 1913.)

**E**RROR to the District Court for Logan County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries due to an explosion of gas for which defendant was alleged to be responsible. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Joseph Wisby, John A. Remy, and C. G. Hornor, for plaintiff in error:

The plaintiff's ignorance of his cause of action, and the concealment thereof by the defendant, suspended the operation of the statute.

*Carrier v. Chicago*, R. I. & P. R. Co. 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203; 19 Am. & Eng. Enc. Law, 244, 245; 25 Cyc. 1214, 1215; *Reynolds v. Hennessy*, 17 R. I. 169, 23 Atl. 639; *Tillison v. Ewing*, 87 Ala. 350, 6 So. 276; *Porter v. Smith*, 65 Ala. 169; *Kane v. Cook*, 8 Cal. 449; *Lewis v. Denison*, 2 App. D. C. 387; *Moses v. Taylor*, 6 Mackey, 255; *Campbell v. Vining*, 23 Ill. 525; *Grant v. Odiorne*, 43 Ill. App. 402; *Athey v. Hunter*, 65 Ill. App. 453; *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124; *Shelby County v. Bragg*, 135 Mo. 291, 36 S. W. 600; *State ex rel. Barringer v. Hawkins*, 103 Mo. App. 251, 77 S. W. 98; *Hickman v. Hickman*, 46 Mo. App. 496; *Quimby v. Blackey*, 63 N. H. 77; *Way v. Cutting*, 20 N. H. 187; *Bowman v. Sanborn*, 18 N. H. 205; *Cook v. Chicago*, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 25 Am. St. Rep. 512, 3 Inters. Com. Rep. 383, 46 N. W. 1080; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Boomer v. French*, 40 Iowa, 601; *Hughes v. First Nat. Bank*, 110 Pa. 428, 1 Atl. 417; *Morgan v. Tener*, 83 Pa. 305; *Campbell v. Boggs*, 48 Pa. 524; *McDowell v. Potter*, 8 Pa. 189, 49 Am. Dec. 503; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Harrell v. Kelly*, 2 M'Cord L. 426; *Texas & P. R. Co. v. Gay*, 86 Tex. 571, 25 L.R.A. 52, 26 S. W. 599, 88 Tex. 111, 30 S. W. 543; *Anding v. Perkins*, 29 Tex. 348; *Ripley v. Withee*, 27 Tex. 14; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Larsen v. Utah Loan & T. Co.* 23 Utah, 449, 65 Pac. 208; *Sherwood v. Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782; *Granger v. L.R.A.* 1917B.

*George*, 5 Barn. & C. 149, 108 Eng. Reprint, 56, 7 Dowl. & R. 729, 29 Revised Rep. 196, 16 Eng. Rul. Cas. 205; *Clark v. Hougham*, 2 Barn. & C. 149, 107 Eng. Reprint, 339, 3 Dowl. & R. 322, 1 L. J. K. B. 249; *Bree v. Holbech*, 2 Dougl. K. B. 655, 99 Eng. Reprint, 415; *Andrews v. Smithwick*, 34 Tex. 544; *Homer v. Fish*, 1 Pick. 436, 11 Am. Dec. 218; *Farnam v. Brooks*, 9 Pick. 212; *Cole v. McGlathry*, 9 Me. 131; *Bishop v. Little*, 3 Me. 405; *Morton v. Chandler*, 8 Me. 9; *Douglas v. Elkins*, 28 N. H. 26; *Jones v. Conoway*, 4 Yeates, 109; *M'Dowell v. Young*, 12 Serg. & R. 128; *Rush v. Barr*, 1 Watts, 110; *Pennock v. Freeman*, 1 Watts, 401; *Raymond v. Simonson*, 4 Blackf. 85; *Mitchell v. Thompson*, 1 McLean, 96, Fed. Cas. No. 9,669; *Tillison v. Ewing*, 91 Atl. 468, 8 So. 1404; *Holt v. Wilson*, 75 Ala. 58; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

Messrs. Dale, Blerer, & Hegler for defendant in error.

Sharp, C., filed the following opinion:

Plaintiff's petition, filed in the district court of Logan county, June 7, 1910, charged that defendant company was, on April 7, 1907, engaged in the business of supplying artificial gas to the residents of the city of Guthrie, for use in their residences and places of business, and as such had constructed its gas pipe lines and other equipment throughout said city; that plaintiff was a merchant and occupied the ground floor room of a certain store building at No. 114 West Harrison avenue in said city; that said store building was piped for and supplied with water received through the water supply line of the waterworks of said city; that the defendant company's gas line was constructed in the alleyway at the rear of said building, in close proximity with and near the water supply line; and that, by permitting its said gas line to become out of repair to an extent that gas escaped therefrom at a point near the water supply line in the rear of plaintiff's building, said gas was transmitted along, to, and under the building occupied by plaintiff, and there caused to be ignited and exploded, whereby, and on account of which wrongful and negligent acts, plaintiff sustained permanent and serious physical injuries, as described in said petition. Anticipating the plea of limitations, plaintiff sought to avoid that defense by charging that defendant was a public service corporation, and that there devolved upon it, under and by virtue of its franchise and by-laws, the high responsibility of keeping its pipe line and appliances in good repair, etc.; that this duty was one owing not only to its patrons, but to the public in gen-

eral; that, notwithstanding the duties and obligations due and owing by defendant, it wholly failed to perform them in the above particulars, and, further, wilfully, and after the date of said accident, concealed the facts connected therewith from plaintiff and all persons acting for and in his behalf. The petition alleged "that the defendant, in order to conceal, and in the act of concealing, the said facts of the cause of said explosion from the plaintiff, at and for some time thereafter, was guilty of wrongful, immoral, and unlawful conduct as follows: viz., By that of one of its officers, agents, or employees, one whose name is unknown to the plaintiff, immediately after said explosion presenting himself at said building and preventing divers persons who were friends and representatives of the plaintiff, from entering said building and making any investigations whatever as to the cause thereof, and then and there, by words, signs, and gestures, unknown to the plaintiff, leading the plaintiff's said friends and representatives to believe that his action was in order to protect, and for the purpose of protecting, the interest of property; by the defendant, subsequent to said explosion; and further by preventing its said officers, agents, and employees from disclosing any facts of the cause thereof to persons other than the officers, agents, and employees of the defendant; and by the defendant making, and causing to be made, false, fictitious, and fraudulent reports as to the cause of said explosion,—all of which was done by the defendant for the purpose of leading this plaintiff to believe that said explosion was not caused by the escape of artificial gas from the defendant's gas lines." It was further charged that plaintiff had made diligent efforts to discover the cause of the explosion by making inquiries from the officers and employees of the defendant, and from other persons, and by examination of the premises and lines of the defendant company, but was wholly unable to discover the cause thereof until within one month of the date of filing his petition.

The sufficiency of the petition was attacked by demurrer, the defendant specifically pleading the Two-year Statute of Limitations. The demurrer was sustained. Plaintiff electing to stand on the sufficiency of his petition, judgment was rendered for the defendant, and from this judgment an appeal has been prosecuted. The Statute of Limitations applicable is, we think, the 3d subdivision of § 5550, Comp. Laws 1909, which provides that an action for the injury to the rights of another, not arising on contract, and not therein enumerated, shall be brought within two years after the cause of action shall have accrued. Atchison, T. L.R.A.1917B.

& S. F. R. Co. v. King, 31 Kan. 708, 3 Pac. 565; Missouri, K. & T. R. Co. v. Wilcox, 32 Okla. 51, 121 Pac. 658.

Plaintiff's injury was sustained more than two years before the bringing of the action, so that, unless the alleged fraudulent concealment by defendant of the facts serves to postpone the operation of the statute, plaintiff's cause of action was barred by limitations. This is the sole remaining question presented for our determination. The statute contains no exception of the kind; and, the action not being predicated upon fraud, that provision of the statute authorizing suit to be commenced, in an action for relief on the ground of fraud, within two years after the discovery of the fraud, does not apply. The first three subdivisions of § 5550, Comp. Laws 1909, are identical with the same numbered provisions of § 5610, General Statutes of Kansas 1909. It does not appear from an examination of the authorities that we have made, that the exact question here presented was ever before the supreme court of Kansas prior to the adoption by the territorial legislature of the above part of the statute, though in the early case of Voss v. Bachop, 5 Kan. 59, we find that the supreme court of that state refused to permit the plea of the Statute of Limitations in bar of an action brought by a client against an attorney for money collected and not accounted for. The court, speaking through Kingman, Ch. J., held that, the allegations of the petition charging that defendant, by his own misrepresentations, had prevented a demand being made on him, said defendant was estopped by his own acts from setting up the statute, and cited in support of its position the case of Way v. Cutting, 20 N. H. 180, a case not involving any professional or fiduciary relationship. In quoting from the latter case the court said: "The principle of natural justice and of positive law that precludes a party from deriving a benefit from his own wrong has from an early period been applied by courts, both of law and equity, to the construction of the Statutes of Limitations. It has accordingly been repeatedly held that a party shall not be protected by the lapse of time during which he has, by his own fraud, prevented the party whom he has injured from asserting his rights at law, and that he, against whom the statute bar is interposed, may avoid it by showing that he has been kept in ignorance of his claim till within the period limited by law for bringing his suit by the fraudulent practices of the party setting up the defense."

The question, in a somewhat changed form, was again before the supreme court of Kansas in McMullen v. Winfield Bldg. & L. Asso. 64 Kan. 298, 56 L.R.A. 924, 91



Am. St. Rep. 236, 67 Pac. 892. There the default was made more than six years prior to the commencement of the action; but it was charged that the secretary of the company artfully and fraudulently concealed his misappropriations by making false entries, etc., in the books, and that the association had no knowledge of his wrongful and fraudulent acts until shortly before bringing its action. It was observed by the court: "Did the fraudulent concealment interfere with the operation of the Statute of Limitations? Did the cause of action accrue when the fraud was committed, or not until the fraudulent conduct and defaults were discovered? Courts of equity have been holding that, independent of a statutory provision, the defendant's fraud and concealment of a cause of action will postpone the running of the Statute of Limitations until such time as the plaintiff discovers the fraud, and this upon the theory that the defendant, having by his own wrong and fraud prevented the plaintiff from bringing his action, cannot take advantage of his own wrong by setting up the statute as a defense. Some authorities confine this rule to proceedings in courts of equity, but hold that at law neither fraud, concealment, nor other circumstance will affect the operation of the statute, unless it is expressly provided for by statute. The weight of authority in this country and in England applies the rule to actions at law as well as to suits in equity. In *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636, Mr. Justice Miller, in holding that concealed fraud was an implied exception to the Statute of Limitations, equally applicable to suits at law as well as in equity, said: 'Statutes of Limitations are intended to prevent frauds, to prevent parties from asserting rights after a lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that, by concealing a fraud, or by committing fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure.' See also *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382; *Traer v. Clews*, 116 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155; *Lieberman v. First Nat. Bank*, 8 Del. Ch. 229, 40 Atl. 382; *Lieberman v. First Nat. Bank*, 2 Penn. (Del.) 416, 48 L.R.A. 514, 82 Am. St. Rep. 414, 45 Atl. 901; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Moore v. Waco Bldg. Assn.* 19 Tex. Civ. L.R.A.1917B.

App. 68, 45 S. W. 974; 19 Am. & Eng. Enc. Law, 2d ed. 245."

*Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* — Kan. —, 70 Pac. 933, was an action to recover damages for wrongful discrimination in freight rates. It was held that concealment and fraud constituted an implied exception to the Statute of Limitations, and that a party who wrongfully concealed material facts, and thereby prevented a discovery of the wrong, or the fact that a cause of action had accrued against him, would not be allowed to take advantage of his own wrong by setting up the statute, the design of which was to prevent wrong and fraud. A rehearing being granted, it was held (68 Kan. 585, 75 Pac. 1051, 1 Ann. Cas. 639) that, although the defendant succeeded in concealing the fact of its discrimination from plaintiff until less than eighteen months prior to the filing of the petition, no ground for postponing the operation of the statute was shown. A vigorous dissenting opinion, however, was filed by Johnston, Ch. J., in which a great number of authorities are cited as sustaining the former position of the court. The rule announced in the majority opinion has since been followed in *Stewart v. Bank of Indian Territory*, 68 Kan. 756, 75 Pac. 1055; *Beckham v. Burrton State Bank*, 68 Kan. 833, 75 Pac. 1133; *McAllister v. Fair*, 72 Kan. 533, 535, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 7 Ann. Cas. 973; *Baxter v. Krause*, 79 Kan. 851, 23 L.R.A.(N.S.) 547, 101 Pac. 467; *Caspar v. Lewin*, 82 Kan. 604, 627, 49 L.R.A.(N.S.) 526, 109 Pac. 657. We are not concluded, however, by these opinions, all of them, save *Voss v. Bachop*, supra, being rendered subsequent to the adoption of the statute. *Barnes v. Lynch*, 9 Okla. 156, 59 Pac. 995.

The first authoritative application to this principle to courts of law found encouragement, if not origin, in the language of Lord Mansfield in *Bree v. Holbech*, 2 Dougl. K. B. 654, 99 Eng. Reprint, 415, where it was observed: "There may be cases which fraud will take out of the Statute of Limitation." In answer to the charge frequently made by different courts, that the expression was mere dictum, it was said by Story, J., in *Sherwood v. Sutton*, 5 Mason, 143. Fed. Cas. No. 12,782: "It is by no means a just representation of this case to consider this language as a mere dictum of Lord Mansfield. He must be understood to have spoken in the name of the court; and the leave granted to the plaintiff to amend and reply fraud in the defendant is proof that the court entertained no doubt upon the principal point." It is said by this learned judge in the opinion that the rule announced by Lord Mansfield has often been

cited, both at law and in equity, since its decision, and has never been denied in England. Judge Story's opinion contains a complete review of the authorities, both in England and America, up to the time of its rendition. It contains a strong and able presentation of the law, to which little, if anything, except in the way of subsequent authorities, could be added. After reviewing the English authorities, it is said that, with one exception (*Troup v. Smith*, 20 Johns. 33), the American cases are in conformity with the rule announced in *Bree v. Holbech*. Among the leading cases, and one cited by Justice Story, is *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124, decided at a time when Parker, J., Sedgwick, J., and Parsons, Ch. J., were all members of that court, and to which the two latter gave expression of their views in the opinion; both referring to the early English case of *Bree v. Holbech*, *supra*. The former in the opinion said: "Is this an answer [plea of limitations] which ought to be deemed satisfactory in a court of justice? I think not. If it should, every man would be screened from making satisfaction for injuries resulting from the fraudulent execution of his contracts, if his fraud was attended with such circumstances of artful concealment as to elude detection until after a lapse of more than six years." While it is said by Parsons, Ch. J.: "The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud."

In *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155, the plea set up the bar prescribed by the 2d section of the Bankruptcy Act, being § 5057 of the Revised Statutes, which declared: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." In answer to the plea of the statute, various acts of fraudulent concealment were charged. The court observed that the case was substantially the same, so far as the question then before it was concerned, as *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636, cited in *McMullen v. Winfield Bldg. & L. Asso.* 64 Kan. 298, 56 L.R.A. 924, 91 Am. L.R.A. 1917B.

St. Rep. 236, 67 Pac. 892, and attention was there called that the case of *Bailey v. Glover* had never been overruled, doubted, or modified by that court; but on the contrary, in *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382, it was reaffirmed, and was distinguished from the case of *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807, relied on by the appellants, and concluded by holding that, upon the pleadings and evidence, the suit was not barred by the limitation prescribed in § 5057 of the Revised Statutes. It will be noted that the foregoing statute contains no exception or provision for tolling the statute. An able and scholarly presentation of the case is presented in *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582, here all of the early authorities, both English and American, are reviewed.

In Texas, as with us (*Comp. Laws* 1909, § 5542), the distinctions between actions at law and suits in equity are abolished. The court arrived at the conclusion that, there being no distinction in that state between legal and equitable remedies, it followed, as a question of legislative intention in the adoption of the Statutes of Limitation, that the fraudulent concealment by a defendant of the litigation would prevent the statute from running against the plaintiff. It was said: "The fact that we have no distinction in our courts between legal and equitable remedies, instead of repelling this uniform construction that has been given to the statute, would seem to afford a still stronger reason for leading with us to its adoption. For if, as it is justly said, there is no distinction of this character in our judicial system, and the statute must therefore be regarded as binding upon the courts, whether in the exercise of their functions as legal or equitable tribunals, is it not a legitimate conclusion that the legislature, having adopted the statute as the rule of decision for a tribunal administering both legal and equitable remedies, must have intended to have adopted it as well with reference to the construction previously placed upon it in equity as at law, if the case before the court appropriately required it? If not, the mere fact that legal and equitable powers have been blended, with us, in a single tribunal, cuts a party off from a remedy to which we would be entitled under the same statute, if legal and equitable remedies were administered in different forums. Such is not believed to be the intention in the adoption of our judicial system."

The question is ably considered in *Reynolds v. Hennessy*, 17 R. I. 169, 23 Atl. 639; the court saying: "The statute does not take away the debt, but simply affects the remedy; and these exceptions show how

liberally the statute has always been created as a remedial measure. But there is a wide distinction between ingrafting an exception into a statute by construction and construing it according to its obvious intent. The rule laid down by Blackstone of considering the old law, the mischief, and the remedy, when applied to this statute, shows that its purpose was to cut off those cases whose prosecution would, or might, result in fraud. It was clearly not intended to thwart the fundamental maxim that no one may take advantage of his own wrong. Hence, if one by fraud conceals the fact of a right of action for six years, it is not ingrafting an exception on the statute to say he is not protected thereby; but it is simply saying he never was within it, since the protection was never designed for such as he. But whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy. Such a construction also has been so frequently applied that it is now said to have the weight of authority in its favor, although it must be admitted there are strongly expressed opinions the other way. *Buswell, Limitations*, § 390; *Angell, Limitations*, 6th ed. chap. 18, § 186; 3 *Parsons, Contr.* 99."

Among other cases supporting the authorities mentioned are the following: *Snodgrass v. Branch Bank*, 25 Ala. 161, 60 Am. Dec. 505; *Porter v. Smith*, 65 Ala. 169; *Conditt v. Holden*, 92 Ark. 618, 135 Am. St. Rep. 206, 123 S. W. 765; *Kane v. Cook*, 8 Cal. 449; *Curran v. Hubbard*, 14 Cal. App. 733, 114 Pac. 81, 83; *Lewis v. Denison*, 2 App. D. C. 387; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Campbell v. Vining*, 23 Ill. 525; *Grant v. Odiorne*, 43 Ill. App. 402; *Athey v. Hunter*, 65 Ill. App. 453; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Cook v. Chicago*, R. I. & P. R. Co. 81 Iowa, 551, 9 L.R.A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; *Carrier v. Chicago*, R. I. & P. R. Co. 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203; *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Boomer v. French*, 40 Iowa, 601; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79, 31 N. E. 681; *Fortune v. English*, 226 Ill. 262, 12 L.R.A.(N.S.) 1005, 117 Am. St. Rep. 253, 80 N. E. 781, 9 Ann. Cas. 77; *Wear v. Skinner*, 46 Md. 257, 24 Am. Rep. 617; *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313, 11 N. E. 81; *Dean v. Ross*, 178 Mass. 397, 60 N. E. 119; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *Mast v. Easton*, 33 Minn. 161, 22 N. W. 253; *Bescher v. L.R.A.*1917B.

*Paulus*, 58 Ind. 271; *Fisher v. Tuller*, 122 Ind. 31, 23 N. E. 523; *Campbell v. Smith*, 49 Ind. App. 639, 97 N. E. 954; *Cress v. Ivens*, 155 Iowa, 119, 134 N. W. 869; *Deake's Appeal*, 80 Me. 50, 12 Atl. 790; *Clark v. Goodrum*, 61 Miss. 731; *State ex rel. Bell v. Yates*, 231 Mo. 276, 132 S. W. 672; *Shelby County v. Bragg*, 135 Mo. 291, 36 S. W. 600; *State ex rel. Barringer v. Hawkins*, 103 Mo. App. 251, 77 S. W. 98; *Hickam v. Hickam*, 46 Mo. App. 496; *Douglas v. Elkins*, 28 N. H. 26; *Quimby v. Blackey*, 63 N. H. 77; *Way v. Cutting*, 20 N. H. 187; *Bowman v. Sanborn*, 18 N. H. 205; *Hughes v. First Nat. Bank*, 110 Pa. 428, 1 Atl. 417; *Morgan v. Tener*, 83 Pa. 305; *Campbell v. Boggs*, 48 Pa. 524; *McDowell v. Potter*, 8 Pa. 189, 49 Am. Dec. 503; *Harrisburg Bank v. Forster*, 8 Watts, 12, 20 Atl. 307; *Reynolds v. Hennessy*, 17 R. I. 169, 23 Atl. 639; *Harrell v. Kelly*, 2 McCord, L. 426; *Texas & P. R. Co. v. Gay*, 86 Tex. 571, 25 L.R.A. 52, 26 S. W. 599; *id.*, 88 Tex. 111, 30 S. W. 543; *Anding v. Perkins*, 29 Tex. 348; *Ripley v. Withee*, 27 Tex. 14; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Larsen v. Loan & T. Co.* 23 Utah, 449, 65 Pac. 208; *Cloyd v. Reynolds*, 44 Pa. Super. Ct. 81; *Boro v. Hidell*, 122 Tenn. 80, 135 Am. St. Rep. 857, 120 S. W. 961; *Ragland v. Owen*, 84 Va. 227, 5 S. E. 91; *Reynolds v. Gauthrop*, 37 W. Va. 3, 16 S. E. 364; *Sherwood v. Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782; *Granger v. George*, 5 Barn. & C. 149, 108 Eng. Reprint, 56, 7 Dowl. & R. 729, 29 Revised Rep. 196, 16 Eng. Rul. Cas. 205; *Clark v. Hougham*, 2 Barn. & C. 149, 107 Eng. Reprint, 339, 3 Dowl. & R. 322, 1 L. J. K. B. 240; *Bree v. Holbeck*, 2 Dougl. K. B. 655, 99 Eng. Reprint, 415.

Authorities announcing a contrary rule, in addition to the Kansas cases already cited, are *Fee v. Fee*, 10 Ohio, 469, 36 Am. Dec. 103; *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413; *Troup v. Smith*, 20 Johns. 48; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Wend. 202; *Callis v. Waddy*, 2 Munf. 511; *Smith v. Bishop*, 9 Vt. 116, 31 Am. Dec. 607; *Hamilton v. Shepherd*, 7 N. C. (3 Murph.) 115; *Pyle v. Beckwith*, 1 J. J. Marsh. 445; *Jacobs v. Frederick*, 81 Wis. 254, 51 N. W. 320; *Peak v. Buck*, 3 Baxt. 71; *Somerset County v. Veghte*, 44 N. J. L. 509; *Blount v. Parker*, 78 N. C. 128; *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 868; *Wood, Limitations*, 3d ed. § 274.

From what we have said, it should not be construed to mean that mere failure to disclose is sufficient to prevent the running of the statute. There must be something more,—some actual artifice to prevent knowledge of the fact, some affirmative

act of concealment, or some misrepresentation to exclude suspicion and prevent inquiry. *Perry v. Wade*, 31 Kan. 428, 2 Pac. 787; *Lancaster v. Springer*, 239 Ill. 472, 88 N. E. 272; *McBride v. Burlington, C. R. & N. R. Co.* 97 Iowa, 91, 59 Am. St. Rep. 395, 66 N. W. 73; *Wood v. Williams*, 142 Ill. 260, 34 Am. St. Rep. 79, 31 N. E. 681; *Smith v. Blachley*, 198 Pa. 173, 53 L.R.A. 840, 47 Atl. 985; *State ex rel. Graham v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244, 66 N. E. 182; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; *State ex rel. Bates v. Yates*, 231 Mo. 276, 132 S. W. 672. But we think the petition sufficiently met this necessary allegation. It charged that defendant, in various ways, actively made, and caused to be made, false, fictitious, and fraudulent reports as to the cause of the explosion, for the purpose of leading plaintiff to believe that said explosion was not the result of the escape and ignition of artificial gas from defendant's mains; that defendant was at all times well aware of the cause of the explosion, and caused secret repairs to be made of its mains and appliances for the purpose of preventing plaintiff from acquiring the knowledge of the cause of the explosion; and in other ways charged defendant with a fraudulent concealment of the facts which would have disclosed to plaintiff his cause of action against defend-

ant, notwithstanding that plaintiff was at all times active and diligent in his efforts and endeavors to discover the cause thereof. It is no sufficient answer to say, as have counsel in their brief, that plaintiff must have known that he was blown up, and realized that he was injured. This he undoubtedly knew; but it was the fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action against it, not the mere fact of the injury. Upon trial the party relying on the fraudulent concealment of the cause of action to avoid the statute would have the burden of proving such concealment. Following what we believe to be the great weight of authority, and keeping in mind that the very purpose of the Statute of Limitations was to prevent fraud, and not to make it secure and successful, we conclude that the petition stated a good cause of action, and that the trial court erred in sustaining the demurrer.

The judgment of the trial court should therefore be reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceeding consistent with this opinion.

Per Curiam:

Adopted in whole.

Petition for rehearing overruled April 5, 1913.

### **Annotation—Concealment or ignorance of cause of action as suspending Statute of Limitations against the action for personal injuries or death.**

The question here presented is whether or not concealment of the existence of a cause of action for personal physical injuries by the responsible party, or ignorance of its existence upon the part of the claimant, suspends the running of the Statute of Limitations against such cause of action during the period of concealment or ignorance. This, of course, includes cases where the concealment was fraudulent, but does not cover cases based upon the fraud itself rather than upon the original cause of action.

Some of the courts seemingly proceed upon the theory that a person must know when he is injured, and therefore that any concealment or ignorance is merely of some element connected with the cause of action, rather than of the cause of action itself, and consequently that such facts do not suspend the Statute of Limitations.

Thus, in *Chamberlain v. Chicago, B. & Q. R. Co.* (1886) 27 Fed. 181, where plaintiff was injured in a railroad ac-

cident and it was alleged that the defendant's physician falsely and fraudulently represented that the injuries did not result from such accident, but from another cause, by reason of which plaintiff did not know until after the expiration of the statutory period, and shortly before the commencement of the action, that the injuries from which he was suffering resulted from the accident, it was held that such representations did not prevent the statute from running within the meaning of the statutory exception that the specified statutory period does not apply "if any person, by absconding or concealing himself, or by any other improper act, prevents the commencement of an action," the court saying: "Now, on the face of it, it appears that he [the plaintiff] was hurt, and knew it; that he was injured, and was conscious of it; and all that can be said is that these representations, falsely and fraudulently made by the doctor, were as to the extent of the injury which he had

sustained. That does not bring the case within the statute. There was nothing in that to prevent the commencement of the action. All that can be said is that the representations of the doctor misled him as to the extent of the injury he suffered, not as to the fact that he had a cause of action, or had suffered injuries."

So, in *Johnson v. Chicago, M. & St. P. R. Co.* (1915) 224 Fed. 196, where a railroad employee injured by reason of defendant's negligence executed a release and allowed the statutory period to elapse without bringing an action for damages, but alleged that failure to bring action was caused by lack of knowledge on his part of the danger of the conditions described in the action, and that defendant's physicians, who had cared for him, were either themselves ignorant of the facts or purposefully and fraudulently concealed them in order to induce the signing of the release, it was held that plaintiff could neither maintain a suit in equity to cancel the release nor recover in an action at law for damages, as the statutory period of limitations had expired, and the case did not fall within the rule that the plaintiff's ignorance of the wrong committed or of his rights with respect thereto cannot be considered in determining when the statute begins to run, unless there has been concealment of the cause of action or fraud on the part of defendant, or, in special cases, unless the ignorance of plaintiff is due to no fault or negligence of his own, but to the peculiar circumstances of the case. The court also said: "There is no statement in the bill that would indicate any conduct on the part of the defendant which prevented the plaintiff from bringing his action prior to the time or within the period limited by law. Plaintiff must act diligently, and not delay the action beyond the time when he is cognizant of the injuries upon which he bases his right of recovery. In the case at bar plaintiff signed a release a year prior to the expiration of the period of limitation. The bill shows on its face that immediately after signing the release plaintiff grew worse and began to suffer from the complication of diseases which he refers to in his bill. Plaintiff must be held to this knowledge, and likewise to the exercise of ordinary diligence in the prosecution of his action, and in seeking relief from the conduct complained of; and if he fails to exercise this diligence, equity will not suspend the operation of the statute." L.R.A.1917B.

And, again, in *McBride v. Burlington, C. R. & N. R. Co.* (1896) 97 Iowa, 91, 59 Am. St. Rep. 395, 66 N. E. 73, where a railroad employee received injuries which resulted in death, and his administratrix, after the expiration of the statutory period, sought to recover damages therefor and to excuse the delay in commencing the action on the theory that the running of the statute had been interrupted by reason of the fact that the defendant had represented to the plaintiff that the death resulted from an accident and that it was in no manner negligent or to blame, and that it concealed all the facts concerning the accident, it was held that the running of the statute against the claim for damages was not interrupted by such misrepresentations and concealment, the court arguing as follows: "Now, we are asked by counsel to . . . hold that, although some of the facts which go to make up or give a right to a cause of action are known, still, because some of them are not made known or are concealed, therefore that is such a fraudulent concealment as will prevent the running of the statute. There was no concealment in this case of the fact that McBride was killed by the hand car; that he was so killed while in the defendant's service. While it is true that one necessary ingredient of the cause of action—defendant's negligence—was concealed, still, every other fact which went to constitute a cause of action was known to plaintiff. The body of the cause of action, if we may call it such,—the killing of McBride while in defendant's service,—was never concealed. Now, if the defendant did not disclose to the plaintiff the particular facts as to how such accident occurred, or if it asserted that his death was accidental and its hand car in good order, it is, at most, a concealment of evidence which might establish one element in a cause of action."

But it has been held that an actual fraudulent concealment of material facts, which prevents discovery of a wrong, or of the fact that a cause of action has accrued, constitutes an implied exception to the Statute of Limitations, so as to prevent the pleading of the statute as a defense and the defendant taking advantage of his own wrong in violation of the purpose of such statutes. *WAUGH v. GUTHRIE GAS, LIGHT, FUEL & IMPROV. Co.* ante, 1253, wherein it was held that the defendant's actual fraudulent concealment of the cause of an explosion which injured plaintiff, and of facts which would render it liable to

plaintiff in damages, worked a suspension of the Statute of Limitations during the period in which plaintiff, although diligent, was prevented by such representations and concealment from discovering defendant's liability. In this case the court maintained that it was no sufficient answer to say that plaintiff must have known that he was blown up and realized that he was injured, and that while this was undoubtedly the case, it was the fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action, and not the mere fact of the injury. It should be noted that the court also expressly pointed out that the decision should not be construed to mean that the mere failure to disclose that a cause of action exists is sufficient to prevent the running of the statute, but that to have such effect there must be something more, such as some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent inquiry.

And some support is afforded the decision in the *WAUGH CASE* by *Whaley v. Catlett* (1899) 103 Tenn. 347, 53 S. W. 131, which was an action for damages for wrongful death, in which it was ruled that the fraudulent concealment of such a cause of action would prevent the running of the Statute of Limitations, but that the concealment must be definite, and not merely the concealment of evidence of defendant's connection with the wrongful death. This decision, however, does not seem to go to the full extent of that in the *WAUGH CASE*.

So, in *Texas & P. R. Co. v. Gay* (1895) 88 Tex. 111, 30 S. W. 543, it was held that fraudulent representations by a railroad company to the effect that it was in a receiver's hands at the time an action against it for wrongful death accrued, whereby action was not brought against it within the statutory period, tolled the statute so as to permit the maintenance of the action within the statutory period after discovery of the fraudulent concealment of the cause of action. And again in *Texas & P. R. Co. v. Gay* (1894) 86 Tex. 571, 25 L.R.A. 52, 26 S. W. 599, which was another branch of the same action, it was held that fraudulent concealment of a cause of action for personal injuries resulting in death takes a case out of the bar of the Statute of Limitations, unless plaintiff's failure to discover the facts is due to his neglect. In this case the defendant railroad company's fraudulent conceal-

ment operated to conceal the fact that a cause of action existed against the company.

In some states statutes have been enacted which either expressly suspend the running of the Statute of Limitations or extend the period where a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled to sue. As illustrative of a statute of the first kind, see *Groendal v. Westrate* (1912) 171 Mich. 92, 137 N. W. 87, Ann. Cas. 1914B, 906, in which Mich. Comp. Laws 1897, § 9739, was under consideration, and in which it was held that the question whether a physician under the circumstances presented had fraudulently concealed a cause of action for malpractice was for the jury. And as illustrative of statutes which extend the period, see *Dryer v. Chicago & A. R. Co.* (1913) 170 Mo. App. 550, 157 S. W. 129, which had under consideration provisions of the statutes of Illinois which provide that if a person liable to an action for death fraudulently conceals such cause of action from the knowledge of the person entitled thereto, the case may be brought within a specified period after the discovery of such concealment, and in which it was held that mere denial of liability on the ground of defendant's alleged freedom from negligence and of the deceased servant's contributory negligence was not a fraudulent concealment of the cause of action within the meaning of the statute, the court saying that the concealment was neither of deceased's death, nor of the fact that he was killed through its agency, and that a quite different case would have been presented if defendant had concealed that the deceased had been killed, or that he was in defendant's employ, or that he was killed while in such employ.

G. J. C.

# OKLAHOMA CRIMINAL COURT OF APPEALS.

HARRIE BLAKE, Plff. in Err.,  
v.

STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 160 Pac. 30.)

**Embezzlement — failure to pay over money.**

1. (a) A fraudulent conversion is an es-

Headnotes by ARMSTRONG, J.

Note. — For mere failure to pay over money as proof of embezzlement, see annotation following this case, post, 1266.

sential element of the crime of embezzlement, and such conversion must be shown by proof that the embezzler appropriated the money to his own personal use or that he placed it to some other use than the purpose for which it was received by him, or that he failed to account for and pay over the same on proper and lawful demand.

(b) Proof of a mere failure to pay over money, standing alone, will not support a judgment of conviction for embezzlement. *For other cases, see Embezzlement, in Dig. 1-52 N. S.*

#### Appeal — failure of proof.

2. When the proof introduced at the trial fails to establish the commission of the offense charged, the verdict of guilty and judgment rendered thereon, as a matter of law, are contrary to the evidence. *For other cases, see Appeal and Error, VII. 1, 2, a, in Dig. 1-52 N. S.*

(September 23, 1916.)

**E**RROR to the District Court of Wagoner County to review a judgment convicting defendant of embezzlement. Reversed.

The facts are stated in the opinion.

Messrs. Sponsler & Graves, Owen & Stone, and Sumner J. Lipscomb for plaintiff in error.

Mr. R. McMillan, Assistant Attorney General, for the State.

Armstrong, J., delivered the opinion of the court:

The plaintiff in error, Harrie Blake, was convicted in the district court of Wagoner county, on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a term of two years and a fine of \$1,000.

The indictment is a lengthy document, and no good purpose can be served by setting the same out in full. It contains, however, allegations to the effect that certain funds "were paid to and received by the said Harrie Blake for the purpose of satisfying a certain judgment in favor of the plaintiff in said action, L. W. Clapp, by virtue of his office as clerk of the district court of Wagoner county, state of Oklahoma. And being then and there by virtue of his office the clerk of the district court, the proper person to receive said sum of money for the use and benefit of the judgment creditor, L. W. Clapp, and having so received said sum of \$2,142.63, the property of and belonging to said L. W. Clapp, he, the said Harrie Blake, did in Wagoner county, state of Oklahoma, then and there unlawfully, wilfully, feloniously, and fraudulently, and not in the due and lawful execution of the trust of him, the said Harrie Blake, as clerk of the district court of Wagoner county, state of Oklahoma, L.R.A.1917B.

aforesaid, embezzle, convert, and appropriate said sum of \$2,142.63 . . . to the use of him, the said Harrie Blake, contrary to the form of the statutes," etc.

It appears that L. W. Clapp brought a suit in the district court of Wagoner county against C. S. Roach and others and recovered a judgment of \$2,142.63. The allegation against the plaintiff in error is to the effect that this money was paid to him, received by him, and embezzled by him.

The testimony introduced by the state was from five witnesses: C. M. Bryant, clerk of the district court at the time of the trial; L. E. Cahill, deputy state examiner and inspector; T. C. Harrill, president of a bank in Wagoner; T. H. Hammett, deputy clerk of the district court under Harrie Blake; and County Attorney C. E. Castle.

In addition, certain admissions were made and certain facts agreed upon by counsel. Witness Bryant testified that after he became clerk of the district court of Wagoner county he received about \$2,100 through County Attorney Castle, and paid the same to the attorneys of record for L. W. Clapp in satisfaction of the judgment. He knew nothing further about the facts in the case. He also said that the county never lost anything by reason of the transaction. In fact, that no one lost any money on account of the same. Witness L. E. Cahill did not testify to any incriminating fact. Witness T. C. Harrill testified to no incriminating fact. He was asked about the bank account of Harrie Blake subsequent to December 30, 1911, and said that from and after this date the account of Harrie Blake did not include any item of \$2,100 or more. Witness Hammett testified to no incriminating fact.

Witness Castle testified to no incriminating fact.

Counsel for the state and for the accused agreed upon a statement of certain facts, to wit, that Harrie Blake received \$2,142.63 in the manner as alleged in the indictment; that he was clerk of the district court of Wagoner county at the time.

Section 5327, Rev. Laws 1910, provides: "Where there is no execution outstanding, the clerk of the court in which the judgment was rendered may receive the amount of the judgment and costs, and receipt therefor, with the same effect as if the same had been paid to the sheriff on an execution; and the clerk shall be liable to be amerced in the same manner and amount as a sheriff for refusing to pay the same to the party entitled thereto, when requested, and shall also be liable on his official bond."

This is the section of the statute which authorizes the clerk, under certain conditions, to receive money in satisfaction of judgments. There is no allegation in the

information to the effect that plaintiff in error, as clerk, received this money and failed to pay the same over upon proper demand therefor.

The proof fails to show that any demand was ever made at any time upon the plaintiff in error for the payment of the money in question.

Section 2243, Rev. Laws 1910, among other things, provides that "any sheriff, coroner, clerk of a court, constable or other ministerial officer, and any deputy or subordinate of any ministerial officer who . . . fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office—is guilty of felony."

This is the statute under which the conviction in this case was had. It is contended by counsel for plaintiff in error that the judgment in this case should be reversed upon the ground that the verdict is contrary to the evidence. The crime charged in this case was embezzlement. The only proof in the record bearing upon the question of guilt is that the plaintiff in error received the sum of money as charged, and that his successor in office paid the judgment with funds received from the county attorney. Whether or not the same identical funds finally paid this judgment is a question upon which there is no light thrown by proof. It is fundamental that the crime of embezzlement cannot exist without there be a fraudulent conversion. The burden is on the state to show this conversion beyond a reasonable doubt. A felonious conversion under the embezzlement statute should be proved either by proof of an appropriation of the money to the personal use of the accused, that is, that he disposed of the same for his own personal benefit and his own private business, or by putting it to some other use than a proper discharge of the trust imposed, or by proving that the accused, after obtaining lawful possession of the funds, failed to account for or to pay the same over on proper or lawful demand. There was no proof offered of either in this case. If a proper demand had been made upon the accused to pay over or account for the money in question, and he had failed to do so, the law would presume a conversion. This the state not only failed to prove, but did not even attempt to prove. The county attorney, in his opening statement to the jury, stated that he expected to prove these facts, but wholly failed to do so. A fraudulent act of conversion is essential to the validity of a conviction under the statute. A mere failure to pay over the money will not justify the same. See *Fitzgerald v. L.R.A.* 1917B.

*State*, 50 N. J. L. 475, 14 Atl. 746; *Henderson v. State*, 105 Ala. 82, 16 So. 931, id. 129 Ala. 104, 29 So. 799.

This question is discussed at some length in the case of *People v. Wyman*, 102 Cal. 552, 36 Pac. 932. Among other things, the court, in the discussion in that case, said: "The only other facts relied upon to sustain the verdict are: (1) That defendant neglected up to the time of his arrest, a period of thirteen days, to cash the orders sent him and to pay for the land which his client desired to purchase from the government; and (2) That, when arrested, he did not have on his person all of the money which had been intrusted to him for the purpose of making such payment, and did not offer to account for the same. These facts are clearly insufficient to prove that defendant had fraudulently appropriated the money of the client to his own use prior to the filing of the complaint upon which he was arrested. The fact that he did not have upon his person all of the money sent to him by his client was not of itself sufficient to justify the jury in finding or believing that he had fraudulently appropriated such money to his own use before his arrest, because such fact is not necessarily inconsistent with the fact that he may still have retained such money under his control, or subject to his order. The circumstance, to say the least, is inconclusive, affording only slight, if any, ground for suspicion, and is not strengthened by the other evidence in the case. Nor can the failure of the defendant to pay for the land prior to his arrest be regarded as a conversion by him of his client's money, much less as evidence of the fraudulent appropriation of such money to his own use."

In the case of *Fitzgerald v. State*, cited supra, the court, among other things, said: "When the owner of goods which have been intrusted to another seeks redress for their conversion in a civil action, he is compelled to establish the fact of conversion by proof of the exercise of some dominion over the goods inconsistent with the right of the true owner. Proof that the owner had demanded the goods, and that the person in possession had refused to return them, is accepted as evidence of conversion. But mere neglect to return, in the absence of a demand, has never been admitted as proof of conversion. Still less will the mere neglect to pay over proceeds lawfully received prove a fraudulent conversion thereof."

In *Almand v. State*, 110 Ga. 883, 78 Am. St. Rep. 140, 36 S. E. 215, the Supreme Court of Georgia discussed the principle here involved, and, among other things, said: "There can be no question that, under the evidence, the check was delivered to



the accused for the purpose of purchasing cotton seed for the oil company, and it cannot be denied that this specific check was delivered by the accused to one of his creditors and went to pay a personal debt. It must be noted, however, that it takes more than this to constitute the offense with which the accused was charged. Undoubtedly the check was technically converted from the use to which it was intended by the owner to have been put; but it is only when a fraudulent conversion has been made that a criminal offense is committed."

See also *State v. Hunnicutt*, 34 Ark. 562; *State v. O'Kean*, 35 La. Ann. 901; *State v. Flournoy*, 46 La. Ann. 1519, 16 So. 454; *State v. Smith*, 47 La. Ann. 432, 16 So. 938; *State v. Pellerin*, 118 La. 547, 43 So. 161; *People v. Page*, 116 Cal. 386, 48 Pac. 326.

In this latter case the court, among other things, said:

"On May 28th defendant did not appear, and an order was then made removing him as guardian of the said estate. 'No other order was made, and no person was appointed guardian in his place and stead, and no demand was made upon him for the moneys and goods in his possession and belonging to the said estate of Louis Lichtneger.' The minute order of removal containing the recital, 'and it appearing to the satisfaction of the court that said Page has appropriated to his own use the funds of the said insane person, and that he has rendered no account thereof,' was next introduced in evidence, against the objection of defendant that it was immaterial, irrelevant, incompetent, and hearsay. In January, 1896, defendant was arrested in the city of New York, and he stated at the time to the officer arresting him 'that he was anxious to return to stand his trial for the offense of which he was accused.' The above is in substance all the evidence introduced by the prosecution, and at the conclusion of it the defendant by his counsel moved the court to instruct the jury to acquit 'upon the ground that the facts proved by the prosecution were not sufficient to establish the guilt of the defendant of embezzlement; that there was nothing in the proof to show that Mr. Page had fraudulently misappropriated any of his ward's money or property; that no demand had ever been made upon him for the money or property of his ward; and that no person had ever been designated by any court or by any person in authority to whom the defendant, Mr. Page, could have delivered the money or property of his ward.' The court overruled the motion, and thereupon the case was submitted without further testimony. It is very evident that the recital above quoted from the order removing defendant from the position of guardian did not constitute any

evidence tending to support the charge of embezzlement. At most it was mere hearsay, and Judge Slack, who made the order and was on the stand as a witness, was not asked and did not attempt to state upon what ground the recital was based. It must therefore be entirely disregarded. Leaving out this recital, it will be observed that there was no evidence showing that defendant ever spent, wasted, or appropriated to his own use any of the money of his ward. It is true he drew out from the savings and loan society most of the money which was on deposit there to the credit of Lichtneger, but this was not a criminal act and did not show a criminal intent to misappropriate the money. He may have intended to deposit the money in some other bank, or to invest it in safe securities. The cashier of the savings and loan society, who testified to the withdrawal, stated: 'I do not know what Mr. Page did with the money which he withdrew. He may have deposited it in some other bank or some safe-deposit box.' So far as appears the defendant at the time of the trial may have still had all the money ready to be paid over on demand to anyone authorized to receive it. The fact that he did not pay to the insane asylum the \$475 ordered to be paid by Judge Levy does not tend to show a misappropriation of that money. He may have believed that Lichtneger was in the 'pauper ward,' and that the asylum was not entitled to demand pay for keeping and caring for him.

"It is urged for respondent that while 'the fact that a defendant does not take the witness stand on his own behalf cannot be taken against him by the jury, yet it is, in our judgment, a fact that should be taken into consideration by this court on the point of the sufficiency of the evidence to justify the verdict.' We do not think so. A person accused of crime is presumed to be innocent until he is proved to be guilty; and facts and circumstances which cannot be considered by the trial court or the jury in determining as to the guilt or innocence of the accused cannot be resorted to in this court to support a verdict not otherwise authorized."

In the case of *People v. Royce*, 106 Cal. 173, 39 Pac. 524, the supreme court of California, in another case involving the principle herein discussed, said:

"The fact that the treasurer of an association deposits a check drawn in its favor in a bank, and has the amount credited to his personal account, does not justify a conviction, in the absence of evidence of a demand by the association, or of inability to respond to a demand."

"In the opinion delivered in department [106 Cal. 178, 37 Pac. 630], it is said that

'the errors complained of are based upon rulings upon questions of evidence, and upon instructions to the jury;' and, as to such errors and questions, we are satisfied with that opinion. But a hearing in banc was ordered on account of a grave doubt whether, under any proper view of the law, there was evidence sufficient to warrant a conviction of the crime charged; and, from further consideration of the case, we are satisfied that there was not such evidence.

"The facts shown by the evidence are these: On February 21, 1893, the appellant was treasurer of the Veterans' Home Association, a corporation, and on that day received a certain draft for the benefit of said association for \$10,350. On the same day he deposited said draft with the Crocker-Woolworth National Bank of San Francisco, and the amount of the draft was credited to appellant's personal account. The president of the bank testified that he 'did not hear him [appellant] give any direction as to whose credit it should be placed,' and that 'we did not place it to the credit of the association because we have not had any such account on our books.' Appellant informed the bookkeeper of the association that he had received this draft, and the amount of it was entered by the bookkeeper on his ledger of the date of February 21st. On February 24th . . . the association received from appellant \$8,310.35 of this money; and the charge against appellant is the embezzlement of the balance of said draft, amounting to about \$2,050. What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. The by-laws of the association required the treasurer to deposit all funds over a certain amount 'in such bank as the board [of directors] may direct;' but it does not appear that the board ever made such direction, or named any bank in which the deposits should be made. The by-laws also provide that all moneys in the hands of the treasurer should be 'turned over to his successor in office;' but it does not appear that appellant ever had a successor in office. It is also provided in the by-laws that the treasurer shall make reports of moneys received and expended 'to the association at its annual meeting,' and also 'at each quarterly meeting of the board of directors;' but there is no evidence of any such yearly or quarterly meeting between February, 1893, and the date of the indictment, which was June 2, 1893, or that appellant failed to report said money, or made any report in which it was not mentioned. There is no evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent

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thereof, or by any other person. The conviction rests, therefore, solely upon the fact that the money was deposited with the bank on February 21st to the personal account of appellant, under the circumstances as above stated. This was evidently the theory upon which the indictment was based, for it is alleged that the embezzlement was committed on the 24th of February, just three days after said deposit. It is true, as the court instructed the jury, that the crime charged might have been . . . committed at any time before the date of the indictment; but the deposit of the money in the bank on February 21st was the only fact proved upon which the conviction could have been based. And that fact is not sufficient to support the verdict. It does not appear that he was ever called upon to apply the money to any need of the association, or to make any particular use of it, or to put it in any special place. It is true that he drew one or two checks on the Crocker-Woolworth Bank, but it does not appear that he had not private funds there, and the testimony of the president of the bank leaves the impression that he had been keeping an account with that bank. He may have had the money all that time ready to respond to any demand of the association. In fact there is no evidence that he did not pay it over to the association. It is clear that he did not clandestinely keep it, for he reported it to the bookkeeper. No doubt embezzlement may be established, under certain circumstances, without proof of a demand, as where other evidence clearly shows an appropriation by an employee of his employer's funds, with intent to do so fraudulently and feloniously. But there is no such evidence in the case at bar. It is sometimes held in civil cases that the deposit by a trustee of trust funds to his personal account is sufficient cause for charging him with interest; but such fact alone is not sufficient evidence to convict a man of a felony.

"For the reasons above given we are of opinion that a new trial should have been given. The judgment and order are reversed, and the cause remanded for a new trial."

In the case of *State v. Weber*, 31 Nev. 385, 103 Pac. 411, the supreme court of Nevada, discussing the question here being considered, among other things, said:

"The mere depositing of the check to defendant's personal account, especially in the face of a showing that the corporation had not then, and never did have, a regular depository for its money, and that the treasurer of the company was not present at the time, certainly, we think, could not be held to constitute a conversion by the defendants

of the money due upon the check. Before the defendant could be legally convicted of embezzlement, it must be proved beyond a reasonable doubt, that the money credited to his personal account upon the check of Captain Hooper belonged to the Doctor Mining Company, and that the defendant either applied the money so credited to him to his own use, or to some use or purpose other than that for which the same was intrusted to him, or that he refused to deliver it to the rightful owner upon demand. There is no showing in the evidence that the defendant applied the money, or any part of it, to his own use or to any other use whatever, or ever refused to account for the same upon demand of the Doctor Mining Company, its treasurer, or anyone else, or that any demand whatever was ever made upon him.

"The record contains a number of other assignments of error, but the view we have taken upon the insufficiency of the evidence makes it unnecessary to consider them."

The proof disclosed by this record, subjected to the test provided by law, wholly fails to warrant the conviction, and, as a matter of law, the verdict was contrary to the evidence. We know nothing of what the real facts in connection with this transaction may be, but in order to warrant a conviction, a case must be established under the proof beyond a reasonable doubt.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

Doyle, P. J., and Brett, J., concur.

### **Annotation—Embezzlement: proof of mere failure to pay over money.**

On failure to account for fund to one jointly interested therein as theft, larceny, or embezzlement, see note to *Northcutt v. State*, 31 L.R.A.(N.S.) 822.

On effect of fact that one is entitled to commissions out of fund upon his prosecution for embezzlement in case he retains the whole fund, see note to *Com. v. Jacobs*, 13 L.R.A.(N.S.) 511.

The cases, with but a few exceptions, are in harmony with the holding of *BLAKE v. STATE*, ante, 1261, that proof of a mere failure to pay over money, standing alone, will not support a judgment of conviction for embezzlement.

This is the rule, unless the particular statute under which the indictment is found, embezzlement being the creature of statute, specifies that a mere failure to pay over money shall constitute embezzlement.

A mere failure of an agent to turn over money received by him, without evidence of a fraudulent conversion or appropriation thereof, is not sufficient to constitute the crime of embezzlement. *Henderson v. State* (1900) 129 Ala. 104, 29 So. 799; *Fleener v. State* (1893) 58 Ark. 98, 23 S. W. 1.

The failure of a county treasurer to pay over money or funds in his hands, where there has been no conversion or misapplication thereof, is not of itself sufficient to constitute the offense of embezzlement. *State v. Hunnicutt* (1879) 34 Ark. 562. The statute under which the charge was preferred in this case reads as follows: "Every officer of the state, city, county, or township employed in the collection of the public revenue, or who may have any public funds in

his hands, who shall convert the same to his own use, or otherwise misapply any part of the money or funds so collected by him, or which may have come to his possession by virtue of his employment, and every such officer who shall fail or omit to pay the amount found due from him upon settlement, shall, on conviction, be fined. . . ."

But under a later statute similar to the foregoing except that it uses the word "or" instead of "and" before the statement that an officer who shall fail to pay over funds shall be punished, it was held in *Davis v. State* (1906) 80 Ark. 310, 97 S. W. 54, that a county treasurer who wilfully (the statute contained the word "wilfully" before the word "fail") failed to pay over funds to his successors was guilty of embezzlement, although he had not misappropriated the funds. But even under this later statute proof of a mere failure to pay over money, without showing that such failure was wilful, would apparently not support a conviction of embezzlement.

In *People v. Westlake* (1899) 124 Cal. 452, 57 Pac. 465, it was held that proof of the wilful omission of a tax collector to pay over money to the county treasurer would not sustain a conviction of embezzlement under a statute providing that every officer who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

It was also held in such case that such proof would likewise be insufficient under a statute making punishable the wilful omission of any officer to pay over to any person authorized by law to receive the same, any money received by him, under any duty imposed by law so to pay over the same.

And upon a prosecution under the same statute, it was held in *People v. Carrillo* (1879) 54 Cal. 63, that it was error to instruct the jury that the failure of the defendant, a tax collector, to pay over money received by him, if unexplained, raised a presumption of felonious appropriation, which would authorize a verdict of guilty.

The mere retention by an agent of his principal's money under a bona fide claim of right is not embezzlement. *State v. Collins* (1894) 1 Marv. (Del.) 536, 41 Atl. 144; *State v. Foster* (1898) 1 Penn. (Del.) 289, 40 Atl. 939, affirmed without mention of this point in (1899) 2 Penn. (Del.) 111, 43 Atl. 265.

A mere failure of a public officer to pay over the amount with which he is chargeable is not of itself alone sufficient to establish a fraudulent appropriation to his own use which is essential to a conviction of embezzlement, under a penal statute declaring that any officer who shall embezzle, steal, secrete, or fraudulently take and carry away any money, or other property, shall be punished. *Robinson v. State* (1900) 109 Ga. 564, 77 Am. St. Rep. 392, 35 S. E. 57.

The failure of one, in whose hands money is placed in reliance upon his honesty or responsibility for its return with stipulated interest, to properly account therefor, does not constitute embezzlement. *Kribs v. People* (1876) 82 Ill. 425, 2 Am. Crim. Rep. 109; *Rauguth v. People* (1900) 186 Ill. 93, 57 N. E. 832.

A mere failure of a guardian to account for trust funds neither proves nor implies embezzlement, under a code provision making punishable as embezzlement the fraudulent conversion by employees, agents, or bailees, of money or property intrusted to their keeping. *State v. Disbrow* (1906) 130 Iowa, 19, 106 N. W. 263, 8 Ann. Cas. 190.

The failure of an agent to pay over to his principal money received on accounts intrusted to him for collection is not punishable as embezzlement, under a statute providing that if any person who may be intrusted with money or other property, which may be the subject of larceny, to be delivered to another person, shall embezzle or fraud-

ulently convert to his own use such property, or secrete it with intent to do so, before delivery thereof to the person to whom it was to be delivered, he shall be punished. *Com. v. Bull* (1884) 5 Ky. L. Rep. 605.

The failure of a salesman to pay over money which he is charged with having embezzled, if unexplained, does not of itself raise a presumption of a felonious appropriation sufficient to convict under a statutory provision to the effect that any clerk who shall wrongfully use, dispose of, conceal, or otherwise embezzle any money which he shall have received for his employer, shall suffer imprisonment. *State v. O'Kean* (1883) 35 La. Ann. 901.

An instruction that the mere retention by a salesman of money collected, or its expenditure for the purposes of his employer in excess of the amount agreed upon for expenses, if accompanied by a bare failure to report or account for it accurately, is sufficient to authorize a conviction, is erroneous because it leaves out the important question of criminal intent, which is a necessary element of embezzlement. *People v. Bauman* (1895) 105 Mich. 543, 63 N. W. 516.

Proof of a mere failure of an agent to pay over money placed in his hands to invest is not sufficient to make out a case of embezzlement, but it must distinctly appear that he acted with a felonious intent, and made an intentionally wrong disposal of the money, indicating a design to cheat and deceive the owner. *People v. Hurst* (1886) 62 Mich. 276, 28 N. W. 838.

An indictment alleging the embezzlement of state funds by a state treasurer by wholly neglecting to account therefor, and to pay over the same, or any part thereof, to his successor in office, was held defective, because no demand was alleged. *State v. Munch* (1875) 22 Minn. 67. The state Constitution made a failure to pay over on demand, not embezzlement of itself, but prima facie evidence of it. A general statute made an improper neglect or refusal to pay over embezzlement per se, but the following section of such statute, the court stated, showed what was intended by "improper neglect or refusal to pay over," by providing that any neglect or refusal by an officer to pay any sum lawfully demanded shall be an embezzlement.

But proof of a balance due the state on the settlement of the accounts of a state treasurer, and of his failure to pay

it over to his successor, unexplained, will alone warrant a conviction of embezzlement. *Hemingway v. State* (1890) 68 *Miss.* 371, 8 So. 317.

And in *Busby v. State* (1907) 51 *Tex. Crim. Rep.* 289, 103 S. W. 638, in discussing the sufficiency of the trial judge's charge as to fraudulent intent upon the prosecution for embezzlement of the assistant financial agent of a state penitentiary shown to be short in his accounts, the court cited with approval the preceding case, and said: "Of course, in cases of this character, there must be a fraudulent intent on the part of appellant; but, in addition to the mere fact of a failure to account for funds received and belonging to the state, but slight additional evidence is required."

In *State v. Mispagel* (1907) 207 *Mo.* 557, 106 S. W. 513, in discussing the proper venue for a prosecution for embezzlement, the court said: "It must, however, be observed that our statute does not make a failure to account for a trust fund, or a fund received by an agent or officer, an offense, but the essence of the offense is the wrongful conversion of the fund; and while failure to account for such fund may constitute very material evidence tending to establish the act of conversion, yet the failure to account by no means constitutes the offense of embezzlement of the fund." The statute referred to provides that if any officer, agent, clerk, apprentice, servant, or collector shall embezzle or convert to his own use, without the assent of his employer, any money or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken, or secreted.

The preceding case was cited, with the foregoing quotation, in *Hanna v. Minnesota L. Ins. Co.* (1912) 241 *Mo.* 383, 145 S. W. 412, an action for malicious prosecution resulting from a charge of embezzlement.

The mere failure of an agent to pay over money to his principal, after he has received it for, and on account of, his principal, does not of itself constitute the crime of embezzlement, nor does the mere conversion of it by the agent to his own use after its reception, and failure to pay it over to his principal, constitute such crime, but there must be a felonious intent on the part of the agent L.R.A.1917B.

at the time of the conversion to appropriate it to his own use, and deprive the owner of the ownership therein. *Home Lumber Co. v. Hartman* (1891) 45 *Mo. App.* 647.

Under an act making an agent, intrusted with the sale of personal property, who shall fraudulently take and convert the proceeds of the sale of the same to his own use, guilty of a misdemeanor, proof of mere neglect to pay over such proceeds is not sufficient to justify a conviction. *Fitzgerald v. State* (1888) 50 *N. J. L.* 475, 14 *Atl.* 746.

The failure of an insurance agent to pay over a balance of his account with the company does not constitute embezzlement. *People v. Howe* (1873) 2 *Thomp. & C. (N. Y.)* 383.

The mere fact of not paying over money is not sufficient evidence in itself to convict the secretary of a lodge of a breach of trust with fraudulent intent. *State v. Butler* (1884) 21 *S. C.* 353, 5 *Am. Crim. Rep.* 206.

The simple failure of a guardian to pay over an ascertained indebtedness as shown by a settlement does not constitute the offense created by a statute providing that any guardian who shall wilfully and maliciously convert to his own use any trust moneys, and on final settlement shall fail to pay them to those entitled thereto, shall be adjudged guilty of a felony. *State v. Henry* (1878) 1 *Lea. (Tenn.)* 720.

But in *State v. Leonard* (1869) 6 *Coldw. (Tenn.)* 307, it was held that the failure and refusal of a county trustee to pay over money in his hands to his successor in office was, unexplained, evidence of a conversion of the money to his own use, and, if proved, would establish the allegation that he embezzled and converted the money to his own use, in an indictment under a code section which provided that, if any person charged with the safekeeping, collection, and disbursement of money or property belonging to the state or any county, used any part of said money or property, by loan, investment, or otherwise, without authority of law, or converted any part thereof to his own use, in any way whatever, he was guilty of embezzlement.

And in *State v. Cameron* (1871) 3 *Heisk. (Tenn.)* 78, holding that an acquittal of a tax collector on an indictment under the foregoing section, for embezzlement of revenue by converting the same by falsely pretending that it was taken from him by robbery, was a bar to a subsequent indictment for fail-

ing to pay over the same moneys, under a statute providing that if any tax collector should wilfully fail and refuse to pay into the treasury of the state the revenue which he had collected, he should be guilty of a felony, the court said, citing the preceding case and setting out its holding, that it followed therefrom that the offense of failing or refusing to pay the revenue collected into the treasury of the state was included in the offense of embezzlement; and although it required more evidence to convict of the latter than the former offense, when the money collected had been loaned or invested contrary to law, yet the conversion of the fund by the collector to his own use, was, when not paid over to the treasury, under either statute, a felony, and although evidence of the collection and failure to pay into the state treasury would support an indictment under the latter statute, and might not be sufficient to embrace a case of loaning and investing without authority of law, the offense was, in law, precisely the same under either statute, when there was a conversion and the money not paid over; and that the failure to pay into the treasury, as has been seen, was evidence of conversion, and the acquittal of the defendant upon the charge of conversion was a bar to the prosecution for failing to pay into the treasury.

An indictment for embezzlement is not sustained by proof of the failure to pay over moneys collected by one employed as the driver of a laundry wagon, under a contract charging him, instead of the patrons of the laundry, with the work brought in, and permitting him to retain a certain percentage of his collections. *State v. Covert* (1896) 14 Wash. 652, 45 Pac. 304.

A mere detention of money belonging to another, without a fraudulent intent

to convert it to the use of the one by whom it is detained, and to deprive that other person of such property, does not constitute embezzlement under an act providing that if any officer, agent, clerk, or servant embezzle or fraudulently convert to his own use money or any property of any other person, which shall have come into his possession or been placed under his care or management, by virtue of his office, place, or employment, he shall be guilty of larceny thereof. *State v. Moyer* (1905) 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344.

In *Dix v. State* (1895) 89 Wis. 250, 61 N. W. 760, proof that a salesman came to the county where, under his contract of employment, he was to pay over the money collected by him in other counties, and that he failed to do so, was held insufficient to support a conviction of embezzlement in such county, in the absence of proof of a demand of payment there by the person entitled to receive the money, or of a conversion thereof by the salesman in that county.

In *Rex v. Hodgson* (1828) 3 Car. & P. (Eng.) 422, it was held no embezzlement where a clerk whose duty it was to receive moneys daily at a certain place, to enter all such moneys so received in a book, and to remit the amount weekly to a certain person, correctly entered the moneys received, and admitted their receipt, but failed to remit them in accordance with his duty.

And in *Reg. v. Creed* (1843) 1 Car. & K. (Eng.) 63, the collector of a water company who rendered a true account of the money he had received, but absconded and failed to pay over the money, was held not guilty of embezzlement; the court stating that if he had rendered an account in which the sums received were omitted, it would be evidence to show that he had embezzled the same.

G. V. I.

#### OKLAHOMA SUPREME COURT.

CHARLES CLARK et al., Plffs. in Err.,  
v.

BOARD OF COUNTY COMMISSIONERS,  
OSAGE COUNTY.

(— Okla. —, 161 Pac. 791.)

#### Garnishment — of county.

1. Where the object to be accomplished is in violation of public policy, the aid of equity may not be invoked. Upon grounds of public policy a county is exempt from

garnishment, and this exemption extends to equitable garnishment.

For other cases, see *Garnishment*, I. b, in Dig. 1-52 N. S.

#### Contract — construction.

2. The terms of a contract examined, and held that, under its provisions that there should be no liability until full performance of the work contracted for, there was no liability, in a suit for the contract price of the work, the evidence showing that the

performance of the work had not been completed at the time of the trial.

*For other cases, see Contracts, IV. c, 2, in Dig. 1-52 N. S.*

(December 5, 1918.)

**E**RROR to the District Court of Osage County to review a judgment in defendant's favor in a garnishment proceeding to reach an amount alleged to be owing under a construction contract; by defendant to plaintiffs' judgment debtors. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Grinstead & Scott, for plaintiffs in error:

This form of proceeding by way of equitable garnishment is well known, recognized, and followed by the courts.

Riggin v. Hillard, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402; Plummer v. School Dist. 17 Ann. Cas. 508, and note, 90 Ark. 236, 134 Am. St. Rep. 28, 118 S. W. 1011.

Defendant is not entitled to damages for failure to complete the courthouse and jail within the time stipulated in the construction contracts.

American Bonding & T. Co. v. Gibson County, 62 C. C. A. 397, 127 Fed. 671; Kasch v. Nelson, 20 Wash. 315, 55 Pac. 118; International Cement Co. v. Beifeld, 173 Ill. 179, 50 N. E. 716.

Notice from the owner to the contractor that he will complete the work and deduct the costs from the contract price is an election to accept the building subject to the necessary costs of completion.

Wilkinson v. Becker, 13 Montg. Co. L. Rep. 106; 6 Cyc. 69, note, 71; Crawford v. Becker, 13 Hun, 375.

Messrs. John W. Tillman and C. K. Templeton, for defendant in error:

One who sells material to a public contractor is charged with the knowledge of the statutory duty of the contractor to give bond as required by the statute, and if he sells his material before such a bond has been given, he does so at his peril, and, if he sustains a loss, cannot recover damages from the officer who failed to require such a bond.

Bushnell v. Haynes, — Okla. —, 156 Pac. 343.

A county is not subject to liability which is neither expressly nor impliedly imposed by statute.

Welker v. Ennett, 44 Okla. 520, 145 Pac. 411.

Neither the county nor its officers are liable on failure to take bond as required by statute.

Blanchard v. Burns, 110 Ark. 515, 49 L.R.A.(N.S.) 1199, 162 S. W. 63. L.R.A.1917B.

Johnson, C., filed the following opinion:

The board of county commissioners of Osage county entered into contracts with Donothan & Moore, a copartnership, for the construction of a courthouse and jail for the county. Contemplating a possible default by the contractors in the performance of their agreements, the contract contained the following clause, to wit: "And if the architects shall certify that such refusal, neglect, or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties."

After partial construction and partial payment of the contract price of the construction, Donothan & Moore notified the board of county commissioners in writing that, on account of financial reverses, they would be unable to complete their contracts, and requested the board to take charge of, and complete, the work out of the unpaid part of the contract price, which the board proceeded to do. Plaintiffs in error furnished materials to Donothan & Moore prior to the abandonment of the work by the latter, for which they were not paid, and obtained judgments against Donothan & Moore upon the indebtedness represented thereby. In this action, plaintiffs in error sued the board of county commissioners and Donothan & Moore, alleging the completion of the work by the county, the fact that the county had not taken from Donothan & Moore a bond for the protection of materialmen, the indebtedness by the county to Donothan & Moore for a balance of the contract price not expended by the county in the completion of the

buildings, the unsatisfied judgments above mentioned, the insolvency of Donothan & Moore, and the absence of an adequate remedy at law; and sought a decree of equitable garnishment against the county to the extent of such amount alleged to be owing by the county to Donothan & Moore. The county contended that it was not liable to garnishment, either legal or equitable; that the work under the contract was not wholly finished at the time of the suit, and under the specific terms of the contract there was no liability until full completion of the work; and that the county had certain claims of offsets and damages against Donothan & Moore which more than consumed the unexpended balance in the courthouse and jail fund. The lower court rendered judgment in favor of defendant, and plaintiffs have appealed.

The decisive issues are: (1) The liability of the county to the proceeding in equitable garnishment; and (2) the liability of the county to Donothan & Moore as based upon the state of completion of the work. We think that the lower court was correct in holding against the liability of the county upon both of such issues, and this without regard to the validity of the county's claim for offsets and damages.

Practically every appellate court of the country which has passed upon the question has held that, in the absence of a statute specifically conferring the right of garnishment against a county, garnishment does not run against a county. *Edmondson v. De Kalb County*, 51 Ala. 103; *Boone County v. Keck*, 31 Ark. 387; *Stermer v. La Plata County*, 5 Colo. App. 379, 38 Pac. 839; *Ward v. Hartford County*, 12 Conn. 404; *Duval County v. Charleston Lumber & Mfg. Co.* 45 Fla. 256, 60 L.R.A. 549, 33 So. 531, 3 Ann. Cas. 174; *Morgan v. Rust*, 100 Ga. 346, 28 S. E. 410; *Fast v. Wolf*, 38 Ill. App. 27; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *Des Moines County v. Hinkley*, 62 Iowa, 637, 17 N. W. 915; *Webb v. McCauley*, 4 Bush, 8; *Clark v. Clark*, 62 Me. 255; *Williams v. Boardman*, 9 Allen, 570; *McDougal v. Hennepin County*, 4 Minn. 184, Gil. 130; *State ex rel. Crawford v. Eberly*, 12 Neb. 616, 12 N. W. 96; *Boalt v. Williams County*, 18 Ohio, 13; *Pettebone v. Beardslee*, 1 Kulp, 180; *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672, 57 S. W. 980; *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 236, 35 Pac. 1081; *Merrell v. Campbell*, 49 Wis. 535, 35 Am. Rep. 785, 5 N. W. 912; *Switzer v. Wellington*, 40 Kan. 250, 10 Am. St. Rep. 196, 19 Pac. 620.

There is no statute of this state specifically authorizing garnishment as against a county. The supreme court of Montana L.R.A.1917B.

sustained garnishment as against a county in the case of *Waterbury v. Deer Lodge County*, 10 Mont. 515, 24 Am. St. Rep. 67, 26 Pac. 1002, but based the decision upon a statute of that state expressly authorizing the writ as against a county. In a case cited by plaintiff in error, viz., *Roggin v. Hillard*, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402, the supreme court of Arkansas sustained an equitable garnishment against a county where the liability was complete and admitted. However, that case, in addition to being contrary to the doctrine of almost the universal holding of other courts, referred to the Arkansas case of *Boone County v. Keck*, 31 Ark. 387, holding that legal garnishment could not run against a county, and itself recognized that garnishment of a county was against public policy; and the conclusion reached in that case, that equitable garnishment would lie when its correlative remedy, legal garnishment, was contrary to public policy, was virtually a holding that equity may disregard public policy. In the Georgia, Indiana, Nebraska, Ohio, and Texas cases above cited, relief was sought in equity, and equitable garnishment against a county was held not to lie.

This court has held that, on grounds of public policy, the government of the United States and the several states, and officers and agents thereof, are exempt from garnishment. *Manwell v. Grimes*, — Okla. —, 149 Pac. 1182. This court has held that neither a county nor its officers are liable for material furnished to a contractor in the construction of public buildings for the county, regardless of the fact that no bond had been taken for the protection of materialmen. *Bushnell v. Haynes*, — Okla. —, 156 Pac. 343; *Wilson v. Nelson*, — Okla. —, 153 Pac. 1179. This court has also held that public buildings are not subject to materialmen's liens. *Western Terra Cotta Co. v. Board of Education*, 39 Okla. 716, 136 Pac. 595; *Gloyd v. Morris*, 42 Okla. 75, 140 Pac. 1149. The reason of these cases is that all men are presumed to know the law, that, if material is advanced in the absence of the bond for the protection of materialmen, it is done in the face of this knowledge and the absence of the bond, which the materialman may have required, and at the sole risk of the creditor, this conjoined with the public policy of not allowing the public interests to be embarrassed by private dispute, to obviate which the bond for the protection of materialmen is provided by statute. The same reasoning is applicable to the instant situation.

In addition to the above, our statute (Revised Laws 1910, § 4836) provides:



"4836. Garnishee not liable for what.— No judgment shall be rendered upon a liability of the garnishee arising: . . .

Third. By reason of any money in his hands as a public officer, or for which he is accountable to the defendant merely as such officer."

This is an express recognition of the public policy of this state, as laid down by implication in other states.

It is clear that a county is not liable to garnishment, and for reasons of public policy. It seems to us that it would be a subversion of equity to say that it would violate public policy. Garnishment is purely a statutory proceeding, and is usually invoked to reach assets of a debtor who has no property accessible to the ordinary legal writs, and who, without regard to the garnished property, is in the insolvent condition which plaintiff in error contends gives rise to ground for the interposition of equity in this case. If the exemption of public policy, as applicable to counties in cases of legal garnishment, could be avoided by application to equity, as is attempted in this case, this would amount to a substitution of the equitable for the legal proceeding in practically all cases where a county is indebted to a defendant, for salaries or on public contract or otherwise, for there would be no difference in the equitable principles applicable to the various classes of indebtedness. The equitable proceeding, as contended for here, would be much easier than the legal garnishment, for no bond of affidavit would be necessary. This would amount to a practical abolition of the exemption, and complete violation and subversion of the public policy involved. The bond is for the protection of materialmen,

furnishing materials to public contractors, and to allow the county to make settlement with such contractors without becoming embarrassed by, or involved in, the multitude of small disputes which might arise between the contractor and his own creditors. If a materialman makes advances of materials in the absence of such a bond, under the holding of this court in the cases of this court upon the question hereinabove cited, he is guilty of laches, makes the advance upon the credit of the contractor and solely at his own risk, for the requirement of the bond and reliance upon its liability is his legal remedy. Such laches would be an additional reason why he might not invoke the aid of equity. We must therefore hold that the exemption of the county from garnishment extends to the equitable remedy.

In addition to the above in this case, if the liability be predicated upon the contract, hereinabove quoted from, independently of the exemption of the county from garnishment, there was no liability on the part of the county to the contractor until full completion of the work; and all of the evidence showed that the work was not fully completed. If the liability be predicated upon quantum meruit, there was an entire absence of proof of the quantum meruit value of the work done by the contractor.

It follows that the suit was not maintainable under either of the issues, denominated by us as decisive; and that the judgment of the lower court should be affirmed.

Per Curiam:

Adopted in whole.

## PENNSYLVANIA SUPREME COURT.

AGNES CATANI, Appt.,

v.

SWIFT & COMPANY.

(251 Pa. 52, 95 Atl. 931.)

### Food — warranty of quality — middleman.

1. One preparing meat for food impliedly warrants to the consumer that it is sound and fit for that purpose, although it passes

through the hands of a middleman under a statute providing that in every such sale, unless the parties otherwise agree, there shall lie an implied undertaking that the goods are sound and fit for household consumption.

For other cases, see *Food*, in *Dig.* 1-52 N. S.

Commerce — interstate — food — prosecution under local laws.

2. The Federal statute making the sale of unfit meat in interstate commerce a misdemeanor, and providing inspectors at the

Note.—The liability of a manufacturer, packer, or vendor to persons not in privity of contract, for injuries from defects in articles sold, is discussed in the notes to *Tomlinson v. Armour & Co.* 19 L.R.A.(N.S.) 923; *Mazetti v. Armour & Co.* 48 L.R.A.(N.S.) 213; and *Crigger v. Coca-Cola Bottling Co.* L.R.A.1916B, 879; and see also later cases, *Gearing v. Berkson*, L.R.A. L.R.A.1917B.

1916D, 1006, and *Kerwin v. Chippewa Shoe Mfg. Co.* L.R.A.1916E, 1188.

The subject of state regulations as affected by the Federal Pure Food Law is discussed in the note to *McDermott v. State*, 47 L.R.A.(N.S.) 985; and see later cases, *State v. Armour & Co.* L.R.A.1916E, 380, and *Arrigo v. Hyers*, L.R.A.1917A, 1116.

packing houses, does not prevent prosecution under a state statute for sale in the original packages of diseased meat shipped from another state, which the packer himself had not inspected.

*For other cases, see Commerce, IV. b, in Dig. 1-52 N. S.*

**Evidence — sufficiency — unfit food.**

3. A prima facie case of liability for selling unfit meat for food is made out by proof that it was diseased and caused the death of a purchaser.

*For other cases, see Evidence, II. h, 1, f, in Dig. 1-52 N. S.*

(Brown, Ch. J., dissents.)

(October 4, 1915.)

**A** PPEAL by plaintiff from a judgment of the Court of Common Pleas for Luzerne County in defendant's favor, notwithstanding a verdict for plaintiff, in an action brought to recover damages for the death of her husband, resulting from eating unfit meat sold to plaintiff by a dealer in the original package. Reversed.

The facts are stated in the opinion.

Messrs. Bush Trescott and Joseph P. Lord for appellant.

Messrs. Frank L. Horton, R. C. McManus, Richard B. Sheridan, and Charles B. Lenahan for appellee.

Frazer, J., delivered the opinion of the court:

This was an action of trespass by plaintiff to recover damages for the death of her husband, which resulted from eating unwholesome and diseased pork slaughtered by defendant in the state of Missouri and shipped to its distributing house at the borough of Nanticoke, in this state, and there sold to a dealer and delivered to plaintiff in its original package, which bore the government stamp showing an inspection by United States inspectors. Plaintiff produced evidence that her husband and other members of the family had eaten the pork and all subsequently became ill, her husband dying a short time later from what the evidence tended to show was trichinosis, a disease resulting from eating meat containing trichinae, a small parasite or germ which multiplies rapidly and bores through the walls of the intestines, stomach, and muscles of the human body and poisons the system. The trial judge submitted to the jury the questions whether plaintiff's husband died of trichinosis, and, if so, if he contracted the disease from pork sold by defendant and eaten by him. The jury returned a verdict for plaintiff, thus deciding both questions in the affirmative. Judgment non obstante veredicto was, however, subsequently entered for defendant.

defendant on the ground that, the Federal laws having been complied with and the meat inspected by the United States inspectors and certified to be sound, defendant was not liable, in the absence of negligence in the transportation or handling of the meat subsequent to the inspection, even though it made no further inspection. From the judgment entered plaintiff appeals, assigning as error this action of the court.

The sale in this case was not made by defendant to plaintiff directly, but indirectly through Louis Otocavani, a dealer, though the testimony as to this is not clear. But assuming Otocavani, who ordered the meat, was a dealer, the first question to be considered is whether there was an implied warranty by defendant that the meat sold to the dealer was free from disease, wholesome, and fit to eat, and whether this warranty extended to the consumer after the meat had passed through the dealer's hands.

The general rule is that, where the sale of articles of food is for immediate consumption, there is an implied warranty that the food is wholesome and fit for the purpose intended, irrespective of the seller's knowledge of disease or defects therein. 35 Cyc. 407, and cases cited. The supreme court of Illinois, after an exhaustive review of the subject in *Wiedeman v. Keller*, 171 Ill. 93, said, at page 98, 49 N. E. 211: "As a general rule, we think the decided weight of authority in the United States is that in all sales of meats or provisions for immediate domestic use by a retail dealer there is an implied warranty of fitness and wholesomeness for consumption. There is, however, no implied warranty of soundness or wholesomeness arising from the sale of meats or provisions to a dealer or middleman who buys on the market, not for consumption, but for sale to others. Nor would there be any liability, in a sale for immediate domestic use, where the vendor was not a regular dealer. 10 Am. & Eng. Enc. Law, 157. In this case, however, the appellee was a regular retail dealer, and as such he sold the meat to appellant for domestic use, and, under the law as it seems to be settled in this country, as the meat turned out to be unwholesome, he was liable, although he was not aware that it was diseased when he sold it to appellant."

This rule has been put in statutory form in Pennsylvania as far as it applies to articles of food by the Act of May 4, 1889, P. L. 87, 3 Pepper & Lewis Dig. 2d ed. page 6723, which provides that "in every sale of green, salted, pickled, or smoked meats, lard and other articles of merchandise, used wholly or in part for food, said

goods or merchandise shall correspond in kind and quality with the description given, either orally or in writing, by the vendor; and in every sale of such goods or merchandise, unless the parties shall agree otherwise, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption."

The contention that the warranty did not extend to subsequent purchasers after the meat passed through the hands of middlemen cannot be sustained. The case of *Ketterer v. Armour & Co.* (D. C.) 200 Fed. 322, is directly in point; that being a case of sale of pork infected with trichinæ. It was there said by Circuit Judge Noyes, at page 322:

"The contention of the defendant is that a manufacturer who deals with the middleman, and not directly with the consumer, owes the latter no duty whatever except the duty owing to all men to refrain from knowingly and wilfully inflicting injury. And as wilful injury is hardly conceivable, the claim comes down to this: That a producer of meats can take no steps to detect poisonous parasites in his products, although the danger of their presence is well known and can be guarded against, and yet may sell such products with impunity so far as the demands of poisoned consumers are concerned. This contention is based upon the theory that so long as the manufacturer sells only to the dealer or middleman he is a stranger to the consumer; there is no contractual relationship to base a duty upon. It is said that the dealer may sue the manufacturer, and that the consumer may sue the dealer, but that the consumer cannot sue the manufacturer. In other words, if the claim be well founded the middleman has an effective remedy, but he is not injured. The consumer is injured, but he cannot look to the wrongdoer and must sue the local dealer, who is likely to be irresponsible and is certainly free from fault.

"And this contention has support in authority. It is unquestionably the rule in the case of many manufactured articles where the consequences of negligent manufacture cannot be followed down to their final results. Thus, as is pointed out in one of the cases, a careless manufacturer of iron could not be held responsible for the destruction of a steamer from the bursting of a boiler into the construction of which his imperfect material, after passing through many hands, had gone. In such cases, and in others less clear, it is said that public policy requires that the remedy for negligence should not be pressed to an impracticable extreme. But I am

wholly unable to apply this rule in the present case; much more to apply it in the name of public policy. Public policy regards the public good, and I am yet to be convinced that the public welfare will be promoted by holding that producers and manufacturers owe no duty to consumers to guard against diseased and poisonous meats and provisions, except in those isolated cases where they happen to sell directly to them.

"The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon 'the demands of social justice.' The producer should be held responsible for the results of negligent acts which he can readily foresee. There is no analogy between the case where defective material, after passing through many hands, produces not to be looked for ill effects. The iron manufacturer who fails to inspect a piece of iron cannot foresee that it will be used in a boiler and cause a ship to sink. But the meat packer who fails to inspect his products for poisonous parasites or ingredients knows that poison will poison, and that the persons to be poisoned through his neglect will be those who eat his products, and no one else. The natural, probable, and almost inevitable result of his negligence will be injury to the consumer, and, in my opinion, every consideration of law and public policy requires that the consumer should have a remedy."

To the same effect is *Meshbesher v. Channellene Oil Co.* 107 Minn. 104, 131 Am. St. Rep. 441, 119 N. W. 428, where the manufacturer was held liable to the consumer for impure oil purchased by the latter from a retail grocer.

The same rule was applied by this court in *Elkins, B. & Co. v. McKean*, 79 Pa. 493, to the sale of oil. In that case it was said by Mr. Chief Justice Agnew (p. 502): "The substance of that point is that after the oil had passed from the defendants in large quantities to Arbuckle & Company, and from them in smaller quantities to Caskey, and from Caskey to Steele & Hart, who sold the lampful to McKean, there can be no recovery. The argument in support of this point is founded upon the alleged successive intervening liabilities of the persons through whose hands the oil had passed. But this proposition is unsound as a legal defense. The number of hands through which the oil had passed might furnish a strong argument on the question of identity, and the guilty knowledge of Elkins, Bly, & Company as to this particu-

lar oil, but could not constitute a legal bar to recovery, if the identity of the oil and the guilty knowledge were made clear. Certainly one who knowingly makes and puts on the market for domestic and other use such a death-dealing fluid cannot claim exemption from liability for his terrible wrong, because he has sent it through many hands. The length of its passage may create a doubt of its identity, or that it was sent on its mission of destruction with a full purpose and knowledge of its dangerous qualities; but, the facts being established, he cannot escape the consequences of his crime against society. The maxim, *Qui facit per alium facit per se*, applies as clearly as other maxim, *Sic utere tuo ut alienum non lædas*. When the article is thrown into the current of trade on the faith of the affirmation of its manufacturers that it is a fit oil for light, and can be safely used in the family, or where it may be required for illumination, they cannot follow it, or avert its injuries, or determine how much of the responsibility is due to others."

These authorities effectually dispose of this question. It is contended by defendant, however, that since the sale was made in the original package, used in interstate shipment, the transaction was exclusively within the Federal statutes relating to the inspection and sale and transportation of meat, and neither the common-law doctrine of implied warranty, nor the Pennsylvania statute above referred to, nor other Pennsylvania statute law forbidding the sale of adulterated food applies, and as defendant had fully complied with the Federal inspection laws, the lower court was right in entering judgment for defendant non obstante veredicto.

Section 2 of the Federal Act of June 30, 1906, 34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8718, prohibits interstate shipment of adulterated food or drugs, and makes a violation of the act a misdemeanor and provides penalties therefor. Section 7 of this act (§ 8723) defines adulteration in the case of meats as consisting "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

The Federal Act of March 4, 1907, 34 Stat. at L. 1256, chap. 2907, Comp. Stat. 1913, § 8681, ¶ 21, provides that any person who shall "sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human

food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor." The same act (Comp. Stat. 1913, § 8681, ¶ 19), authorizes the Secretary of Agriculture to appoint inspectors at all slaughterhouses, packing houses, etc., to examine animals in accordance with the rules and regulations to be prescribed by him. Under these rules the packer is forbidden to make an inspection prior to the government's inspection, in the manner in which such inspection is made; but there is nothing to indicate that a subsequent independent inspection is forbidden or could not be made by the packer. Defendant made no pretense of showing such independent inspection or examination, but relies upon the argument that no such inspection was necessary, and that its duty to the consumer was fulfilled by the government inspection, in analogy to the decisions under the Pennsylvania coal mining laws requiring the placing of underground mining works under supervision and control of a certified mine foreman, for whose negligence the mine owner is held not responsible. *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237. It should be noted, however, that the Federal statutes do not require the packer to surrender control of his establishment, as is the case with the Pennsylvania mine owner. All that the former is required to do is to afford an opportunity for the government officials to make an inspection. The question was decided contrary to defendant's contention in *O'Connor v. Armour Packing Co.* 15 L.R.A. (N.S.) 812, 85 C. C. A. 459, 158 Fed. 241, 14 Ann. Cas. 66. While that was a case involving the duty of a master to a servant, the duty of defendant to the public would seem to be as high as his duty to his servant. In that case it was said, 15 L.R.A. (N.S.) at page 818: "The contention of the defendant is that the inspection by the government was all that could be required, and that, under the circumstances, the master was not chargeable with the duty of making any inspection. It was not denied that the doctrine requiring inspection was applicable to the case, but the contention is that the inspection provided was sufficient, as matter of law, to relieve the defendant of the charge of negligence. The object of the Federal statutes requiring inspection was to provide additional safeguards against the traffic in spoiled or diseased cattle and meats. They should not be so construed or applied as to deprive anyone injured or damaged by the negligence or wrongdoing of a dealer in or a vendor of cattle or meats any remedy which he had under laws existing when the

statutes were enacted. We are not of opinion that the inspection by government officials of a place, machinery, instrumentality, or material necessarily and as matter of law releases the master from his duty to make such examinations and inspections as are required of him by the rule which demands that he exercise ordinary and reasonable care for the safety of his servant."

The question was also discussed in *Clintman v. Northrop*, 8 Cow. 45, where it was said as to the effect of an official inspection and stamp of goods, at page 46: "The act does not declare that the certificate or mark of the inspector shall be conclusive. It is not the object or policy of our system of inspection laws to render the decisions of the different inspectors of flour, beef, pork, staves, leather, etc., final and conclusive. The object of those laws is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets. I am not aware that the law, in any case, gives a conclusive effect to the ex parte certificate of a public officer in relation to matters which depend upon the exercise of integrity, judgment, and discretion; and by which private rights and contracts may be seriously affected."

We agree with the reasoning of above cases, and hold that the Federal statutes providing for meat inspection by government officers do not relieve the packer from liability for damages where he has made no inspection nor taken any steps to ascer-

tain for himself whether the meat sold by him is fit for food. The common-law duty to sell only wholesome food still remains, and the burden of discharging this duty has not been shifted to government inspectors. The jury having found that the death of plaintiff's husband was the result of eating meat packed by defendant which was affected by a disease which the evidence showed was discoverable by proper inspection, the burden was on defendant to show fulfillment of its duty, which burden was not met by merely proving inspection by the United States government inspectors.

Under the foregoing principles governing the sale of articles of food, a prima facie case is made out by proof that the meat sold by defendant was diseased and caused the death of plaintiff's husband. It was not necessary to go farther and prove defendant knew the food was unwholesome. Defendant's duty was absolute. 35 Cyc. 407; *Wiedeman v. Keller*, 171 Ill. 93, 98, 49 N. E. 211; *Meshbesh v. Channellene Oil Co.* 107 Minn. 104, 131 Am. St. Rep. 441, 119 N. W. 428. It was bound to know that the meat was unwholesome and unfit for food, and this duty was not performed by merely showing an inspection and approval by United States government inspectors. This view of the case makes it unnecessary to discuss the question raised as to the admissibility of the depositions.

The judgment is reversed, and judgment is directed to be entered in favor of plaintiff on the verdict.

**Brown, Ch. J., dissents.**

#### WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON, Resp't.,  
v.

GEORGE P. ROSSMAN, Appt.

(— Wash. —, 161 Pac. 349.)

**Employment agency — fee — who is worker.**

1. A stenographer and bookkeeper is a worker within the meaning of a statute forbidding the taking of a fee for securing employment for workers.

*For other cases, see Employment Agency, in Dig. 1-52 N. S.*

**Statute — indefiniteness — commission from worker.**

2. A statute forbidding the taking of commissions for securing employment for

workers is not void for indefiniteness because of the use of the word "workers."

*For other cases, see Statutes, I. c, in Dig. 1-52 N. S.*

**Constitutional law — employment agency — forbidding taking of fee.**

3. No constitutional rights are infringed by forbidding the taking of a fee or commission for securing employment for workers.

*For other cases, see Employment Agency, in Dig. 1-52 N. S.*

(December 5, 1916.)

**APPEAL** by defendant from a judgment of the Superior Court for King County convicting him of the crime of charging a fee for furnishing employment or information leading thereto. Affirmed.

The facts are stated in the opinion.

**Mr. Edgar S. Hadley, for appellant:**

A stenographer or a bookkeeper is not a worker within the meaning of initiative measure No. 8.

**Note.**—As to constitutionality of statute forbidding taking of fee for securing employment for another, see annotation following this case, post, 1280.  
L.R.A.1917B.

Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523; 36 Cyc. 1274, 1275; 5 Cyc. 859; Re Appropriations for Deputies, 25 Neb. 662, 41 N. W. 643.

The word "worker" is so indefinite as to render the act void through its indefiniteness.

State v. Powles & Co. 90 Wash. 112, 155 Pac. 774.

The liberty and the pursuit of happiness in which the individual is protected by our Constitutions apply as fully to his right to contract as to the right to follow any legitimate vocation, untrammelled by unnecessary regulations, or freedom from arrest or restraint of his person.

Spokane v. Macho, 51 Wash. 324, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 756; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; State v. Moore, 113 N. C. 697, 22 L.R.A. 475, 18 S. E. 342; Lawton v. Steele, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499; Re O'Neill, 41 Wash. 184, 3 L.R.A.(N.S.) 558, 83 Pac. 104, 6 Ann. Cas. 869; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 861, 7 Ann. Cas. 577; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Dent v. West Virginia, 129 U. S. 121, 32 L. ed. 625, 9 Sup. Ct. Rep. 231; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Williams v. Fears, 179 U. S. 274, 45 L. ed. 188, 24 Sup. Ct. Rep. 128.

Messrs. Alfred H. Lundin and Lane Summers, for respondent:

A stenographer and bookkeeper is a worker within the meaning of the statute.

Com v. Griffith, 204 Mass. 18, 25 L.R.A.(N.S.) 957, 134 Am. St. Rep. 645, 90 N. E. 395; State v. Rose, 125 La. 462, 26 L.R.A.(N.S.) 821, 51 So. 496; Pendergast v. Yandes, 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724; Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176, 26 L. ed. 704; Heckman v. Tammen, 184 Ill. 144, 56 N. E. 361; Hightower v. Slaton, 54 Ga. 108, 21 Am. Rep. 273; Com. v. John T. Connor Co. 222 Mass. 299, L.R.A.1916B, 1236, 110 N. E. 301; Phoenix Furniture Co. v. Put-In-Bay Hotel Co. 66 Fed. 683; Hughes v. Torgerson, 96 Ala. 346, 16 L.R.A. 600, 38 Am. St. Rep. 105, 11 So. 209; Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303; Abrahams v. Anderson, 80 Ga. 570, 12 Am. St. Rep. 274, 5 S. E. 778; Cohen v. Aldrich, 5 Ga. App. 256, 62 S. E. 1016; Thompson v. Passmore, 9 Ga. App. 771, 72 S. E. 185; Capron v. Strout, 11 Nev. 304, 9 Mor. Min. Rep. 391; State ex rel. L.R.A.1917B.

Pleasant v. Ottawa, 84 Kan. 100, 113 Pac. 391.

The statute is sufficiently definite to be valid and enforceable.

Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Stuth, 11 Wash. 423, 39 Pac. 665; State v. Fox, 71 Wash. 185, 127 Pac. 1111; Com. v. Louisville & N. R. Co. 140 Ky. 21, 130 S. W. 798; Katzman v. Com. 140 Ky. 124, 30 L.R.A.(N.S.) 519, 140 Am. St. Rep. 359, 130 S. W. 990; Meffert v. Packer, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; Aiton v. Board of Medical Examiners, 13 Ariz. 354, L.R.A.1915A, 691, 114 Pac. 962.

The act is not unconstitutional.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Raast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 370, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; Tanner v. Little, 240 U. S. 369, 60 L. ed. 379, 36 Sup. Ct. Rep. 379; Pitney v. State, 240 U. S. 387, 60 L. ed. 385, 36 Sup. Ct. Rep. 385; Wiseman v. Tanner, 221 Fed. 694.

Mount, J., delivered the opinion of the court:

The defendant was convicted of the crime of charging a fee for furnishing employment or information leading thereto. He has appealed from the sentence imposed upon that conviction.

The facts are stipulated in substance as follows: The defendant was operating an agency for the employment of stenographers and bookkeepers, and was charging a fee of \$2 as an enrolment fee, and 20 per cent of the first month's salary after the applicant secured employment. On the 14th day of February, 1916, the appellant demanded and received from one Elnora Hughes the sum of \$2. She was then seeking employment as a stenographer and bookkeeper.

The appellant makes three contentions in this court, to the effect: First, that a stenographer and bookkeeper is not a worker within the meaning of initiative measure No. 8; second, that the word "worker" is so indefinite as to render the act void; and, third, that the act is unconstitutional under the 5th and 14th Amendments to the Constitution of the United States, and like provisions of the Constitution of this state. We shall notice these contentions briefly.

On the first point the appellant relies upon the case of Huntworth v. Tanner, 87 Wash. 670, at 680, 152 Pac. 527, where we held that a school-teacher was not a worker within the meaning of that act. In that case we said: "The act has no reasonable relation to any subject other than the protection of those who may be classed as workers or laborers. It has never been contend-

ed that business and professional men, teachers, and those following scientific pursuits, are not amply equipped to protect themselves. A teacher renders the very highest class of professional service, whereas, those for whose benefit this law was passed are frequently unskilled in business affairs, and in many instances are men of foreign birth, having no competent understanding of our business methods or our language."

It is contended by the appellant that a stenographer and bookkeeper, for the reasons stated in *Huntworth v. Tanner*, *supra*, is not included within the meaning of the term "worker." Some things there said might lead to that conclusion. But we are satisfied that a stenographer and bookkeeper is a worker, and therefore comes within the meaning of the act. In *Georgia*, in a case where a man was employed as a private secretary and stenographer to the president of a railroad and banking company at \$125 per month, his duties being to receive dictation and transcribe letters, and to take care of the papers in the office, including the keeping of books and statements, it was held that he was a worker, and was entitled to have his wages exempt from garnishment. *Abrahams v. Anderson*, 80 Ga. 570, 12 Am. Rep. 274, 5 S. E. 778. And in *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015, also a *Georgia* case, a stenographer was also held to be a worker. In that case it was said: "That a stenographer is skilled and trained cannot affect the nature of the work he does, although it does affect its character. After acquiring the trade, the test is the method of carrying it on. It is difficult to conceive of anything more thoroughly manual than the work of a stenographer. Receiving the sounds from the lips of another, he registers what he hears and reproduces what he receives. He exercises no independence of thought, no initiative, no discretion. The test of his efficiency is his absolute acceptance of what is given him and its return unchanged. If his employer indulges in the pastime of murdering the King's English, he must become a 'particeps criminis,' and join in the assassination. So pronouncedly are the physical faculties involved in stenography that there comes a time when the hand refuses to work, although the mental faculties may be entirely clear. It is pre-eminently manual labor, work of the hand."

Under the rule in these cases, and others of a similar character which might be cited, we are satisfied that a stenographer and bookkeeper is a worker within the common acceptance of that term, and is within the meaning of initiative measure No. 8.

It is next contended that the term "worker" is so indefinite as to render the

act void. This contention is based upon the decision in *State v. Powles & Co.* 90 Wash. 112, 155 Pac. 774. In that case we held that the term "commission merchant," which was defined to be "any person, firm, or corporation whose principal business is the sale of farm, dairy, orchard, or garden produce on account of the shipper or consignor," was too indefinite to base a criminal charge upon by reason of the use of the words "principal business." But it was not held there that the words, "commission business," if they had been used alone, were not capable of accurate definition. But because the word "principal" was used, it was held that it could not be determined with accuracy what the principal business of a commission merchant might be. The word "worker" is capable of definite definition, and is readily understood. We think there is no merit in the contention that the act is void for indefiniteness because of the use of the word "worker."

It is next contended that the act is unconstitutional because it is not within the police power of the state to regulate or interfere with the right of a private citizen to pursue a lawful business. In the case of *Huntworth v. Tanner*, we reserved the constitutional question, because in that case it was not necessary to determine that question; for we held that a school-teacher was not a worker within the meaning of the act. The question now presented is whether this act is within the police power of the state.

A number of cases are cited by the appellant to the effect that a citizen is guaranteed the protection of his property and the pursuit of his happiness under the Constitution of the United States, and that any person is at liberty to pursue any lawful calling and to do so in his own way when not encroaching upon the rights of others; and it is contended that the police power of the state does not extend to the right to take away or regulate a lawful business. There can be no doubt of the right of a citizen to pursue a lawful calling in a lawful way; but it is equally true that there can be no doubt of the right of the state, through its legislature, to regulate a business which may become unlawful by improper and unlawful means.

In *Munn v. Illinois*, 94 U. S. 113, at page 124, 24 L. ed. 77, it was said: "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . . From this source come the police powers, which as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 12 L. ed. 291, 'are nothing more or less than

the powers of government inherent in every sovereignty; . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

In *State v. Mountain Timber Co.* 75 Wash. 581, L.R.A. —, —, 135 Pac. 645, 4 N. C. C. A. 811, this court said: "Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim, 'Salus populi suprema lex.' It is not a rule; it is an evolution."

In *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209, in discussing the police power of the state, this court said: "If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

And in *Munn v. Illinois*, supra, at page 132 of 94 U. S. the Supreme Court of the United States said: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

And in *McLean v. Arkansas*, 211 U. S. 539, at page 548, 53 L. ed. 315, 320, 29 Sup. Ct. Rep. 208, it was said: "If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

In *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 177, 37 L.R.A.(N.S.) 466, L.R.A.1917B.

117 Pac. 1106, we said: "The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the Constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise."

We think there can be no doubt of the principles enunciated in the foregoing quotations. In the *Huntworth Case*, supra, the reason for this act was pointed out. We there said, at page 679 of 87 Wash.: "The mischief inducing the present act is not hard to find. It was to correct what society had come to regard as a wrong practised upon those who for many reasons were unable to protect themselves against impositions and extortions. It was to protect a class that was powerless under existing conditions to protect itself. As said by the Supreme Court of the United States in *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821, when speaking of the Federal statute prohibiting any person from demanding or receiving remuneration for providing employment for sailors: 'The story of the wrongs done to sailors in the larger ports, not merely of the nation but of the world, is an oft-told tale.' Or, as the court of appeals of New York said when considering the constitutionality of a statute regulating employment agencies: 'The legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality.' *People ex rel. Armstrong v. Warden*, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325."

And quoting from *Moore v. Minneapolis*, 43 Minn. 418, 45 N. W. 719, we said: "The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experi-



ence, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the legislature, as a matter of proper police regulation. . . . The propriety of police regulation seems apparent when it is considered that, by means of such agencies, ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution.'"

We then said: "Furthermore, the act must be determined by a consideration of its natural effect when put in operation. In operation it may tend to protect the day laborer who, as said by the examiner in the office of the labor commissioner of the city of Seattle, 'is generally poor and without means' (*Wiseman v. Tanner* [D. C.] 221 Fed. 694), and who, in consideration of a fee, is directed to a job which may not exist, or which may not endure because of collusion between the employment agent and a corrupt foreman."

It is apparent from these quotations from *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 527, that the act, and the purposes for which it was enacted, were to prevent frauds which had become common in the

class of business to which the act relates, and was therefore, under the authorities above cited, within the police power of the state to regulate, and even suppress, to the extent, at least, of the frauds. The constitutionality of this act was upheld in *Wiseman v. Tanner*, supra, where all the authorities cited in the appellant's brief, and many not therein cited, were considered.

It is further argued by the appellant that the act is prohibitive of the business, and therefore is unconstitutional. This contention, we think, is without merit, because the act does not prohibit the business. Section 2 of the act (Laws 1915, p. 1) makes it unlawful for any employment agent to demand or receive fees from persons seeking employment. It does not prohibit the business. Fees, of course, may be charged against persons desiring to employ laborers. We are of the opinion that the act is a valid exercise of the police power, and is not unconstitutional upon either ground.

The judgment appealed from is therefore affirmed.

**Morris, Ch. J., and Chadwick and Fullerton, JJ., concur. Ellis, J., concurs in the result.**

Petition for rehearing denied.

### **Annotation—Constitutionality of statute forbidding taking of fee for securing employment for another.**

The question of the right to license employment agencies under the police power has been treated in notes to *People v. Warden*, 2 L.R.A.(N.S.) 859; *Spokane v. Macho*, 21 L.R.A.(N.S.) 263; and *People v. Brazee*, L.R.A.1916E, 1150.

As stated in the opinion in *STATE v. ROSSMAN*, ante, 1276, the Washington statute was upheld by the majority opinion of the Federal district court in *Wiseman v. Tanner* (1915) 221 Fed. 694. There are extended majority and dissenting opinions in this case. The question arose upon a motion for a temporary injunction to restrain the enforcement of the act. Affidavits were presented in behalf of the plaintiffs to the effect that they had always been frank and honest with all persons dealing with them in seeking employment; and the defendant filed affidavits of various persons, including the president of the state federation of labor, the secretary of the municipal civil service commission and ex officio labor commissioner, the corporation counsel of the city of Seattle, L.R.A.1917B.

and others to the general effect that, according to their experience and observation, the employment agencies as conducted in the state led to a shortening of the length of employment, owing to the desire of the agencies to secure as many fees as possible, and collusion with foreman, superintendents, and other agents of employers.

The majority opinion cites in support of its conclusion decisions of the United States Supreme Court upholding various restrictions made in the exercise of the police power upon freedom of contract. The opinion expressly refers to the fact that the statute was initiated by a vote of the people, and said that, the electors having expressly stated therein that the welfare of the state demands the adoption of the provisions of the act, the court could not examine into local conditions. Continuing, the opinion says: "It is clearly apparent that what the regulation shall be and how to be administered are matters for the state, and a strong preponderant opinion be-

ing prevalent among the electors of the state, they having expressed at a general election that the public welfare required regulation as set forth in the act, and having declared that the evil existed and shall be met by prohibiting the collection of fees from a class of persons, the court cannot interfere, unless it appears that the act has no real or substantial relation to the evil sought to be remedied, which does not appear in this case. The court cannot say that the electors of the state, in adopting the act which declared that the welfare of the state required the prohibition of the collection of fees from the sources designated, did not exercise a reasonable discretion in declaring a public policy as in the act set forth."

And, in concluding, the majority opinion observed that the fact that complainants may have conducted their business honestly, and in such a way that no complaint could be rightfully lodged against them, would not prevent the state from adopting the measure, if necessary, to reach persons who have not so conducted their business, but, as stated before the bar, in such a way as to have three men for one job,—one upon the job, one going to the job, and one coming from the job,—and receiving compensation from all; that the honest must suffer with the others in regulating the business of the general class.

There is an able and elaborate dissenting opinion by Cushman, D. J., who said: "I dissent from the conclusion that the act in question is an act to regulate, reasonably or otherwise, this business, as it clearly appears to be one destroying and prohibiting the business of such agencies, where neither public health, safety, nor morals are concerned. If such business includes in it no harmful element, but when properly conducted is alone beneficial, then, under the Constitution, neither legislature nor electors can strike it down or prohibit it. To do so violates the 14th Amendment to the Constitution, and deprives those in that business of their liberty and property without due process of law." The opinion then points out the essential fallacies of the argument that the act did not prohibit business, since the employers might still pay the employment agencies a fee for seeking employees, and thereby the business might continue.

Many of the cases referred to in the majority opinion are distinguished in the dissenting opinion either as cases in which the court has upheld laws regulating the conduct of a lawful business,

or laws regulating or prohibiting a business found to inherently have in itself essential elements of harm. After citing and commenting upon numerous cases upholding the constitutionality of certain regulatory statutes, the dissenting opinion observes: "There is nothing in the present case that can be said to be similar in any way to these conditions. There is nothing in the business of an employment agency inherently wrong, or tending towards wrong. It will probably always be that some of the unemployed will be poor, friendless, and among strangers, and therefore to be imposed upon with less danger than those more fortunately situated; but this fact does not show that the tendency of the business is in any way harmful. It simply affords the dishonest man in the business an opportunity to practise oppression. A business is not to be prohibited because persons affected by it are likely to be unfortunate." Again, the dissenting opinion says: "It is said in the majority opinion that the state is qualified to legislate concerning local conditions, but the right of the laborer to work, to sell his labor for bread, and to hire someone to find him a place to work and to sell it, smacks more of fundamental and primary principles than of local or temporary conditions. Misfortune and dishonesty are of neither time nor place. Primarily the legislature is the judge of such conditions, but its act will not stand where it is palpably in excess of the legislative power. . . . This law goes beyond what is reasonable in a remedy when it goes beyond the disease and deprives the patient of life. If the individual grocer defrauds his customers, by his weights or otherwise, no one would contend that the business of grocer should be prohibited. If this law may be upheld, it is not perceived why some other equally well-meaning legislature or electorate might not, with better reason, upon recital that the negro was in certain respects inferior to the white race, and was liable to be imposed upon by the dishonest white man, forbid all contracts between negroes and white men." The dissenting opinion concludes: "It may be easier and simpler to prohibit a business than regulate or prohibit wrong conduct in it; but where neither public health, safety, nor morals are concerned, for doubtful convenience sake in such case to say, 'Thou shalt not,' alike to right and wrong, to the wicked and the just, is to fail in the assertion

of that for which laws and government were borne."

It will be observed that, as pointed out in the opinion in *STATE v. ROSSMAN*, ante, 1276, the statute in question does not make it unlawful for an employment agent to demand or receive fees from persons seeking employees.

The California supreme court in *Ex parte Dickey* (1904) 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, held unconstitutional an act which merely limited the charges which the owner of an employment agency might make for his services in securing employment. In arriving at its decision the court said: "The petitioner is engaged in a harmless and beneficial business. As part of his property in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon anyone to employ him, and whoso seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the

class discussed by Judge Cooley in the paragraph above quoted,—'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities' of one class of citizens 'in a manner before unknown to the law.' For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, 'instead of calling upon others to show how and where the authority is negatived.' And where, it may be asked, could the line be drawn, if the legislature, under the guise of the exercise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessities of life, be restricted in their right of contract, and, consequently, in their profits, to 10, 5, or 1 per cent? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the legislature fix the price and value of the services of labor? The law is clearly one of those, the danger of whose enactment was foreshadowed by this court in *Ex parte Jentzsch* (1896) 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803, when it said: 'So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurk no small danger to the Republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.'"

W. W. A.

#### KANSAS SUPREME COURT.

W. W. KIMBALL COMPANY, Appt.,

v.

BOARD OF COUNTY COMMISSIONERS  
OF SHAWNEE COUNTY et al

(— Kan. —, 161 Pac. 644.)

#### Tax — notes — foreign corporation.

A piano company incorporated under the laws of Illinois with its home office at Chicago maintained a branch office at Topeka, where pianos were sold and sale notes taken therefor, retaining title in the company

until paid. These notes were transmitted to the home office, copies being returned to the register of deeds for filing, and the originals were retained at Chicago, only being sent here for payment and remittance, practically all the payments being made here and credited and remitted to the home office; no part thereof being retained for the use of the local office. Returns for assessment were made on the local bank account and average stock on hand. Held, that such notes were not taxable here to the company, the situs for taxation being the domicile of the owner.

For other cases, see *Taxes*, II. in *Dig.* 1-52 N. 8.

Headnote by WEST, J.

(December 9, 1916.)

**Note.** — The situs of intangible personal property, including notes or other evidences of debt, as between different states or countries, for purposes of property taxation, is considered in the note to *Liverpool* L.R.A.1917B.

& L. & G. Ins. Co. v. Board of Assessors, L.R.A.1915C, 903. This question in relation to inheritance or succession taxes is considered in the note to *Re Helena*, 46 L.R.A.(N.S.) 1167.

**A**PPPEAL by plaintiff from a judgment of the District Court for Shawnee County in defendants' favor in an action brought to enjoin him from levying a tax warrant. Reversed.

The facts are stated in the opinion.

Messrs. Charles Curtis and Otis E. Hungate for appellant.

Messrs. S. M. Brewster, Attorney General, J. L. Hunt, Assistant Attorney General, and W. E. Atchison, for appellees.

The notes in question are property within the state of Kansas subject to its jurisdiction, and the tax in question is authorized by its statutes.

Wilcox v. Ellis, 14 Kan. 588, 19 Am. Rep. 107; Fisher v. Rush County, 19 Kan. 414; New Orleans v. Stempel, 175 U. S. 302, 318, 44 L. ed. 174, 179, 20 Sup. Ct. Rep. 110; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Higgins v. Com. 126 Ky. 211, 103 S. W. 306; Re Jefferson, 35 Minn. 215, 28 N. W. 256; Johnson County v. Hewitt, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; State Assessors v. Comp. toir Nat. d'Escompte, 191 U. S. 388, 402, 48 L. ed. 232, 238, 24 Sup. Ct. Rep. 109; Com. v. Dun, 126 Ky. 108, 10 L.R.A.(N.S.) 920, 102 S. W. 859.

West, J., delivered the opinion of the court:

The plaintiff procured a temporary injunction against the defendants, restraining them from levying a certain tax warrant, and from a judgment vacating such injunction and for costs this appeal is taken. The plaintiff is a piano company, an Illinois corporation, with its office and headquarters at Chicago, and had a branch of its selling business at Topeka in charge of a manager, a portion of its instruments being sold on credit by instalments, the purchaser executing a conditional sale contract, in which he promises to make payment at the Chicago office, the seller to retain title until the payments are made. The usual course of business was to forward the originals to the home office, where they were retained, copies being returned to the register of deeds for filing. Some of the customers sent their payments to Chicago, but it was admitted that practically all made them at the local office, where credit was given on the books; the cash being sent to Chicago. It was testified that neither the sale contracts nor the payments made on them were permitted to

be used in the business at Topeka, and that the proceeds of local cash sales were kept distinct and separate from those received on these contracts. The taxation of \$1,600 worth of these contracts gave rise to this controversy, the plaintiff claiming that they had no taxable situs in Shawnee county. The court made no findings of fact, but there was testimony in support of the plaintiff's claims, as already indicated. It was also brought out that as each payment matures a notice is mailed to the customer from the Chicago office, with a notation that the payments may be made, if desired, at the Topeka store, to which the note is sent, thus giving the customer the option to pay here, although the contracts are, by their terms, payable at Chicago; that all the proceeds are sent to Chicago, and no part thereof retained for use here; that whenever money is needed, it is remitted from the Chicago office, although usually the local offices are supposed to be self-supporting. In a large number of cases the instruments were bought on monthly payments, which were made at the local office, and by those in charge remitted to the home office.

The defendants contend that the plaintiff maintained a store and stock of goods in Topeka; that notes for deferred payments on pianos sold, while on their faces payable in Chicago, were almost invariably paid here, and that the important question is whether or not a foreign corporation may establish a store here, carry a stock, and avoid taxation upon its credits arising out of its business, thus gaining a preference over local enterprises. Admitting that only property in its jurisdiction may be taxed by the state, they argue that the business situs of the notes was in Topeka, where they had, for the purposes of collection, the protection of Kansas laws. The general provision of the Corporation Act (Gen. Stat. 1909, § 1724) that foreign corporations doing business here, are under like restrictions and obligations as domestic corporations is invoked, and also § 9223 of the General Statutes of 1909, which requires property of merchants to be listed where their business is usually done, which counsel concede means only property employed in such business, and not all the property owned by such merchants. Returns for taxation were voluntarily made on the local bank account and average stock on hand, so that, as suggested by plaintiff, the pianos for which the contracts in question were given were taxed in this jurisdiction.

It cannot be said, and it is not claimed, that these notes were in Kansas on the 1st of March, or that they ever remained here for any length of time. There is no show-

ing that they were used in business here or otherwise than for collection and remittance to the home office. Counsel for the defendant put the matter thus: "Do the statutes authorize their taxation; and are they subject to the taxing jurisdiction of the state? This last question means: Is it equitable that the credits should be taxed here and not elsewhere?"

Section 9214 of the General Statutes of 1909 provides: "That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act."

Section 9215 reads: "The term 'personal property' shall include . . . all other assets of every company, incorporated or unincorporated, and every share or interest in such . . . assets, by whatever name the same may be designated."

Section 9221: "Money collected by any agent for any . . . corporation which is to be transmitted immediately to such . . . corporation shall not be listed by such agent; but such agent shall if required by the assessor state under oath the amount of money in his hands and to whom the same is to be transmitted."

In *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107, a resident of Butler county who had contracted to sell certain land in Illinois had taken notes therefor which were deposited with certain bankers in that state, and it was held that he was not taxable here upon these notes. In the opinion it was said: "Then what is there in Kansas to be taxed? Certainly no tangible property; and not even any intangible property that needs any protection from our laws. Everything is and has been in Illinois. . . . Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas except that the owner of the notes resides in Kansas."

Prominence was given to the fact that the owner of the notes still owned the land and was liable for the taxes thereon, and the injustice of requiring him to pay the additional tax on the notes whenever within the jurisdiction of this state was considered. In *Fisher v. Rush County*, 19 Kan. 414, a citizen of Rush county who had sold certain real estate in Iowa and received promissory notes in part consideration secured by mortgage thereon, both made payable in Iowa and left there for collection, and had never been in Kansas, was held not liable here for taxes thereon. The correlative terms of taxation and protection were given force in the decision, and it was pointed out that personalty does not always follow the owner if the business transacted or the situs of the notes be not in the state where the owner resides. In L.R.A.1917B.

*Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871, it was found that the plaintiff was the owner of a mortgage on lands in Jackson county, securing a note for \$6,000, but, having given his own note for \$2,300 to a resident of Missouri, had indorsed the \$6,000 note and assigned the mortgage to him as collateral security, and they were thereafter continuously held in Missouri until after March 1, 1887; that, March 24, 1887, the mortgage note having been paid to the plaintiff, the mortgage was released by the Missouri holder, and it was held that the plaintiff was properly chargeable with taxes thereon, his domicile being deemed the taxable situs. This was affirmed by this court. *Gibbins v. Adamson*, 58 Kan. 818, 51 Pac. 1101. It was held in *Kingman County v. Leonard*, 67 Kan. 531, 535, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 961, that judgments rendered by the courts of this state in favor of and owned by citizens of other states are not taxable here. It was said to be quite well settled that choses in action belonging to a non-resident in the hands of a managing agent within the state are taxable; also that "some weight at least should be given to the rule that credits are generally regarded as residing with the creditor. The case of *Fisher v. Rush County*, supra, is an extreme one, and has been criticized."

In *Mccartney v. Caskey*, 66 Kan. 412, 414, 71 Pac. 833, tax sales certificates issued by a county treasurer of this state on sales of real estate for delinquent taxes, owned by a nonresident, were held not subject to taxation in this state. The plaintiff, a resident of California, employed an agent to bid for real estate at tax sales, and the certificates were sometimes kept in California and sometimes at the agent's office in Kansas. It was there said: "If the owner be a nonresident the certificate has no situs in this state."

*Kingman County v. Leonard* was followed as controlling authority, and attention was called to the criticism therein of *Fisher v. Rush County*. In *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181, promissory notes, belonging to a nonresident of Kansas, given by a resident of Missouri and secured by trust deeds of real estate in Missouri, which had never been brought into this state, but which were left, for safe-keeping only, in a bank vault in Missouri, were held to constitute personal property with its location at the residence of owner. It was pointed out (76 Kan. 821) that the statute places tax sale certificates, judgments, notes, bonds, and mortgages, and all evidences of debt secured by a lien on real estate in the same category, and distinguishes them

from tangible personal property. *Kingman County v. Leonard and Mecartney v. Caskey* were cited. It was said that the doctrine that the note is only the evidence of the debt constituting the owner's tangible property is thoroughly established. As to the intimation that such property might acquire a situs here for the purpose of taxation, it was declared: "Notes, mortgages, tax sale certificates, and the like might be brought into the state for something more than a temporary purpose, be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such a situs has aptly been termed a 'business situs'" (citing authorities). 76 Kan. 822. That to establish an independent business situs generally, the element of the separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them or some power of managing, controlling, or dealing with them in a business way. "A merely transitory presence in a foreign state or a naked custody for safe-keeping is not enough." 76 Kan. 823.

Also that probably the weight of authority would not now sustain the holding in *Fisher v. Rush County* that the property had a business situs in Iowa because it was left there for collection. "Although much confusion still exists, legal thought upon the subject of the taxation of intangible property has been considerably clarified since the opinions in the *Wilcox* and the *Fisher Cases* were written, and many of the arguments there advanced would now be regarded as unsatisfactory." 76 Kan. 825.

In the recent case of *Freedom Twp. v. Douglas*, — Kan. —, 60 Pac. 1147, holding valid chapter 276 of the Laws of 1905 prescribing where the property of certain insurance companies shall be listed for taxation, it was stated that "it is entirely competent for the legislature, except as limited by the Constitution, to fix the situs of property, tangible and intangible, for the

purposes of taxation. 37 Cyc. 947. In the absence of specific legislation, debts evidenced by notes and mortgages are ordinarily taxed at the domicile of the owner."

If the equities of the correlative doctrine of taxation and protection are to be considered, then so long as the notes in controversy remained in Illinois, the residence of the owner, they were under the protection of the Illinois laws. Their transmission here for payment and remittance cannot reasonably be said, as a matter of law, to localize them for taxation, the legislature never having evinced such a purpose.

Attention is called to the case of *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346, 55 L. ed. 762, L.R.A. 1915C, 903, 31 Sup. Ct. Rep. 550, holding certain choses in action owned by an insurance company doing business in Louisiana taxable there. But in that case the legislature had enacted, among other things, that "no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent or representative."

The effect of the decision was that the legislature had power thus to localize for the purpose of taxation the situs of the credits there involved. But here we find no expression of legislative intention to fix a local situs, and, whether important or not, no equitable pressure requiring such localization.

The situation presented is one which, under the general rule, permits and calls for the operation of the maxim that personal property follows the domicile of the owner.

The judgment is reversed.

All the Justices concur.

Petition for rehearing denied.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY A. BOLSTER, Admr., etc., Appt.,  
v.

CITY OF LAWRENCE.

(— Mass. —, 114 N. E. 722.)

Municipal corporations — collapse of bathhouse — liability.

A municipal corporation is not liable for injury caused by the collapse of a structure L.R.A.1917B.

erected and maintained under statutory authority as a bathhouse for the free use of the public, although it is authorized to make a small charge for accommodations furnished.

For other cases, see *Municipal Corporations*, II. g, 1, in *Dig. 1-52 N. S.*

(January 4, 1917.)

Note. — The liability of municipal corporations for injuries through unsafe conditions in parks or other public grounds

**A**PPEAL by plaintiff from a judgment of the Superior Court for Essex County sustaining a demurrer to a declaration in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. Scott Peters, Harry J. Cole, Frederick H. Magison, and Willbert F. Barrett, for appellant:

When a municipal corporation is acting for the benefit of its citizens alone, and is not acting under a duty imposed by the state, it is liable for the negligent management of its corporate property as a private corporation would be.

Hildreth v. Lowell, 11 Gray, 345; Haskell v. New Bedford, 108 Mass. 208; Perry v. Worcester, 6 Gray, 544, 66 Am. Dec. 431; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Emery v. Lowell, 104 Mass. 13; Little v. Holyoke, 177 Mass. 114, 52 L.R.A. 417, 58 N. E. 170; Anthony v. Adams, 1 Met. 284; Sullivan v. Holyoke, 135 Mass. 273; Hawks v. Charlemont, 107 Mass. 414; Deane v. Randolph, 132 Mass. 475; Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320; Dickinson v. Boston, 188 Mass. 595, 1 L.R.A. (N.S.) 664, 75 N. E. 68; Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481; Bates v. Westborough, 151 Mass. 174, 7 L.R.A. 156, 23 N. E. 1070; Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 491; Rhobidas v. Concord, 70 N. H. 90, 51 L.R.A. 381, 85 Am. St. Rep. 604, 47 Atl. 82; McGraw v. District of Columbia, 3 App. D. C. 405, 25 L.R.A. 691; Doherty v. Braintree, 148 Mass. 495, 20 N. E. 106.

Mr. Daniel J. Murphy, for appellee:

There can, of course, be no recovery for death unless given by statute, and there is no statute that enlarges the common-law liability as to municipal corporations in a case like the present.

Donohue v. Newburyport, 211 Mass. 561, 98 N. E. 1081, Ann. Cas. 1913B, 742; O'Donnell v. North Attleborough, 212 Mass. 243, 98 N. E. 1084.

Where there has been no pecuniary private or corporate advantage in the performance of a public service, defendant is not liable for mere neglect in the performance of the public duty.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Moynihan v. Todd, 188 Mass. 301, 108 Am. St. Rep. 473, 74 N. E. 367; Dono-

hue v. Newburyport, supra; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Haley v. Boston, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888; Johnson v. Somerville, 195 Mass. 370, 10 L.R.A. (N.S.) 715, 81 N. E. 268; Hafford v. New Bedford, 16 Gray, 297; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Pettingell v. Chelsea, 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 390; Howard v. Worcester, 153 Mass. 426, 12 L.R.A. 160, 25 Am. St. Rep. 651, 27 N. E. 11; Morrison v. Lawrence, 98 Mass. 219; Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Sampson v. Boston, 161 Mass. 288, 37 N. E. 177; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289; Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326; Rome v. Worcester, 188 Mass. 307, 74 N. E. 370; Barry v. Smith, 191 Mass. 78, 5 L.R.A. (N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817; Smith v. Gloucester, 201 Mass. 329, 87 N. E. 626; Postal Teleg.-Cable Co. v. Worcester, 202 Mass. 320, 88 N. E. 777; Hathaway v. Everett, 205 Mass. 246, 137 Am. St. Rep. 436, 91 N. E. 296; Kerr v. Brookline, 208 Mass. 190, 34 L.R.A. (N.S.) 464, 94 N. E. 257; McGraw v. District of Columbia, 3 App. D. C. 405, 25 L.R.A. 691.

Rugg, Ch. J., delivered the opinion of the court:

The allegations in the several counts of the plaintiff's declaration, so far as now material, are in substance that the defendant city maintained and operated a bathhouse established by it on the shore of the Merrimac river, whereby the plaintiff's intestate, who had resorted to the bathhouse for the enjoyment of the facilities there afforded, while in the exercise of due care, was mortally injured by the giving way of the structure and its approaches, resulting from the negligence of the defendant and its servants. The bathhouse was maintained under Rev. Laws, chap. 25, §§ 20, 21. Thereby the defendant was authorized to purchase or lease land and erect or repair a building "for public baths" and to "make open bathing places" and to "provide instruction in swimming," and also to "establish rates for the use of such baths." There is no averment that the defendant made any charge for the use of the bathhouse. The argument before us proceeded upon the assumption that no charge was made, and that the bathhouse was established and

other than streets is discussed in the note to Bernstein v. Milwaukee, L.R.A.1915C, 435, and see later cases, Nashville v. Burns, L.R.A.1915D, 1108; Ackeret v. Minneapolis, L.R.A.1915D, 1111; and Hibbard v. Wichita, L.R.A.1917A, 399.

Many other specific aspects of the general L.R.A.1917B.

subject of municipal liability as affected by the distinction between public or governmental and private or proprietary functions are treated in annotation cited in the Indexes to L.R.A. Notes under the title, "Municipal Corporations," subtitle "Liability for damages."

maintained for the free use of the public. The case must be considered on that footing.

The general principles of law by which claims for liability in tort against cities and towns must be determined are well established. The municipality, in the absence of special statute imposing liability, is not liable for the tortious acts of its officers and servants in connection with the gratuitous performance of strictly public functions, imposed by mandate of the legislature or undertaken voluntarily by its permission, from which is derived no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefited by way of compensation for use or assessment for betterments. A city or town is not liable therefore for negligent or tortious acts in the conduct of schools (*Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332), the construction of schoolhouses (*Howard v. Worcester*, 153 Mass. 426, 12 L.R.A. 160, 25 Am. St. Rep. 651, 27 N. E. 11), the maintenance of a city hall solely for public uses (*Kelley v. Boston*, 186 Mass. 165, 66 L.R.A. 429, 71 N. E. 299), of shade trees (*Donohue v. Newburyport*, 211 Mass. 561, 98 N. E. 1081, Ann. Cas. 1913B, 742), of a house of industry (*Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781), of a public park (*Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220), in the printing of committee reports (*Howland v. Maynard*, 159 Mass. 434, 21 L.R.A. 500, 38 Am. St. Rep. 445, 34 N. E. 515). Nor is it answerable for the acts of police officers (*Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721), highway surveyors (*Dupuis v. Fall River*, 223 Mass. 73, 111 N. E. 706; *Smith v. Gloucester*, 201 Mass. 329, 87 N. E. 626), road commissioners (*McManus v. Weston*, 164 Mass. 263, 31 L.R.A. 174, 41 N. E. 301), members of the fire department (*Hafford v. New Bedford*, 16 Gray, 297; *Pettingell v. Chelsea*, 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 380; *Workman v. New York*, 179 U. S. 552, 580, 45 L. ed. 314, 327, 21 Sup. Ct. Rep. 212), assessors (*Rossire v. Boston*, 4 Allen, 57; *Hathaway v. Everett*, 205 Mass. 246, 137 Am. St. Rep. 436, 91 N. E. 296), selectmen (*Cushing v. Bedford*, 125 Mass. 526; *Pinkerton v. Randolph*, 200 Mass. 24, 85 N. E. 892), boards of aldermen (*Child v. Boston*, 4 Allen, 41, 51, 81 Am. Dec. 680), the city government (*Griggs v. Foote*, 4 Allen, 195), licensing boards (*McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210), tax collectors (*Alger v. Easton*, 119 Mass. 77), constable and deputy collector of taxes (*Dunbar v. Boston*, 112 Mass. 75), overseers of the poor (*New Bedford v. Taunton*, 9 Allen, 207), servants in the discharge of fireworks (*Tindley v. Salem*, 137 Mass. L.R.A.1917B.

171, 50 Am. Rep. 289), those in charge of celebrations, playgrounds, and public amusements (*Kerr v. Brookline*, 208 Mass. 190, 34 L.R.A.(N.S.) 464, 94 N. E. 257; *Higginson v. The Treasurer* (*Higginson v. Slattery*) 212 Mass. 583, 588, 42 L.R.A.(N.S.) 215, 99 N. E. 523), boards of health (*Barry v. Smith*, 191 Mass. 78, 88, 91, 5 L.R.A.(N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817), other health officers (*Harrington v. Worcester*, 186 Mass. 591, 598, 72 N. E. 326), collectors of refuse (*Johnson v. Somerville*, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268), gatemen or draw tenders (*Butterfield v. Boston*, 148 Mass. 544, 2 L.R.A. 447, 20 N. E. 113; *Hawes v. Milton*, 213 Mass. 446, 100 N. E. 665), transit and subway commissioners (*Mahoney v. Boston*, 171 Mass. 427, 50 N. E. 939, 4 Am. Neg. Rep. 395), and officers charged with enforcement of statutes as to the removal of wires and electric appliances from streets (*Postal Teleg.-Cable Co. v. Worcester*, 202 Mass. 320, 88 N. E. 777).

On the other hand a municipality is answerable for the acts of its servants or agents in the conduct of functions voluntarily undertaken for its own profit and commercial in character, or to protect its corporate interests in its own way. Thus it is liable for the acts of agents specially selected and deputed to repair highways to the exclusion of those public officers provided by the law, on the ground that it is protecting by quasi private instrumentalities its pecuniary interest growing out of statutory liability for defects in highways. *Butman v. Newton*, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481. It is liable on the same ground, for agencies used in lighting streets. *Dickinson v. Boston*, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68; *Sullivan v. Holyoke*, 135 Mass. 273. So also it is liable for negligence in the management of its water department (*Hand v. Brookline*, 126 Mass. 324; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Johnson v. Worcester*, 172 Mass. 122, 51 N. E. 519), in the operation of its sewer system (*O'Brien v. Worcester* 172 Mass. 348, 52 N. E. 385, 5 Am. Neg. Rep. 171; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519), in running a ferryboat (*Davies v. Boston*, 190 Mass. 194, 76 N. E. 663, 20 Am. Neg. Rep. 108), in the letting of a public hall for profit (*Little v. Holyoke*, 177 Mass. 114, 52 L.R.A. 417, 58 N. E. 170; *Oliver v. Worcester*, 102 Mass. 489, 499, 3 Am. Rep. 485), in managing a farm, partly for the support of its poor, partly for the maintenance of its highway department, and partly for the production of income (*Neff v. Wellesley*, 148 Mass. 487, 2



L.R.A. 500, 20 N. E. 111), in the operation of a stone crusher for profit (*Duggan v. Peabody*, 187 Mass. 349, 73 N. E. 206, 17 Am. Neg. Rep. 559; *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454), and in the maintenance of electric and gas lighting plants, for the use of which rates are charged (*O'Donnell v. North Attleborough*, 212 Mass. 243, 98 N. E. 1084).

The difficulty lies not in the statement of the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability, if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statutes is not of consequence. *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289.

The maintenance of free public baths upon the bank of a river is in its essence a public benefit. It is manifestly in the interests of the public health that the people have abundant facilities for cleanliness. Opportunity for swimming under sanitary conditions and under the protection and with the instruction of public officers tends toward the amusement of the people, as well as their healthful and athletic exercise. It belongs to the same class of public service as municipal playgrounds and swimming pools for small children. It is a kind of social advantage which the commonwealth long has provided at Nantasket and Revere beaches on a considerable scale. It is in its intrinsic characteristics a project for the general good of all the public.

The only doubtful aspect of the case arises from the circumstances that the statute empowers the cities and towns which vote to adopt its provisions, "to establish rates for the use of such baths," and thus possibly to derive a revenue or profit from the undertaking. But, as has been pointed out, there is no allegation that there has been any rate charged in the case at bar. The simple possibility that a charge might have been made is not enough to transform that which in its main features as actually conducted is a purely public duty rendered for the common good into a quasi commercial adventure.

In this respect the case is indistinguishable in principle from city hospitals maintained, not infrequently under special statute, for the performance of a duty assumed for the benefit of the public. Although such institutions may receive pay patients, their public character is not lost thereby, and no liability attaches to the municipality arising from negligence of those in charge. *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836. The case at bar is L.R.A.1917B.

somewhat similar to that where a city has been exonerated from responsibility for negligence in the care of its city hall, although housed in it rent free were the commercial revenue yielding departments of water, sewer, and ferries. *Kelley v. Boston*, 186 Mass. 165, 66 L.R.A. 429, 71 N. E. 299. It is not unlike the cases where a slight revenue is obtained from the labor performed at a public workhouse (*Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781), a charge sufficient to cover the bare cost of removal of steam engine ashes is collected in connection with the gratuitous removal of all ashes from dwelling houses (*Haley v. Boston*, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888), or a rental is received for the use of the tunnel and subways in Boston (*Mahoney v. Boston*, 171 Mass. 427, 50 N. E. 939, 4 Am. Neg. Rep. 395), in each of which it has been held that the comparatively insignificant element of income received did not affect the dominating public character of the enterprise, and did not render the city liable for the torts of public officers and servants in performing such public duty.

A similar conclusion was reached, as to liability for negligence in the operation of a bathhouse maintained by public authority, in *McGraw v. District of Columbia*, 3 App. D. C. 405, 25 L.R.A. 691, although it does not appear directly in that case that there was authority to make any charge.

It follows that for the acts set forth in the plaintiff's declaration the defendant is not liable on the broad ground recognized in most jurisdictions that in the establishment and maintenance of purely public instrumentalities devoted to the common good, as is a bathhouse under the circumstances here disclosed, it acted as an agency of government in the performance of duties assumed solely for the benefit of the public. See *Donohue v. Newburyport*, 211 Mass. 561, 565, 98 N. E. 1081, Ann. Cas. 1913B, 742.

The demurrer to the plaintiff's declaration was sustained rightly and judgment in favor of the defendant is affirmed.

#### NEW YORK COURT OF APPEALS.

JULIUS FRANK et al., Respts.,

v.

THEODORE CARTER, Appt.

(219 N. Y. 35, 113 N. E. 549.)

Husband and wife — illegal marriage — necessities — liability.

One who has gone through a form of mar-

**Note.** — As to liability for necessities furnished reputed wife, see annotation following this case, post, 1290.

riage with a woman already married to another, and who lives with her and holds her out as his wife, cannot defeat a claim for necessities furnished her, by setting up the illegality of the marriage.

*For other cases, see Husband and Wife, I. a, 2, in Dig. 1-52 N. S.*

(July 11, 1916.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the St. Lawrence County Court which affirmed a judgment of a justice of the peace in plaintiffs' favor, in an action brought to recover the purchase price of certain goods claimed to have been purchased of plaintiffs on defendant's credit by his alleged wife. Modified and affirmed.

The facts are stated in the opinion.

Mr. Hermon J. Donavin, for appellant:

The articles sold do not come within the scope of necessities, but even if they did, Carter would not be liable, as what evidence there is on this point tends to show that she was amply provided for, with no evidence to the contrary.

Wanamaker v. Weaver, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135.

Defendant's marriage was void ab initio, and he never became the husband of Mary Howard Moore, and she never became his wife.

Hopper v. Hopper, 92 Hun, 415, 36 N. Y. Supp. 610; Blinks v. Blinks, 5 Misc. 193, 25 N. Y. Supp. 768; Park v. Park, 24 Misc. 372, 53 N. Y. Supp. 677.

Mr. John C. Tulloch, for respondents:

Defendant must either pay for the goods purchased or the plaintiffs must lose the amount of their claim, and defendant having accredited Mary Howard Carter as his agent, the loss, if any, should fall on him.

Bickford v. Menier, 107 N. Y. 400, 14 N. E. 438; Walsh v. Hartford F. Ins. Co. 73 N. Y. 10; Bank of Monongahela Valley v. Weston, 172 N. Y. 265, 64 N. E. 946; Merkel v. Lazard, 114 App. Div. 28, 99 N. Y. Supp. 686; Barnes v. Long Island Real Estate Exch. & Invest. Co. 88 App. Div. 91, 84 N. Y. Supp. 951; Clark v. Metropolitan Bank, 3 Duer, 248; Story, Agency, § 127; Stalner v. Tysen, 3 Hill, 279; Cromwell v. Benjamin, 41 Barb. 558; Hatch v. Leonard, 165 N. Y. 439, 69 N. E. 270; Wanamaker v. Weaver, 176 N. Y. 77, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135; Keller v. Phillips, 39 N. Y. 351; Zimmer v. Settle, 124 N. Y. 37, 21 Am. St. Rep. 638, 26 N. E. 341; De Brauwere v. De Brauwere, 203 N. Y. 460, 38 L.R.A.(N.S.) 508, 96 N. E. 722; Wilder v. L.R.A.1917B.

Brokaw, 141 App. Div. 911, 126 N. Y. Supp. 932.

The articles purchased, being clothing of the wife, were as much necessities for which defendant was liable, as if such purchases had been groceries, food, or fuel, and for such purchases Mary Howard Carter was his accredited agent.

Lindholm v. Kane, 92 Hun, 369, 36 N. Y. Supp. 665; Kegney v. Ovens, 18 N. Y. S. R. 482, 2 N. Y. Supp. 319; Winkler v. Schlager, 64 Hun, 83, 19 N. Y. Supp. 110; Wenz v. McCann, 107 App. Div. 567, 95 N. Y. Supp. 462; Hazard v. Potts, 40 Misc. 365, 82 N. Y. Supp. 246; De Brauwere v. De Brauwere, 144 App. Div. 521, 129 N. Y. Supp. 587; Thrall Hospital v. Caren, 140 App. Div. 171, 124 N. Y. Supp. 1038; Keller v. Phillips, 39 N. Y. 351; Zimmer v. Settle, 124 N. Y. 45, 21 Am. St. Rep. 638, 26 N. E. 341.

It was for the defendant to have proved as a defense that the goods sold were not necessities, he having the burden of proof to satisfy the court or jury that they were not necessities.

Wickstrom v. Peck, 163 App. Div. 608, 148 N. Y. Supp. 596; Mandel Bros. v. Simpson, 67 Misc. 386, 122 N. Y. Supp. 397; Bradt v. Shull, 46 App. Div. 347, 61 N. Y. Supp. 484; Rosenfeld v. Peck, 149 App. Div. 663, 134 N. Y. Supp. 392.

Hiscock, J., delivered the opinion of the court:

This action was brought to recover the purchase price of two lots of goods claimed to have been purchased respectively of different merchants on the credit of the defendant by his alleged wife.

In form defendant had been married to the woman who purchased the goods, and for several years had lived with her and held her out as his wife. Finally, he learned that at the time of the purported marriage she had another husband living, and he was proceeding to institute a prosecution against her for bigamy when she fled from the country. On the eve of her departure she purchased the goods in question. One lot, consisting of a suit and skirt aggregating in value \$33.50, was purchased of the plaintiffs, and the other lot, aggregating in value \$21, was purchased from another storekeeper, who assigned his account to the plaintiffs. There was some slight evidence that during the time the man and woman were living together he permitted her to make small purchases of necessities on his credit, but I cannot find the slightest evidence to sustain the judgment so far as it covers the assigned account. There is not a word of testimony to indicate what the articles were which

are claimed to have been so purchased or that they were sold on the credit of the defendant. While, of course, we must make proper allowance for the informalities of a trial in justice court, obviously there is no rule or principle which permits us wholly to substitute speculation and conjecture for evidence, and I agree with the dissenting opinion of Mr. Justice Woodward that we should have to do this if we affirmed the judgment as to this cause of action.

While the evidence is not at all satisfactory in respect of the other cause of action, I think that it probably did permit the court to find facts sufficient to sustain the judgment. While some of the testimony indicates that the sale was made to the wife personally rather than on the credit of the husband, I think that this testimony refers to the physical transaction whereby the contract was made with her and the goods delivered to her, and that it might be found that it was the intention to sell them on the credit of the husband and charge them to him. The evidence also permitted the finding that the goods were necessities, and, this being so, it was lawful, under ordinary circumstances, for the storekeeper to charge them to the husband unless it appeared by way of defense that the wife was amply supplied with articles of the same character as those purchased,

or that she had been furnished with ready money with which to pay therefor, and which facts were not established. *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135.

The only remaining question for our consideration is whether the liability of the defendant was affected by the fact that his purported marriage with the woman was void. I think that it was not. Inasmuch as he had gone through the form of a marriage with her and lived with her and held her out as his wife, his status was no different for the purposes here involved than it would have been had the marriage been a legal one. *Johnstone v. Allen*, 6 Abb. Pr. N. S. 306; *Munro v. De Chemant*, 4 Campb. 215; *Blades v. Free*, 9 Barn. & C. 167, 109 Eng. Reprint, 63, 4 Moody & R. 282, 7 L. J. K. B. 211; *Ryan v. Sams*, L. R. 12 Q. B. 460, 17 L. J. Q. B. N. S. 271, 12 Jur. 745.

I recommend that the judgment be reduced by deducting the sum of \$21, with interest thereon from January 13, 1913, and that as so modified it be affirmed, without costs of this appeal to either party.

*Willard Bartlett, Ch. J., and Collin, Cuddeback, Hogan, Seabury, and Pound, JJ., concur.*

### **Annotation—Liability for necessities furnished reputed wife.**

"Marriage imposes on the husband the general duty of supporting his wife, and if he is derelict in this duty, he is liable to third persons who furnish necessities to his wife. His liability in this respect is not abrogated by statutes enabling the wife to hold to her own use property acquired by her and otherwise enlarging her rights and liabilities." 13 R. C. L. § 230, p. 1198.

The notes to *Wanamaker v. Weaver*, 65 L.R.A. 529, and *James McCreery & Co. v. Martin*, 47 L.R.A.(N.S.) 279, as to the liability of husband for necessities furnished wife while living with him, include cases considering the liability of the husband not only by reason of his obligation as such to support and maintain his wife, but also on account of the presumptive agency arising from cohabitation, as well as on account of any acts or omissions constituting an assent, actual or constructive, on his part, and exclude cases considering the liability of the husband when the wife is such by repute only. The present note is intended to include all cases considering the liability of a man for necessities furnished a woman reputed to be his

wife, whether there has been any form of marriage between them or not other than cohabitation as man and wife.

Reason and justice seem to demand that a man should not be permitted to live with a woman, allowing her the use of his name and representing her to be his wife, and then escape liability for necessities furnished her on credit by third persons, by showing that she is not in fact his wife. Accordingly the cases are substantially agreed that a man living with a woman as his wife, holding her out and representing her to the world as such, is liable for necessities furnished her on credit by third persons. He is estopped from denying that the relationship of husband and wife exists between them in order to escape liability. *Watson v. Threlkeld* (1798) 2 Esp. (Eng.) 637; *Blades v. Free* (1829) 9 Barn. & C. 167, 109 Eng. Reprint, 63, 4 Moody & R. 282, 7 L. J. K. B. 211; *Ryan v. Sams* (1848) 12 Q. B. (Eng.) 460, 17 L. J. Q. B. N. S. 271, 12 Jur. 745; *Hudson v. Brent*, Esp. N. P. Dig. (Eng.) 124, cited in 1 Salk. 118, note, 91 Eng. Reprint, 110, note; *Munro v. De Chemant* (1815) 4 Campb. (Eng.)

215; *Redferns Limited v. Inwood* (1912) 27 Ont. L. Rep. 213, Ann. Cas. 1913D, 1061; *Hoyle v. Warfield* (1887) 28 Ill. App. 628; *Warrington v. Anable* (1899) 84 Ill. App. 593; *Ponder v. Graham* (1851) 4 Fla. 23 (dictum). And see *Paule v. Goding* (1861) 2 Fost. & F. (Eng.) 585, and *Paquin v. Beauclerk* [1906] A. C. (Eng.) 148, 75 L. J. K. B. N. S. 395, 54 Week. Rep. 521, 94 L. T. N. S. 350, 22 Times L. R. 395.

In *Watson v. Threlkeld* (1798) 2 Esp. (Eng.) 637, the court said: "It is certain that if a man has permitted a woman to whom he was not married, to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so, or not. He gives her a credit from his name and cohabitation; and it is not to be supposed that the tradesman could look to the credit of a woman of that description and not to that of the man by whom she was supported." The court added, however, that this "must not be taken to be the case of a common strumpet who may assume the name of a person, without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family."

And in *Hoyle v. Warfield* (1877) 28 Ill. App. 628, the court said: "The parties were living together as husband and wife and were recognized and treated as such in the community where they lived; and as to all who furnish them the necessities of life which come under the head of family expenses, under the belief that such relation existed, when such belief is justified by the conduct of the parties, as it clearly was in this case, we think the provisions of § 15 of chap. 68, Rev. Stat., apply. That section provides that 'the expenses of the family . . . shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately.' Under the provisions of this section we think it makes no difference to which of the parties the credit is originally given; they are both liable."

For stronger reasons, if anything, the same rule likewise obtains where the parties have gone through a marriage ceremony which is afterwards found to be invalid and of no effect. *Robinson v. Nahon* (1808) 1 Campb. (Eng.) 245; L.R.A.1917B.

*Hawley v. Ham* (1826) Taylor, K. B. (Can.) 385; *Johnstone v. Allen* (1869) 6 Abb. Pr. N. S. (N. Y.) 306, 39 How. Pr. 506. *FRANK v. CARTER*, ante, 1288, is to this effect.

The separation of the parties relieves the husband, so called, from liability for goods sold after that incident, if no marriage has in fact taken place between the parties. Thus in *Munro v. De Chemant* (1815) 4 Campb. (Eng.) 215, Lord Ellenborough said: "Had the goods been furnished while the defendant was living with this lady, his representation that she was his wife would have been conclusive against him; but I think his liability for necessities supplied to her after they had separated depends entirely upon whether he really has been lawfully married to her or not. If the jury think upon the evidence that she is indeed his wife, they will find for the plaintiff, but the action cannot otherwise be maintained."

In *Johnstone v. Allen* (1869) 6 Abb. Pr. N. S. (N. Y.) 306, 39 How. Pr. 506, the court said that, after marriage, whether lawful or not, as long as it exists, third persons without notice who have dealt with the wife on the assumption that she was indeed such, and which assumption was based upon the representation of the husband himself, can recover for necessities furnished her, if the husband fail to provide them. Generally, as to liability of husband for necessities furnished wife while living apart from him, see note to *Denver Dry Goods Co. v. Jester*, L.R.A.1917A, 957.

A man not cohabiting with a woman or otherwise holding her out as his wife is not liable for her debts from the mere fact that he permits her to call herself by his name. *Gomme v. Franklin* (1859) 1 Fost. & F. (Eng.) 465.

W. W. A.

#### NORTH CAROLINA SUPREME COURT.

YOUNG FERRELL, Admr., etc., of Freeman Ferrell, Deceased,

v.

DURHAM TRACTION COMPANY, Impleaded, etc., Appt.

(— N. C. —, 90 S. E. 803.)

Electricity — Injury to trespasser — Liability.

1. An electric company which permits its

Note. — The principles governing the duty and liability of a company maintaining an electric wire over or across private

wires to sag so low over a railroad track as to endanger persons on the top of cars cannot escape liability for their throwing a person off a car by the fact that he was a trespasser on the train.

*For other cases, see Electricity, III. a, in Dig. 1-52 N. S.*

**Carrier — person on train as helper — punishment.**

2. One riding on a freight train under agreement with a brakeman that he should help handle freight for his fare cannot, as matter of law, be said to be within a statute providing punishment for anyone who, without permission of the conductor, rides on a train with intent to being transported free.

*For other cases, see Trial, II. c, 5, in Dig. 1-52 N. S.*

(Brown and Walker, JJ., dissent.)

(December 19, 1916.)

**A**PPEAL by defendant traction company from a judgment of the Superior Court for Durham County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Hoke, J.:

On motion made in apt time, there was judgment of nonsuit as to the railroad company, and, the cause being submitted to the jury as to liability of the traction company, the following verdict was rendered:

"(1) Was plaintiff's intestate injured and killed by the negligence of the defendant Durham Traction Company, as alleged in the complaint? Answer: Yes.

"(2) Did plaintiff's intestate by his own negligence contribute to his injury and death as alleged in the answer? Answer: No.

"(3) What damages, if any, is plaintiff entitled to recover of defendant Durham Traction Company? Answer: \$575."

Judgment on the verdict for plaintiff, and defendant the traction company appealed, assigning for error chiefly the refusal to nonsuit as to appellant because of the alleged fact that intestate, at the time he was killed, was a trespasser on the train of its codefendant and was also there in violation of the criminal laws of the state.

Messrs. W. L. Foushee and W. J. Brogden, for appellant:

Plaintiff's intestate was a trespasser on the freight train.

Vassor v. Atlantic Coast Line R. Co. 142 N. C. 68, 7 L.R.A.(N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; Purple v. Union P. R. Co. 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123, 11 Am. Neg. Rep. 509; Cooper v. Lake Erie & W. R. Co. 136 Ind. 366, 36 N. E. 272; Peterson v. South & Western R. Co. 143 N. C. 260, 8 L.R.A.(N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618; Bailey v. North Carolina R. Co. 149 N. C. 169, 62 S. E. 912; Willis v. Atlantic & D. R. Co. 122 N. C. 909, 29 S. E. 941; Briscoe v. Henderson Lighting & Power Co. 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600.

If the plaintiff's intestate was a trespasser, then the defendant the Seaboard Air Line Railway, owner of said premises, would owe him no duty except to refrain from inflicting wilful or wanton injury.

Willis v. Atlantic & D. R. Co. 122 N. C. 909, 29 S. E. 941; Vassor v. Atlantic Coast Line R. Co. 142 N. C. 68, 7 L.R.A.(N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; Peterson v. South & Western R. Co. 143 N. C. 260, 8 L.R.A.(N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618; Bailey v. North Carolina R. Co. 149 N. C. 169, 62 S. E. 912; Quantz v. Southern R. Co. 137 N. C. 136, 49 S. E. 79; Thomp. Neg. §§ 945-947, 949; Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; Southern Bell Teleph. & Teleg. Co. v. Odom, 9 Ga. App. 246, 70 S. E. 1116; Greenville v. Pitts, 102 Tex. 2, 14 L.R.A.(N.S.) 979, 132 Am. St. Rep. 843, 107 S. W. 50; McCaughna v. Owosso & C. Electric Co. 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73; Hector v. Boston Electric Light Co. 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, 15 Am. Neg. Cas. 714; Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203, 14 Am. Neg. Cas. 201; Rodger v. Union Light, Heat & P. Co. — Ky. —, 123 S. W. 293; Monroe v. Atlantic Coast Line R. Co. 151 N. C. 374, 27 L.R.A.(N.S.) 193, 66 S. E. 315.

Messrs. Manning, Everett, & Kitchin and S. C. Brawley, for appellee:

Violation of an ordinance or a statute, unless it is the proximate cause of the injury, would not relieve the defendant from liability.

McGhee v. Norfolk & S. R. Co. 147 N. C. 155, 24 L.R.A.(N.S.) 119, 60 S. E. 912; Sluder v. St. Louis Transit Co. 189 Mo. 107, 5 L.R.A.(N.S.) 186, 88 S. W. 648; Leathers v. Blackwell Durham Tobacco Co. 144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11.

property to trespassers or licensees are considered in the notes to Guinn v. Delaware & A. Teleg. & Teleph. Co. 3 L.R.A.(N.S.) 983, and Braun v. Buffalo General Electric Co. 34 L.R.A.(N.S.) 1089, 1094. L.R.A.1917B.

For the sake of the analogy reference is also made to the annotation to Austin v. Baker, L.R.A.1916F, 1132, on the liability of lesser for injuries to licensee or trespasser.

The defendant traction company was a trespasser itself, and it is in no better position than plaintiff's intestate.

*Daltry v. Media Electric Light, Heat & P. Co.* 208 Pa. 403, 57 Atl. 833; *Caglione v. Mt. Morris Electric Light Co.* 56 App. Div. 191, 67 N. Y. Supp. 660; *Wittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 410, 62 N. Y. Supp. 297.

Hoke, J., delivered the opinion of the court:

The action was originally instituted against the Durham Traction Company and the Sea Board Air Line Railroad Company, and there is evidence on the part of plaintiff tending to show that on April 7, 1915, about 7 P. M., the intestate, at the invitation of an acquaintance, a brakeman on a freight train of defendant railroad, was on top of a car of said train as it moved out of East Durham, going north; that the brakeman was giving the intestate and his brother this ride with the view and under promise of having them help in unloading freight at a near-by station on the route. There was testimony also to the effect that the train hands were accustomed to get help in this way, and that at previous times it had been done with the conductor's knowledge; that, not far from East Durham, while intestate was on the car and going back towards the caboose, a power wire of the traction company which had been stretched across the railroad and negligently allowed to sag, and so low as to threaten the safety of all persons on the car or trains of that character, struck the intestate as he was stepping from one car to the other, knocked him down between the cars, and he was run over and killed. On these, the facts chiefly relevant, the court rendered judgment of nonsuit as to the railroad company, and, on issues submitted, there was verdict establishing that the intestate was killed by the wrongful negligence of the traction company, "as alleged in the complaint;" that there was no contributory negligence on the part of the intestate, and assessing the damages at \$575. Judgment having been entered on the verdict, the traction company excepted and appealed, assigning for error chiefly the refusal to order a nonsuit as to appellant also.

It is undoubtedly the general rule that a trespasser cannot maintain an action against the owner for negligent injuries received by reason of conditions existent upon the premises, but this is a principle growing out of and dependent upon the right of ownership, and considered essential to their proper enjoyment. All of the decisions in this jurisdiction, cited in *suppl. R.A.1917B*.

port of defendant's exceptions, are cases of that character. *Briscoe v. Henderson Lighting & Power Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600, and others. Even as to suits of that kind, the position has been very much qualified as in case of technical trespass, etc. 29 Cyc. 443. But the principle referred to and relied upon has no necessary or proper application to the facts of this record, where the injury was caused by the wrong of a third person having no connection with the owner or his proprietary rights. In such case, the general rule is the other way, and recovery is not ordinarily denied merely because of the fact that the injured party is himself a trespasser. Such fact may or may not be a relevant circumstance on the question of proximate cause, but is not allowed to defeat the action as a matter of law.

The distinction is very well presented in a case from 72 N. J. L. 276, 3 L.R.A.(N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412, 19 Am. Neg. Rep. 389 (*Guinn v. Delaware & A. Teleph. Co.*); the relevant facts and the decision of the court therein being as follows:

"The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken end fell in the grass in a field belonging to Gulick. Across this field people were accustomed to travel without objection, but as far as appears without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property, or at best a mere licensee. The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity. *New York & N. J. Teleph. Co. v. Bennett*, 62 N. J. L. 742, 42 Atl. 759, 5 Am. Neg. Rep. 657; *Brooks v. Consolidated Gas Co.* 70 N. J. L. 211, 57 Atl. 396.

"The duty to exercise care is established as to travelers upon the highway and employees of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by Chief Justice Beasley, in *Van Winkle v. American Steam Boiler Co.* 5?

N. J. L. 240, 19 Atl. 472, to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons, . . . known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill.

"The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case, the guy wire was stretched over an open field, across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee as against the landowner cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong nor a wrong to the defendant. The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may in fact reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount."

In *Watson on Damages for Personal Injuries*, speaking to the question, the author says (§ 230):

"At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. 'The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result, generally reached, is that no man can set up a public or private wrong committed by another as an excuse for a wilful or unnecessary or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.'

"Thus the fact that the plaintiff was upon the platform of a street car in violation of a municipal ordinance is not of itself sufficient to defeat a recovery in an action against the driver of a vehicle by whom the plaintiff was injured, and that a motorman was running his car at a higher rate of speed than allowed by law when a tree fell L.R.A.1917B,

upon the car and injured him is not a defense in an action against the municipality, merely because had he been going at the legal rate the tree would have fallen before he reached the point in question."

And the general principle is approved in many well-considered decisions of other courts. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209-218, 16 L. ed. 433-436; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052. And *Curtis, Electricity*, § 402, is to the same effect. There are many other authoritative cases in support of the principle, as stated, that an injured party is not barred of recovery for a wrong done him because of the mere fact that he was, at the time, a trespasser upon the premises of a third person. Such a fact in itself is ordinarily allowed no significance in determining the rights of the parties on such an issue, a position emphasized in this case by facts in evidence tending to show that the traction company was itself a trespasser in carrying its wires over the railroad company's line. *Daltry v. Media Electric Light, Heat & P. Co.* 208 Pa. 403, 57 Atl. 833; *Caglione v. Mt. Morris Electric Light Co.* 56 App. Div. 191, 67 N. Y. Supp. 660. It is suggested for defendant that the intestate was in violation of state statute in being on the car at the time. Rev. § 3748. This statute was enacted to punish persons who ride on a train without permission of the conductor or the engineer and with intent of being transported free, and would seem to have no application to this case, where the intestate had been invited to get on by an employee of the company "to help unload freight" at the next station. Assuredly a criminal intent to avoid payment of fare should not be decided against him as matter of law when there are facts in evidence tending to show that he "was to pay his fare by helping to unload;" that he had done this several times with the knowledge and approval of the conductor and, at the time he was struck, was going along the top of the car to the caboose.

In some of the authorities cited in support of appellant's position, as in *Cumberland Teleg. & Teleph. Co. v. Martin*, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718, and others, the court does not seem to have been sufficiently advertent to the recognized distinction in cases where the action by a trespasser was against the owner of the premises and when against

third persons; but, in any event, these decisions should not be allowed as controlling on the facts of this record. In *Drum v. Miller*, 135 N. C. 204, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421, 16 Am. Neg. Rep. 215, the court held, in effect: "In order, . . . that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected"—a statement of the doctrine contained in 21 Am. & Eng. Enc. Law, 2d ed. p. 487.

A like ruling was soon thereafter made, in *Hudson v. Atlantic Coast Line R. Co.* 142 N. C. 198, 55 S. E. 103, and the principle has been again and again approved in our decisions. *Robinson v. Melville Mfg. Co.* 165 N. C. 495, 52 L.R.A.(N.S.) 385, 81 S. E. 681; *Ward v. North Carolina R. Co.* 161 N. C. 184, 76 S. E. 717; *Sawyer v. Roanoke R. & Lumber Co.* 145 N. C. 24-28, 22 L.R.A.(N.S.) 200, 58 S. E. 598; *Kimberly v. Howland*, 143 N. C. 399, 7 L.R.A.(N.S.) 545, 55 S. E. 778; and numerous other cases could be cited.

Speaking to the question in *Drum v. Miller*, supra, Walker, Judge said: "When therefore a wilful wrong is committed or a negligent act which produces injury, the wrongdoer is liable, provided in the latter case he could have foreseen that harm might follow as a natural and probable result of his act; for, if he can presume that harm might naturally and probably follow, he must necessarily intend that it should follow, or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and, in the other, he will be presumed to intend that which, in the exercise of the care of a pru-

dent man, he should see will be followed by injurious consequences."

The verdict in this case has established that the traction company has negligently allowed its power wire to sag so low over the line of the railroad that it was likely to kill or seriously injure any and every one on the top of the railroad company's trains. The intestate was killed because of this negligent wrong. It was the result likely, in fact almost certain, to occur from its wrong, and, in our opinion, the defendant's responsibility for it has been correctly and properly established.

There is no error, and the judgment of the lower court is affirmed.

**Brown, J., dissenting:**

I am of opinion that the motion to nonsuit should have been allowed. The evidence, taken in its most favorable view for plaintiff, tends to prove these facts: The intestate was killed on April 7, 1915. At the time he was on top of a running freight train of the railroad company, walking towards the caboose. He was caught by two wires belonging to the traction company, stretched across the railroad right of way, by its consent, and fastened to juniper poles 143 feet apart, one on the east and one on the west side of the right of way, about 2 miles from Durham. The intestate was thrown to the ground between the cars and killed. The intestate was not an employee of the railroad company, but was riding on top of the rapidly running freight train, without the knowledge or consent of the conductor or of any proper authority of said company. It is in evidence that one Howard Holeman, a brakeman, invited the intestate to ride on the train. No one else knew of it. There had been an extraordinary snow-storm and wind April 2 and 3, 1915, that had caused the wires to sag so low that they caught the intestate about the shoulder and threw him under the wheels. The wires were in proper position on April 2d, and defendant traction company had no notice that they were sagging, as result of the storm.

That the intestate was a trespasser as to the railroad company, and violating the statute (Rev. § 3748) making it a misdemeanor to ride on top of the freight train under such circumstances, cannot successfully be questioned. *Vassor v. Atlantic Coast Line R. Co.* 142 N. C. 68, 7 L.R.A.(N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; *Bailey v. North Carolina R. Co.* 149 N. C. 169, 62 S. E. 912.

The statute is explicit and forbids any person other than a railway employee in the discharge of his duty from riding or attempting to ride on top of any car, coach, engine, or tender on any railroad without



authority from the conductor of the train or the engineer, and makes it a misdemeanor to do so. If the intestate was a trespasser, the railroad company, the owner of the premises, owed him no duty except to refrain from inflicting wilful or wanton injury, and the defendant the traction company owed him no greater duty than did its lessor, the railroad company. The poles of the traction company were put on the land of the railroad company, and its wires crossed its tracks by its consent. It was not required to foresee that the plaintiff would violate the statutes of the state and put himself in a position of danger where he would possibly come in contact with its wires. *Willis v. Atlantic & D. R. Co.* 122 N. C. 909, 29 S. E. 941; *Vassor v. Atlantic Coast Line R. Co.* supra; *Peterson v. South & W. R. Co.* 143 N. C. 260, 8 L.R.A.(N.S.) 1240, 118 Am. St. Rep. 799, 55 S. E. 618; *Quantz v. Southern R. Co.* 137 N. C. 136, 49 S. E. 79.

If the plaintiff had been an employee of the railroad company, or rightfully on top of the car, it would be different. If the railroad company, the owner of the right of way over which the wires of the defendant were stretched, owed the plaintiff's intestate no duty except to refrain from inflicting wilful or wanton injury, then the defendant could not be held to a higher degree of care than the owner of the premises, upon which rested the primary duty of keeping

its premises and right of way reasonably safe.

The railroad company owned the right of way and had the right to stretch its telegraph and telephone wires along and across its right of way with its wires. If mischief happened to a trespasser by reason of the wires being stretched across the right of way, it is his fault. He is held to assume the risk. The implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser. *McGhee v. Norfolk & S. R. Co.* 147 N. C. 147, 24 L.R.A.(N.S.) 119, 60 S. E. 912.

The *Benton Case*, 165 N. C. 354, 81 S. E. 448, does not controvert this well-settled proposition. *Benton* was not a trespasser upon the service company's property, but had climbed a tree and come in contact with a sparking wire with defective insulation. The question presented by this appeal is well settled and fully discussed in many cases, and we need not dwell on it further. *Briscoe v. Henderson Lighting & Power Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600; *Southern Bell Teleph. & Teleg. Co. v. Odom*, 9 Ga. App. 246, 70 S. E. 1116; *Cumberland Teleph. & Teleg. Co. v. Martin*, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; *McCaughna v. Owosso & C. Electric Co.* 129 Mich. 407, 95 Am. St. Rep. 441, 89 N. W. 73.

*Walker, J.*, concurs in this opinion.

#### OKLAHOMA SUPREME COURT.

*E. E. CHIVERS*, Guardian, Plff. in Err.,  
v.

BOARD OF COUNTY COMMISSIONERS  
OF JOHNSTON COUNTY.

(— Okla. —, 161 Pac. 822.)

#### Appeal — denial of former judgment.

1. An appeal lies to this court from an order of the trial court that plaintiff take nothing by reason of a former judgment and that the payment of the same be permanently enjoined.

*For other cases, see Appeal and Error, I. b, in Dig. 1-52 N. S.*

#### New trial — absence of issues.

2. A petition for new trial is not proper or allowable, where there has been no issue of fact raised by the pleadings or determined by the verdict of a jury or its legal

Headnotes by BURFORD, C.

Note. — For collateral attack upon judgment because of insufficiency of pleadings, see annotation following *Jarrell v. Laurel Coal & Land Co.* L.R.A.1916E, 316. L.R.A.1917B.

equivalent upon a former trial in the same court.

*For other cases, see New Trial, I. in Dig. 1-52 N. S.*

#### Same — raising of issue.

3. An issue of fact which may be re-examined upon a new trial arises only upon a material allegation in the petition controverted by the answer, upon new matter in the answer controverted by the reply, or upon new matter in the reply considered as denied without further pleading.

*For other cases, see New Trial, I. in Dig. 1-52 N. S.*

#### Judgment — on deficient pleading — effect.

4. A judgment rendered in a cause in which defendant appears and pleads, and in which the petition brings before the trial court a subject matter within the jurisdiction of the court, but states the plaintiff's cause of action defectively, or not at all, all parties being within the jurisdiction of the court, is erroneous, but is not void.

*For other cases, see Judgment, II. a, in Dig. 1-52 N. S.*

#### Same — default — appearance.

5. Defendant appeared in the cause, filed a demurrer, and was present at the final

hearing, and joined in submitting the cause to the court. Held, that the judgment rendered was not a judgment by default. *For other cases, see Judgment, I. a, in Dig. 1-52 N. S.*

(December 5, 1916.)

**E**RROR to the District Court for Johnston County to review a judgment in defendant's favor in an action brought to recover certain taxes paid by plaintiff. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Sam H. Butler, for plaintiff in error:

A judgment will not be opened or vacated if the defense set up by defendant is not meritorious, or is purely technical in its character, or is dishonest or unconscionable.

23 Cyc. 964, 965; Welch v. Mastin, 98 Mo. App. 273, 71 S. W. 1090.

Plaintiff's judgment was valid and binding, and the court erred in vacating the same.

Hill v. Williams, 6 Kan. 17; Clark v. Roman, — Okla. —, 151 Pac. 479; Hawkins v. Hawkins, — Okla. —, 153 Pac. 845.

Messrs. P. B. H. Shearer and J. J. Stobaugh for defendant in error.

Burford, C., filed the following opinion:

E. E. Chivers, as guardian of certain minors, sued the board of county commissioners of Johnston county to recover certain taxes paid by him. On October 24, 1914, after service and appearance and filing of a demurrer, by the county attorney, it seems, from the journal entry, both parties appeared and "the cause was submitted to the court," who thereupon heard evidence and rendered judgment for plaintiff and against defendants for a part of plaintiff's demand. No exception was taken to this judgment, and no appeal perfected. Some eleven months thereafter, to wit, on September 25, 1915, the defendants by the county attorney filed a petition in said cause setting out the judgment and alleging same was rendered "under chap. 152 of Laws of 1910-11, and that after the rendition of said judgment and on the 15th day of June, 1915, the supreme court of Oklahoma, in the case of Johnson v. Grady County, — Okla. —, 150 Pac. 497, held that part of said chapter unconstitutional and void, and that said judgment at the time it was rendered was unconstitutional and void, and that said judgment at the time it was rendered was contrary to law, and that this fact could not with reasonable diligence have been discovered until the decision of the supreme court, but the same was discovered after the term at which said judgment was rendered and without fault of defendant herein." Prayer was that the court "set aside and hold for naught the said judgment in this case, and that the county treasurer of said county of Johnston be temporarily restrained from paying said judgment or any part of said judgment, and that the petitioner have a new trial in this cause and for all proper relief." This petition was verified and was filed after the term at which the original judgment was rendered, but prior to the next succeeding term. It will be noticed that the county treasurer was not a party to this proceeding. The plaintiff then appeared specially and moved to "quash the service herein," alleging that "there has been no service," and that he "therefore asks that the same be quashed." Upon this motion being overruled, plaintiff filed a "demurrer to the petition for new trial" upon the ground that same was insufficient in law. This "demurrer" was by the court on October 4, 1915, overruled; said "defendant given ten days to plead." The court on the same day temporarily restrained the county treasurer from paying the judgment or any part thereof "until the further order of the court." On October 21, 1915, plaintiff filed a motion "to set aside and revoke the order made in this cause on October 4, 1915, which set aside the former judgment of this court and also granted defendant a temporary restraining order."

A careful examination of the various orders above referred to constrains us to hold that the trial court had not at this time "set aside" any former judgment. He had only ordered that the matter of payment by the treasurer be held in statu quo until his further order, and had overruled plaintiff's "demurrer" and given him leave to plead. Inasmuch as the statute (§ 5037) provides that "the facts stated in the petition shall be considered as denied without answer," it does not appear what pleading plaintiff might have filed; but, at any rate, he had the leave, and clearly his original judgment had not yet been vacated or set aside. On the same day that plaintiff filed this latter motion, the same came on for rehearing. Two journal entries reciting the court's action appear in the record. Construing them together, it appears that the trial court overruled plaintiff's motion, found that the original judgment rendered on October 24, 1914, "was void and of no effect," and ordered that plaintiff "take nothing by his judgment rendered on October 24, 1914," and, without granting any new trial, made the temporary restraining order, theretofore issued against the county treasurer, a perpetual injunction, and rendered judgment for the defend-

ant board for costs. Exception being taken, an extension of time to perfect an appeal was allowed, and within proper time the cause brought here for review.

At the outset, we are confronted by the contention of defendant in error that no proper appeal is before us for consideration. This is based upon the contention that the judgment of October 24, 1914, was set aside on October 4, 1915; that plaintiff Chivers's motion to vacate of October 21, 1915, and the overruling thereof on that day, was insufficient to confer a right to review the judgment of October 4th, on appeal, the fifteen days for appeal therefrom allowed by statute, no extension having been granted, having expired prior to the time plaintiff's motion of October 21, 1915, was filed. The fallacy of this argument is that, as above shown, the court did not make any final order in relation to the judgment of October 24, 1914, until October 21, 1915. We may leave out entirely plaintiff's motion and demurrer. The trial court on October 21, 1915, set aside, vacated, and perpetually enjoined the enforcement of his prior judgment. From this order clearly he had a right to appeal, having properly objected and excepted thereto. Rev. Laws 1910, §§ 5236-5239.

The order in this case is clearly distinguishable from the order held not appealable in such cases as *Byars v. Sprouls*, 24 Okla. 299, 103 Pac. 1038; *Aetna Bldg. & L. Asso. v. Williams*, 26 Okla. 191, 108 Pac. 1100, and *Clapper v. Putnam Co.* — Okla. —, 158 Pac. 299. In those cases the court vacated the former judgment and ordered a new trial. Hence each cause was not finally determined until the new trial was had and a final judgment rendered. Here the judgment was set aside, held void, and its payment enjoined. Clearly there was nothing more to be done by the plaintiff in the trial court. His rights, if any he had, under his petition, were finally determined against him. Nothing was left but a right of appeal. Such order not only "grants an injunction," but "affects a substantial right" and determines the action "upon" summary application "after judgment," and brings the matter within the statute governing appeals.

Upon the merits, the defendant seeks to justify his pleading under § 5037, Rev. Laws 1910, authorizing in certain cases the filing after the term of a petition for new trial. This section of the statute contemplates only the granting of a new trial in proper cases. After an examination of the record in this case, we are convinced that if the defendant's application be construed only as a petition for a new trial under § 5037, *supra*, it could avail nothing by rea-

son of the fact that a petition for a new trial has no proper office and could not rightfully be granted in this cause. This for the reason that there never was an issue of fact presented or determined preceding the original judgment, and therefore there could not, in any proper sense, be a new trial. Under our statute (Rev. Laws 1910, § 5033,) "a new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, the approval of the report of a referee, or a decision by the court." See *Price v. Ratcliffe*, — Okla. —, 148 Pac. 153.

In the original proceeding a petition and demurrer thereto were filed. The record then shows that the parties appeared and "the cause was submitted to the court." Apparently the only thing to be submitted was the petition and demurrer thereto. The journal entry of the judgment does show that the trial court heard "the evidence offered," but, so far as the record shows, there was no answer filed, and in no way were the facts alleged in the plaintiff's petition controverted. It is difficult to see, therefore, how an "issue of fact" arose upon the original trial which could be re-examined in a new trial. In *Owen v. District Ct.* 43 Okla. 442, 143 Pac. 17, this court quoted and approved the language of the supreme court of Kansas in *McDermott v. Halleck*, 65 Kan. 403, 69 Pac. 335, as follows: "We are of the opinion that the conclusions which naturally, logically, and inevitably result from an examination and comparison of the different Code provisions having reference to trials and new trials are these: First, the only pleadings possible under the Code are the petition, answer, reply, and demurrer; second, issues can arise only upon pleadings; third, a trial is had only of issues; fourth, a new trial is had only of issues of fact after such issues of fact have been . . . determined by a referee, a jury, or a court; fifth, the issues of fact so to be re-examined upon a new trial must have arisen upon a material allegation in the petition controverted by the answer, new matter in the answer controverted by the reply, or new matter in the reply denied without further pleading."

The language of this same case, upon the same propositions, is also adopted and approved by this court in *Powell v. Nichols*, 26 Okla. 734, 29 L.R.A.(N.S.) 886, 110 Pac. 762. The language used is but another statement of the statute. Rev. Laws 1910, §§ 4989-4991.

In *Cowart v. Parker-Washington Co.* 40 Okla. 56, 136 Pac. 153, this court said: "The purpose of a motion for a new trial is to procure a re-examination of an issue of fact in the same court. Where there

has never been any examination of an issue of fact, there can be no re-examination or new trial."

In *Clapper v. Putnam Co.* supra, this court quoted and approved the language of the supreme court of Kansas in *Wagner v. Atchison, T. & S. F. R. Co.* 73 Kan. 283, 85 Pac. 299 (referring to what is § 5033, Rev. Laws 1910), as follows: "From this language it is plain that a motion for new trial has no function to perform unless an issue of fact has been . . . determined and the determination has been embodied in one of three specified forms. Not only must there have been a trial, a judicial examination of the issues of fact, but those issues must have been definitely settled by the verdict of a jury, or its equivalent, final and conclusive upon the facts unless vacated. Until that stage of the proceedings in an action has been reached, the condition precedent to the filing of a motion for a new trial does not arise; the single circumstance capable of creating a field for its operation has not occurred; the only subject matter vulnerable to its attack does not exist. There is no such thing as a new trial of issues of law."

Under these decisions, which, upon examination, must be taken to be sound in principle, no issue of fact was raised by answer or other pleading prior to the rendition of the original judgment. No such issue could have been determined. There could therefore be no new trial. It is insisted, however, that the judgment rendered below was void, and that, this condition being shown to the trial court by defendant's petition, the court had power to set it aside. The trial court evidently took the view that the judgment was void, since he so declared it, vacated it, and enjoined its operation, without granting a new trial. If it be true that the judgment was wholly void, we have no doubt of the power of the court to vacate it. "A 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights." *Black, Judgm. § 170; Jefferson v. Gallagher*, — Okla. —, 150 Pac. 1071. Its operation may be enjoined (*Rev. Laws 1910, § 4881*) or set aside upon motion at any time, whether during the term when rendered or thereafter, by any party affected thereby. *Rev. Laws 1910, § 5741; Choi v. Turk*, — Okla. —, 154 Pac. 1000, and cases cited. It is not necessary to plead a meritorious defense in a motion to vacate such a judgment. *Wheatland Grain & Lumber Co. v. Dowden*, 26 Okla. 441, 110 Pac. 898. It may be attacked collaterally. *Jefferson v. Gallagher*, L.R.A.1917B.

supra. Some courts have even held that a void judgment may be vacated after the term by the court upon its own motion. 23 Cyc. 948, and cases cited. But a void judgment is to be clearly distinguished from one voidable only. The distinction, says Mr. Black (*Judgm. § 170*), is almost universally to be made upon "the single case where there was a total want of jurisdiction to render it." A judgment may have been erroneous, voidable upon appeal, and yet not be void. If the court had jurisdiction of the parties and subject matter, and rendered a judgment within the issues, though such judgment might have been erroneous and reversible for error of law committed by the trial court, the judgment is not void, and the statute relating to vacating void judgments is not applicable to it. *Gray v. Gray*, — Okla. —, 157 Pac. 730; *Clark v. Roman*, — Okla. —, 151 Pac. 479; *Gill v. Executive Committee*, — Okla. —, 152 Pac. 812; *Kaufman v. Grow*, — Okla. —, 158 Pac. 300; *Smith v. Finger*, 15 Okla. 120, 79 Pac. 759. Jurisdiction, said this court in *Jefferson v. Gallagher*, supra, is based upon three things: (1) Jurisdiction of the parties. (2) Jurisdiction of the general subject matter. (3) Jurisdiction of the particular matter which the judgment professes to decide.

Bearing these principles in mind, we come to the consideration of the record in relation to the present judgment. The original petition alleged, in substance, that plaintiff was guardian of certain minors, citizens of the Chickasaw Nation, who owned certain lands therein described as their allotted portions of the tribal lands; that the county authorities had attempted to levy taxes upon the lands for several years; that plaintiff refused to pay, alleging that the taxes so levied were illegal and void; that, finally, to effect a desired sale of the lands, being required to do so by the purchaser, he paid the taxes under protest, notifying the treasurer that he would seek to recover them back. Prayer was for the recovery of the taxes and interest. Judgment was for a portion of the amount demanded. Under the allegations of the petition and the decision in *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, there can be little doubt of the invalidity of the tax. At the time the case was filed and tried, chapter 152, Laws 1910-11, allowing the recovery of taxes voluntarily paid upon erroneous assessments, was on the statute books. In *Johnson v. Grady County*, — Okla. —, 150 Pac. 497, this court held that the portion of that chapter above referred to was unconstitutional because not embraced in the title to the act. It may be conceded that the petition did not state

sufficient elements of duress or oppression to constitute a cause of action. The court had admittedly jurisdiction of the subject matter of suits against the county to recover taxes. This sort of action, brought under proper circumstances, existed long before and entirely independent of chap. 152 of the Laws of 1910-11. This was expressly recognized in *Johnson v. Grady County*, supra; *Louisiana Realty Co. v. McAlester*, 25 Okla. 726, 108 Pac. 391; and in prior cases. That act only broadened the previously existing right of action and extended it to taxes voluntarily paid. The particular subject of litigation was brought before the court by the petition, and the court rendered a judgment within the issues. The defendant's demurrer challenged the sufficiency of the petition, and the court found such petition adequate. For aught that appears here, the very question of the constitutionality of the statute may have been raised and the statute held constitutional by the trial court. No appeal was perfected from the judgment. Does the fact that the petition stated the cause of action defectively or not at all, the subject matter referred to in it being within the jurisdiction of the court, alone render the judgment void? In considering this question we have considered as apposite cases decided upon collateral attack for the reason that it is universally conceded that a void judgment may be collaterally attacked, and the converse must be true that, if a collateral attack upon a judgment is not permissible, judgment is not void.

Mr. Black, in his work on Judgments (§ 241), says: "It would be impossible, on any rational theory, to make jurisdiction dependent upon the validity of the case stated by the plaintiff. For the court must pass upon the sufficiency of the declaration, and jurisdiction to proceed, at least so far, must be acquired by the mere filing of the pleading and service of process."

Again, he says (§ 269): "A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which the suit is brought; these are matters which must be set up in defense to the action, and which are concluded by the judgment."

In *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399, it is said: "A judgment cannot be collaterally attacked for want of jurisdiction because the petition does not state a cause of action, since, if it states a case belonging to a general class over which the authority of the court extends, jurisdiction is conferred."

In *North Pacific Cycle Co. v. Thomas*, 26 Or. 381, 46 Am. St. Rep. 636, 38 Pac. 307, the court said: "If the object of the

plaintiff can be ascertained from his complaint, and the court has power to grant the relief demanded and jurisdiction of the parties, the judgment rendered is not subject to collateral attack, although the complaint may in fact have been bad in substance." "There is an important difference between a want of jurisdiction and a mere defect in obtaining it. In the former case, the judgment is absolutely void. . . . In the latter case, it is simply erroneous and voidable, and can be attacked only in some direct proceeding authorized by law."

So in the instant case the judgment could have been attacked in any direct proceeding authorized by law, such as appeal, etc. But the motion under consideration is so framed that it can be considered only as a motion to vacate a void judgment, and is not a proceeding authorized by law to correct an erroneous one.

In *Rowe v. Palmer*, 29 Kan. 337, the supreme court of that state said: "It is not necessary for us to decide whether the petition states such a cause of action as would be good if challenged by demurrer. If it contains sufficient matter to challenge the attention of the court as to its merits, and such a case is thereby presented as to authorize the trial court to deliberate and act, a judgment rendered thereon is not void."

In *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426, 48 N. W. 964, it is said that: "The sufficiency of the petition is not a test of jurisdiction."

In *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911, it was said: "If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits or authorize the court to deliberate with respect thereto, then the judgment . . . rendered upon it is not void, but at most is only voidable."

The following cases will be found to sustain the doctrine above set forth: *Edelstein v. United States*, 9 L.R.A. (N.S.) 236, 79 C. C. A. 328, 149 Fed. 636; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Selby v. Pueppka*, 73 Neb. 179, 102 N. W. 263; *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 662; *Bitzer v. Mercke*, 111 Ky. 299, 63 S. W. 771; *Wood v. Blythe*, 46 Wis. 650, 1 N. W. 341; *Kalb v. German Sav. Inst.* 25 Wash. 349, 87 Am. St. Rep. 757, 65 Pac. 559; *State v. Horton*, 89 N. C. 581; *Pierson v. Benedict*, 5 Kan. App. 790, 48 Pac. 996; *Altman v. School Dist.* 35 Or. 85, 76 Am. St. Rep. 468, 56 Pac. 291; *Re James*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 716; *Rich v. Chicago*, 187 Ill. 396, 58 N. E. 306; *Edmundson v. Independent School Dist.* 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671. Such is the

practical effect of the holding of this court in *Kaufman v. Grow*, — Okla. —, 158 Pac. 300; *Edwards v. Smith*, 42 Okla. 544-550, 142 Pac. 302; and *Hill v. Persinger*, — Okla. —, 157 Pac. 745.

Movant relies upon *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380; *Lewis v. Clements*, 21 Okla. 167, 95 Pac. 769; and *Clark v. Holmes*, 31 Okla. 164, 120 Pac. 642, Ann. Cas. 1913D, 385.

In *Farris v. Henderson*, supra, it was said: "A complaint which states no cause of action will not support a judgment by default; and such judgment will be rendered in the appellate court. If the complaint states no cause of action, the objection is fatal at every stage of the proceedings."

There is no conflict between this doctrine and that here announced. *Farris v. Henderson*, supra, was an appeal from the judgment rendered after demurrer overruled. The judgment was clearly erroneous. The court does not hold that it is void.

In *Lewis v. Clements* and *Clark v. Holmes*, supra, this court said: "A judgment by default, upon a complaint that does not contain allegations sufficient to constitute a cause of action, is void, and will be reversed on appeal."

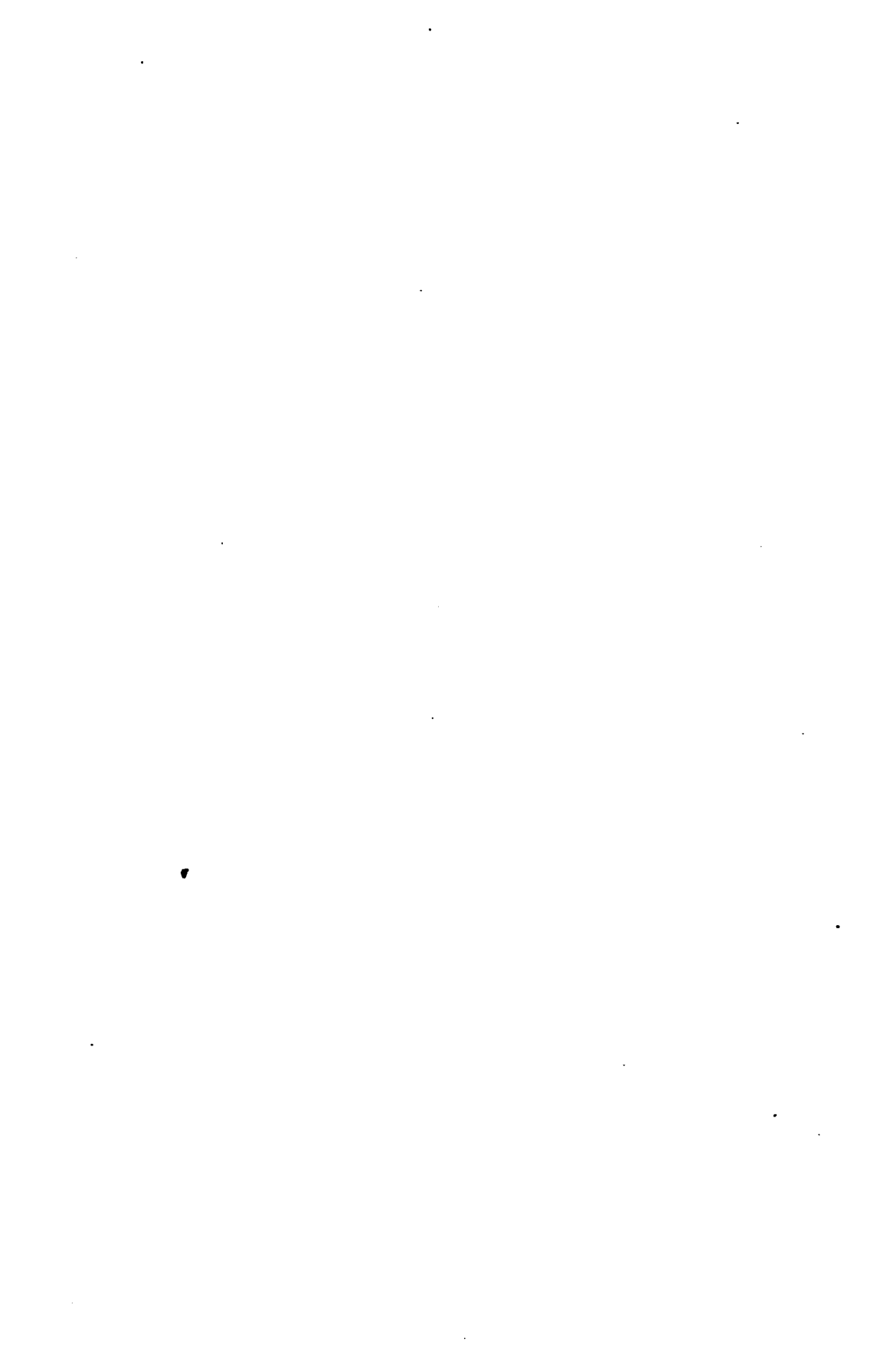
These statements are likewise not in conflict with this opinion, for the reason that in those cases the judgment was by default, while in the instant case there was a de-

murrer filed and an appearance made by defendant at the final hearing when the judgment was rendered. In no true sense, therefore, could the judgment in the instant case be said to be by default. See *Crossan v. Cooper*, 41 Okla. 281, 137 Pa. 354; *Black*, Judgm. § 80.

We conclude that the judgment rendered was not void. *El Reno v. Cleveland-Trinidad Paving Co.* 25 Okla. 648, 27 L.R.A. (N.S.) 650, 107 Pac. 163. That by failure to exercise the right of appeal, or to have the judgment vacated within the term, no statutory ground for vacation after the term appearing, the judgment became binding upon defendant, that a petition for a new trial was not applicable to the instant case, and the trial court was in error in vacating the judgment as void and in enjoining its payment.

It follows that the order of the trial court should be reversed, with directions to set aside and vacate the order of October 21, 1915, in all things, to vacate and set aside the restraining order and injunction granted against the county treasurer, to overrule and deny the defendant's petition for a new trial, and to render judgment for plaintiff in error for costs.

**Per Curiam:**  
Adopted in whole.



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